

**IN THE FINANCIAL SERVICES TRIBUNAL**

CASE NO: PFA 7/2019

In the matter between: -

GEORGE KATSOURAS

APPLICANT

and

PENSION FUNDS ADJUDICATOR

FIRST RESPONDENT

ALEXANDER FORBES ACCESS RETIREMENT FUND

SECOND RESPONDENT

Tribunal: L DLAMINI (Chairperson), Z MABHOZA and E PHIYEGA

Hearing: 3 JULY 2019

Decision: 31 JULY 2019

Summary: Application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 – basis for calculation of member's fund credit

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**DECISION**

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## **A. INTRODUCTION**

1. This is an application in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“FSRA”). The applicant, George Katsouras (“applicant”) seeks reconsideration of the decision of the first respondent, the Pension Funds Adjudicator (“PFA”) dated 14 December 2018. The second respondent is the Alexander Forbes Access Retirement Fund (“AF”).
2. Two bundles of papers were prepared in the usual course. For ease of reference, the first bundle which forms the founding papers for this application is referred to as “bundle I”. The bundle of papers prepared by the PFA is referred to as “bundle II”.
3. The applicant represented himself. Yolande Palmer was on a watching brief for the PFA. The AF was represented by Gert Potgieter, Marien Botha and Alvina Chetty.

## **B. BRIEF BACKGROUND**

4. The applicant was employed by Kemtek Imaging Systems (“employer”) since 1 November 1997 until he retired on 31 December 2017. By virtue of his employment, the applicant was a member of the Access Pen Kemtek Pension Fund (“the KPF”).

5. At all material times before 2016 the KPF invested funds in Ashburton Investments (“Ashburton”) and was managed by the Gallet Group Employee Benefits Proprietary Limited (“Gallet Group”). Mid-year 2016 the KPF changed administrators from Gallet Group to the Pogir Group. The Pogir Group invested KPF funds into an umbrella fund managed by AF.<sup>1</sup>
  
6. The KPF investment into the AF umbrella fund was subject to a transfer in terms of section 14 of the Pensions Fund Act 24 of 1956 (section 14 transfer) which the Financial Sector Conduct Authority had to approve. Pending the section 14 transfer, the applicant had “two portions” of investments. One portion comprised of funds originally invested in Ashburton which were now pending the section 14 transfer to AF management. The other portion was made up of contributions accumulated over the last few months of the applicant’s employment leading up to retirement which were invested in the new umbrella fund which AF set up in December 2016.
  
7. For all intents and purposes the dispute relates to the part of applicant’s pension benefit that was originally invested with Ashburton. This portion constituted virtually all of the applicant’s interests (about 96% of his total fund benefit) in the KPF accumulated over a period of about 20 years. Therefore benefits accumulated in the months preceding applicant’s retirement do not form part of the dispute.

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<sup>1</sup> Refer to p,24 of bundle I also p,5 bundle II.

### **C. APPLICANT'S CLAIM**

8. Here we deal briefly with the applicant's version as it appeared on the papers and on his submissions during proceedings.
9. On or about June 2017 anticipating early retirement, the applicant requested a valuation of his pension benefit. He received a written quotation from AF on 13 July 2017 signed by one Roger Woods reflecting an amount of R2 728 962.35 as at 30 June 2017).<sup>2</sup>
10. Having received the valuation, the applicant was eager to invest his pension benefit in the money market. He enquired about the prospects of the kind of investment he sought. In particular the applicant received confirmation that the KPF permitted investment of the member's portion into a money market portfolio.
11. The employer confirmed that the applicant's pension could be invested in the money market and that such investment did not require trustees' resolution. The employer then requested the applicant to send a member investment choice (switch form) to AF.<sup>3</sup>
12. The applicant signed the switch form on 19 July 2017 and sent it to AF. On the last page of the switch form the applicant wrote:

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<sup>2</sup> See p, 28 of bundle I.

<sup>3</sup> Refer to 31 of bundle II.

**“as this is a generic form, I wish to clarify that I would like to move my stand alone pension fund from the Ashburton Balanced Fund to a money market fund. thank you.”**

He again appended his signature underneath the handwritten inscription.

13. On the same day, 19 July 2017, AF sent an email to Ashburton advising the latter that the member wanted to switch his total benefit from the KPF to the Money Market portfolio. Notably AF also confirmed in the same email that the KPF does offer a pre-retirement switching but that it had not been utilised since June 2015.<sup>4</sup>
14. The applicant pension fund benefit was therefore invested in the Money Market on 11 August 2017 in the amount of R2 728 962.35.<sup>5</sup>
15. During December 2017, due to retire that month, the applicant requested valuation of his pension fund because his intention was to invest the proceeds in the Allan Gray preservation pension fund. The response to his request was delayed. The valuation came from his employer on 29 January 2018 and reflected applicant’s total pension at R3 055 660 22.<sup>6</sup>
16. However, during February and March 2018 the applicant received fluctuating valuations. On 7 February 2018 the valuation had been reduced

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<sup>4</sup> See p,56 of bundle II.

<sup>5</sup> See p, 30 of bundle II.

<sup>6</sup> See p, 38 of bundle I.

to R2 912 845 but increased on 16 February 2018 to R2 972 795 06. It was again reduced in March 2018 to R 2 905 503 59. The applicant stated that these fluctuations did not make sense to him. However, the valuation eventually given was for the amount of R 2 922 837 which was the amount transferred to the Allan Gray preservation fund.

17. After making enquiries the applicant was advised by AF that AF had made an error of switching the applicant's pension investment invested on 11 August 2017 in the Money Market portfolio back to equities. The applicant stated emphatically that this "switch back" had been done without his knowledge and, of course, without his consent.
18. Following this information, the applicant argued that he noticed other errors. Firstly, his pension fund showed "real growth" of 4.125% over the period 30 June 2017 and 11 August 2017 which earned his pension R112 583. However, only R58 074 was allocated because an incorrect period for calculation had been used. Secondly, no interest was not allocated to his investment for the period between 1 December 2017 and 10 January 2018. In addition to these two errors, market fluctuations reduced his investment, as this investment was now no longer in money markets.
19. Applicant stated that he advised AF about these errors which AF undertook to attend to. The applicant stated further that AF accepted that it would

allocate him “Agterskot”, to ensure all returns earned were correctly allocated to him. He referred us to AF’s email dated 27 March 2018.<sup>7</sup>

20. The applicant consequently claims a total loss of R156 714.

#### **D. AF’S RESPONSE**

21. We now turn to briefly deal with AF’s version of events in response to the applicant’s claim.

22. AF admitted that it received the applicant’s instruction to switch from equities to Money Market on 19 July 2017 and that it (AF) received confirmation of the investment on 11 August 2017. However, AF argued that “the investment manager should not have acted on this instruction” because GP was not an authorised signatory of the KPF. Therefore, the applicant’s fund benefit could only be invested in equities. As such, no mandate existed to invest in the Money Market portfolio. Moreover, the applicant was aware that no such mandate existed.<sup>8</sup>

23. AF also argued that the loss of R79 772 that the applicant suffered was as a result of negative market movements. This loss relates to the period between 26 January 2018 and 16 February 2018.

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<sup>7</sup> See p,19 of bundle II.

<sup>8</sup> See p, 15 of bundle II.

24. Therefore, AF did not deny that it made an error in the manner in which it calculated the applicant's fund benefit. However, AF stated that the underlying reason for its miscalculation was that its calculation was based on an incorrect investment portfolio.
25. The error overstated the applicant's transfer value which AF had to adjust to reflect the correct value of the fund benefit to prevent the applicant from being unduly enriched.

## **E. ANALYSIS**

26. The Decision of the PFA dated 14 December 2018 ("Decision") seems to be largely based on the fact that there was no breach of the KPF Rules in particular Rule 9.2.1 and Rule 9.1.1. ("Rules"). It is trite that the Rules of the fund are binding on its officials and members and all concerned.
27. The decision further states that the applicant did not seem to realise that his investment was exposed to risk of market fluctuations that may affect the values due to changes in market conditions. Consequently, the PFA concluded that the losses suffered by the applicant, which are attributable to these changes in market conditions, cannot be blamed on AF.
28. Further, the PFA based its decision on the fact that the applicant sought reliance on the Rules that the KPF did not allow. However, AF has never raised such issues. In fact, AF's argument was that monies were invested



in terms of the applicant's instructions but that later it (AF) realised it did not have the mandate to implement the applicant's instructions to have the money invested in the Money Market portfolio. Therefore, the error occurred because there was no mandate for the investment manager to carry out the instruction to invest and not because the Rules did not allow for the investment manager to obtain the mandate.

29. It appears that the PFA did not confront the issue of why the mandate could not be obtained to have the money invested according to the applicant's instruction. Moreover, having not received the mandate, why was the applicant not advised that his investment instruction could not be carried out.
30. Further, the line of argument adopted by AF's representatives during the proceedings seemed to suggest that the KPF's mandate was only to invest in a specific portfolio, the RMB Ashburton Balanced portfolio (equities) and by exclusion, not in the Money Market portfolio. However, evidence of such mandate was not produced. The argument therefore remained contrary to the written communication that AF sent to the applicant in this regard.
31. Furthermore, AF representatives argued that the applicant could have signed another form authorising investment in the Money Market which then suggests that it was possible to follow the applicant's instructions. Besides the fact that such argument was never raised before, which we deal with later, it points to the difficulty with the premise that the Rules prevented investment in the Money Market. If the Rules initially prevented

investment in the Money Market, AF's argument that the Rules later would permit the same investment because another form could be signed becomes untenable. It is therefore important to note that AF's response made no reference to the Rules.

32. In any event it does not appear from the record that the applicant was ever given the opportunity to respond to whether or not his instructions breached any specific Rules. The applicant's approach to the matter seems to have been that there was authority for him to invest in the Money Market portfolio.
33. Turning to new information. During proceedings, AF argued that if the applicant wanted to invest in the Money Market portfolio, he should have signed another form that would have then authorised it to invest in the Money Market. AF however did not dispute that such information was never directly communicated to the applicant. There was also no dispute that nothing prevented AF from doing so and further that the applicant had made it abundantly clear where he wanted the investment to be made.
34. However, AF argued that it had effective channels through which it distributed information to members to ensure that they were well informed regarding the process of switching, and related matters. However, no proof in this regard was provided.

35. This was a new fact that does not seem to have formed part of what the PFA had to consider. Clearly, the applicant was never given the opportunity to respond to it in circumstances he ought to have been.
  
36. In response to this, the applicant made it abundantly clear that he had never been advised neither did it come to his attention as a trustee that he ought to have done anything further to ensure that he could invest in the Money Market portfolio. The applicant emphatically denied that he knew that he had to fill in any other form to ensure his instructions could be carried out. Such requirement was never brought to his attention.
  
37. We do not accept AF's argument that the applicant ought to have known better about what formalities he needed to meet because he was the trustee of the KPF. The facts of this matter clearly show that the applicant had asked for advice and that he had been assured that his instruction to invest in the Money Market was valid. In fact, AF proceeded to actually make the investment according to the instruction.
  
38. Further, there is no evidence to suggest that the applicant was subsequently advised otherwise. There is also no factual basis to argue that the applicant knew that there was no authority to invest in the manner sought in his instruction. The record supports the applicant's contention

that AF had authority to deal with the investment<sup>9</sup> and that pre-retirement switching was authorised.<sup>10</sup> The contrary has not been shown.

39. We turn to the alleged loss. The PFA does not seem to have adequately interrogated the issue of the portfolio where the investment was placed and the period over which the alleged loss occurred. With regard to where the investment was made, the evidence shows that the applicant wanted to invest the fund credit into the Allan Gray preservation fund where it would be “safe”.
40. Regardless of the reason for “disinvesting” from the Money Market Portfolio and investing in equities, AF invested the applicant’s benefit fund credit into what it called the Life Stage portfolio which it considered to be “low risk”. Notably, the said portfolio lost about 5% of value between 29 January 2018 and 7 February 2018.
41. With regard to when the investment was made, we note the section 14 application was granted on 10 November 2017. The applicant requested valuation of his fund benefit in December 2017 as he was due to retire at the end of that month. He did not receive any response until after the loss occurred. The loss of about R79 772 occurred over the period 26 January 2018 to 16 February 2018 when the applicant had already retired and while he was waiting for the evaluation.

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<sup>9</sup> See p,66 of bundle II.

<sup>10</sup> Refer to p,56 of bundle II.

42. The FPA seems to have dealt with the matter on the basis that the applicant put himself in the position that caused the loss; that he chose both the portfolio and the time of his investment. We respectfully disagree with that approach. The PFA does not seem to have considered what would have happened if the valuation had been provided on time bearing in mind the applicant's readiness to instruct Allan Gray.
43. Furthermore, it seems that the applicant was not given the opportunity to respond to the actuarial findings contained in the actuarial report of Argen Actuarial Solutions (Actuarial Report). It may have assisted us to understand the basis on which the actuaries were instructed. Assuming the instructions were in writing, such instructions did not form part of the record provided to us.
44. We could however glean that the actuaries "were appointed to determine whether the calculations performed by AF were reasonable".<sup>11</sup> However, the actuarial "analysis" seems to deal with matters that have wider implications. For instance, the Actuarial Report states:
- "... the instruction by the Complainant's to disinvest his benefits into money market portfolio in the Kemtek fund is only applicable to the Kemtek fund i.e. the complainant should have submitted a similar instruction to the to the AF fund."
45. The above seems to suggest that part of what the actuaries had to determine was whether the applicant met the formalities to enable him to

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<sup>11</sup> See p, 75 of bundle II.

do an investment switch. The actuaries' statements resonate with AF's contention that the applicant ought to have signed another form to ensure a successful switch. We have already stated that the applicant was not afforded the chance to respond to these matters before the decision to dismiss his claim was taken.

## **FINDING**

46. In the circumstance the decision of the PFA should be set aside. The only order this Tribunal then may make in terms of section 234(1)(a) of the FSRA is to remit the matter to the decision-maker for further consideration.

## **CONCLUSION**

1. The following Order is made: -
  - 1.1. The decision is set aside and matter is remitted to the decision maker for reconsideration.
  - 1.2. No order as to costs.

Signed on behalf of the Tribunal on this 31 JULY 2019 at Pretoria.



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Langa Dlamini (Chairperson)