

THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA2/2019**

In the matter between:

LINDA McCREESH

Applicant

and

PENSION FUNDS ADJUDICATOR

First Respondent

SANLAM UNBRELLA PROVIDENT FUND

Second Respondent

CAPITOL CATERERS SWAZILAND (PTY) LTD

Third Respondent

Tribunal: H Kooverjie (chair), J Pema, N Nxumalo

Hearing: 11 April 2019

Decision: 16 April 2019

Summary: Matter remitted to Pension Funds Adjudicator. No basis to withhold a portion of the applicant's withdrawal benefit in terms of section 37D(1)(b)(ii) of the Pension Funds Act.

DECISION

1. The applicant, Ms McCreesh requested this Tribunal to reconsider the

decision of the Pension Funds Adjudicator (“**PFA**”), dated 26 November 2019. The decision affects her pension to the extent that the PFA has made a determination to withhold a portion of her benefit in terms of section 37D(1)(b)(ii) of the Pension Funds Act.

2. The applicant was employed with the third respondent from 1 December 2012 until 15 December 2017. She was initially a member of the Old Mutual Superfund Provident Fund: The third respondent (Capitol Caterers) then transferred the fund by way of section 14 transfer to the Sanlam Umbrella Provident Fund (Sanlam). In a letter dated 12 July 2018, Sanlam advised that the estimated transfer value was R107,234.75.
3. At the hearing of this matter, Sanlam agreed to abide to the decision of the Tribunal. Sanlam however objected to the applicant seeking a cost order against them. This however was clarified by the applicant who can submitted that this was an error on her part. She does not seek a cost order against Sanlam, but only a cost order against her previous employer, the third respondent.
4. The third respondent, Capitol Caterers, in a letter two days before the hearing (9 April 2019), advised that it would not be able to attend the hearing of the matter and it will withdraw its objection to the applicant’s case. However it will persist with the civil case against the applicant in Swaziland.

5. The issue before this Tribunal essentially turns on whether the PFA was entitled to withhold the amount of E3 610.95 (R3,610.95).

6. The determination essentially was that the applicant “***must wait for the conclusion of the criminal proceedings before claiming the full withdrawal benefit. Consequently Capitol Caterers was required to prove additional loss it incurred within 12 weeks of the determination. If Capitol Caterers fail to prove the loss, then Sanlam is ordered to pay the applicant her withdrawal benefit (except for the loss proven by Capitol Caterers) within 14 weeks of this determination.***”

7. From the correspondence from the third respondent, we note that Sanlam is in the process of paying the applicant’s provident fund. In her application the applicant’s grounds for reconsideration were *inter alia* the following that:
 - 7.1 the PFA failed to balance the competing interests by not considering the weakness in the third respondent’s case;

 - 7.2 the third respondent failed to prove the existence of criminal proceedings against the applicant. She has neither been arrested nor charged to date. In particular the period between end of November 2017, (when the applicant’s employment was terminated) to mid-2018, (when she served a complaint before the PFA), no proceedings has been instituted against her.

8. The issues between the parties arose when the third respondent accused the applicant of committing fraud and misappropriating her employer's monies. This led to disciplinary proceedings being instituted where it was allegedly found that E3 610.95 was misappropriated.
9. The applicant denied all the allegations against her and further held that the PFA was also incorrect in withholding a portion of her pension fund to the value of E3 610.95, particularly in the absence of any civil proceedings or criminal proceedings instituted against her.
10. During the course of the hearing, the applicant persisted that the third respondent has no case against her. Her employers' conduct remains unsubstantiated to date. For instance, it was only when she lodged a complaint with Sanlam regarding the payment of her funds that she was summonsed to appear at the Police Station in Swaziland. Even upon doing so, the police did not charge her and she left the police station.
11. We note the decision of the PFA and do not take issue with the findings of the PFA at the time of its decision. Its decision to withhold the complainant's withdrawal benefit was consistent with section 37D(1)(b)(ii) of the Act, and therefore lawful.
12. Section 37D(1)(b)(ii) stipulates that:

“A registered fund may deduct any amount due by a member to his

employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

(i) ...

(ii) Compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned."

13. In its determination, we also take cognisance of the fact that the PFA took into account of the following facts, namely that:

13.1 a criminal case of theft and fraud was opened against the complainant with the Swaziland Police, under case number 2745/2018. Therefore there was a pending criminal case against the applicant in respect of committing theft and fraud against her employer;

13.2 the third respondent was still in the process of investigating the matter and there was a possibility that the amount of the

alleged fraud may increase.

14. It was therefore on this basis that the third respondent was given a period of 12 weeks to prove any additional loss it incurred as a result of the alleged theft and fraud.
15. However it was noted in the determination that should the respondent fail to prove the additional loss, the first respondent must withhold only the proven loss and release the balance of the complainant's withdrawal benefit.
16. We note that the period in which the third respondent was given an indulgence has long passed. To date it has failed to prove the loss, as well as the additional loss it alleged to have incurred.
17. No substantiation, evidence or documents have been placed before this Tribunal or the office of the PFA to indicate otherwise. Therefore it is our view that there remains no basis in withholding the portion of the applicant's fund. There appears to be no indication that there is progress in the criminal proceedings or civil proceedings.
18. In light thereof, this matter must be remitted to the PFA, to reconsider its decision regarding the withheld amount of E3 160.95. It is further required to inform Sanlam of its decision. As alluded to above, we have been made aware that Sanlam is in the process of making payment to

the applicant once it obtains the tax qualifications from SARS. Sanlam should be promptly advised to do same in respect of the withheld amount. It is therefore required for the PFA to take cognisance of the aforesaid when reconsidering its previous determination.

COSTS

19. We are of the view that this is an instance where exceptional circumstances exist and which warrants a costs order in favour of the applicant. The conduct of the third respondent in this matter raises concern. The third respondent's excuse for not appearing is without merit. Even though it operates from Swaziland, we have been made aware that it has offices in South Africa, namely Johannesburg and Pietermaritzburg.
20. Moreover the Secretariat was only informed two days before the hearing of the third respondent's logistical difficulties when the date of the hearing had already been communicated to them in February 2019. In order to accommodate itself, a postponement was sought. The applicant, on the other hand, is unemployed, had no legal representative, but made a point to appear and address the Tribunal.
21. The third respondent's conduct does not demonstrate good faith. The circumstances which the applicant finds herself in does not occur in the normal course of events. The applicant has incurred not only travel and

accommodation costs to be present at the hearing, she had also utilized the services of an instructing attorney at some point, but was unable to retain such services due to her financial predicament.

22. In light thereof the third respondent is liable for the costs of the application and all reasonable costs, relating to her travel and accommodation for the purposes of attending this hearing. Such costs are to be taxed on the High Court scale.

23. The following order is therefore made:

- (1) the matter is remitted to the PFA to reconsider its decision of 26 November 2018;
- (2) the third respondent to pay the costs of the application, including reasonable travel and accommodation costs incurred by the applicant to attend this hearing, which costs should be taxed on the High Court scale.

SIGNED at **PRETORIA** on this **16th** day of **APRIL 2019** on behalf of the Panel.



ADV H KOOVERJIE SC

With the Panel consisting also of:

J Pema

N Nxumalo