

**THE FINANCIAL SERVICES TRIBUNAL**

Case No: **PFA43/2019**

In the matter between:

**MFUNDO RAYMOND BUKUBUKWANA** Applicant

and

**OLD MUTUAL SUPERFUND PROVIDENT FUND** First Respondent

**AMATOLA WATER BOARD** Second Respondent

**PENSION FUND ADJUDICATOR** Third Respondent

Tribunal: W Ndinisa (chair), Mr G Madlanga and L Makhubela

Hearing: 20 August 2019

Decision: 5 September 2019

*Summary: Late filing of application for reconsideration and requirements for condonation. Degree of lateness not compensated by lack of good explanation for lateness and lack of prospects of success. Purposive interpretation of section 37D of the Pension Fund Act 24 of 1956*

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**DECISION**

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**INTRODUCTION**

1. The Applicant instituted this application requesting the Tribunal to reconsider the

determination of the Pension Fund Adjudicator (“**PFA**”) dated 28 January 2019 (“the Determination”).<sup>1</sup> The PFA is cited herein as the Third Respondent.

2. The First Respondent is a registered pension fund organisation (“**the Fund**”)<sup>2</sup> and the Applicant was a member of the Fund by virtue of his then employment with the Second Respondent. Although the First Respondent delivered its written submissions in opposing this application, it did not make appearance during the hearing of this application.
3. The Second Respondent (Amatola Water Board) is then an employer of the Applicant from 1 August 2010 to 18 August 2018. The Second Respondent was represented by its legal practitioner at the hearing of this application.

#### **PRELIMINARY ISSUES FOR CONSIDERATION**

4. The First and Second Respondents (who will thereafter be referred to as Respondents collectively) raised preliminary points for consideration by this Tribunal. The first issue raised by the Respondents is late filing of the Applicant’s Application for reconsideration. The second issue is the Applicant’s delivery of another application for reconsideration dated 9 May 2019 without indicating whether he purported to amend, augment or replace his previous application.
5. We shall now consider the preliminary points raised in the matter and determine their impact, if any, on the Applicant’s application for consideration.

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<sup>1</sup> Record, A7

<sup>2</sup> Record, A151

Late delivery of Application for reconsideration

6. The PFA delivered her Determination on 28 January 2019 and the Applicant received it on the same day.<sup>3</sup> On 9 April 2019 the Applicant delivered his application for reconsideration in terms of section 230 of the FSR Act (“the First Application”).<sup>4</sup> The First Application was late by seven (7) days in that the last day was on 29 March 2019.<sup>5</sup>
  
7. The FSR Act provides in section 230 (2) that:

*“The application must be made-*

*(a) if the applicant requested reasons in terms of Section 229, within 30 days after the statement of reasons was given to the person; or*

*(b) in all the cases within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed”.*
  
8. Rule 9 of the Financial Services Tribunal Rules (“the Tribunal Rules”) reiterates the content of section 230 of the FSR Act.
  
9. Rule 31 of the Tribunal Rules states that an application for condonation within the jurisdiction of chapter 15 of the FSR Act may be made on affidavit or in written submission and must be filed with the Secretariat and all after parties to the proceedings.
  
10. Further, the Tribunal Rules states in rule 32 that condonation application must be succinct and show good cause.

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<sup>3</sup> Record, A2

<sup>4</sup> The Applicant delivered two applications for consideration in terms of section 230 of the FSR Act with any explanation for such conduct and for that reason there is a First and Second Application

<sup>5</sup> Record, A67

11. There was no application for condonation in the First Application which was delivered late. On 9 May 2019 the Applicant delivered another application for reconsideration in terms of section 230 of the FSR Act (“the Second Application”).<sup>6</sup> The Applicant did not indicate the purpose of the Second Application. The Respondents were left to guess on whether the Second Application was a replacement or amendment or augmentation of the First Application. Notwithstanding the Second Respondent’s concerns raised in respect of the Second Application,<sup>7</sup> the Applicant’s legal representative did to address same during arguments.
12. This panel is of the view that it will consider the statement dealing with the aspect of condonation contained in the Second Application and confine itself in that regard. This approach is adopted on the basis that rule 31 of the Tribunal Rules envisages, amongst others, written submissions on condonation. In other words, the two paragraphs titled “*AD CONDONATION*” contained in the Second Application will be considered on the basis of rule 31.<sup>8</sup> However, we shall express our view on the status of the Second Application later in this decision.
13. We shall now consider submissions made by the parties on lateness of the Application and requirements for condonation.

## **CONDONATION AND REQUIREMENTS**

### Reasons for lateness

14. The Applicant states the following in his Second Application on the aspect of condonation:-

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<sup>6</sup> Record, A131

<sup>7</sup> Record, A161

<sup>8</sup> Record, A137

*“Ad CONDONATION:*

*I pray that the Tribunal may condone my late filing of the Appeal in that it was not due to my own making but that I fell sick on a number of time and I could not ask assistance from the legal representative since I have not been paying them for a while now. I attach medical certificates hereunder and mark them annexures “MC”*

*I was only relieved when my Attorneys inquired about my pensions recently and when I explained to them, they advised that they will assist me as they have done so already”<sup>9</sup> (own emphasis)*

15. Briefly, the Applicant submits that he “*fell sick on number of time*” and that he could not ask for assistance from his legal representatives since he has not been paying them.
16. There are three documents marked “MC” in the record which states that “*This serves as to confirm that Mfundo Raymond Bukubukwana ID 7005066243082 was seen at Gonubie clinic...*”<sup>10</sup> The three documents appear to have been issued by the Province of the Eastern Cape: Health Department and carry an official stamp of the same department. The three documents indicate that the Applicant was seen at the clinic from 27 March 2019 to 29 March 2019.
17. The other documents marked “MC” on record are extracts from a January 2018 diary book which carry , amongst others, various handwritten narrations with different dates, namely 15 August 2018, 2 October 2018, 30 October 2018, 27

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<sup>9</sup> Record, A137

<sup>10</sup> Record, A140 - 142

November 2018, 29 January 2019 and 27 February 2019<sup>11</sup>. Save for the date of 29 January 2019 and 27 February 2019, we do not see relevance of the attachments. In fact the attachments do not suggest that the Applicant was incapacitated or was not enabled to draft his application in time. In short we are not able to decipher the content of the attachments to justify the lateness of the Applicant.

#### Degree of lateness

18. We note that the Applicant's First Application was only late by 7 days and that appears to be minimal. However the enquiry does not end on this point. We are enjoined to consider the prospect of success in the matter and the importance of the matter.<sup>12</sup>

#### Prospects of success

19. The Applicant raises number of grounds as a basis for his challenge of the PFA's Determination. The Applicant states that *"it is difficult confusing as what basis is the PFA order saying that they see the complaint cannot succeed in Court and therefore dismissed my complaint"*<sup>13</sup> It is apposite at this stage to provide a synopsis of the facts as contained in the Determination.
20. The Applicant commenced his employment with the Amatola Water Board (Second Respondent) from August 2010 until 18 June 2018. He was a member of the Old Mutual Superfund Provident Fund (the First Respondent) by virtue of his employment with the Second Respondent. On exiting the Second

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<sup>11</sup> Record, A143 -144

<sup>12</sup> *Melanie v Santam Insurance Co Ltd*, 1962 (4) 531 (A) at 532 C-F

<sup>13</sup> Record, A3

Respondent's employment, a withdrawal benefit become due and payable to the Applicant. The First Respondent, on instructions of Second Respondent, withheld the withdrawal benefits pursuant to section 37D(1)(b)(ii) of the Pension Fund Act 24 of 1956 ("**the Act**").

21. The Applicant is aggrieved with the withholding of his withdrawal benefit by First Respondent. It is the hallmark of Applicant's case that he finds it illegal and unfair for the First Respondent to withhold his pension based on the summons that he is indebted to the Second Respondent. The Applicant sought an order from the PFA directing the First Respondent to pay his withdrawal benefit.
22. The version of the First Respondent is that based on the combined summons and particulars of claim under case number 1412/2018, the First Respondent is satisfied that there exist a *prima facie* case against the Applicant and that the First Respondent will withhold payment pending the outcome of the legal proceedings. It is recorded that the Applicant has a fund value of R1 716 909.77.
23. The Second Respondent submitted that it has instituted legal action against the Applicant in the High Court to recover various losses which it incurred as a result of his alleged fraudulent conduct together with 9 others. The Second Respondent claims an amount of R35 534 908.69 and the details of the same will not be repeated here. The Applicant had denied the allegations against him and has delivered his defence in the High Court.
24. The issue that the PFA was called to determine is whether or not the withholding of the Applicant's benefit is consistent with section 37D(1)(b)(ii) of the Act and therefore lawful.

25. The PFA correctly stated that as a general principle of law, pension benefits are not reducible, transferable or executable save for certain exceptions as outlined in section 37A and 37D of the Act. Section 37D(1)(b)(ii) of the Act states the following:

*“A registered fund may-*

*(a) ..*

*(b) 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;”. (own emphasis)*



26. On analysis of section 37D(1)(b)(ii) of the Act, the PFA stated the following, in arriving to her Determination:

*“On plain reading of the provision, section 37D(1)(b)(ii) does not authorise the withholding of a member’s benefit where he is potentially liable for theft, dishonesty, fraud or misconduct against the employer. The lacuna in this provision would have rendered it abortive in circumstances like present, where the fund is not already in possession of a court order by the time the member terminates his membership. As a result, the court gave the section a purposive interpretation and found that, to give it efficacy, section 37D(1)(b)(ii) must be read to confer a discretion on the fund to withhold the member’s withdrawal benefit pending the finalisation of proceedings against him. (see Highveld Steel and Vanadium Corporation Ltd v Oosthuizen [2009] 1 BPLR 1 at 5 paragraph 19 (SCA)).”<sup>14</sup> (own emphasis)*

27. We are in agreement with the approach taken by the PFA in light of the decision of the Supreme Court of Appeal, namely *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* referred to herein above. It is our view that this matter must end at this point.

28. The PFA further referred to rule 9.2 of the First Respondent’s Rules dealing with deductions from benefits and same rules provides, in brief, that

(2) *“The FUND may also reasonably withhold payment of a portion or the whole of any benefit payable in respect of a MEMBER or a*

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<sup>14</sup> Record, A12

*BENEFICIARY provided that:*

(a) ....

(b) *The Fund is satisfied that the PARTICIPATING EMPLOYER has established a prima facie case against the MEMBER concern. (own emphasis)*

29. The aforementioned rule clearly does not assist the Applicant on the aspect of prospect of success.
30. Further, the PFA was alive to the aspect of possible delay in finalising the pending High Court matter which could have influence her Determination. It is apparent from the records of this matter that there was no delay in instituting legal proceedings in this matter. The case in the High Court remains pending.
31. We agree with the PFA when she holds that the First Respondent is authorised to withhold the Applicant's withdrawal benefit pending the finalisation of the legal proceedings against him.
32. We therefore hold that there are prospect of success in the First Application lodged by the Applicant.

Legal principles on condonation application

33. The approach to be adopted when dealing with an application for condonation is set out in the often cited case of *Melanie v Santam*

*Insurance Co Ltd*<sup>15</sup>, in the following terms:

*“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for what would be piecemeal approach incompatible with a true discretion... What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help the issue and strong prospects of success may tend to compensate for a long delay. And Respondent’s interests in finality must not be overlooked.”*

34. We are of the view that the Applicant has failed to provide a good explanation for the delay in that no full explanation which accounts for the days of delay on the record, save for that he was sick. There is no explanation when and for how long did he get sick. Further, there is no explanation on how did the sickness contributed in not enabling him to deliver his First Application in time.
35. Further, we are of the view that on the facts presented to us and the submissions made, the Applicant has no prospect of success on his First Application. The degree of lateness, which is minimal, is not compensated or assisted by the lack of good explanation on the delay and lack of prospect of success.

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<sup>15</sup> 1962 (4) 531 (A) at 532 C-F

36. The Applicant did not canvass the aspect of importance of the case in his condonation application or statement. Save to state that the Applicant's legal representative did mention that the Applicant is facing financial challenges which are affecting his children schooling and his house, nothing much was submitted.
37. It is therefore our conclusion that the Applicant did not show good cause and for the reasons stated above, the First Application dated 9 April 2018 is dismissed.

Irregular Application

38. The Applicant lodged what we designated as the Second Application on or about 9 May 2018. The Applicant delivered the Second Application without any explanation on whether these documents constitute an amendment or replacement or augment of the existing First Application.
39. Since the Second Application is not lodged in terms of the Rules of the Tribunal and is not properly before this panel, we are not in a position to consider same. It is therefore dismissed. As noted before herein above, we have only considered the section and the documents in the Second Application that dealt with the aspect of condonation submissions.

**CONCLUSION**

40. In light of the facts and the information stated herein above, we make the following order:
- (a) The First and Second Applications are dismissed.
  - (b) No costs order is made.



**W NDINISA**

With the Panel consisting also of:

L Makhubala

G Madlanga