

THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA69/2019**

In the matter between:

WEBBER WENTZEL

Applicant

and

LUKHAIMANE M A
(Pension Funds Adjudicator NO)

First Respondent

PAUL ADIMULAR PETER

Second Respondent

ALEXANDER FORBES RETIREMENT FUND
(Provident Section)

Third Respondent

ALEXANDER FORBES LIFE LTD

Fourth Respondent

In the matter between:

Case No: **PFA68/2019**

WEBBER WENTZEL

Applicant

and

LUKHAIMANE M A
(Pension Funds Adjudicator NO)

Second Respondent

FAIZAL ESSOP

Second Respondent

ALEXANDER FORBES RETIREMENT FUND
(Provident Section)

Third Respondent

ALEXANDER FORBES LIFE LTD

Fourth Respondent

Hearing Date: 2 March 2020

Tribunal: H Kooverjie (Chairperson), N Nxumalo and A Jaffer (Members)

Summary: What constitutes compensation in terms of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956?

DECISION

1. The applicant, Webber Wentzel challenges the decisions of the Pension Fund's Adjudicator ("**the PFA**") in respect of two complaints lodged by the applicant's former employees, Mr Essop and Mr Peter, who are cited as the second respondent in these matters. In terms of their employment contracts with the applicant, Mr Essop and Mr Peter were members of a Retirement Fund administered by third and fourth respondents ("**the Fund**").
2. At the applicant's request, the Fund had taken a decision in terms of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 ("**the Pension Funds Act**") to withhold the withdrawal benefits payable to Mr Essop and Mr Peter following their resignation from their employment with the applicant before the disciplinary inquiry into allegations of soliciting and taking bribes against them. In the impugned decision, the PFA ordered that the withheld withdrawal benefits be released and paid to the members.
3. These matters were heard together as the issues for determination are the same and the facts relating to Mr Essop and Mr Peter are similar.
4. This Panel only heard the representations made on behalf of the applicant, Mr Peter. The second respondent attended the hearing but made no submissions. The Panel was further advised that Mr Essop would not be in attendance.
5. The grounds for reconsideration were set out in the respective applications for

reconsideration. For the purposes of this hearing the pressing issues in dispute concerned the PFA's finding that the loss and damages suffered by the applicant was not the "**type of damages**" contemplated under the Pension Funds Act, which underpins the impugned decision.

6. Furthermore, it had not been disputed that the PFA issued the determination without the applicant's response.
7. We however take cognisance of the fact that the PFA had indeed considered the Fund's response to the complaints lodged by both Mr Essop and Mr Peter.
8. The Fund had acceded to the requests of Webber Wentzel, the applicant, to withhold their benefits pending the determination of both the civil and criminal proceedings instituted by the applicant against Mr Peter and Mr Essop. In the civil proceedings, Webber Wentzel claims for the recovery of losses it suffered as a result of their alleged corrupt activities.
9. We note that the Fund in its consideration, held the view that withholding their benefits was reasonable. Although the civil trial had been postponed, it was at the members' request, Webber Wentzel did not cause any undue delay in pursuing the civil matter and that it should be afforded an opportunity to pursue the case against the said employees. The Fund however advised that it would monitor the progress of the civil proceedings in particular to ensure that the complainant's benefit is not withheld unreasonably or indefinitely. If, at any stage, the Fund finds that the employer is unreasonably delaying the matter, then it would release the benefit to Mr Essop and Mr Peter.

10. The Fund relied on the authority of the **Appanna**¹ and **Buthelezi** matters on the provision of section 37D of the PFA which allows retirement funds to withhold member benefits. In **Buthelezi v Municipal Gratuity Fund**, the adjudicator affirmed:

“...the purpose of section 37D(1)(b) is to protect an employer’s right to pursue recovery of misappropriated moneys and in order to give effect to that purpose, the provision for deduction should be interpreted to impliedly include the power to withhold payment of the benefit for a reasonable time pending the determination or acknowledgment of liability. However, I also stress that the implicit power to withhold the benefit must be exercised reasonably and within reasonable time, that is, the employer should not be allowed to withhold the benefit indefinitely.”

11. It is trite that the object of section 37D(1)(b)(ii) is to protect the employer’s right to pursue the recovery of money misappropriated by its employees. Although that section provides for withholding of benefits where judgment has been obtained, it is settled law that the section includes the the power to withhold payment of a member’s pension benefits pending the determination or acknowledgement of such member’s liability.²
12. The trustees are required to consider the facts of the matter and exercise their discretion in deciding whether or not to withhold the benefits as well as the time period that they will withhold the member’s benefit.

¹ *Appanna v Kelvinator Group Services of SA Provident Fund; Buthelezi v Municipal Gratuity Fund*

² *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen 2009 (4) SA 1 SCA*

13. Rule 11.3 of the Fund's Registered Rules are aligned to section 37D(1)(b)(ii) of the Pension Funds Act which states as follows:

“Notwithstanding any other provisions of these Rules, the Trustees may, where an Employer has instituted legal proceedings in a court of law and/or laid a criminal charge against the Member concerned for compensation in respect of damages caused to the Employer as contemplated in section 37D of the Act, withhold payment of the benefit until such time as the matter has been settled or formally withdrawn; provided that:

(a) the amount withheld shall not exceed the amount that may be deducted in terms of section 37D(1)(b)(ii) of the Act;

(b) the Trustees in their reasonable discretion are satisfied that the Employer has made out a prima facie case against the Member concerned and there is reason to believe that the Employer has a reasonable chance of success in the proceedings that have been instituted;

(c) the Trustees are satisfied that the Employer is not in any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;

(d) once the proceedings have been determined, settled or withdrawn, any benefit to which the Member is entitled is paid forthwith; and

(e) the Trustees, at the express written request of a Member whose benefit is withheld, may, if applicable and practical, permit the value of the Member's benefit as at the time of such request to be isolated, in whatever manner the Trustees believe appropriate, from the possibility of a decrease therein as a result of poor investment performance.”

14. The PFA, in interpreting section 37D(1)(b)(ii) held the view that the applicant has to demonstrate actual financial loss. In these instances it found that the applicants suffered no financial loss. More particularly the PFA stated:

“There is no doubt that the alleged conduct by the complainant amounts to fraud and dishonesty. However section 37D(1)(b)(ii) of the Act does not apply in this instance as there is no evidence of financial loss suffered by the third respondent as a result of the complainant’s alleged conduct. Section 37D(1)(b)(ii) of the Act is there to protect the third respondent’s patrimonial from diminution by the complainant’s misconduct and to allow an appropriate set off against the retirement benefit.”

15. From the summons, the PFA further observed that the third respondent did not allege how it suffered financial loss as a result of a complainant’s conduct, save to submit that it had to appoint a forensic investigator, who services cost an amount of R1,472,765.17. Consequently the PFA held that the complainant’s conduct did not fall within the ambit of section 37D(1)(b)(ii) of the Act. Consequently the Fund acted outside the scope of its powers as contained in section 37D(1)(b)(ii) of the Act, by withholding the complainant’s benefit pending the finalising of the criminal case against him.
16. As alluded to above the PFA issued its determination without the response from the applicant.
17. The PFA only had the benefit of the Fund’s response and had at the time enquired from the Fund whether there was any financial loss suffered by Webber Wentzel as a result of the ex-employee’s alleged conduct except for the cost of the forensic investigation. In response the Fund referred the Tribunal to the

particulars of claim of the summons issued by the applicants.

18. The issue was as to what constitutes compensation in terms of section 37D(1)(b)(ii) of the Pension Funds Act as well as the word “**any loss**” as referred to in rule 11.3 of the Fund’s Rules require due consideration.
19. Counsel on behalf of the applicant submitted that the word “**compensation**” as set out in section 37D(1)(b)(ii) of the Act, seeks a liberal interpretation as “**compensation**” includes any damage caused to the employer by a reason of any theft, dishonesty, fraud or misconduct by the member. Compensation should therefore not be construed as actual financial loss and extends beyond legal costs. The costs of the forensic investigation certainly constituted “**loss**” incurred by the applicants.
20. The applicant submitted that the PFA’s reasoning aforesaid is misconstrued and it was not placed in possession of the forensic auditor’s report detailing the *modus operandi* employed which included *inter alia* the practice of receiving kickbacks from service providers in exchange for service contracts for the applicants overcharging the applicant, the inflation of invoices and the payment for services not rendered by service providers.
21. The PFA was not privy to the findings that these kickbacks were orchestrated through *inter alia* the drawing up of invoices for “**Provision of Security/Risk Management Services 90 Rivonia Road...** in the name of the company called “**Ikule Management Services**” with the invoiced amount being paid from Mandela into the bank accounts of Mr Peter and Mr Essop by way of direct EFT transfer from Mandela account to Mr Essop and receipt of cash deposit.

22. Such bribes or kickbacks were received by Mr Essop and were at the expense of the applicant. The applicant was obliged to conduct a forensic investigation thus incurring further costs in order to uncover the corrupt activities of Mr Essop and Mr Peter.
23. In argument counsel for the applicants argued that these losses emanate from disgorgement claims which together with the costs were reasonably incurred to unearth the corrupt payments made to Mr Essop and Mr Peter.
24. It is evident that the PFA did not have the benefit of the applicant's version and more particularly the extent of the corrupt activities and the nature of the loss suffered by the applicants. The PFA only had the benefit of the Fund's response and the pleadings in respect of the civil claim. We also note that the extent of the loss was not properly ventilated by the Fund as well. In particular, whether the costs incurred in respect of the forensic investigation were justified and whether such expenditure constitute a "**loss**" in terms of the Act.
25. The Fund should exercise a certain measure of caution and make enquiries as to the extent and proof of the losses in the aforesaid instance. The benefits payable to Mr Essop and Mr Peter were more than the loss incurred by the applicants (if we minus the forensic investigation costs). The amount withheld should not exceed the amount to be deducted. The trustees should have satisfied themselves on this aspect. The Fund was required to exercise its discretion and balance competing interests with due regard to all factors.
26. We are of the view that these are issues the PFA is required to consider upon consideration of all the material facts which were not placed before her

previously.

27. It is therefore appropriate to remit the matter to the PFA for reconsideration in order to make an informed decision. It should seek representations from both the applicants and the Fund on the aforesaid issues as part of its reconsideration.
28. Counsel for applicant submitted that the trial date is set down on 4 June 2020, where the issues raised herein would properly be ventilated at the said trial. The Tribunal was advised that it is anticipated that the proceedings would be finalised then without any delay.
29. The applicants did not persist with the relief sought in respect of the costs aspect. It must be emphasized that this Tribunal is only entitled to consider a costs order in exceptional circumstances.
30. In light of the aforesaid, the applications are successful.
31. The following order is made in respect of both applications:
 - (1) the decision is set aside and the matter is referred to the office of the PFA for the reconsideration of both matters.

SIGNED at **PRETORIA** on this **4th** day of **MARCH 2020** on behalf of the Panel.

A handwritten signature in blue ink, appearing to read 'Koooverjie', written in a cursive style.

ADV H KOOVERJIE SC

With the Panel consisting also of:

N Nxumalo

A Jaffer