

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA42/2020

KPMG SERVICES (PTY) LTD

APPLICANT

and

MILIMO MASETI

FIRST RESPONDENT

PENSION FUNDS ADJUDICATOR

SECOND RESPONDENT

KPMG PROVIDENT FUND

THIRD RESPONDENT

DECISION

The complainant, Ms Maseti, lodged a complaint with the Pension Funds Adjudicator (“the PFA”) concerning the non-payment of her withdrawal benefits by the Fund, which became payable when she left the employ of her employer, the applicant (KPMG Services (Pty) Ltd). The Fund is managed by Alexander Forbes Financial Services (Pty) Ltd.

The complaint was upheld by the PFA and the employer applies for reconsideration of the decision in terms of sec 230 of the Financial Sector Regulation Act, 2017.

The parties waived their right to a hearing and agreed that the application may be decided on the papers filed.

The complainant resigned with immediate effect on 10 July 2017 after an internal investigation was launched by the employer into an allegation of theft of assets. The

employer laid a criminal charge against the complainant on 5 September 2017. On the same day, the employer requested the Fund by email not to pay any pension benefits to the complainant because “we have opened a criminal case against her”.

The Fund complied with the request but in due course on 16 July 2018 released part of the amount to her credit because the alleged loss suffered by the employer was for a lesser amount.

Although a warrant for arrest was issued against the complainant, it has not been executed. According to the police, the address given by her to the Fund and the PFA does not exist and that the police cannot locate her. A quick check on Google Maps shows that the address does not exist: the street address appears to be an open field of land and the “complex” or “unit” name is one of a coffee house, some distance away from the street address.

The finding by the PFA that the complainant is not hiding from the police does not appear to be correct. However, the PFA is correct in finding that Alexander Forbes could have located the complainant. A possibility springs to mind: she could have been asked to attend to the offices of Alexander Forbes to FICA her particulars. In any event, payment to her of the balance must be dependent on a proper FICA.

It is not necessary to deal with all the PFA’s reasons for ordering the Fund to proceed with the payment of the complainant’s withdrawal benefit because one of the reasons is determinative.

In terms of the rules of the Fund, the trustees may withhold payment of a benefit where an employer has laid a criminal charge against a member for compensation in respect

of damage cause to the employer as contemplated in sec 37D of the Pension Funds Act, 1956, provided (inter alia) “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 reasonable chance of success in the proceedings that have been launched.”

As the PFA pointed out, the Fund did not exercise this discretion because the only information it had was that “a criminal case had been opened” against the complainant. The PFA accordingly found that the trustees exercised their discretion to withhold payment of the complainant’s withdrawal benefit without any supporting evidence that the employer had made out a prima facie case against the complainant.

The employer sought to overcome the problem for the first time in “further reasons” filed in the reconsideration application. It now gave the detail of the “crime” and “loss” and said that the evidence was provided verbally to the Fund and “was available from when the request was made to withhold” the funds.

If this was an attempt to apply for the submission of further evidence, it fails not only on procedural grounds. It does not establish that the “trustees” exercised any discretion.

The application for reconsideration is dismissed.

Signed at Pretoria on 17 September 2020

A handwritten signature in black ink, appearing to read 'LTC Harms', written in a cursive style.

LTC Harms (deputy chair)