

**IN THE NON-BANK FINANCIAL INSTITUTIONS TRIBUNAL OF  
THE REPUBLIC OF BOTSWANA HELD AT GABORONE**

**NBFIT 0007/2023**

In the matter between:

**TSHEGOFATSO KGABANYANE**

**APPLICANT**

**AND**

**NON-BANK FINANCIAL INSTITUTIONS  
REGULATORY AUTHORITY**

**1<sup>ST</sup> RESPONDENT**

**AND**

**FIRST NATIONAL BANK BOTSWANA  
PENSION FUND**

**2<sup>ND</sup> RESPONDENT**

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**CONSTITUTION OF THE TRIBUNAL**

**M. BAOLEKI**

**CHAIRPERSON**

**D. MAKATI-MPHO**

**DEPUTY CHAIRPERSON**

**F. MOTLHANKA**

**MEMBER**

**T.SENWEDI**

**RECORDING**

**FOR APPLICANT:     IN PERSON**

**FOR 1<sup>ST</sup> RESPONDENT**

**DITSHETSA MAKEPE           DIRECTOR-ENFORCEMENT**

**KAGISO GASENNELWE       MANAGER-ENFORCEMENT**

**PHINEOUS SESINYI           ACTING DIRECTOR- RETIREMENTS  
FUNDS**

**FOR 2<sup>ND</sup> RESPONDENT**

**TEFO MMOPI                   PRINCIPAL OFFICER**

**PLACE AND DATE OF PROCEEDINGS**

**GABORONE**

**14<sup>TH</sup> JUNE 2023**

**JUDGMENT**

**URGENT APPLICATION AND DETERMINATION THEREOF**

1. On 25 May 2023, the Applicant placed before this Tribunal an application for the review of the 1<sup>st</sup> Respondent's decision on urgency basis.

2. Placing reliance on regulation 8(3) of the Non-Bank Financial Institutions Regulatory Authority (Tribunal) Regulations of 2018, as read together with rule 8 of the Tribunal Rules, the Applicant contended that the circumstances of her matter qualifies it to be heard as a matter of urgency.
3. The Applicant set forth explicitly the circumstances which she avers render the matter urgent. That:
  - a. the review is noted against the decision of the 1<sup>st</sup> Respondent contained in its letter dated 3 May 2023 in terms of which request for early withdrawal of her deferred retirement benefits to pay accrued arrears in respect of her mortgage loan was declined. The 1<sup>st</sup> Respondent grounded its refusal on section 52(1)(d) (ii )(ii) (aa) of the Retirement Funds Act, 2022 which in its understanding provides that the member's total accrued pension benefits must be able to cover the total mortgage loan. As the Applicant's accrued fund benefit stood at P235 532.05, the 1<sup>st</sup> Respondent held it to be insufficient to cover the total sum of P1 344 334.19 owed on her mortgage loan.
  - b. the Applicant does not accept the above interpretation and sets out that she is deferred member of the 2<sup>nd</sup> Respondent's pension fund. She stated that she has a mortgage loan facility that was financed by her former employer, First National Bank Botswana (FNBB), prior to her retrenchment;

- c. the said mortgage loan has run into arrears as she is currently unemployed and does not have the means to meet the monthly instalments;
  - d. the bank has foreclosed the mortgage loan and already have judgment against the said property. She stated that the said property was accordingly attached on 20 May 2023;
  - e. as a deferred member of the 2<sup>nd</sup> Respondent's pension fund, she is requesting, contrary to the 1<sup>st</sup> Respondent's decision, to be paid her preserved retirement fund benefits early for she wishes to pay up the amount of P157 795.61 (mortgage arrears) which FNBB has undertaken to accept so as to save her house which is about to be executed upon.
4. She further placed the following reasons as to why she claims she could not be afforded substantial redress at a hearing in due course. That:
- a. as the property is under attachment it poses a high risk for her losing the property as FNBB can execute judgment by selling the property anytime;
  - b. the matter should be treated as urgent as the normal process may take a longer time and FNBB may have auctioned the property by then, rendering the outcome of this review academic.

5. Both the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent were directed by this Tribunal to file their notices of opposition, if any, in respect of the urgency thereof.
6. It is to be noted that none of the Respondents filed any papers opposing the Applicant's urgent application. The 1<sup>st</sup> Respondent chose to file a Notice to Abide, which was followed by its Statement of Case. Whereas the 2<sup>nd</sup> Respondent similarly filed its Statement of Case, it chose to be silent and expressed no view with respect to the urgency or otherwise of the Applicant's review.
7. The matter was consequently set done for hearing on 14 June 2023.
8. As a preliminary step in terms of rule 11 of the Tribunal Rules, the Tribunal is enjoined to determine, firstly, whether or not the Applicant has established the requirements for an urgent review and, if not, it shall dismiss the application with leave to file in the normal cause subject to the Act, the Regulations and the Rules.
9. The Applicant proceeded to move her urgent application in an emphatic and brief style. She relied on her papers and argued that the fact that her house has been attached and liable to a sale in execution which may occur anytime renders the matter urgent as the decision of this Tribunal may help save her house which is the only home she has.

10. While the 1<sup>st</sup> Respondent has filed a Notice to Abide, which does not tell this Tribunal as to whether in the 1<sup>st</sup> Respondent's view, the matter is urgent or not, Ms. Makepe out of the blue, took a stance that the Applicant could have been quick to respond in her attempts to save her house. Surprisingly, Ms. Makepe continued to present arguments opposing the urgent application.
11. The Tribunal interrupted Ms. Makepe and reminded her that since she has not filed opposing papers specifically or impliedly pleading, she could not proceed to present arguments opposing the urgent application. It behoves this Tribunal to state at this juncture that, it is a cardinal rule that parties to any civil proceeding are bound by their pleadings, and for that matter, it is not open to this Tribunal to base its decision on unpleaded matter. It was therefore not open to Ms. Makepe to attempt to argue in opposition, absent pleadings.
12. With only the Applicant's version in support of her urgent application, the Tribunal considered the grounds upon which the urgent application was sought.
13. The Tribunal finds that the matter is urgent and good cause has been shown; in particular, we find merit in the Applicant's submission that she may not be afforded substantial redress at a hearing in due cause as her house is under attachment and liable for a sale in execution. The Applicant furnished a cogent explanation as to the urgency of her matter and set out her grounds in detail. Accordingly, this matter is urgent.

## **INTRODUCTION**

14. The Applicant, Ms. Kgabanyane, seeks to set aside determinations made by the 1<sup>st</sup> Respondent (Non-Bank Financial Institutions Regulatory Authority) against her and in favour of the 2<sup>nd</sup> Respondent (First National Bank Botswana Pension Fund) on 3 May 2023. The determinations were made pursuant to a complaint lodged with the 1<sup>st</sup> Respondent after the 2<sup>nd</sup> Respondent's refusal to release part of the Applicant's deferred retirement fund benefits to cover the amount owed in respect of a mortgage loan facility with FNBB.

## **FACTS**

15. The relevant facts as stated by the Applicant in her testimony and contained in her review papers are as follow.
16. The Applicant was employed by FNBB as an Attorney Liaison Officer, on permanent and pensionable terms. She worked for FNBB till September 2021 upon which she was retrenched on account of business restructuring. As the Applicant's employment was on pensionable terms, she consequently on retrenchment became a deferred member of the 2<sup>nd</sup> Respondent.

17. It is common cause that while the Applicant was in the employ of FNBB she took a mortgage loan facility to procure Lot 36880 Gaborone, repayable on monthly instalments over the agreed term. The finer details of this loan agreement are not germane to the issue before this Tribunal. However, what is important to note is that the mortgage loan liability was subsisting at the Applicant's point of exist from FNBB, and it still does to date.
18. The Applicant on account of her unemployment subsequently fell into arrears due to her failure or inability to raise the agreed monthly instalments.
19. On 20 January 2023, the Applicant approached the 2<sup>nd</sup> Respondent seeking financial assistance. She submitted her affidavit of unemployment together with proof of indebtedness and urged the 2<sup>nd</sup> Respondent to pay a portion of her deferred retirement fund benefits early because she wishes to pay up her home which is about to be executed upon.
20. The 2<sup>nd</sup> Respondent responded on 28 January 2023 declining her request on the ground that section 52 1(d)(ii)(aa) (*sic*) of the Retirement Funds Act, 2022, required that:

*"the members shall demonstrate that the amount owed shall be covered by her accrued benefits. Please be advised that your Fund Credit as at 31 October 2022 was P235 535.05, her fund credit was not only enough to cover*



*her personal loan inclusive of arrears amounting to P180 975.57.”*

21. The Applicant did not agree, and on 18 April 2023 addressed a complaint letter to the 1<sup>st</sup> Respondent in the following terms:

*“This serves to lodge a complaint against a decision of First National Bank Botswana Pension Fund (“the Fund”) dated 28<sup>th</sup> January 2023.*

*The decision of the Fund is captured in the attached letter which was issued in response to my request for encashment dated 20<sup>th</sup> January 2023.*

*From the attachments the following is discernable:*

*In rejecting my request, the Fund prioritized and offered to settle a different loan I have with FNBB but had not requested for;*

*As at 31 October 2022 my Fund Credit stood at P235 532.05 which is enough to cover a sum of P157 795.61 in fulfilment of a payment plan accepted by the creditor being FNBB;*

*The said sum of P157 795.61 therefore represent the amount owed and sufficient enough to suspend an impending execution.*

*Future facility payments are not yet owed and that is why they are not demanded. For future payments I attach hereto proof that*

*I will be able to raise the necessary future payments as and when they become due in the form of a lease agreement.*

*Your urgent intervention would be greatly appreciated.*

*Yours sincerely*

*Tshegofatso Kgabanyane"*

22. The above-quoted letter makes reference to a Payment Plan that was proposed by the Applicant, and accepted by FNBB.
23. The Payment Plan dated 8 February 2023 is captured in the following terms:

*We refer to your proposal dated 7<sup>th</sup> February 2023.*

*Please note that your account has been handed to our attorneys for litigation and we are currently at judgment stage. (own emphasis)*

*The bank accepts your proposal on the following terms:*

1. *Settlement of arrears outstanding at the time of payment;*
2. *Maintain monthly instalment of BWP9 850.11 without default post arrears settlement.*

*The bank upon fulfilment of the above will suspend the execution of judgment unless you fail to settle pay as above. (own emphasis)*

*Please note that over and above the referred payments there are costs payable by yourself which are collection commission and legal costs.*

*Let us have payment in the sum of BWP157 795.61 in fulfilment of your accepted proposal.*

*The information is furnished in confidence and does not constitute any liability on the part of the bank, its officials and/or informants.*

*Yours faithfully*

*Thato Morapelo  
Senior Legal Collection Manager  
Credit Recoveries-Retail*

24. While in the above quoted letter the immediate demand was only for the settlement of arrears in the sum of P157 795.61, true to its words that the Applicant's matter was at judgment stage before the High Court, FNBB proceeded to get a default judgment against the Applicant on 21 March 2023.

25. In terms of the judgment contained in CVHGB-003844-22, FNBB was successful with respect to both Claim A and B. The Court granted order in favour of FNBB in the following terms:
1. Payment in the sum of BWP 1 163 018.14;
  2. Interest thereon at the prime lending rate plus 1% calculated daily on the amount outstanding and compounded monthly over a 365 day year from 29 September 2022 to date of payment;
  3. An order declaring Lot 36880, Gaborone specially executable.
  4. Payment in the sum of BWP 157 137.11; and
  5. Interest thereon at the prime lending rate plus 4% calculated daily on the amount outstanding and compounded monthly over a 365 day year from 29 September 2022 to date of payment.
26. A Writ of Execution to attach and take into execution the immovable property of the Applicant, Lot 36880 Gaborone was similarly issued by the High Court on 21 March 2023 in order to satisfy the judgment debt.

27. Therefore, by the time the 1<sup>st</sup> Respondent considered the Applicant's complaint, the Payment Plan, the Judgment and Writ of Execution were extant.
28. Having considered the complaint, the 1<sup>st</sup> Respondent responded on 3 May 2023 declining the Applicant's request. The relevant portion of the letter reads thus:

*The NBFIRA refers to your letter dated April 18, 2023 wherein you requested for your mortgage loan arrears with FNBB to be cleared by FNBB Pension Fund.*

*Please be informed that Pension Funds are regulated by NBFIRA in terms of the Retirement Funds Act and Regulations and the Income Tax Act Superannuation Fund Regulations. NBFIRA has consequently reviewed the facts surrounding the matter as presented by yourself and FNBBPF and has taken note that the Pension Fund advised you that pursuant to section 52 (1)(d) (ii) (ii) (aa) of the Retirement Funds Act, 2022, which states that the member's total accrued pension benefits must be able to cover the total mortgage loan, they could not accede to your request. (own emphasis)*

*In the light of the above, the Regulatory Authority wishes to confirm that you do not qualify to be assisted in terms of section 52(1)(d) of the Retirement Funds Act, 2022 since your accrued fund benefit of P235 532.05 could not cover the total sum of P1 344 334.19 owed on your mortgage loan. Furthermore, the*

provision excludes prepayments and settling mortgage loan arrears. (own emphasis)

*Regarding your contention that the Fund rejected your request and prioritized and offered to settle your personal loan with FNBB, please be informed that FNBBPF was proposing that you consider clearing your personal loan as an option available to you in accordance with the legislation.*

*It is with the foregoing that this matter has been finalised and considered closed by NBFIRA. This does not, however, preclude you from seeking redress through the Non-Bank Financial Institutions Tribunal.*

*Yours sincerely.*

*Boa Ndebele*

*Head, Communications and Consumer Affairs.*

## **THE PRESENT PROCEEDINGS**

29. Unreceptive to the decision of the 1<sup>st</sup> Respondent, the Applicant is before this Tribunal contending that she does not agree with the interpretation and legal conclusions reached by the 1<sup>st</sup> Respondent in its decision.
30. She contends that both section 52(1)(c) of the Retirement Funds Act, 2022 and section 52(1)(d)(ii)(ii)(aa) of the same Act come to her aid.

31. With respect to section 52(1)(c) of the Act, she submitted that her situation is a classic case of a default on the repayment of any loan by herself as a deferred member, and that she has submitted proof in the form of an affidavit that she has been unemployed for six consecutive months, and further that her deduction is only effected as a last resort.
  
32. Now coming to section 52(1)(d)(ii)(ii)(aa) of the Act, the Applicant contended that the 1<sup>st</sup> Respondent misdirected itself in holding that the provision demands that she demonstrates that her total accrued pension benefits must be able to cover the total mortgage loan.
  
33. Advancing the above argument further, the Applicant drew the Tribunal's attention to 52(1)(d)(i)(i)(bb) of the same Act which is applicable to retiring members. Her gripe is that the 1<sup>st</sup> Respondent are mixing issues- that with respect to retiring members, the Act is clear and dictates that the retiring member should demonstrate as a condition precedent that the accrued benefits will cover the entire mortgage loan. Coming to deferred members, her submission is that the opposite is required- all that the deferred member must demonstrate is that the amount owed, (which amount is determined by the creditor having regard to the current liability that is due and payable), shall be covered by her accrued benefits.

34. In her case, she argues that the amount owing is contained in the Payment Plan and confirmed by FNBB as P157 795.61 which amount can be covered by her accrued deferred retirement benefit of P235 532.05. Regarding the balance of the mortgage loan, she emphatically argued that such are future facility payments that are not yet owed and are not yet demanded. With respect to her ability to make good of future payments should the mortgage arrears be cleared with a portion of her fund credit, she attached a signed lease agreement in respect of Lot 36880, Gaborone [the encumbered property] as proof that she will be able to raise the necessary future payments as and when they become due.
35. She further argued that the 1<sup>st</sup> Respondent's conclusion that section 52(1) of the Act rules out prepayments and settlement of mortgage loan arrears is without merit and violates the plain and literal meaning of the provision. In sum, she contended that this conclusion could only be reached when proper rules of interpretation of statute were disregarded.
36. In respect of the Summons and Judgment obtained by FNBB, the Applicant stated that as she had defaulted on her mortgage repayment, FNBB issued Summons as it could not resort to self-help. She further confirmed that FNBB has foreclosed the mortgage loan.



37. However, she emphasised that FNBB has made a commitment that it will suspend execution of the judgment on condition that the Applicant settle the outstanding arrears and consistently and without fail pay the agreed monthly instalments until the mortgage loan is totally liquidated.
38. In closing, the Applicant stated that while it is risky to call upon her deferred retirement fund benefits in favour of a house which she will still owe even if the accumulated arrears are paid, such a risk is worth pursuing as she will rather have a home for her family and see how to raise money for her retirement later on, more especially that she is still of marketable value and has prospects of rejoining the labour market, considering her skill and age.

### **1<sup>ST</sup> RESPONDENT'S ARGUMENTS**

39. Submitting in reply, Ms. Makepe for the 1<sup>st</sup> Respondent argued that the amount owed by the Applicant is made up of the principal amount together with the arrears. She submitted that at the end of March 2023, the principal amount stood at P1 163 018.14, while arrears totaled P157 137.11.
40. With regards to the Payment Plan as agreed to by FNBB, Ms. Makepe submitted that in light of the judgment obtained by FNBB, the total amount owed is the principal debt and the arrears as at the time of the judgment, plus interest.

41. As to why under the provision dealing with retiring members [52(1)(d)(i)(i)(bb) of the Act], Parliament chose to expressly prescribe that the condition precedent is the demonstration by the retiring member that the accrued benefits will cover the mortgage loan, but chose to use a different expression with respect to deferred members [52(1)(d)(ii)(ii)(aa) of the Act] -that the member shall demonstrate the amount owed shall be covered by her accrued benefits, Ms. Makepe had very little to say.
42. While Ms. Makepe admitted to the difference in language between the two provisions, she stated that she does not understand as to why Parliament chose to use different expressions. She, however, argued that viewed from any angle, the amount owed is the amount that FNBB certified as the amount owed when it foreclosed the mortgage bond.
43. She further defended the 1<sup>st</sup> Respondent's conclusion that 52(1)(d)(ii)(ii)(aa) of the Act states that the total accrued benefits must be able to cover the total mortgage loan. It is noteworthy that Ms. Makepe argued further that the 1<sup>st</sup> Respondent's decision was correct and not a misdirection in holding that section 52(1)(d) of the Act excludes prepayments and settlement of mortgage loan arrears.

44. In support of 1<sup>st</sup> Respondent's arguments, Ms. Makepe filed heads of argument. The heads of argument can be summarised into two legs. Firstly, it is the 1<sup>st</sup> Respondent's argument that the intention of the Legislature was to ensure that deductions are only made from members' accrued benefits in situations where such deduction would result in the member's position being improved either by an asset being fully paid for in the case of a mortgage bond, or a liability been completely lifted off, or by a debt being fully extinguished in the case of other loans. Going into detail, the 1<sup>st</sup> Respondent argued that the Legislature could not have intended for deductions for part-payments and/or payment of arrears, which would still leave the member owing with a debt liability and having depleted their pension funds at the same time. The 1<sup>st</sup> Respondent contends that, to permit the above, would defeat the protection that the Legislature sought to effect by ensuring that members do not access funds for unresolved debt which could leave the member worse off should they default later.
45. Coming to the second leg of the 1<sup>st</sup> Respondent's argument; it is contended that the total amount owed to FNBB as at the time of the 1<sup>st</sup> Respondent's decision, which is the subject of this current review is, P1 344 334.19 (principal debt plus arrears). It is submitted that the amount owed is not the arrears (as contained in the Payment Plan) but what is wholly owed to the bank based on what was loaned from them. It is argued that the Applicant's accrued fund credit which stood as P235 532.05 as at the time of her request for deduction cannot cover the total amount owed.

46. Having closed her submissions, Ms. Makepe proceeded to introduce Mr. Phineas Sesinyi who was presented as the Retirement Funds subject matter expert in the employ of the 1<sup>st</sup> Respondent. While Mr. Sesinyi proceeded to give his analysis and background to the Retirement Funds Act, he concentrated much in agreeing and backing up the arguments already put forward by Ms. Makepe. He went on to state that section 52(1)(d) of the Act provides that deferred members must demonstrate that amount owed will be covered by the accrued benefits, which essentially means that the deferred member must demonstrate that the accrued benefits will pay off the entire mortgage loan. He argued that the phrase 'mortgage loan' is also used in the opening line of section 52(1)(d) of the Act, which means that even for amount owed with respect to deferred members, it still means the whole amount. After raising essentially the same arguments as Ms. Makepe, the Tribunal will not, for the sake of brevity, repeat Mr. Sesinyi's arguments.

## **2<sup>ND</sup> RESPONDENT'S ARGUMENTS**

47. In a brief reply, Mr. Tefo Mmopi contended that the Applicant's debt is comprised of the mortgage loan and personal loan. He submitted that in their response to the Applicant's claim in terms of which she requested a portion of her deferred retirement fund benefits to part-pay her mortgage loan, they assessed the Applicant's case and came to the conclusion that section 52(1)(c) of the Act is the applicable provision.

48. He stated that as the 2<sup>nd</sup> Respondent, they deemed it fit to recommend to the Applicant to consider taking the option of paying off her personal loan as it stood at P180 975.57 which amount could be liquidated by her accrued benefits.
49. As regards the request to pay the mortgage loan arrears in order to enable the Applicant to forestall the sale in execution of her house, the 2<sup>nd</sup> Respondent's Statement of Case indicates that before it took its decision, it sought clarity from the 1<sup>st</sup> Respondent who confirmed that the proper interpretation of section 52(1)(d) of the Act, with respect to deferred member, does not authorise allowable deductions where the accrued benefits were not enough to clear the mortgage loan. Bearing in mind guidance from the 1<sup>st</sup> Respondent- as the Regulatory Authority, the 2<sup>nd</sup> Respondent declined the Applicant's request.

### **ISSUES TO BE DECIDED**

50. The crux of the issue between the Parties, and what has to be decided, is whether the claim by the Applicant was correctly rejected by the 1<sup>st</sup> Respondent.
51. In order to solve the issue at hand, three important sub-questions fall for determination. First, whether or not section 52(1)(c) of the Act is applicable to the Applicant's case.

52. The second sub-question is, what was the amount owed by the Applicant in terms of section 52 (1)(d)(ii)(ii)(aa) of the Act as regards the mortgage facility as at the time the 1<sup>st</sup> Respondent determined her appeal?
53. The third sub-question to be decided is whether section 52(1)(d)(ii)(ii)(aa) of the Act, as regards deferred members, precludes deductions for purposes of paying member's mortgage loan arrears, or any other amount of money due on the repayment of mortgage loan; or is it only limited to deductions that will settle the full mortgage loan as advanced?
54. The first port of call in the process of finding answers to the questions as identified above is the governing legislation. This is so because, as Wallis J.A held in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)** (endorsed by the Court of Appeal of Botswana in **Seleka v Bibian Ventures (Pty) Ltd [2015] BLR 412 (CA)**):

*"... interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstance of its coming into existence..."*

## **ANALYSIS AND FINDINGS**

55. In Botswana, the basic rule has been that active members and deferred members cannot access their retirement benefits until they reach the age of retirement. However, the Retirement Fund Act, 2022 (the Act) has recognised that there might be justifiable reasons which necessitate such early withdrawal. Section 52 of the Act is relevant provision. This indicates the Legislature's awareness of circumstances which might prevail which might necessitate early release of retirement benefits
56. While members are now provided with a legislative tool which enable them to justify the early release of their retirement benefits, the interpretation of the statutory provisions that permits such early release of preserved retirement benefits is the subject of debate before this Tribunal.
57. With respect to the first sub-question, in terms of section 52(1)(c) of the Act,

*"Notwithstanding section 49, a licensed fund may deduct from a benefit payable to a member or his or her dependents or nominees- in the case of a default on the repayment of any loan by a deferred member, having provided proof that he or she is unemployed for six consecutive months, if such a deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangements for the required payment can be made."*

58. At first sight, the above quoted provision makes it clear that, a deduction by the Fund (subject to satisfaction of all other conditions) to make good a deferred member's default on the repayment of any loan, is envisaged, and certainly not prohibited by the Act. It is on this understanding that the Applicant put on a spirited argument that her default on the mortgage loan constitutes a default on the repayment of any loan as envisaged by the Act, and as she meets all the other conditions, the Board of the Fund must authorise a deduction from her deferred retirement benefits to save her house.
59. There is, however, an obstacle in the way of this argument. While section 52(1)(c) of the Act, in general terms, refers to a default on the repayment of any loan by the deferred member, section 52(1)(d) of the same Act, in specific terms, deals with default in respect of mortgage loans.
60. What then is the position of the law where the same enactment uses the general phrase, default on 'any loan', and later dedicate a provision dealing specifically with default on 'mortgage loans'?
61. The remarks made in **Bloate v United States, 552 U.S (2010)**; which followed the decision in **United States v Chase, 135 U.S 255, 260 (1890)** are certainly apposite.

*"The general language of a statutory provision, although broad to include it, will not be held to apply to a matter specifically dealt with in another part of the same statute."*



62. The Tribunal holds that this canon of interpretation has full application as well to statutes such as this one here, in which a general authorisation for the deduction to pay any loan in the event of a default member's default (subject to other conditions as per the provision) and a more limited and specific authorisation (in respect of default in mortgage loans) exist side by side in the Retirement Funds Act, 2022. This interpretation is further preferred by this Tribunal as it gives effect to section 29(1) of the Interpretation Act which provides that an Act must be construed as a whole; and as best to attain its object according to its true intent and spirit (section 26 of the Interpretation Act).
63. On the basis of the foregoing, the Tribunal cannot agree with the Applicant's argument, and accordingly holds that section 52(1)(c) of the Act is of no assistance to the Applicant whose mortgage loan default is, by law, specifically dealt with under a different provision (section 52(1) (d)) of the same Act.
64. We now turn to the second question.
65. Section 52(1)(d) of the Act deals with defaults on mortgage loans in relation to both deferred members and retiring members. It opens with a general *proviso*, that "*notwithstanding section 49, a licensed fund may deduct from a benefit payable to a member or his or her dependents or nominees*".

66. Significantly, section 52(1)(d)(ii)(ii)(aa) of the Act as a stand-alone sub-section (subject to the above *proviso*) provides as follows:

*"a licensed fund may deduct from a benefit payable to a member or his or her dependents or nominees-any amount due on the repayment of a mortgage loan by a member on the date which he or she becomes a deferred member of the fund provided that, where a person's membership is deferred-the member shall demonstrate that the amount owed shall be covered by his or her accrued benefit."*  
(own emphasis)

67. While the Parties before this Tribunal are in agreement that in terms of the above quoted provision it is possible to access deferred retirement benefits before preservation date, they are nonetheless in disagreement with respect to whether or not the Applicant has met conditions of release of her deferred retirement benefit. The Parties are in disagreement as to the exact amount due and owed by the Applicant in respect of the Mortgage facility.
68. The Applicant argued forcefully on the basis of a Payment Plan dated 8 February 2023, authored by FNBB that, should she settle the arrears outstanding at the time of payment (P157 795.61), the bank will suspend execution of judgment unless if she fails to settle the above.

69. She, however, failed to take into consideration that FNBB, contrary to its undertaking has proceed to get judgment on 21 March 2023, and in so doing foreclosed the Mortgage loan, thereby rendering the Mortgage loan in its entirety, plus the arrears (P1 163 018.14 and P157 137.11) due and payable, and also got an order declaring Lot 36880. Gaborone specially executable. Further, the Applicant failed to take heed of the fact that as at 20 May 2023, FNBB has proceeded to attach the said Lot 36880, Gaborone.
70. Therefore, the Tribunal is attracted to the 1<sup>st</sup> Respondent's argument that as at the time it considered the Applicant's appeal, FNBB had an extant judgment in its favour issued against the Applicant. The judgment is sounding in money (entire mortgage loan and arrears) and it was in pursuance of the said judgement that a writ of execution was issued against the house, which was attached on 20 May 2023.
71. So, it is the Tribunal's conclusion that the Applicant's submission that the amount owed is only the arrears is without merit. Therefore, the 1<sup>st</sup> Respondent cannot be faulted for its finding that the amount owed as per the judgement and the Writ of Execution exceeds her accrued benefits. It is important to note that the High Court has already determined same and it remains extant.

72. Therefore, the Applicant's application for the deduction of a portion of her deferred retirement benefits fails on the basis that the amount as owed [as captured in the judgment of the High Court] as at the time the 1<sup>st</sup> Respondent considered her appeal, and as at now, exceeds and cannot be covered by her accrued benefits. The Payment plan has been superseded by the judgment of the High Court, and, more specifically, by the enforcement of the said judgment, in terms of which the attachment of the house in question has been effected by the FNBB.
73. Bearing the above conclusion in mind as regards the second question which essentially disposes off this Application for Review, the Tribunal finds it unnecessary to make a final determination on the third question, which called for a proper interpretation of Section 52(1)(d)(ii)(ii)(aa) read in context of Section 52(1)(d)(i)(i)(bb) of the Act.

### **CONCLUSION**

74. In result, there can only be one outcome, namely:

74.1 as the Applicant's mortgage loan is already foreclosed by FNBB and FNBB has an extant judgment and Writ of Execution that has caused the encumbered property to be attached, the Applicant is, unsuccessful on the basis that her accrued benefits of **P235 535.05** cannot cover the amount owed which is the **P1 344 334.19** owed on the Applicant's foreclosed mortgage loan.

**ORDER**

75. In the premises, the Applicant cannot succeed and the application is hereby dismissed with no order as to costs.
76. The Parties are advised that any person who is dissatisfied with the decision of this Tribunal may, within 28 days of receipt of this decision, appeal to the High Court.

**DELIVERED IN OPEN COURT AT GABORONE ON THIS 4 DAY OF AUGUST 2023.**

  
.....  
**M. BAOLEKI**  
**CHAIRPERSON**

**I AGREE:**

  
.....  
**D. MAKATI-MPHO**  
**DEPUTY CHAIRPERSON**

**I AGREE:**

  
.....  
**F. MOTLHANKA**  
**MEMBER**

