

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

**NBFIT 0003/2023**

In the matter between:

**MONTHUSI DEBELE**

**APPLICANT**

**AND**

**NON-BANK FINANCIAL INSTITUTIONS  
REGULATORY AUTHORITY**

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

**AND**

**ALEXANDER FORBES FINANCIAL  
SERVICES BOTSWANA**

**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**

ANGELINA MPE DEPUTY DIRECTOR-ENFORCEMENT

KAGISO GASENNELWE MANAGER-ENFORCEMENT

BONTLE NDLOVU MANAGER-RETIREMENTS FUNDS

BARATI OTLHOGILE LEGAL INTERN-ENFORCEMENT

**FOR 2<sup>ND</sup> RESPONDENT: NO APPEARANCE**

**PLACE AND DATE OF PROCEEDINGS**

GABORONE

20<sup>TH</sup> JUNE 2023

JUDGMENT

**FACTS AND BACKGROUND**

1. The relevant facts as stated by the Applicant in his testimony and contained in his review papers are as follow.

2. The Applicant, a 53 year old married man with two minor children holds a Bachelor's Degree in Electrical and Electronic Engineering from the University of Botswana which he obtained in 1998. Between 1999 and 2001, he worked for Botswana Television as an engineer. He then took up employment as an engineer with Orange Botswana (Vista) from 2001 till 2014 at which point he was retrenched. It is worth noting that while under the employ of Orange Botswana, the Applicant was under a pensionable scheme administrated by Minet Botswana (then AON Botswana). Therefore, upon retrenchment, the Applicant became a deferred member of Minet Botswana.
3. The Applicant subsequently joined Ericson Botswana as an engineer, on permanent and pensionable terms. He worked for Ericson Botswana from 2014 till 2020 upon which he was retrenched on account of business restructuring due to *Covid 19* effects. As the Applicant's employment was on pensionable terms, he consequently on retrenchment became a deferred member of the Alexander Forbes Retirement Fund.
4. Whilst unemployed, the Applicant enjoyed deferred pension membership of both Minet Botswana and Alexander Forbes Retirement Funds. On or about August 2021, on account of his age and unemployment state, the Applicant inquired from both Minet Botswana and Alexander Forbes as to his options to take early retirement. Both funds responded indicating that the early retirement option was exercisable at age 55 and 50 respectively.

5. As the Applicant was 50 years old, he resolved to exercise his early retirement option as availed by Alexander Forbes Retirement Fund (**the 2<sup>nd</sup> Respondent**) in terms of rule 5.2.1.1 of the Fund Rules. In the premises, the Applicant retired from the 2<sup>nd</sup> Respondent's retirement fund in August 2021 and as such commuted one-third of his retirement benefit as a cash lump sum.
6. With respect to the remaining two-thirds retirement benefit, the Applicant was informed by the 2<sup>nd</sup> Respondent that since the remaining two-thirds entitled him to an annual pension of more than P5 000 per annum, he was required as a matter of law in terms of the Retirement Funds Act, 2014 and the Income Tax (Superannuation Funds) (Amendment) Regulations, 2001 to purchase an annuity policy to enable him to earn a monthly pension for the rest of his life.
7. The Applicant found this unacceptable as the annuity quotations availed to him by the 2<sup>nd</sup> Respondent had a minimum monthly pension of P750.21 and the maximum being P1274.16 monthly pension. To him, this was too little to sustain his family. He accordingly wrote to the 2<sup>nd</sup> Respondent on 1 December 2021, requesting to be paid his two-thirds retirement benefit as a cash lump sum. He submitted that he has an incomplete multi-residential property at Mogoditshane Block 9 currently at roofing level stage, which he needed to complete. He concluded by stating that with the help of a cash lump sum payment of his two-thirds retirement benefit he would complete his multi-residential

project and earn a monthly rental of at least P7 000 per month, compared to the meagre P1200 per month from pension.

8. The 2<sup>nd</sup> Respondent responded on 20 December 2021 declining his request on the ground that its Retirement Funds Rules together with the Income Tax (Superannuation Funds) Regulations 2001, did not provide for commutation of two-thirds retirement benefit as cash lump sum payment where pension payable to a pensioner was more than P5 000 per annum. The 2<sup>nd</sup> Respondent consequently urged the Applicant to take heed of his statutory obligation and purchase an annuity policy with the remaining two-thirds retirement benefit.
9. The Applicant did not agree, and on 31 October 2022 (at this point the law had changed as the Retirement Funds Act, 2014 was now repealed (old law) and the Retirement Funds Act, 2022 (new law) was the governing legislation), sent an email to the 2<sup>nd</sup> Respondent relying on the new law requesting for lump cash payment of his remaining two-thirds retirement benefit. The 2<sup>nd</sup> Respondent once again responded declining the request on the ground that the Applicant's pension was dealt with under the old law and based its refusal on the strength of the 1<sup>st</sup> Respondent's Circular 6 of 2022 that states that

*"Where pension benefits were commuted and or paid out before 14 October 2022, the provisions of the Retirement Funds Act, 2014 (old law) apply and such benefit payouts shall be finalised under the old Act."*

10. The Applicant once again did not agree, and on 12 December 2022 launched an appeal against the 2<sup>nd</sup> Respondent seeking the 1<sup>st</sup> Respondent to reconsider the meaning and effect of its Circular 6 of 2022 for the following reasons, that:

10.1 the cutoff point with respect to the applicability of the old law should be people who have taken their one-third retirement benefit and are already taking up their monthly pension, and not for people like him who have taken their one-third retirement benefit but have not signed for monthly pension;

10.2 as he has another deferred pension with Minet Botswana that he would like to keep till he reaches the age of retirement (55 years) he wished to use the two-thirds retirement benefit sitting with the 2<sup>nd</sup> Respondent to complete the multi residential project that will earn him a substantial monthly rental compared to the minimum P750.21 or maximum P1274.16 per month offered by the prospective annuity policies. Further, that encashing his two-thirds retirement benefit held by the 2<sup>nd</sup> Respondent will not disadvantage him as he has a substantial deferred pension with Minet Botswana; and

10.3 he essentially sought that his two-thirds retirement benefit held by the 2<sup>nd</sup> Respondent be immediately paid as lump sum cash.

11. The 1<sup>st</sup> Respondent replied declining the Applicant's request on the ground that since he retired in August 2021, which is a date before the commencement of the new law and its Regulations, the Applicant was governed by the old law which still bound him to procure an annuity policy with the balance of his retirement benefit. Therefore, the Applicant's appeal was dismissed.

12. Now coming to this Tribunal, the Applicant submitted that his appeal is premised on the ground that the 1<sup>st</sup> Respondent misdirected itself in holding that he was governed by the old law while in his understanding the new law is the applicable law for the following reasons, that:

12.1 the cutoff point with respect to the applicability of the old law is people who have taken their one-third retirement benefit and were already taking up their monthly pension as at 14 October 2022 (commencement date of the new law), rather than people like him who have taken their one-third retirement benefit but had not signed for monthly pension (as at the commencement date of the new law);

12.2 the new law was done because there was a problem with the low amounts under the old law. Therefore, the new law came to assist people like him who had not yet bought an annuity policy;

- 12.3 he questioned the rationality of introducing the new law if the 1<sup>st</sup> Respondent was still able to say people could live with the P417 per month under the old law;
- 12.4 the law is there to help people. In addition, he argued that the law is remedial, and is not there to punish people. Further, he argued that the evolving nature of the law is to help address real life challenges particularly with regard to living standards;
- 12.5 the new law, when he reads it, only enjoins those who have a pension of P20 000 per annum to buy annuity policies. His contentions is, as his annual pension is below the newly set threshold and has not taken up any annuity policy, he should be permitted to encash his remaining benefits as lump cash payment for it falls below the new threshold; and
- 12.6 further that the new law is silent and does not expressly exclude people in his situation. Therefore, the law must be interpreted in his favour as he is in a different situation from those who in 2021 opted to purchase an annuity under the old law, more so that his benefits are not invested and are just sitting there.



13. Submitting in reply on behalf of the 1<sup>st</sup> Respondent, Ms. Mpe in an emphatic but brief style, contended that the issue is quite simple. She contended that the issue is, which law regulates the Applicant's retirement, that is, is it the law that was in force at his point of retirement, which is the Retirement Funds Act, 2014 (old law) or the Retirement Funds Act, 2022 (new law)?
14. Ms. Mpe submitted that the applicable law is the law which was in force in 2021 when the Applicant retired. She further submitted that the Superannuation Funds Regulations, 2001 and the 2<sup>nd</sup> Respondent's Fund Rules as at the time of the Applicant's retirement are the supporting Regulations and Rules that are applicable. Going into detail, Ms. Mpe submitted that the Applicant placed reliance on the old law to place his retirement into effect and at that point in time, a pension of P1200 per month payable upon commutation of the pensioner's one-third retirement benefit was above the threshold; which obligated the Applicant to procure an annuity policy, and forbade encashment of two-thirds benefit as a lump sum payment.
15. On the inapplicability of the new law with respect to the Applicant's case, Ms. Mpe submitted that Section 13 (1)(c) of the Interpretation Act [Cap: 01:04] is instructive in stating that the repeal of an enactment does not affect any right, privilege, obligation or liability acquired, accrued or incurred thereunder. She further submitted that an enactment comes into force on the day it is published in the Government Gazette. She pointed out that the new law was published in October 2022 while the

Applicant retired a year before, August 2021. It is the 1<sup>st</sup> Respondent's submission that since the Applicant retired under the old law and his balance was higher than the threshold, he was under an obligation to purchase an annuity policy, but it seems he opted to defer it, waiting on the re-enactment of the law.

14. Ms. Mpe wound up her submissions by suggesting that since the Applicant on his own admission accepted that he has encashed his one-third retirement benefit under the old law, it is not open to him to rely on the provisions of the new law. She argued that the new law is only applicable to those who had not retired on its commencement date. She closed by submitting that the Applicant is no longer a member, and his funds are now resident in the preservation account awaiting his confirmation as to which insurer shall administer his annuity policy.
15. Having closed her submissions, Ms. Mpe proceeded to introduce Ms. Bontle Ndlovu who was presented as the Retirement Funds subject matter expert in the employ of the 1<sup>st</sup> Respondent. Ms. Ndlovu took the stand and proceeded to state the process for retirement. She stated that:
  - 15.1 first step is commutation of the one-third retirement benefit. She stated that if the balance is below the threshold, the retiring member will encash the whole of their retirement benefit as lump sum payment;

- 15.2 if the balance is in excess of the threshold, the retiring member moves to the next stage of purchasing annuity;
- 15.3 the fund through its administrator will source quotations from annuity service providers and availed the quotations to the retiring member; and
- 15.4 where a retiring member takes his one-third retirement benefit, his entire benefit is set aside in anticipation of his acquisition of the annuity policy.
16. On explaining Circular 6 of 2022, Ms. Ndlovu stated that its main purpose was to set out the cutoff point and to try to explain to the public that the new law does not apply retrospectively. Ms. Ndlovu explained that while the Applicant is of the firm view that the new law is applicable to those who had retired but not bought annuities on the date it commenced, that is not the case. She stated that the cutoff is the payment of the one-third retirement benefit. She stated that it is incorrect for the Applicant to say that there is no annuity yet. Rather, she pointed out that it is an annuity as we speak as he was now removed (he is not a member) and the funds are put somewhere waiting for him.<sup>1</sup>

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<sup>1</sup> Ms. Ndlovu was misstating the position of the law. If indeed the Applicant already has an annuity, then there was no need for the 1<sup>st</sup> Respondent (her own employer) to have written to the Applicant directing him to procure the annuity for which he already has. Also, annuity is defined in the definition section of the old law as regular payment for the balance of the lifetime of the retired member. As the Applicant has not started drawing regular payments, he cannot be said to already have an annuity as alleged by Ms. Ndlovu.

17. On being asked to provide further clarity as to the meaning of the cutoff point- whether it is the point when the member writes a letter communicating his intention to retire, or it is the date the employer/fund confirms the retirement, or age, Ms. Ndlovu stated that normally the member indicates the date of retirement in their letter of retirement, therefore the employer does not dictate such date, so anyone can choose the date they want to retire from employment/fund. Interestingly, while Ms. Ndlovu started by stating that the cutoff point is payment of the one-third retirement, she changed posts to now suggest that the cutoff point is the date that the retiring member has indicated in their retirement letter. She closed by indicating that the Applicant should have known he had retired at the point of indicating his last date of membership.<sup>2</sup>
18. On rebuttal, the Applicant argued that he was not just waiting for the re-enactment, he was appealing and writing letters and emails. He indicated that there were delays and the process is lengthy. He argued that the 1<sup>st</sup> Respondent ignored his submission that he has another deferred pension that will provide for him upon reaching normal retirement age.

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<sup>2</sup> Ms. Ndlovu's averment is a misapprehension of the law. The cutoff point is not necessarily the date the member states as his last day of retirement. The applicable law clearly sets the cutoff as the retirement date, which is the date the applicant actually ceased his membership with the 2<sup>nd</sup> Respondent's retirement fund (it could not be cessation of employment as he was on retrenchment) and draws their retirement benefit.

19. Regarding the 1<sup>st</sup> Respondent's submission that the law does not look back, the Applicant argued that his case is comparable to where he, on facing a murder trial, the High Court convicts him and imposes the death penalty and while his appeal is pending before the Court of Appeal, Parliament abolishes the death penalty. He posed the question- whether he be hanged just because he committed the offence while the death penalty was lawful, even though Parliament would have now outlawed the death penalty at the point of his appeal.
20. In reply, Ms. Mpe submitted that if Parliament wanted the new law to apply retrospectively, it would have said so. She went on to submit that in the instant case, there is no provision that expressly states that the new law will apply to past retirements claims.

### THE ISSUES

21. To distil the germane issues, it is important to give a brief account of the law. Before the 14 October 2022 any retiring member who after commutation of his/her one-third retirement benefit would be entitled to an annual pension in excess of P5 000 per annum was obliged to purchase an annuity policy for purposes of earning a monthly pension for the rest of their life. See section 32(13) of the Income Tax Act as read with Regulation 2(1)(e) of the Income Tax (Superannuation Funds)(Amendment) Regulations, 2001.

22. The Retirement Funds Act, No. 38 of 2022 (new law) which repealed and re-enacted the Retirement Funds Act, No.27 of 2014 (old law) commenced on 14 October 2022. So, by the time the Applicant lodged his appeal with the 1<sup>st</sup> Respondent, the Retirement Funds Act, 2022 and its Regulations were the governing legislation.
23. Complementary to the new law is the Income Tax (Superannuation Funds) Regulations 2022, Statutory Instrument No. 147 of 2022, published on 11 November 2022. Of relevance to the present case is Regulation 2(vii) which provides that where the pension to a pensioner is less than P20 000 per annum, the pensioner will be entitled to commutation of the entire pension benefits as a single lump sum payment.
24. The foregoing re-enactment has consequently increased the *de minimis* (minimum) threshold for annuitisation, which is the threshold above which members are required to purchase an annuity from P5 000 per annum under the old law to P20 000 per annum.
25. Noteworthy is that the new law is silent and omits any mention whether retired members who, having retired under the old law but had before 14 October 2022 not finalised or procured their annuity policies at that date were now subject to the new law with respect to annuity policy prescripts. This, succinctly, became the fundamental issues before this Tribunal:

25.1 whether a retired member who retired under the old law, but had not finalised procuring his annuity policy before 14 October 2022 (the commencement date of the new law) can proceed to invoke the newly-set annuity threshold and place a claim entitling him to the balance of his retirement benefits as a single lump payment, or is he still bound by the statutory provisions (annuity threshold) as they stood at the time of his retirement? and

25.2 whether the process of purchasing an annuity policy by the Applicant amounts to an independent transaction separate from his 2021 retirement which will consequently be governed by the law in force as at the time the Applicant actually purchases the annuity policy?

**DETERMINATION OF THE FIRST ISSUE**

26. As stated above, the first issue is, whether the Applicant who retired under the old law, but had not finalised the procurement of his annuity policy before 14 October 2022 (commencement date of the new law) can proceed to invoke the newly-set annuity threshold and place a claim entitling him to the balance of his retirement benefits as a single lump payment, or is he still bound by the statutory provisions (annuity threshold) as they stood at the time of his retirement? Put differently, does the new law have retrospective effect so much so that it is applicable to retirements that were effected before its commencement date?

K.F.M

27. The Tribunal has dispassionately given thought and weighed the contending arguments from both sides. The most important sub-question to the first issue that we need to ask ourselves is when in law, does an enactment commence?
28. The answer to the above posed sub-question is not far to come by. Section 49 of the Interpretation Act which we feel instructive to reproduce here, provides in no ambiguous terms that:  
*"commencement' in relation to an enactment means the date on which the enactment comes or came into operation."*
29. Bearing in mind the above definition, this Tribunal is unhesitatingly of the settled view that the new law commenced on 14 October 2022 as clearly set out in the **Retirement Funds Act (Date of Commencement) Order, Statutory Instrument No. 138 of 2022**, and regulates matters as of that date, unless there is express provision to the contrary.
30. This leads us to the main issue of whether the new law has retrospective effect so much so that it is applicable to retirements that were effected before its commencement date.
31. Whereas the Applicant put a spirited argument that the new law looks back to assist those who retired under the old law but had not signed up for annuity though required under the old law, Ms. Mpe for the 1<sup>st</sup> Respondent dealt at length in her submissions



and her heads of argument with the state of the law regarding retrospective effect of amending statutes.

32. She referred this Tribunal to the case of **Incedon (Welkom) (Pty) Ltd v QwaQwa Development Corporation Ltd 1990 (4) SA 798 (A)** which held that there is a presumption in law that legislative provisions do not interfere with completed transactions or vested rights. She further cited **First National Bank of Botswana v Tau 2009 (1) BLR 112 (CA)** where Tebbutt JP held that it is settled law that in the interpretation of statutes no legislation, including subsidiary legislation, is presumed to operate retrospectively. She amplified her submissions by referring the Tribunal to Section 13(1)(b) and (c) of the Interpretation Act which provides as follows:

*"The repeal of an enactment shall not affect the previous operation of the enactment or anything duly done or suffered thereunder; or affect any right, privilege, obligation, or liability acquired, accrued, or incurred thereunder."*

33. Straight away, to Ms Mpe's submission, the Tribunal totally subscribes much as we do not agree with the Applicant. Upon a careful reading of the above-quoted Section 13 of the Interpretation Act, what emerges from there is the principle that, in a repeal of an enactment, acts, rights and obligations done, acquired and accrued there remain intact.

34. The Tribunal further finds merit in Ms. Mpe's submission in respect of the presumption against retrospective application of legislation. The Tribunal finds support on the time-honoured principle formulated in **Peterson v Cuthbert and Co Ltd 1945 AD 420 at 430**, based upon the Roman-Dutch law, that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the statute to have that effect (see also **First National Bank of Botswana v Tau 2009** and **Inclodon (Welkom) (Pty) Ltd v QwaQwa Development Corporation Ltd** (above) to which we were ably referred by Ms. Mpe).
35. In so holding, this Tribunal is enjoined to point out here that the above position is not in any way a state of the art of our jurisprudence. The courts have taken a similar stance in a line of authorities including the case of **Port Elizabeth Municipality v SA Breweries 1925 EDL 99 117** which states that:
- "a legislature exercising its power to make retrospective enactments must do so with clarity and precision in order to enable effect to be given to its provisions."*
36. What then is the correct approach in cases such as the present where the Applicant's retirement action was instituted before the re-enacting legislation came into being, but the associated action of procuring the pension annuity was still not closed?

37. Section 13(1)(b) and (c) of the Interpretation Act is instructive. It is clear that our law accepts the rule that, where a statutory provision is amended, while a matter is pending, the rights of the parties to an action, in the absence of a contrary intention, must be decided in accordance with the statutory provisions in force at the time of the institution of the action. See the case of **Bell v Voorsitter Van Die Raskklassifikasieraad En Andere 1968 (2) SA 678-679**.

38. Therefore, the Tribunal holds that, the old law and its procedure as set thereunder remain intact in respect of the governance of the Applicant's retirement, inclusive of the purchasing of his annuity policy.

#### DETERMINATION OF THE SECOND ISSUE

39 The Applicant has a second string to his bow. He submits that the purchase of the pension annuity was not pending on 14 October 2022 when the new law commenced. He argues that it could only have become 'pending' had he taken a positive step of completing the annuity application form and further undertaken the necessary steps to purchasing the annuity policy. His argument is that he has always indicated his opposition and refusal to purchase an annuity as in his estimation the monthly salary proposed by the annuity providers was too little to sustain his livelihood. He argued emphatically that the Respondents could therefore not proceed with processing his annuity, or subject it to the provisions of the old law because, so it was

argued, the application for the annuity was not a 'pending' activity when the amending legislation took effect on 14 October 2022.

40. There are two obstacles in the way of this argument. Firstly, as a general rule, transactions or acts which were completed or ought to be completed prior to the commencement of a statute belong, as far as that statute is concerned, to the past. Secondly, the Income Tax (Superannuation Funds) Regulations, 2022 which the Applicant seeks to place reliance on has not been made with retrospective effect, and that means it is only valid as from the date of its publication in 2022. See *Thom En 'N Ander v Moulder 1974 (4) SA 894*.
41. Notably, a better and complete answer is provided by the decision of *Bellairs v Hodnett 1978 1 SA 1109 (A)*, which states that: "the general rule is that the statute does not apply to acts and transactions which have already been completed or which stand to be completed shortly, or in respect of which an action has been instituted (but not yet decided) with reliance on the provisions of the repealed law."
42. Significantly, in the definition section of the old law, the phrase "retirement date" is defined as meaning "the date upon which the member actually ceases employment and draws a retirement benefit. (*Emphasis added*). Bearing the above definition in mind, the Tribunal holds that the Applicant's submission that the new law comes to his aid is without merit. The principle is that upon cessation of employment (in the case of the Applicant-cessation

of membership of the 2<sup>nd</sup> Respondent retirement fund) and drawing his one-third retirement benefit, he was to comply with the annuity policy process shortly thereafter, in accordance with the old law, which is his governing legislation.

43. So, in determining the correctness of the decision of the 1<sup>st</sup> Respondent, the decision of the 1<sup>st</sup> Respondent is considered by this Tribunal in light of statutory provisions as they stood at the time when the Applicant retired and subsequent amendments or re-enactments to these provisions are not taken into account for purposes of delivering the Tribunal judgment. See **Terblanche v Ress 1920 CPD 505**. To hold otherwise, would mean that this Tribunal has reached a conclusion that "as at a past date, the law shall be taken to have been that which it was not". Stated differently, the Tribunal would be coming to the aid of retired members (who relied on the provisions of the old law) but deliberately or otherwise delayed taking up pension annuity policies until the commencement of the new law in order to escape the provisions of the old law while they fall in truth within these provisions.
44. The Tribunal therefore holds that as a matter of law, the Applicant as at his retirement date was required to procure an annuity as soon as he had drawn his one-third retirement benefit. Thus, the fact that the Applicant may have not completed annuity applications forms as soon as he ought to have, does not mean that before the 14 October 2022 there was no pending application.

45. It is important to note that an annuity policy is not procured at leisure and wish of the retired member, it is an ever-abiding statutory obligation that binds those whom the law has identified as qualified for it, as is the case with the Applicant. It does not matter whether the Applicant has another substantial deferred pension with Minet Botswana or not.
46. In the premises, the Tribunal is of the view that the new legislation is not applicable to the Applicant and that the 1<sup>st</sup> Respondent was entitled to, and in fact, obliged to deal with the Applicant's annuity obligation as if the re-enacting (new) legislation has not been passed.
47. Before we conclude our judgment, regardless of the risk of being repetitive, we need to have a look at the balance of the Applicant's argument for the sake of completeness. Whereas the Applicant put up a spirited argument that the Legislature could never have passed the new law to disadvantage those who had already retired, more especially that they were the ones facing dire economic hardships, Ms. Mpe made her point in a brief style, contending that the law in question operates onward.
48. The Tribunal has considered the submissions made by both parties on this point. Straight away, to Ms. Mpe's submissions, we totally subscribe much as we do not agree with the Applicant. Upon careful reading of the provisions of the new law, and while we agree in principle with the Applicant's submission that Parliament has the power to make law; with all respect to

Parliament it seems to us that there are limits in its powers, and one of the limits is that while it may be able to set aside something which has been done, it cannot say that the thing which has already happened in the past (in the present case, the Applicant's retirement under the old law) shall not be done in the past.

49. Put differently, it was impossible for Parliament in August 2021, to prevent a decision made in terms of the old law and the then applicable Income Tax (Superannuation) Funds 2001 compelling the Applicant to take up an annuity policy as dictated by law. Therefore, Parliament cannot say that those who retired under the old law in the past have not retired in the past. We therefore hold that this Tribunal has to deal with this matter, its circumstances, and the law as they were at the time the Applicant retired.

50. The holistic reading of the provisions of the new law, ensuring that the Act "best attains its object according to its true intent and spirit" as envisioned in section 26 of the Interpretation Act, leads to an inescapable conclusion that the Act does not change the general rule that a statute does not operate retrospectively unless specifically expressed. Had that been the intention of the Legislature, it would have said so. Therefore, the Act, does not support the proposition made by the Applicant- that retired persons who, at the time the Act came into force on 14 October 2022 had not yet procured an annuity as required by the old Retirement Funds Act 2014, were by operation of law now governed by the new Act and its Regulations, more specifically,

the Income Tax (Superannuation Funds) Regulations 2022, Statutory Instrument No. 147 of 2022. This conclusion could only be reached when proper rules of interpretation of statute were disregarded.

### CONCLUSION

51. As a result, the answer to the issues before the Tribunal is that the new law, the Retirement Funds Act, 2022 does not apply to acts and transactions which have already been completed (that is, where retirement has been effected together with the purchasing of an annuity) or which stood to be completed shortly, or in respect of which an action had been instituted with reliance on the provisions of the old law, [the Retirement Funds Act, 2014], that is, where retirement has been effected but only choice of whom the annuity provider will be has not yet been decided by the retiree.
52. Explicitly, the Applicant fell on the latter category. By the time the new law entered into force, he had already retired on reliance of the old law, but had not yet decided to purchase an annuity, though mandatorily obliged to purchase such an annuity shortly or within a reasonable time upon retirement.

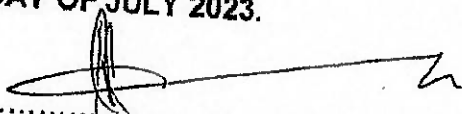
### ORDER

53. In the premises, the Applicant cannot succeed and the application is hereby dismissed with no order as to costs.



54. 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.

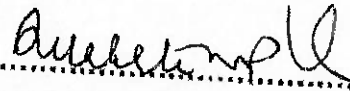
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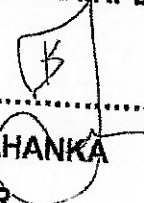
  
.....  
**M. BAOLEKI**  
**CHAIRPERSON**

**NON-BANK FINANCIAL  
INSTITUTIONS TRIBUNAL**  
MVA HOUSE, FAIRGROUNDS OFFICE PARK

25 JUL 2023

PRIVATE BAG RWK 11 GABORONE  
TEL: +267 392 4246  
REPUBLIC OF BOTSWANA

I AGREE:   
.....  
**D. MAKATI-MPHO**  
**DEPUTY CHAIRPERSON**

I AGREE:   
.....  
**F. MOTLHANKA**  
**MEMBER**