

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

NBFIT 0006/2023

In the matter between:

MPUISANG KOMBANI

APPLICANT

AND

**NON-BANK FINANCIAL INSTITUTIONS
REGULATORY AUTHORITY**

1ST RESPONDENT

AND

**ALEXANDER FORBES FINANCIAL
SERVICES BOTSWANA**

2ND RESPONDENT

CONSTITUTION OF THE TRIBUNAL

M. BAOLEKI

CHAIRPERSON

D. MAKATI-MPHO

DEPUTY CHAIRPERSON

F. MOTLHANKA

MEMBER

FOR APPLICANT: IN PERSON

FOR 1ST RESPONDENT

KAGISO GASENNELWE AND EMMANUEL PATI

FOR 2ND RESPONDENT:

KEALEBOGA TUMAGOLE, RAYMOND PHALE AND LAURA MORETI.

PLACE AND DATE OF PROCEEDINGS

GABORONE

14TH AUGUST 2023

JUDGMENT

FACTS AND BACKGROUND

1. The background facts as depicted from the pleadings filed of record and as stated by the Applicant in his testimony are in the following respects.
2. The Applicant was an employee of Botswana Accountancy College (BAC). He retired from his employment on 30 September 2021. As the Applicant's employment with BAC was on pensionable terms, upon retirement he commuted one-third of his retirement benefit as a cash lump sum. The one-third

retirement benefit, being P70 352.95 was paid to the Applicant by the pension fund administrator, Alexander Forbes Financial Services (**the Second Respondent**).

3. With respect to the remaining two-thirds retirement benefit, the Applicant contends that he has always insisted that the remaining balance should be paid to him as cash lump sum. In terms of a letter dated 22 January 2022, the Applicant requested the Second Respondent to transfer the two-thirds retirement benefit into an ABSA investment account bearing account number 1144865, held with ABSA Industrial Branch Gaborone. It is important to note that in the same letter the Applicant stated that he was dismayed to learn from a certain Kagiso Mosienyane, an employee of the Second Respondent, that his two-thirds retirement benefit had been transferred to Botswana Life Insurance Company (**BLIL**) for purposes of annuity purchase. The Applicant contended that he had never instructed the Second Respondent to transfer his funds to BLIL as he had no intention whatsoever of having his hard earned money invested with BLIL.
4. Having considered the Applicant's written request, the Second Respondent responded through a letter dated 24 February 2022.
5. In its response, the Second Respondent specified that on 1 December 2021 the Applicant was consulted by a Retirement Consultant who delivered to the Applicant a pension annuity quotation from BLIL which was the only option available as at the time based on the two-thirds retirement benefit balance of

P140 706.10. The Second Respondent further urged the Applicant 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. Even though the annuity quotation availed to him by the Second Respondent provided for a monthly pension of P1081.34, which was above the statutory threshold for annuitisation, the Applicant found this unacceptable. In the Applicant's opinion, the quoted monthly pension was too little to sustain his family.
8. He accordingly wrote to the First Respondent on 13 March 2023 appealing the Second Respondent's decision. In his appeal to the First Respondent, the Applicant again requested to be paid his two-thirds retirement benefit as a cash lump sum. The grounds of his appeal were as follows:
 - 8.1 that he has identified the rearing of cattle, goats and the supply and delivery of food and stock (in particular, manufacturing of products such as mayonnaise, tomato sauce and atchar) as more lucrative a business than a monthly pension; and
 - 8.2 that with the help of a cash lump sum payment of his two-thirds retirement benefit he would buy a truck through which his envisioned business was to be successful,

compared to the meagre P1081.34 per month from pension.

9. The First Respondent responded on 6 April 2023 declining his request on the ground that the 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 First Respondent consequently urged the Applicant to take heed of his statutory obligation and secure an annuity policy with the remaining two-thirds retirement benefit.
10. Being dissatisfied with the First Respondent's decision, the Applicant launched the current review application. The substance of the Applicant's review application is that the First Respondent was wrong to decline his request. The Applicant specifically argued that the two-thirds retirement benefit should be paid to him as cash lump sum to enable him to finance his agricultural project.
11. The Applicant stated further that his request is founded on the President's statement that the country has secured an external export market for the sale of Botswana beef at competitive rates. Therefore, his wish is to rear cattle for beef production to take advantage of the identified market.
12. The Applicant further argued that the Retirement Funds Act, 2022 comes to his assistance for the following reasons:

- 12.1 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 without discrimination;
 - 12.2 the law is there to help people. In addition, he argued that the law is remedial, and is not there to punish people; and
 - 12.3 the new law, when it is explained to him, only enjoins those who have a pension of P20 000 per annum to buy annuity policies. His contention is, as his annual pension is below the newly set threshold and he 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.
13. Submitting in reply on behalf of the First Respondent, Mr. Gasennelwe contended that the issue is quite simple. He contended that the issue is, whether a pensioner who has taken one-third of his retirement benefit and proceeded to purchase an annuity policy can cancel such a policy?
 14. Mr. Gasennelwe submitted that the following facts were acknowledged and common cause, that the Applicant:
 - 14.1 admitted to retiring from his employment on 30 September 2021;

- 14.2 admitted to encashing his one-third retirement benefit;
and
- 14.3 has signed the application for annuity as well as an Annuity Pension Policy Contract on 1 December 2021.
15. Mr. Gasennelwe urged the Tribunal to consider the above admitted facts. He proceeded to submit that the law does not allow a person in the position of the Applicant to encash. He placed reliance on clause 46 of the Annuity Pension Policy Contract which provides that the contract expires on the death of the pensioner. He further argued that in terms of clause 49 of the Annuity Pension Policy Contract, the contract may not be surrendered or terminated. Going into details, Mr. Gasennelwe contended that the Applicant's request amounted to a request for cancellation of an annuity policy which is not allowed by law.
16. Mr. Gasennelwe further submitted that since the Applicant retired in 2021, the Retirement Funds Act, 2014 and the relevant Regulations is the applicable law. He submitted that in terms of regulation 28 (1)(a) of the Retirement Funds Regulations, 2017, a pension is payable for the lifetime of the member. In closing, Mr. Gasennelwe submitted that the First Respondent has no discretion to act against the law, nor any powers in terms of the law to authorise cancellation of a pensioner's annuity.

THE ISSUES

17. There are two issues for determination. The first issue is whether or not, there exists a valid and extant Annuity Pension Policy Contract as between Botswana Life Insurance Limited and the Applicant? Assuming the answer to the first issue is in the affirmative, the next issue will be, whether a retired person who has purchased an annuity policy still has two-thirds retirement benefit that they may encash in terms of the law and at their will? In other words, is an annuity contract cancellable?

DETERMINATION OF THE FIRST ISSUE

18. While the Applicant contended in his oral argument and as per his letter dated 22 January 2022 that he had never instructed the Second Respondent to transfer his funds to BLIL as he had no intention whatsoever of having his hard earned money invested with BLIL, the record indicates otherwise.
19. In fact, a completed Application for Annuity appearing at page 23 of the paginated bundle of record, points towards the completion of an application for annuity in terms of which the Applicant provided his personal details, payment details and a list of his beneficiaries, being his three sons, Kedumetse Sekwenyane, Oteng Sekwenyane and Thato Sekwenyane.
20. Of equal importance is the Annuity Pension Policy Contract dated 1 December 2021 appearing at page 24 of the paginated bundle of record. A perusal of the said contract *ex facie* shows that the Applicant executed the contract as an annuitant- a person to whom payment is to be made in terms of the

- agreement and the life upon whom such annuity payment is dependent.
21. When the Applicant was referred to the said Annuity Pension Policy Contract, his response was brief. He stated that he could not recall signing the Annuity Pension Policy Contract. It is important to note that the Applicant did not query or dispute the fact that he ever signed the annuity contract. The Applicant merely stated that he did not recall doing so.
 22. As regards the position of the law regarding his request, the Applicant indicated that he is not basing his request before this Tribunal on any provision of the law. He suggested that it was solely his idea that if he could encash his pension funds he could use them to improve his life.
 23. The Tribunal has considered the submissions made by both parties on this point.
 24. Upon careful reading of the Annuity Pension Policy Contract and bearing in mind that the Applicant is not denying that there is an annuity contract in existence (save for his failure to recall signing it) and further noting that the contract was not controverted, the Tribunal holds that there is nothing refuting the existence of the annuity policy, nor are there established facts that the said annuity policy was entered into without the consent of the Applicant, or that it is contrary to the law. Therefore, the annuity policy as between the Applicant and the BLIL is held to be valid and extant, and binding on the parties thereto.

DETERMINATION OF THE SECOND ISSUE

25. Having ascertained the position as regards the annuity contract, its existence and execution thereto, the issue that falls for determination is whether a retired person who has purchased an annuity policy still has two-thirds retirement benefit that they may encash in terms of the law and at their will?
26. It is beyond debate that the Applicant's retirement was placed into effect in September 2021 as per the Retirement Funds Act, 2014. While the said Act is now repealed, on the strength of section 13 (c) of the Interpretation Act,¹ the Applicant's rights, obligations and privileges acquired or accrued thereunder remain unaffected. Therefore, the applicable law in respect of the Applicant's matter is the Retirement Funds Act, 2014. The Retirement Funds Act, 2022, which commenced on 14 October 2022, is inapplicable in respect to this matter. Consequently, the increased *de minimis* (minimum) threshold for annuitisation from P5 000 per annum under the Retirement Funds Act, 2014 to P20 000 per annum under the Retirement Funds Act, 2022 is inapplicable to the Applicant.
27. For the following reasons, the Tribunal finds merit in the First Respondent's argument that, as a matter of law, the annuity policy contracted as between the Applicant and BLIL subsist for the lifetime of the Applicant and cannot be cancelled at his will.

¹ "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."

28. First, it is important to note that clause 46 of the Annuity Pension Policy Agreement is a restatement of Regulation 28(1)(a) of the Retirement Funds Regulations, 2017, which commits pension to the lifetime of the member. In particular, it is provided that a pension shall be payable for the lifetime of the beneficiary if the beneficiary is a member. In the premises, payment of pension as per the extant annuity policy is tied to the lifetime of the Applicant.
29. Second, in terms of regulation 28.3 of the Retirement Funds Regulations, 2017, on purchasing of an annuity policy, all obligation from the Fund in respect of the Applicant were transferred to BLIL and the Second Respondent has no further obligations in respect of the Applicant. It is worth noting that the Second Respondent no longer holds any retirement funds for the Applicant as the purchase of the annuity policy has the effect of transferring such funds to the life insurer (BLIL) to secure the monthly pension. As things stand, the extant Annuity Pension Policy Contract is the governing framework in respect of the relationship between the Applicant and BLIL.
30. In the main, the Tribunal holds that, as a matter of law, pension is payable for the lifetime of the Applicant. The Applicant as a pensioner has no option under the applicable Retirement Funds Act 2014, and its Regulations to request for any two-thirds retirement benefit encashment. In actual fact, there is no two-thirds retirement benefit that the Applicant can talk about or claim. The Applicant has used his two-thirds retirement benefit to

purchase an annuity policy with Botswana Life Insurance Limited that has earned him an entitlement to a certain monthly payment for the rest of his life.

31. To conclude, it is important to note that the Tribunal is a creature of statute and can only act within the precincts of the law. It has no discretion beyond what the law provides. It cannot exercise power unless the law permits it to do so. There is no law that authorises this Tribunal to order cancellation of an annuity policy to enable the Applicant to buy a motor vehicle and cattle. If the Tribunal was to grant the Applicant his wishes, it will be acting without legal authority which amounts to acting lawlessly, something that the law cannot permit.

CONCLUSION

32. According to the submissions before this Tribunal, neither the applicable Retirement Funds Act, Regulations, nor the Fund Rules permit cancellation of annuity policy once purchased. As a result, the Applicant's request for payment of his two-thirds retirement benefit to be paid to him in full cannot be upheld by the Tribunal.
33. In consideration of the fact that there were no protracted arguments delaying the proceedings, the best consideration in the circumstances is that there be no order as to costs.

ORDER

- 34. In the result, the Applicant cannot succeed and the application is hereby dismissed with no order as to costs.

- 35. The Parties are advised that any person who is dissatisfied with the decision of this Tribunal may, within 28 days of delivery of this decision, appeal to the High Court.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 13 DAY OF OCTOBER 2023.

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M. BAOLEKI
CHAIRPERSON



I AGREE:
D. MAKATI-MPHO
DEPUTY CHAIRPERSON

I AGREE:
F. MOTLHANKA
MEMBER