

**IN THE NON-BANK FINANCIAL INSTITUTIONS TRIBUNAL OF  
BOTSWANA**

**CASE NO. NBFIT-0001/2022**

**In the review between:**

**ADAM SENATLA MOTSEKO**

**APPLICANT**

and

**NBFIRA**

**RESPONDENT**

Applicant in Person

A. Mpe, B. Otlhogile, K. Toteng for the Respondent

**DETERMINATION IN TERMS OF SECTION 51 OF THE NON-BANK  
REGULATORY AUTHORITY ACT, NO. 3 OF 2016 ("THE ACT") AND  
REGULATIONS 12 AND 27 OF THE NON-BANK FINANCIAL  
INSTITUTIONS REGULATORY AUTHORITY (TRIBUNAL)  
REGULATIONS, SI NO. 80 OF 2018 ("THE REGULATIONS")**

**CORAM: M. BAOLEKI, CHAIRPERSON  
D. MAKATI-MPHO, DEPUTY CHAIRPERSON  
F. MOTLHANKA, MEMBER  
T. SENWEDI, SECRETARY, RECORDING**

**[1] INTRODUCTION**

1.1 This review application concerns the refusal by the Respondent to uphold an appeal filed by the Applicant against NMG Administrators Botswana ("the Administrator") for non-payment of the Applicant's full retirement benefit. The Respondent as the regulatory authority established in terms of the Act, regulates and supervises non-bank financial institutions in Botswana and is empowered by the Fund rules to hear appeals brought before it against the decisions of the regulated institutions.

- 1.2 The Tribunal is a statutory creature of Parliament in terms of section 50 of the Act. It is responsible for reviewing decisions made by the Respondent. The review application before the Tribunal concerns a decision made by the Respondent as an appellate body.
- 1.3 In terms of section 52 (2) of the Act, the Applicant is obligated to file his application for a review of the Respondent's decision within 28 days of the making of the decision. The review was received by this Tribunal on 17 October 2022. The decision complained against was made by the Respondent on the 21 September 2022. Therefore, this matter is properly before the Tribunal as it was filed within the 28 days prescribed time. A letter acknowledging receipt of the review application was sent by the Secretary of the Tribunal to the parties on 20 October 2022. In the same correspondence, copies of the review notice and supporting documents were forwarded to the Respondent requesting them to file their response within 28 days of receipt of the correspondence. This is a legal requirement in terms of regulation 12 (5) of the Regulations.
- 1.4 On 17 November 2022, a statement of case (response) was received by the Tribunal from the Respondent. On the 24 November 2022, the Applicant was served with the Respondent's response. The Applicant filed his written reply on even date restating the grounds on which he relied upon on his review notice, and disputed the Respondent's reasons for dismissing his appeal. No further submissions were received from the parties and issues were joined.
- 1.5 Having considered the written submissions before this Tribunal, it was considered necessary to hold an oral hearing in the matter so that the issues could be fully ventilated in open court. A Notice of Hearing was therefore sent to the parties on 19 January 2022 scheduling the hearing date for the 30 January 2023 at 0930 hours in the Tribunal courtroom. The hearing took place as scheduled.

## **[2] THE HEARING**

### **Applicant's evidence**

- 2.1 The Applicant took oath and testified that he is a retired soldier (Lance Corporal) who served on pensionable terms in the Botswana Defence Force. By virtue of his employment in the force, the Applicant became a member of the Botswana Public Officers Pension Fund ("**the Fund**"). The Applicant stated that he retired on 31 December 2021. He stated that due to injuries sustained following a car accident in which he was a driver, he was compelled to retire earlier than he would have. He further stated that he is of the firm view that he deserves to be paid his retirement benefits in full so as to pay his medical fees, pay out a personal loan he has with Letshego Financial Services, legal fees and maintain his children.
- 2.2 He testified further that:
- 2.2.1 though the car accident resulted in him breaking his legs, he left Botswana Defence Force on the basis of age;
  - 2.2.2 his age had reached retirement age as set out in the Botswana Defence Force Act in respect of officers of low rank;
  - 2.2.3 the urgent case he has relates to a charge of causing death by reckless driving as his car accident resulted in the death of a person;
  - 2.2.4 the Applicant testified that the trial has ended and he is awaiting judgment which was set to be delivered in November 2022; and
  - 2.2.5 he never sought the assistance of Legal Aid Botswana.
- 2.3 The Applicant testified that:

- 2.3.1 he has an outstanding personal loan with Letshego Financial Services that is in arrears;
  - 2.3.2 further, he has 4 minor children, being a 12 years old, 10 years old, 3 years old and a year old, who look to him for maintenance and support.
- 2.4 He closed his testimony by stating that he had not yet purchased an annuity. It was his testimony that at the point of his retirement, he had P789 851.84 in his fund. He confirmed that he was paid his one third retirement benefit, being P236 283.95.
- 2.5 The Applicant reiterated his request to the Tribunal to overturn the decision of the Respondent and that he be given his two thirds retirement benefit as a single lump sum payment. He stated that his health, personal loans and his maintenance obligation towards his 4 minor children are the main reasons for his request.

### **[3] RESPONSE**

- 3.1 The Respondent's representative, Ms. Angelina Mpe stood up to respond to the Applicant's submissions. She submitted that there is no law that gives the Respondent any discretionary powers to order the withdrawal of retirement benefit in excess of what is prescribed by the law.
- 3.2 Further, she submitted that regulation 2(1)(e) of the Income Tax (Superannuation Regulations), 2001, provides that where the member's two thirds benefit pays them less than P5 000 per annum, that is the only circumstance where a member, with the permission of the Commissioner General, may encash his pension benefit as a single lump sum payment. She pointed out that with regards to the Applicant, his pension benefit was more than P5 000 per annum. Therefore, she submitted that as the Respondent their hands are tied as they have no residual powers to alter what is prescribed by the Income Tax Act. She further pointed out that, the power to authorise single lump sum payment of pension benefit lies with the Commissioner General of the Botswana Unified Revenue Services. She pointed out that as the Respondent, it is beyond them to authorise lump sum payment of

pension benefits.

- 3.3 Ms. Mpe further submitted that though the Retirement Fund Act, 2022 ("2022 Act") was in force at the time of the hearing, the Applicant's case falls under the repealed Act. She pointed out that the Applicant retired in December 2021 while the Retirement Fund Act, 2014 ("2014 Act") was still in force. It was her submission that the Applicant's retirement benefits were processed under the Repealed Act and paid out using the same repealed Act. She submitted that rule 5 (4) (a) of the Rules of the Botswana Public Officers Pension Fund ("BPOPF Rules") have not been amended and they are in conformity with regulation 2(1)(e) of the Income Tax (Superannuation Regulations), 2001.
- 3.4 The Respondent further submitted that while the new Income Tax (Superannuation Funds) Regulations, SI No. 147 of 2022 had been passed on 25 October 2022 revising the limits of withdrawals, the said regulations are inapplicable to the Applicant's case as he had retired in 2021.
- 3.5 The Respondent submitted that even assuming that the 2022 Act covered the Applicant, the position would still be the same for the following reasons:
  - 3.5.1 the Applicant's retirement was not on medical grounds. It was ordinary retirement on the basis of age;
  - 3.5.2 section 52(1)(b) of the 2022 Act provides for default on repayment of loans by a deferred member while the Applicant is a retired member;
  - 3.5.3 in terms of the 2022 Act, financial assistance is applicable to repayment of a mortgage loan by a member on his retirement due to medical reasons;
  - 3.5.4 the Applicant however, has no mortgage loans that qualified him to be assisted at the point of his retirement;

- 3.5.5 further, his retirement from the Botswana Defence Force preceded the commencement of the 2022 Act; and
- 3.5.6 she buttressed the point that they do not have discretion to override the dictates of the law.
- 3.6 The Tribunal gave the Applicant the opportunity to address the Respondent's points. He stated that he appreciates the law and cannot argue with it. Yet, considering his situation, he argued that his ill health, financial difficulties and maintenance requirements for his children dictated that the Tribunal ought to intervene and order the payment of his full retirement benefit. He stated that this is the money he worked for and he cannot be left to suffer, while he had money to help him.
- 3.7 On being asked if he understands the purpose of a pension benefit, the Applicant stated that pension is there to assist one to provide for themselves, and buy necessities such as food, when the member is no longer active and has retired from service. He however highlighted that the proposed monthly sum that he got from annuity quotations is almost nothing. It cannot meet his expenses.

#### **[4] RESPONDENT'S HEADS OF ARGUMENT**

- 4.1 At the closing of the hearing, the Tribunal requested the Respondent to provide it with written submissions on points of law within 10 days. The Respondent obliged and filed their heads of argument on 13 February 2023. The Tribunal is indebted to the Respondent for their heads of argument.
- 4.2 The nub of their submission is that neither the BPOPF Rules nor the Income Tax Act or the 2014 Act permit any further withdrawal benefit to be paid to the Applicant beyond the already paid one third pension benefit. Further, it is the Respondent's argument that the law does not give them a discretion to alter the position of the law with respect to pension withdrawal. Since the Applicant's annual pension exceeds the threshold set by the Income Tax (Superannuation Funds) Regulations,

2001, he is not entitled to a lump sum payment of the balance of his retirement benefit.

- 4.3 The Respondent annexed a copy of the BPOPF Rules to the heads of argument and according to this document, the Applicant is barred by rule 5.4 thereof, from receiving the two thirds pension benefit as he requests. The said rule is in line with regulation 2(e) of the Superannuation Funds, 2001.

## **[5] DETERMINATION AND REASONS THEREFOR**

### **Introduction**

- 5.1 The Applicant requests payment of his two thirds retirement benefit in lump sum. The initial one third retirement benefit has already been paid to him. He worked in the Botswana Defence Force as a Lance Corporal until he retired on 31 December 2021. He submitted that he suffers from ill-health and he is unable to afford his medical expenses, maintenance for his children and repayment of his personal loan. Hence, his request to encash the balance of his retirement benefit in full.
- 5.2 The Applicant requests this Tribunal to review the decision of the Respondent in terms of which his request to encash the balance of his retirement in full was declined. The Applicant submitted that the decision of the Respondent must be overturned by the Tribunal. Further, he urges the Tribunal to order the payment of his two thirds retirement benefit in lump sum so that he may use the money to maintain his children, finance his medical bills and pay off his personal loan.
- 5.3 The issue that falls for determination is whether or not the Applicant is entitled to receive payment of his two thirds retirement benefit in full as a lump sum.

### **The law governing the Applicant's benefit**

- 5.4 The Applicant retired in December 2021 during the tenure of the Retirement Funds Act, 2014 ("2014 Act"). At the time of his retirement, the 2014 Act was the law in force and he retired pursuant to the said legislation. Noteworthy is that his review application was heard on 30

January 2023. At the time of the hearing, the 2014 Act had been repealed and replaced with the Retirement Funds Act, 2022 ("2022 Act").

- 5.5 Which law then regulates this matter before the Tribunal? In terms of section 49 of the Interpretation Act<sup>1</sup>, commencement in relation to an enactment means the date on which the enactment comes or came into force. Given that the 2022 Act commenced on 14 October 2022, in the absence of clear words to the contrary, the Act should be interpreted in such a way that it does not operate retrospectively. This is in full accord with the general presumption that the legislature legislates for the future and not for the past. Further, in terms of section 13 (b) and (c) of the Interpretation Act, the repeal of an enactment does not affect the previous operation of the enactment or anything duly done thereunder, nor affect any right, privilege, obligation or liability acquired, accrued or incurred thereunder. It is common cause that the Applicant retired in 2021 under the 2014 Act. While the 2014 Act may have been repealed, on the strength of section 13 (c) of the Interpretation Act, his rights, obligations and privileges acquired or accrued thereunder remain unaffected. Therefore, the applicable law in respect of the Applicant's matter is the 2014 Act.

**Does the Retirement Funds Act, 2014 permit two thirds encashment of retirement benefit for payment of loans and medical expenses**

- 5.6 Section 40 of the 2014 Act sets out different instances under which withdrawals from a member's pension may be permitted.
- 5.7 In particular, section 40 (1)(d) provides that:

*In the case of a default on the repayment of any loan by the member in circumstances where his or her membership is not terminated, the amount of the benefit which the member would have received on termination of the membership on the date of the default, if such a deduction is effected as a last resort after the board of the fund is satisfied that no other arrangement for the required payment may be made.*

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<sup>1</sup> Chapter 01:04.



- 5.8 For the Applicant to successfully rely on the above provision, he must prove that his membership of the pension fund has not terminated. The 2014 Act provides a definition for a member. Section 2 defines a member as a person who is admitted to the membership of the fund in terms of the rules, but does not include any member or former member who has received all the benefits, which may be due to him or her from the fund and whose membership has been terminated in terms of the rules. The Applicant has retired. He no longer contributes to the fund. His active membership has therefore terminated on the basis that he has received all his benefit, being one third pension benefit. The two-thirds pension benefit balance goes towards procuring an annuity policy as dictated by the law
- 5.9 Section 40(1)(e) of the 2014 Act deals with financial assistance with respect to payment of loans. The loans are however restricted to loans granted by the employer, or loans guaranteed by the employer. As the Applicant's loans were neither granted nor guaranteed by the employer, it is unnecessary to say more, except that this provision does not cover the Applicant's loan which is a personal loan granted by Letshego Financial Services.
- 5.10 With respect to encashment of retirement benefit in full to fund medical expenses, it is the testimony of the Applicant that he had a car accident which led to his illness. While the Respondent did not dispute the Applicant's illness, that is not the end of the matter. It is to be noted that the Applicant admitted in his evidence that he was not retired on medical grounds. Rather, he retired on the basis of statutory age limit. Neither the 2014 Act nor the Fund rules come to the assistance of a retired member who wishes to encash his two thirds retirement benefit as a single lump sum payment, In fact, in terms of rule 5.1 of the Fund rules, once the one third percent of the retirement benefit has been paid to a retired member, they are obligated to purchase a pension annuity from one of the registered insurers or from the Fund itself. Once purchased, the annuity so purchased is compulsory, non-commutable, non-assignable and payable for life. <sup>2</sup>

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<sup>2</sup> See regulation 5.3.2 (a) of the Fund rules.

5.11 The Applicant stated that he has 4 minor children who all look to him for maintenance. Yet, he has no financial means to fully and meaningfully support them. Pitiful as that may be, there is, however, no law that comes to the assistance of the Applicant to assist him to encash all his retirement benefit in full to meet the needs of his children as requested. Even section 40(1)(g) of the 2014 Act does not lend support to the Applicant's case. In terms of the aforementioned provision, a licenced fund may deduct from the benefit payable to a member any amount payable in terms of a maintenance order issued by a court. The Applicant testified that he is willingly seeking to maintain his children on his own motion. His efforts are not pursuant to a court order compelling him to maintain his children.

### **The fund rules and the Applicant's benefit**

5.13 It is common cause that the Applicant as a former military officer belonged to the Botswana Public Officers Pension Fund. The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (See Section 7 (3) of the Retirement Funds Act, 2014).<sup>3</sup> By section 5 of the Retirement Funds Act, those Rules must be consistent with the Act and with any other conditions that may be prescribed.

5.14 The Applicant, as a retired soldier in the Botswana Defence Force, is therefore bound by the rules of the Botswana Public Officers Pension Fund ("Fund"). His claim can only succeed if he can show that the Respondent in upholding the decision of the Administrator did not act in terms of the Fund rules and the applicable law.

5.15 Pursuant to section 32 (13) of the Income Tax Act, withdrawal of a pensioner's contribution is to be determined according to the Fund rules as well as the Income Tax (Superannuation Funds) Regulations. Regulation 2(1)(e) of the Superannuation Funds Regulations permits the Applicant to access one third percent of his pension on retirement. It further provides that where the pension payable to the pensioner after committal of the one third is less than P5 000 per annum or P417 per month, the Commissioner General may grant approval for payment of such pension as a single lump sum payment. It is clear that for the

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<sup>3</sup> *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28].

Applicant to succeed in his claim he must fall within the ambit of the aforementioned provision.

5.16 In his testimony, the Applicant confirmed that his annuity quotations indicate that he will draw a monthly pension in excess of P417. The Applicant's two thirds retirement benefit also indicates that it is above the limit set by the law. In the premises, he is not entitled by law to encash his pension benefit as a single lump sum payment.

5.17 Further, regulation 28(1)(a) of the Retirement Funds Regulations, 2017 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, unless provided otherwise by law, payment of pension is tied to the lifetime of the Applicant. Otherwise, the intended purpose of pension will be defeated.

5.18 In terms of the Fund rules, rule 5.4, on retirement or retrenchment, a member may commute:

- a) all of the retirement benefits if the remaining benefits after computation of one third is less than the amount as determined by the Income Tax Act; or
- b) not more than one third of the pension or such a maximum amount as may be determined by legislation from time to time; and
- c) an annuity option chosen cannot be altered and it shall apply for the pensioner's lifetime.

5.19 The Applicant was duly paid his one third pension benefit in terms of the Fund rules and the Retirement Funds Act, 2014. The applicable law does not permit encashment of the full retirement benefit as he is above the threshold. Therefore, the applicable law does not permit the Applicant to encash his retirement benefit in full.

5.20 Further, no law permits or grants the Tribunal, or the Commissioner General, let alone the Respondent the discretion to sanction commutation contrary to the law. While it is fundamentally true that the Applicant's situation is touching, 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 the Tribunal to temper with the dictates of the law based on humanitarian grounds.

## **[6] CONCLUSION**

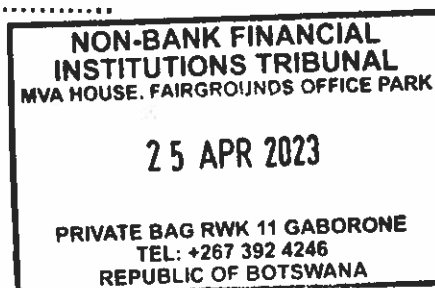
According to the submissions before this Tribunal, neither the applicable Retirement Funds Act, the Fund rules nor the Income Tax Act permit any further withdrawal benefit to be paid to the Applicant. It is evident that the Respondent acted in compliance with the provisions of the Fund rules, the provisions of the Income Tax Act, and the Act. Therefore, the Applicant's request for his retirement benefit to be paid to him in full cannot be upheld. In consideration of his existing plight, and 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.

## **[7] ORDER**

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

**DELIVERED IN OPEN COURT AT GABORONE ON THIS 25<sup>TH</sup> DAY OF APRIL 2023.**

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



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

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