

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

CASE NO. NBFIT-0004/2022

In the review between:

JUDITH BONOLO GOBODIWANG

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 in terms of the fund rules to consider appeals brought before it against the decisions of the regulated institutions.

- 1.2 The Tribunal is a statutory creature created by 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 her 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 14 November 2022. The decision complained against was made by the Respondent on the 31 October 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 15 November 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 14 December 2022, a statement of case (response) was received by the Tribunal from the Respondent. On the same day, the Applicant was served with the Respondent's response. The Applicant filed her written reply on even date restating the grounds on which she relied upon on her review notice, and disputed the Respondent's reasons for dismissing her 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 a hearing in this 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 she is a retired teacher who served in the public service on pensionable terms at Lewis Primary School in Molepolole. By virtue of her employment in the civil service, the Applicant became a member of the Botswana Public Officers Pension Fund ("the Fund"). The Applicant stated that she retired from the public service on the 31 December 2021. She stated that due to ill health, she was compelled to retire earlier than she would have. She further stated that looking at her health condition, she was of the firm view that she deserves to be paid her retirement benefits in full so as to nurse her health and fund her medical expenses.
- 2.2 She testified that she was given her one third retirement benefit after Princess Marina Hospital wrote to the Administrator informing them that the Applicant was their patient and was in need of medical attention in South Africa. She further stated that after she was given her one third retirement benefit, she went to South Africa and stayed there for two (2) weeks, utilising the funds. She testified that on receiving medical care in South Africa, a tube was left inside her body on the understanding that she will return to the doctor after 1 month for its removal. She stated that the doctor did not record in her medical card that she was to return after a month, but that the doctor informed her verbally as she was leaving the consultation room that she is to return after a month.
- 2.3 She testified that:
- 2.3.1 after her return from South Africa, she wrote to the Administrator on the 6 July 2022 requesting to encash her balance, being two thirds of her pension benefits;
- 2.3.2 the main reasons for her request for encashment were her ill health that necessitated funding, her personal loans that she wished to liquidate and to use the balance of the money to build herself a house;

2.3.3 on the 11 July 2022, the Administrator responded to her request declining to payout her full pension benefit as a single cash payment, since this would contravene the retirement fund laws;

2.3.4 she wrote to the Respondent on the 25 August 2022 appealing the decision of the Administrator; and

2.3.5 the Respondent in its decision communicated on the 31 October 2022, dismissed her appeal citing the same reasons that were given by the Administrator.

2.4 The Applicant stated that her request before this Tribunal is that:

2.4.1 the decision of the Respondent should be overturned and she be given her two thirds retirement benefit;

2.4.2 her medical condition has deteriorated, and she cannot sit down for long and needs to have the tube left in her body removed;

2.4.3 she was constrained to say more as some issues are too private to be mentioned in open court; and

2.4.4 she pleaded with the Tribunal that she requests her two thirds retirement benefit to be paid as a lump sum payment so that she may seek medical assistance for herself without relying on the Government.

2.5 The Tribunal sought clarity from the Applicant whether on visiting South Africa for medical attention, she was self-funded or the Government took care of her expenses. The Respondent testified that she was taken to South Africa on Government ambulance together with other patients. She stated that the Government was the one responsible for their trip and funded the medical bills. She further stated that she has been to Princess Marina Hospital many times and she was told that the medical report she is waiting for has not arrived from South Africa. She stated that she is now tired of waiting for Princess Marina Hospital and wants

to use her own retirement benefit to take herself to South Africa without involving the Government.

2.6 The Applicant further testified that while in South Africa, kidney stones were removed from her body. She stated that when Princess Marina Hospital did a scan post her operation in South Africa, they realised that a tube was left inside her. She stated that in her understanding the tube was to be removed from her body when she visited South Africa for her medical review. She further stated that her situation is worsened by the fact that she has a mentally disturbed offspring, who, though an adult, does not fend for himself and requires her attention and care. She testified that the said offspring becomes violent when his demands are not met. As an example, he became violent after the Applicant could not give him money to go and cut his hair. She stated that she has referred his situation to the social welfare services, and she is awaiting assessment.

2.7 The Applicant testified that the doctor who consulted her in South Africa never wrote in her medical card or anywhere else that she was to return for medical review after a month. She stated that the said doctor just said it through word of mouth. In closing her evidence, the Applicant stated that she has personal loans, she owes BOPRITA P12 000 and also owes Bayport Financial Services P8900. She further stated that her funeral scheme with Botswana Teachers Union is in arrears. The Applicant ended her testimony by stating that she has not come before the Tribunal on the basis of the law. She stated her understanding that there is no provision in the law that she can use to support her request. However, she appealed to the Tribunal to assess her dire situation and come to a reasonable conclusion looking at her financial situation and her failing health.

[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 her pension benefit as a single lump sum payment. She pointed out that with regards to the Applicant, her 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 is her submission that the Applicant's retirement benefits were processed under the 2014 Act and paid out using the same 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 have been passed on 25 October 2022 revising the limits of withdrawals, the said regulations are inapplicable to the Applicant's case as she long retired in 2021. The Respondent submitted that even assuming that the 2022 Act covered the Applicant, her case would remain unchanged for the following reasons:

3.4.1 the option for financial assistance to cover a default on the repayment of any loans is limited to deferred members, whom, the Applicant is not;

3.4.2 financial assistance is applicable to repayment of a mortgage loan by a member on her retirement due to medical reasons. She pointed out that the Applicant has no mortgage loans that qualified her to be assisted at the point of her time of retirement;

3.4.3 further, her retirement from the public service preceded the commencement of the 2022 Act; and

3.4.4 she buttressed the point that the Respondent does not have discretion to override the dictates of the law.

3.5 The Tribunal gave the Applicant the opportunity to address the Respondent's points. She states that she is in grave pain and appreciates the law. Yet, considering her situation, she argued that her ill health, and home situation dictate that the Tribunal ought to intervene and order the payment of her full retirement benefit. She stated that this is the money she worked for and requires it for her medical expenses and she does not want to utilise Princess Marina Hospital as there are many delays that jeopardise her chances of ever regaining her good health. She stated that her children are starving, and she has no other means to provide for them.

3.6 On being asked if she 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, electricity when the member is no longer active and has retired from service. She however highlighted that the proposed P600 per month that she got from annuity quotations is almost nothing. It is her submission that the proposed amount cannot meet her monthly needs as she has adult daughters who are not working, and she cares for them and her grandchildren. On being asked, the Applicant stated that she herself, has no minor children.

[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, she is not entitled to a lump sum payment of the balance of her retirement benefit.
- 4.3 The Respondent annexed a copy of the BPOPF Rules and according to this document, the Applicant is barred by rule 5.4 from receiving the two-thirds pension benefit. 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 her two thirds retirement benefit in lump sum. The initial one-third retirement benefit has already been paid to her. She worked in the public service on pensionable terms as a primary school teacher until she retired on the 31 December 2021. She submitted that she suffers from ill health and she is unable to afford her medication and medical expenses. Hence, her request to encash the balance of her retirement benefit in full.

- 5.2 The Applicant requests this Tribunal to review the decision of the Respondent in terms of which her request to encash the balance of her retirement in full was declined. The Applicant submits that the Tribunal must overturn the decision of the Respondent. Further, she urges the Tribunal to order the payment of her two-thirds retirement benefit in a lump sum so that she may use the money to finance her medical bills and build herself a house.
- 5.3 The issue that falls for determination is whether the Applicant is entitled to receive payment of her two thirds retirement benefit in full as a lump sum for purposes of financing her medical expenses and building a house.

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 her retirement, the 2014 Act was the law in force and she retired pursuant to the said legislation. Noteworthy is that her review application was heard on the 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 Act¹, 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 the 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 established 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, her rights, obligations and privileges acquired or

¹ Chapter 01:04.

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.

5.8 For the Applicant to successfully rely on the above provision, she must prove that her 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. She no longer contributes to the fund. Her active membership has therefore terminated on the basis that she has received all her benefits, 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 loans, as they were personal loans granted by BOPRITA

and Bayport 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 she is ill. She tendered medical documents to show proof of her ailment. It is to be noted that the Applicant admitted in her evidence that her trip to South Africa to receive medical care was at the instance of the Government. The trip was facilitated by Princess Marina Hospital and funded by Government. She confirmed that she travelled using Government ambulance. Evidently, the letter from Princess Marina Hospital dated 10 May 2022 confirmed that the Applicant was their patient. The letter further confirmed that the hospital had referred the Applicant for medical/surgical interventions in South Africa at Lenmed Ahmed Kathrada Private Hospital. The letter further provided details of the trip.
- 5.11 How then does the Applicant want the Tribunal to believe that her one third retirement benefit was used to fund the said trip and medical expenses? While the Applicant states that her one -third retirement benefit was paid to her by the Administrator on the basis of the letter from Princess Marina Hospital, her testimony is implausible. The Applicant's entitlement to her one-third retirement benefit is a matter of law. She was entitled to her one-third retirement benefit on the basis of the Retirement Funds Act. Even if she was not of ill health, the said benefit was still payable. The Tribunal therefore rejects her testimony that the Administrator paid her one-third retirement benefit for the sole purpose of funding her medical bills. That could never have been the reason payment had accrued to her by law. Furthermore, the letter from Princess Marina Hospital did not confirm that the Applicant needed money to fund her medical expenses. Rather, the letter confirmed that the Government was responsible for the Applicant's medical care.
- 5.11. The Tribunal further notes that although it may seem likely that a medical practitioner treating a referred foreign patient would omit to record on the Applicant's referral documents that the patient should return for further medical reviews, and choose to inform the patient via word of mouth it would be unjust to admit such as a fact. To qualify that as the truth the Tribunal would be assuming that the medical practitioner made an omission.

5.12. It may well be that the Applicant is frustrated as she perceives her medical condition urgent and the public health service may appear too slow for her own welfare. However, there is no law that comes to the assistance of the Applicant to assist her to encash all her retirement benefit on medical grounds. Without being insensitive to the Applicant's medical situation, even her own admission that she is coming to the Tribunal on the basis of compassion bears testimony that the Applicant is quite familiar with the position of the law .

The fund rules and the Applicant's benefit

5.13 It is common cause that the Applicant as a former public servant, she 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).² 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 teacher in the Botswana civil service, is therefore bound by the Rules of the Botswana Public Officers Pension Fund ("Fund"). Her claim can only succeed if she 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 of her pension on retirement. It further provides that where the pension payable to the pensioner after committal of the one third is less than P5000 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 Applicant to succeed in her claim she must fall within the ambit of the aforementioned provision.

² *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28].

5.16 In her testimony, the Applicant confirmed that her annuity quotations indicate that she will draw P600 per month. The said P600 exceeds the limit set by the law. Since the Applicant's quotation is above the P417 threshold, she is not entitled by law to encash her 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 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. In fact, in terms of Rule 5.1 of the Fund Rules, once the one third 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.³

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

- a) all 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 her 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 she is above the threshold. Therefore, insensitive as the Tribunal may appear, the applicable law does not permit the Applicant to encash her retirement benefit in full. Rather, it compels her to purchase an annuity from a registered insurer or the Fund itself.

³ See regulation 5.3.2 (a) of the Fund rules.

5.20 Further, no law permits or grants this 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.

5.21 Sensitive as the Tribunal maybe towards the Applicant's plight, the Tribunal has no legal power to order payment of the full retirement benefit in her favour for purposes of financing her medical expenses or building herself a house. If the Tribunal was to grant the Applicant her wishes, it will be acting without legal authority which amounts to acting lawlessly, something that a constitutional democracy cannot permit.

[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 her retirement benefit to be paid to her in full cannot be upheld. In consideration of her 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 this 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 DAY OF
APRIL 2023.**

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**M. BAOLEKI
CHAIRPERSON**

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

25 APR 2023

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REPUBLIC OF BOTSWANA

I AGREE:

[Handwritten signature]
.....
**D. MAKATI-MPHO
DEPUTY CHAIRPERSON**

I AGREE:

[Handwritten signature]
.....
**F. MOTLHANKA
MEMBER**