

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

CASE NO. NBFIT-0005/2022

In the review between:

PELOTSHWEU MODIMOOPELO

APPLICANT

and

NBFIRA

RESPONDENT

Applicant in Person

A. Mpe, B. Othogile, 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 the decision of Alexander Forbes 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. The Respondent is also empowered in terms of Rule 8.5 and 16.5 of the Administrator's Rules and BTCL Fund Rules, respectively, to preside over complaints/appeals brought against decisions of the Administrator.

- 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 14 November 2022. The decision complained against was made by the Respondent on the 5 May 2022. 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 15 December 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 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 the 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 was employed as a Technician by Botswana Telecommunications Corporation Limited ("BTCL") on pensionable terms until he was retrenched in 2008. He testified that at his time of retrenchment he had worked for BTC for seventeen years. The Applicant stated that he has been looking for a job since his retrenchment but could not find it.
- 2.2 By virtue of his pensionable employment with BTCL, the Applicant became an active member of the BTCL Pension Fund ("the Fund") on assumption of duty till his time of retrenchment. He confirmed that he was paid his one quarter pension benefit upon retrenchment. The Applicant stated that having struggled to secure a job for many years, he heard about a new retirement law that enables one to call upon his retirement benefit to pay out his loans. He stated that he has one child whom he cannot support as he is unemployed. The Applicant testified that he has read the Retirement Funds Act, 2022 ("2022 Act") and in his understanding, he is a deferred member and under section 52 of the 2022 Act, he is entitled to be assisted with his pension funds to pay any of his debts. He testified that he has been unemployed for over 14 years, and therefore qualifies to be assisted under the 2022 Act.
- 2.3 He testified that he has a loan with Absa Botswana that has fallen into arrears that he needs to settle. The Applicant stated that the balance of the loan as at 2 September 2022 was P39 813.73. It was the Applicant's testimony that he also has a top-up loan of P19 513.86 which he procured from Letshego Financial Services on the 3 August 2022. In explaining how he managed to get a loan facility whilst unemployed, the Applicant stated that he earns a P1356.81 monthly pension from Botswana Life Insurance Limited. Further, he stated that as the loan deduction is P750 per month, he was able to qualify for the loan.
- 2.4 The Applicant went on to testify that he has tried to access agricultural loan facilities from the National Development Bank and the Citizen Enterprise Development Agency but was unsuccessful as he has been blacklisted. He stated that he is being threatened with civil imprisonment regarding the Absa Botswana personal loan. However, he confirmed that no judgment has been issued in the matter and further

that the matter is yet to be litigated.

- 2.5 The Applicant stated that his request before this Tribunal is that the decision of the Respondent should be overturned and he be given his two thirds retirement benefit as a single lump sum payment. He stated that his personal loans and his maintenance obligation towards his minor child are the main reasons for his request. The Applicant therefore pleaded with the Tribunal that he requests his two thirds retirement benefit to be paid as a lump sum payment.

[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 She submitted that though the Applicant was initially retrenched, encashed one quarter of his accumulated pension benefit and remained a deferred member, he has since retired upon attaining the age of 50 (and encashed his one third pension benefit) evidenced by his P1300 per month pension salary. She went on to submit that the Applicant bought annuity so he cannot seek to rely on the provisions of section 52 of the 2022 Act. Ms. Mpe submitted that the Applicant has no money in the BTCL pension fund. Further, that he has bought an annuity- an insurance product that guarantees to pay a certain agreed monthly amount for the rest of the beneficiary's life. She submitted that as the Applicant in his testimony confessed, the annuity policy is with the Botswana Life Insurance Limited. She therefore submitted that there are no funds of the Applicant sitting with the BTCL pension fund. Therefore, it is the Respondent's submission that the fund has no jurisdiction over the Applicant and the matter falls outside the Respondent's supervisory powers over the BTCL pension fund, save where the Applicant has a complaint against the Botswana Life Insurance Limited, as a regulated body.

- 3.3 The Respondent submitted further that the Applicant must appreciate that he is no longer a deferred member, and accept that he is now a pensioner. Ms. Mpe submitted that a deferred member is one who is out of the fund, who no longer contributes, but has his funds sitting with the Fund until they retire and purchase an annuity. She further submitted that a pensioner is a member of the Fund who has retired and has bought or is in the process of purchasing an annuity policy which pays him an agreed sum on monthly basis for the rest of their life.
- 3.4 The Applicant interjected and insisted that he is a deferred member as he no longer contributes towards his pension. His submission was that the Funds at Botswana Life Insurance Limited are his and he is a deferred member on the sole ground that he no longer contributes towards the accumulation of his pension. The Applicant stated that he is a 52 years old hopeless man whose only refuge is his pension funds. He submitted that the money that he has taken from Botswana Life Insurance Limited as a monthly salary can be reimbursed to Botswana Life Insurance Limited and the balance of his two-third retirement benefit should be paid to him as a single lump sum.
- 3.5 The Respondent in turn submitted that the Applicant is misinterpreting the nature of a deferred member, and submitted that the Applicant is a retired member. It is the Respondent's submission that the Applicant made a self-defeating admission by confirming that he has already bought an annuity from Botswana Life Insurance Limited. Thereby, admitting that he has no funds with the BTCL Pension Fund. The Respondent submitted further that the 2022 Act is equally inapplicable in the Applicant's case as the Applicant fails to meet all the requirements of section 52(1)(c) as he does not fall within the ambit of a deferred member.
- 3.6 The Tribunal gave the Applicant the opportunity to address the Respondent's points. He stated that in his understanding, the 2022 Act covers him as he is a deferred member. The Applicant submitted that even the P1356.81 that he is getting per month is below the encashment threshold under the 2022 Act. He further submitted that the 2022 Act

should be helpful so as to avert the possibility of civil imprisonment.

- 3.7 The Applicant concluded his submission by stating that he understands the purpose of a pension benefit as a means of helping him clear his loans, buy food and take care of himself and his child.

[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 BTCL Rules, the Income Tax Act, nor the 2014 Act or the 2022 Act permit any withdrawal once an annuity has been purchased with an insurance company. Further, it is the Respondent's argument that the Applicant no longer has any funds with BTCL Pension Fund, as much as he is no longer a member of the Fund. It is the Respondent's submission that the Applicant is seeking an order that cannot be enforced as it is too late in the day to make reference to two thirds pension funds when the said funds have already procured an annuity product. The Respondent annexed a copy of the BTCL Rules to their heads of argument and according to this document, the Fund has no liability in respect of the member once an annuity is procured and such liability rests with the registered insurer from whom the annuity is purchased.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The Applicant requests payment of his two thirds retirement benefit in a lump sum. The initial one third retirement benefit amounting to P135 027.80 has already been paid to him. He worked for the BTCL as a Technician on pensionable basis until he was retrenched in 2008. He submitted that he is unable to maintain his child and repay his personal

loans. Hence, his request to encash the balance of his retirement benefit in full which at the time of his retirement stood at P270 056.00.

- 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 child, and pay off his personal loans.
- 5.3 The issue that falls for determination is whether a retired person who has purchased an annuity policy still has two thirds pension benefit that they may encash in terms of the law and at their will?
- 5.4 Before delving into the issue for determination set out at 5.3 above, it is important to determine the applicable law that regulates the Applicant's case.

The law governing the Applicant's benefit

- 5.5 The Applicant was retrenched in 2008. It is worth noting that at his time of retrenchment, he had not reached his age of retirement. He however reached the age of 50 in 2021 and retired in terms 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. It is to be noted that at the time of the hearing on 30 January 2023, the 2014 Act had been repealed and replaced with the Retirement Funds Act, 2022 ("2022 Act").
- 5.6 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

¹ Chapter 01:04.

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.

5.7 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.

The Fund Rules and the Applicant's benefit

5.8 It is common cause that the Applicant as a retrenched officer (and later a retired employee) of BTCL belonged to the BTCL 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 2014 Act, those Rules must be consistent with the Act and with any other conditions that may be prescribed.

5.9 The Applicant, as a retired employee in the BTCL, is therefore bound by the Rules of the BTCL 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.

5.10 In his testimony, the Applicant confirmed that his annuity with Botswana Life Insurance Limited gives him a monthly pension of P1356.81. The confirmation letter from the insurer indicates that the annuity commenced on the 1 October 2021. The Applicant wrote to the Respondent on the 27 April 2022, 6 months since drawing his monthly pension, requesting to encash his supposedly two thirds pension benefit as cash lump sum.

5.11 On the 5 May 2022, the Respondent in their correspondence referenced NBFIRA 10/1/31-II (01) communicated their decision in the following terms:

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

5.12 *"We note your circumstances and request for consideration on this matter, however kindly be informed that Pension Funds are regulated by NBFIRA in terms of that the Retirement Funds Act, 2014 and the Income Tax (Superannuation Funds) Regulations. In this regard your pension benefits should be paid in accordance with these Acts.*

5.13 *The legislation stipulated above prescribes that, a member is entitled to receive a maximum of up to one third (1/3) of his/her benefit tax free upon retirement, and the remaining two thirds (2/3) is used to secure a pension from the fund or purchase an annuity for the Member from a registered life insurer that will pay a monthly pension to the Member for life. If the pension/annuity pays the Member less than P5, 000 per year he/she is entitled to full encashment of the benefits payable.*

5.14 *We note that your pension quotations exceed the P5000 per annum prescribed in the aforesaid legislation, as a result you are not allowed to withdraw the two thirds (2/3), as this is set aside as your pension during your life."*

5.15 While the Respondent in their determination went at length to restate the law in respect of two thirds pension encashment in Botswana, that was not the issue before it. What was before the Respondent was a narrow issue in respect of whether an annuity policy bought could be cancelled at the instance of the Applicant for purposes of encashing funds to settle his personal loans, maintain his child and attending to his welfare issues.

5.16 The Tribunal recognizes and does not hold to fault the Applicant's continued lack of understanding as to the nature of the "Deferred member" status, which essentially creates confusion as to the main issue for determination. As such, it would be remiss for the Tribunal not to address the question of 'who is a deferred member?'. While the 2014 Act does not provide a definition for a deferred member, a 'deferred member' is defined in the 2022 Act as one; *who no longer contributes to the fund but has preserved pension rights with the fund.* It follows then that in 2008 when the Applicant was retrenched, he

became a deferred member because he no longer contributed to the Fund. However, he could not cash out as he had not reached retirement age. Such status continued until 2021 where upon reaching early retirement age, he cashed out his one third pension benefit and proceeded to purchase annuity, thus becoming a pensioner. Noteworthy, is that the purchase of an annuity has the effect of terminating any claim that the Applicant may have against the Fund.

5.17 It is to be noted that at the time the Applicant wrote to the Respondent that he had retired, having reached the age of 50. In terms of Rule 5.2.1 of the BTCL Fund Rules, a member who has reached the age of 50 could retire before reaching the normal age of retirement of 55. The Applicant having been retrenched, had invoked the said Rule 5.2.1 at the time of lodging his appeal with the Respondent.

5.18 As a retired member, Rule 5.3.1 of the BTCL Fund Rules had obligated BTCL to purchase an annuity for the Applicant with a registered insurer. The annuity was purchased from Botswana Life Insurance Limited. Further, as Rule 5.3.2 of the BTCL Fund Rules provided that no further liability in respect of a member who has purchased an annuity rested with the Fund, there was no claim that could lie against the Pension Fund or the Administrator. Such liability rests with the registered insurer. At the time the Respondent considered the Applicant's appeal, it ought to have picked that neither the Administrator nor the BTCL Pension Fund were liable to the Applicant.

5.19 For completeness, it is important to note that 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, payment of pension is tied to the lifetime of the Applicant. Otherwise, the intended purpose of pension will be defeated.

5.20 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 the insurer and the Fund has no further obligations in respect of the Applicant.

5.21 Sensitive as the Tribunal maybe to the Applicant's plight, 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 2014 Act to request for any two-thirds pension encashment. In actuality, there is no two-thirds retirement benefit that the Applicant can talk about or claim. He has used his two-thirds pension benefit to purchase an annuity policy with Botswana Life Insurance Limited that entitles him to a certain payment for the rest of his life.

5.22. 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 order cancellation of an annuity policy to enable the Applicant to pay his personal loans, or maintain his minor child. 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.

[6] CONCLUSION

According to the submissions before this Tribunal, neither the applicable Retirement Funds Act, nor the Fund Rules permit cancellation of annuity policy once purchased. It is evident that while the Respondent correctly dismissed the Applicant's appeal, the reasons for the dismissal were not in compliance with the provisions of the Fund Rules, and the 2014 Act. Therefore, 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, but for different reasons as set above. 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.

General remarks

The circumstances for this case are a cause for serious concern. The promotion of public understanding of the non-bank financial system is one of the key functions of the Respondent. Section 4(2)(c) of the NBFIRA Act, 2016 is instructive. It became evident during this case that a lot of public education needs to be done by the Respondent and the Pension Funds to raise public awareness. In order to promote member awareness of their rights and obligations, the Respondent is encouraged to carry out more public education and awareness campaigns. Such campaigns must be made simple and communicated in a language best understood by the audience.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 25TH DAY OF APRIL 2023.

[Handwritten signature]
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M. BAOLEKI
CHAIRPERSON

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25 APR 2023
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REPUBLIC OF BOTSWANA

I AGREE:

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

I AGREE:

[Handwritten mark]
.....
F. MOTLHANKA
MEMBER