

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

CASE NO. NBFIT-0002/2022

In the review between:

PEGGY TSHOLOFELO MMOPELE

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] PRELIMINARIES

1.1 Before this Tribunal could consider the merits of the present review application, a preliminary issue raised by the Respondent fell for determination. The preliminary point raised by the Respondent in their statement of case is that this matter is out of time. In essence, the Respondent are relying on section 52(2) of the Non-Bank Financial Institutions Regulatory Authority Act (“the Act”) that provides that an application for review must be made within twenty-eight (28) days of the making of the decision. It is the Respondent’s submission that the Applicant has fallen foul of this requirement, and, is therefore out of time.

- 1.2 From the record, it is clear that the decision of the Respondent was made on 26 April 2016. The Applicant lodged her application for review with this Tribunal on 25 October 2022, some six (6) years after the decision was made; thus being out of the statutory twenty-eight (28) days. It is worth noting that an application for condonation for late filing of the review application was not made by the Applicant prior to instituting her review application.
- 1.3 Conscious of the fact that the Applicant was out of time, the Tribunal did apply its mind to the question whether the Tribunal could *mero motu* condone the default. The Tribunal came to the conclusion that the terms of section 52(2) of the Act are peremptory.
- 1.4 The said provision prohibits the institution of review proceedings after the lapse of twenty-eight (28) days from the date of the judgment sought to be reviewed unless leave of the Tribunal is sought and obtained on good cause. The provision provides for only one exception, namely, the making of an application for leave to file out of time, either before or after the time set has ended, and that leave can only be granted on good cause.¹
- 1.5 Ms Mpe, for the Respondent submitted that in order for the Applicant to succeed in her condonation application, the circumstances must be such that a valid and justifiable reason exists as to why the review application was not brought in time and why the non-compliance must be condoned (**Attorney General v Manica Freight Services 2015 BLR 35**). She relied on the authority of **General Accident Insurance Company South Africa Ltd v Zampelli 1988 (4) SA 407** which held that condonation is not a mere formality and it is not every circumstance that will warrant condonation.

¹ See section 52(3) of the Act. And further see *Tiphe Transport Holdings (Proprietary) Limited v Thebe and Others* [2018] 1 BLR 206 (CA) at 210 to 211.

1.6 In attempting to meet the test for condonation for late filing, the Applicant sought to explain the circumstances of her lateness from the bar. It is trite that an applicant seeking condonation is required to set out the full circumstances explaining the causes for the delay in order that the court may assess whether blame is to be attached to the applicant, his or her attorney, or some other party.

1.7 De Villiers J in the case of **Chibonga v Chemdol (Proprietary) Limited 2002 (2) BLR 255 (IC)** laid out the principles to be applied to a reasonable time in review proceedings as follows:

“Where it is alleged that an application for review was not launched within a reasonable time, the court must consider whether as a fact the proceedings were launched after an unreasonable lapse of time and, if the answer is in the affirmative, whether the unreasonable delay should be condoned. The first inquiry is a factual one. Where the issue of condonation arises, the court exercises a discretion. This discretion is a judicial one, to be exercised in the light of all the relevant circumstances. There are two principal reasons for the rule that the court should have the power to refuse to entertain a review at the instance of an aggrieved party who has been guilty of unreasonable delay. The first is that unreasonable delay may cause prejudice to other parties. The second is that it is desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions. In deciding whether a reasonable time has elapsed, the court does not exercise a discretion. The enquiry is a factual one, depending on all the relevant circumstances. If the court were to arrive at the conclusion that there has been an unreasonable delay, it exercises a discretion as to whether the unreasonable delay should be condoned.”

- 1.8 The general common law principles of condonation were set out as follows by Holmes JA in **Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)** at p 523C:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensated for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interests in finality must not be overlooked.”

- 1.9 Turning to the Applicant’s explanation as set out from the bar, the Applicant contended that it took her a rather long time to institute review proceedings as she initially approached the Directorate of Public Service Management (“DPSM”) to query the Respondent’s decision. She stated that she was informed that the DPSM does not deal with issues relating to calculation or miscalculation of pension benefits.

- 1.10 It is the Applicant’s testimony that she then engaged the law firm, Kambai Attorneys to pursue her matter. It is further the Applicant’s testimony that through her attorneys, legal proceedings were instituted at the High Court. She informed the Tribunal that later on her attorney advised her that the presiding judge had indicated that they have no cause of action, and that she cannot purport to claim money that she did not work for.

1.11 Dissatisfied with her attorney's words, the Applicant testified that she then went to the Ministry of Finance, where she was redirected to this Tribunal. When the Applicant was called upon to clarify whether the matter has been decided by the High Court, she informed the Tribunal that her attorney informed her that the matter was dismissed by the High Court. The Applicant proceeded to produce a record of documents concerning her matter before the High Court.

1.12 A perusal of these documents indicate that the Applicant's attorneys issued a letter of demand to the Botswana Public Officers Pension Fund on 13th June 2017. It would appear that the demand letter was not met with a favourable response. Consequently, the Applicant's attorneys instituted action proceedings before the High Court on 2nd August 2017 under Case No. CVHGB-002396-17. A court order from the High Court, per Motswagole J. indicates that the Applicant's matter was ultimately struck out of the roll on 2nd March 2020 on account of the Applicant's failure to comply with the scheduling order issued on 26th August 2019. It is to be noted that there is nothing on record showing that the Applicant ever attempted to apply for reinstatement of the matter post being struck out on 2nd March 2020.

1.13 While the Respondent submitted that the Applicant took six (6) years before pursuing her matter, and that the delay is unreasonably long and ought not to be condoned, its submission misses the point. It may well be that the Applicant's matter was not pursued as timeously and meticulously as it should have, but sight must not be lost of the fact that the Applicant did institute proceedings before the High Court in 2017. The Applicant's case remained pending finalisation before the High Court until it was struck off the roll on 2nd March 2020.

1.14 Therefore, the Applicant's delay in resuscitating her claim must be viewed as of 2nd March 2020, when the matter was struck off the roll, to October 2022, when she filed her review application before this Tribunal. The reason for the foregoing is that it did not take the Applicant more than a year post the Respondent's decision in 2016 to have issued a demand letter in respect of her query, which was later followed by action proceedings before the High Court in 2017.

1.15 However, to have waited from March 2020 till October 2022 to revive her matter amounts to an unreasonable delay on the part of the Applicant. She has nonetheless argued that her failure to revive the matter was not out of a carefree attitude towards the finalisation of her matter. Rather, she stated that she had ran out of funds to afford legal representation. She submitted that she waited for this Tribunal to be operationalized so that she could pursue her case as the Tribunal offered an inexpensive medium as opposed to the High Court.

1.16 The Tribunal holds that, plausible as the Applicant's explanation sounds, the inescapable factual conclusion is that there has been an unreasonable delay on her part to bring finality to her case. It therefore follows that the Tribunal must exercise discretion as to whether the Applicant's unreasonable delay should be condoned nonetheless.

1.17 The general common law principles of condonation set out in **Melane v Santam Insurance Co Ltd** come to play. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case.

1.18 While there has been a long delay in bringing this matter to finality, it is important to consider the explanation given by the Applicant in her failure to reinstitute her matter. She stated that she ran out of funds and approached the Ministry of Finance who advised her that the Minister of Finance no longer handled appeals. She stated that she was advised that the Tribunal will soon be operationalized. This becomes even more critical when consideration is had to the fact that immediately after this Tribunal commenced operations on 10 October 2022, the Applicant filed her review application without any delay. Further, the importance of the issue raised by the Applicant's case cannot be overstated. It goes to the soundness and orderliness of the non-banking financial services sector.

1.19 Considering these interrelated facts, the importance of the issue at hand, the explanation given and the prospects of success, there is compensation for the long delay in bringing the matter to finality.

1.20 While it is in the Respondent's interest that appeals against its decisions must be timeously brought to finality, the Tribunal must not overlook the fact that this matter goes to the core of the function of the Respondent; its ability to foster fairness, efficiency and orderliness of the non-bank financial sector and safety and soundness of the non-bank financial institutions.

1.21 For the reasons above, this Tribunal is not inclined to strike out the Applicant's papers and condonation for late filing of the review application is hereby granted.

2 Introduction

2.1 This is a review application lodged on 25 October 2022 with the Tribunal in terms of section 52 of the Act.

- 2.2 The applicant is Ms. Peggy Tsholofelo Mmopele, who was employed by the Botswana Defence Force (“BDF”) as a Senior Communications Officer on permanent and pensionable terms prior to her retirement on 31 March 2016. By virtue of her pensionable employment with the BDF, the Applicant was during the term of her employment, a member of the Botswana Public Officers Pension Fund (“the Fund”) until her time of retirement from the public service.
- 2.3 The Respondent is the Non-Bank Financial Institutions Regulatory Authority. The Respondent is established in terms of the Act to regulate and supervise non-bank financial institutions in Botswana. Importantly, the Respondent serves as an appellate structure in respect of decisions of the regulated entities. In particular, in terms of rule 17.11 of the Rules of the Botswana Public Officers Pension Fund (“the Fund rules”), the Respondent is empowered to preside over complaints/appeals brought against decisions of the Fund.
- 2.4 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.
- 2.5 The essence of the review is that the Applicant alleges that, prior to her retirement, she was led, by the Fund Administrator (then Alexander Forbes Financial Services Botswana), to believe that she would receive a high retirement value (as she understood it, an amount that included both her own and the employer’s contributions) on retiring than the value she was actually paid upon retirement.

2.6 The review therefore relates to the administration of the fund and the interpretation and application of its rules. It alleges that the Applicant sustained financial prejudice in consequence of the maladministration of the fund by the Fund Administrator which influenced her decision to opt for early retirement, and that a dispute of fact or law has arisen in relation to the fund between the Fund and its Administrator on one hand and the Applicant on the other.

2.7 In essence, the Applicant seeks to review the decision of the Respondent confirming the decision of the Fund to pay the Applicant's retirement benefits in accordance with the benefit statement issued by the Fund that had a fund credit of P2, 325, 363.66, as opposed to a statement issued by the administrator that contradicted the Fund's statement and had a fund credit of P4, 401, 400.63. More with respect to the factual background shall follow below.

2.8 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 31 January 2023 at 0930 hours in the Tribunal courtroom. The hearing took place as scheduled.

3. **THE HEARING**

Applicant's evidence

- 3.1 The Applicant took oath and testified that she was employed by the Botswana Defence Force (“BDF”) on 21 July 1982 and remained in its employ as a Senior Communications Officer until her retirement on 31 March 2016. She testified that a few short months before her retirement, she visited the Fund Administrator to inquire about her benefit statement. She stated that before she could commit to any decision regarding her life, she needed to know what her pension benefits would be. Accordingly, she sought advice from the Fund Administrator that was specifically tasked with the responsibility of providing that kind of information.
- 3.2 It is the Applicant’s testimony that she had not been receiving her benefits statements for over two years at the point of visiting the Fund Administrator. She stated that she was requested to produce her Identity Card for purposes of verification and assistance. She further stated that she was surprised to hear that her fund credit sat at over P4 000 000, however the Fund Administrator confirmed that it was the actual and correct calculations. The Applicant stated that the basis of her surprise was that two years preceding her inquiry she had received a benefit statement that indicated that she had about P1 900 000 in her fund, which had now dramatically increased to over P4 000 000 within 24 months. It is important to note that per the Applicant’s testimony, the Fund Administrator at this stage never furnished her with a printed copy of her benefit statement. She was only told by the officer who was assisting her with the figures sitting in her fund.
- 3.3 The Applicant stated that after a few months she went back to the Fund Administrator for further inquiries. By way of response to her inquiry, so her testimony goes, the Fund Administrator provided her with the same figures but did not show her any document or handed her any document showing proof of her fund credit. It is the Applicant’s testimony that unaware that the figures verbally communicated to her overstated her legitimate pension

entitlement, she formed a decision to retire and gave notice to the BDF on 30 November 2015 communicating her decision to opt for early retirement. In her notice of retirement letter, the Applicant indicated to the BDF that her notice period was to run from January 2016 ending 31 March 2016. The BDF accepted her retirement and confirmed the 31 March 2016 as her date of retirement.

- 3.4 The Applicant stated that it was only in January 2016 that while attending pre-retirement counselling that she was handed a benefit statement by the Fund that stated her fund credit as P2 325 363.66. It was her evidence that she was shocked by the benefit statement from the Fund, as all along she trusted the figures stated by the Fund Administrator as true and correct. Claiming to have retired on 31 March 2016 on the basis of the pension advice relayed to her verbally by the Fund Administrator sometime in 2015, the Applicant stated that she objected to any reduction in her pension benefits, but to no avail. She testified that the Fund was adamant in its insistence that the true and correct benefit statement was as issued by it, rather than the Fund Administrator.
- 3.5 The Applicant stated that on visiting the Fund Administrator on 20 April 2016 (that was after her retirement), she was provided with a copy of her benefit statement by the Fund Administrator detailing among other things, a fund credit of P4 401 400.64. The Applicant testified that, but for this inaccurate pension data provided verbally by the Fund Administrator and later verified post her retirement by a computer printout, she would not have opted for early retirement from the BDF in March 2016.

- 3.6 On explaining how a benefit statement issued to her on 20 April 2016 could possibly influence her to opt for early retirement in November 2015, the Applicant stated that throughout the last quarter of 2015, she frequented the Fund Administrator who kept verbally advising her that her fund credit was in excess of P4 000 000. She stated that the 20 April 2016 computer printout was merely a confirmatory benefit statement that corroborated the previous verbal representations issued by the Fund Administrator on each occasion of inquiry.
- 3.7 She closed her testimony by stating that even on assuming that the Fund benefit statement was the true and correct one, the Fund was bound by the Fund Administrator's benefit statement who was its lawful agent and its decisions and declaration were taken to bind the Fund.

4. **RESPONSE**

- 4.1 Submitting in reply, Ms. Angelina Mpe for the Respondent had this to say with respect to the Applicant's submissions. She submitted that there was no record to show that the Applicant ever made a written enquiry before she gave the notice to retire and that there was also nothing on record to show that she ever received a written confirmation of her fund credit before making a life changing decision to retire.
- 4.2 The Respondent submitted that all the benefits statements on record issued by the Fund have a note to the effect that "any errors in your personal details should be reported to the Employing Authority" but notwithstanding, the Applicant decided to enquire from Alexander Forbes (the Fund Administrator") instead of the Employing Authority or the Fund.

- 4.3 The Respondent submitted that the Fund benefit statements for the year 2013, 2014, and 2015 were consistent with the Applicant's contributions and the Fund's declared interest rates. The Respondent further contended that the estimated returns based on the P4 401 400.64 that the Applicant alleges to be her fund credit would have meant that the returns declared by the Fund for the year ending 31 March 2015 was 125%. It was submitted that this would be inconsistent with market fundamentals and other actual returns previously declared by the Fund. In conclusion, the Respondent submitted that the Fund Administrator's statement containing the P4 401 400.64 was erroneous and had to be corrected.
- 4.4 With respect to the conduct of the Applicant in placing reliance on verbal information to inform her decision to retire, the Respondent characterized such conduct as highly irresponsible and unreasonable, especially that the Applicant was literate having served as a Senior Communications Officer. Further, the Respondent submitted that the benefit statement containing the P4 401 400.64 was handed to the Applicant after she had already retired from the public service. Therefore, it is the Respondent's submission that the benefit statement could not have persuaded or enticed the Applicant to retire.
- 4.5 Alternatively, the Respondent argued that if payment was to be effected in terms of the Fund Administrator's statement, it would have resulted in the Applicant being unjustifiably enriched in the sum of P 2 076 036.98 which amount would still have been recoverable by the Fund in terms of Rule 8.3 of the Fund Rules.

5. **RESPONDENT'S HEADS OF ARGUMENT**

At the closing of the hearing, the Tribunal requested the Respondent to provide it with written submissions on points of law within ten (10) days. The Respondent obliged and filed their heads of argument on 17 February 2023. The Tribunal is indebted to the Respondent for their heads of argument. The heads of arguments filed augmented the Respondent's response above and for the sake of brevity the Tribunal will not duplicate the arguments as they have been captured in the response above.

6. **DETERMINATION AND REASONS THEREFOR**

Introduction

- 6.1 The Applicant requests this Tribunal to review the decision of the Respondent that confirmed the decision of the Fund to pay the Applicant's retirement benefits in accordance with the benefit statement issued by the Fund that had a fund credit of P2, 325, 363.66, disregarding the statement issued by the administrator that contradicted the Fund's statement and had a fund credit of P4, 401, 400.63.
- 6.2 The issues that fall for determination are in our view the following:
- (a) Whether the statements of benefit issued by the Fund and the Fund Administrator as at 1 January 2016 and 20 April 2016 regarding the fund credit as at 31 March 2016, respectively, misstated the Applicant's retirement benefit entitlement;
 - (b) Whether the Fund and/or the Fund Administrator acted negligently in issuing these statements to the Applicant;
 - (c) Whether the Fund and /or the Fund Administrator acted unlawfully in issuing these statements;

- (d) Whether the Applicant suffered a loss as a result of issuing of these statements to her; and
- (e) Whether there is a causal link between the negligent and unlawful statements and the loss or damage suffered.

6.3 Before delving into the issues set out above, it is important to restate briefly the law with respect to delictual liability based on negligent misstatements. In terms of the important decision in **Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A)**, a delictual claim for damages based on negligent misstatement is available to a plaintiff who can establish:

- (i) that the defendant made a misstatement to the plaintiff;
- (ii) that in making this misstatement the person acted (a) negligently, and (b) unlawfully;
- (iii) that the misstatement caused the plaintiff to sustain loss; and
- (iv) that the damages claimed represent proper compensation for such loss.

6.4 The Trust Bank case confirmed again that, while the Aquilian Action formally envisaged a concept of patrimonial loss restricted to injury to person and tangible property, it is now settled law that the range of application has been extended to include the possibility of claiming damages for a negligent misstatement causing pure economic loss, that is, pecuniary loss where there is no physical injury to person or property.

6.5 It is important to emphasise that the Trust Bank case authoritatively sets out that the appropriate remedy for a party who sustains pure economic loss due to a negligent misstatement is damages.

6.6 Therefore, the Applicant has no right, contractual, statutory or otherwise, to a pension at a level higher than the actual value of the contributions (an amount that includes both her own and the employer's contributions). **Gauthier v Canada (Attorney General) (200), 22 N.B.R.(2d) 211: 578 A.P.R 211) at p229.** What she would be entitled to receive, if she was to be successful in her matter, is an award of damages for the pecuniary loss she has suffered as a result of the Fund and/or Fund Administrator's negligent misstatement/misrepresentation. The assessment of the Applicant's pecuniary loss would take into account the negative financial repercussions of her proven premature retirement as well as its positive effects on her financial situation.

6.7 We deal with each identified issue in turn.

Misstatement

6.8 The Respondent was dismissive in her explanation as to why the Fund and the Fund Administrator issued two contradictory statements. In the Respondent's view, the Applicant has no one to blame but herself as all the benefits statements issued by the Fund have a note to the effect that "any errors in your personal details should be reported to the Employing Authority". But that notwithstanding, so the Respondent's argument runs, the Applicant decided to enquire from Alexander Forbes (the Fund Administrator") instead of the Employing Authority or the Fund itself.

6.9 The naivety of the Respondent's submission is astonishing. Personal details relate to matters within the Applicant's personal knowledge. These include, errors in relation to her date of birth, names, identity card number, and date of joining the membership.

- 6.10 The reason why such errors are to be reported to the Employing Authority is on the sole basis that the employer is the custodian of the employees' personal details. Mathematical or actuarial calculations of fund credit can never be classified as matters of personal knowledge/details. Such calculations require a skilled and trained eye to compute and analyze. Therefore, the calculations cannot fall within member's personal details.
- 6.11 Importantly, in terms of section 15 (1) (aa)- (cc) of the Retirement Funds Act, No. 27 of 2014 ("RFA, 2014") , the board of a licensed fund is obligated to appoint and manage an administrator who shall maintain the membership records of the licensed fund; collect contributions on behalf of the licensed fund; and pay benefits.
- 6.12 Furthermore, in terms of section 15 (1) (b) of the RFA, 2014, the board of the licensed fund is required to ensure that adequate and appropriate information is communicated to stakeholders informing them of their rights, benefits and duties in terms of the rules, together with such matters as may be prescribed by the Regulatory Authority. Section 15 (2) of the RFA, 2014 goes further to provide that the service provider, in this case, the administrator, acts towards the licensed fund and its members as if it has a fiduciary responsibility.
- 6.13 It therefore cannot lie in the mouth of the Respondent to attempt to blame the Applicant for accepting the Fund Administrator's benefit statement as correct. It is a matter of law that the Fund Administrator has fiduciary responsibilities towards members on behalf of the Fund. There is a clear responsibility in terms of section 15 (1) (d) requiring that adequate and appropriate information must be communicated to members in respect of their rights, duties and benefits. The members are not expected to pick and choose and treat benefit statements issued by Fund Administrators as unreliable and unauthentic than benefit statements issued by the Funds themselves.

6.14 The benefit statement from the Fund Administrator states that **ONLINE UPDATES WITHDRAWAL CALCULATION AS AT EXIT DATE 31 03 2016**. There is no ambiguity in this heading. Its plain meaning is that the amounts reflected on the statements will be paid out to the member in the event such member retires on 31 March 2016. There is no explanation on the statement cautioning the reader that the values reflected thereon are mere illustrative values, or are based on the retirement benefit as at the projected normal retirement date, as opposed to the early retirement that the Applicant opted for.

6.15 Given that both benefits statements had no explanations cautioning the Applicant that the values reflected thereon were estimates and unverified, even assuming that the Fund's explanation that the Fund Administrator's benefit statement was erroneous was held to be valid, it does not negate the fact that the retirement values shown on the benefits statements as at 1 January 2016 and 20 April 2016 painting a picture of the fund credit as at 31 March 2016 were contradictory and are a misstatement of the correct position.

6.16 The Tribunal notes that a Fund Administrator is required to act in the best interests of members at all times. The failure to perform this duty constitutes maladministration of the fund. **Connery v Old Mutual Life Assurance Co. (SA) Ltd and Another [2002] 6 BLPR 3544 (PFA) at 3550A-B and Khambule v CNA Ltd Now CNA (Pty) Ltd and Others (1) [2001] 9 BPLR 2472 (PFA) 2484C-D**. The duty to act with due care, diligence and in the best interest of members is critical in cases where members may suffer financial losses as a result of any failure to act timeously or properly. *

6.17 It is beyond debate that a relationship existed between the Applicant and the Fund Administrator when she sought and received its retirement benefits advice. At the time, the relationship was such that the Applicant could reasonably be expected to trust the accuracy of the pension information

provided by the Fund Administrator in the same way she was to trust that of the Fund. One of the core functions of the Fund Administrator in terms of the RFA, 2014, was precisely the provision to inquiring Fund Members of general and specific information about their pension. The Fund Administrator held itself out as having knowledge and expertise required to provide accurate pension information and it provided that information with the tacit understanding that the members could, without any inquiry or research, rely on it to plan their future. That is precisely what the Applicant was expected to do and indeed did. In the circumstances, the law did not obligate her to consider whether the Fund Administrator's advice conformed to the Act or the Fund (as the Fund Administrator was the fiduciary of the Fund itself). The Respondent's submission that the Applicant ought to have been cognizant of the Act and, therefore known that the Fund Administrator's calculation of her pension was erroneous, negates the Fund Administrator's very purpose and is unrealistic and it must fail.

Negligence

6.18 This issue can be disposed of swiftly. In January 2016, the Fund furnished the Applicant with a benefit statement that indicated her fund credit as of 31 March 2016 to be sitting at P2, 325, 363.66. On 20 April 2016, the Fund Administrator furnished the applicant with a benefit statement that had a fund credit of P4, 401, 400.63 as at 31 March 2016. When the Applicant queried these values (since they were significantly contradictory of the other), she was met with an implausible explanation that the benefits shown on the Fund's benefits statement were the true and accurate values while those in the Fund Administrator were incorrect. The Tribunal has already found that the benefit statements do not lend themselves to that interpretation given that the Fund Administrator has fiduciary responsibilities and had a legal duty in terms of section 22 the RFA, 2014, to administer the fund in a responsible manner, ensuring in terms of section 15 (1)(d) of the RFA, 2014, that adequate and

appropriate information regarding benefits are communicated.

6.19 In view of the above and the explanation given by the Fund or the Fund Administrator, one would have expected that the Fund and the Fund Administrator, and the Respondent later at appeal stage, would have sought the Fund and the Fund Administrator, to give a detailed explanation to the Applicant to make it absolutely clear in a subsequent benefit statement what the actual and correct values were, and explaining fully and on actuarial basis how a miscalculation of retirement benefits could arise as between benefit statements of the Fund and the Fund Administrator. This was important as though the Applicant had retired as at 31 March 2016, she was yet to be paid her retirement benefits. Therefore, the Applicant deserved clarity, guidance and confirmation of her actual retirement benefits.

6.20 The Tribunal therefore finds both the conduct of the Fund Administrator and Fund at best tardy and negligent in the manner in which they have handled this matter. Sadly, a negligent statement is not enough to make them pay. The issue of the unlawfulness of their conduct and resultant loss by the Applicant also needs to be explored.

Unlawfulness

6.21 The question that arises here is whether the Fund acted unlawfully in furnishing, through its agent the Fund Administrator, inaccurate information to the complainant and in breach of its legal duty under section 15 (1)(d) of the RFA, 2014 to:

“ensure that adequate and appropriate information is communicated to stakeholders’ informing them of their rights, benefits and duties in terms of the rules, together with such matters as may be prescribed by the Regulatory Authority.”

6.22 The Tribunal is satisfied that the Fund has failed in its legal duty to communicate adequate and appropriate information to the Applicant. In the result it has acted unlawfully. The Tribunal arrives at this conclusion having taken into consideration the various factors discussed in the Trust Bank case; **Bayer South Africa (Pty) Ltd v frost 1991 (4) SA 559 (A) at 568D-F**. In this case we consider the following factors to be important:

(1) *The context in which the benefits statements were furnished*

The statements were furnished within the context of the legal duty that the Fund has to the Applicant under section 15 (1) (d) of the RFA, 2014, namely, to ensure that adequate and appropriate information is communicated to the Applicant as regards, among other things, her benefits.

(2) *The nature of the statements*

The statements relate to matters in respect of which the Fund and the Fund Administrator have intimate knowledge and expertise. Furnishing these statements forms part of the normal business of the Fund and it is, moreover, its legal duty to do so.

(3) *The purpose of the statements*

The information contained in these statements is intended to enable the Applicant to make informed decisions relating to her rights, benefits and duties. Inaccurate or false information could have serious financial consequences.

(4) *Relationship between the parties*

The relationship between the Applicant and the Fund is one of trust. The Applicant made financial contributions to the fund so that when she retires she will be relatively financially secure. The Fund then contracts the Fund Administrator to administer its business and ensure that the Applicant's plans for her retirement are realized when that time comes.

(5) *Consideration of public policy*

The Tribunal considers that, on the application of the standard laid down in the Bayer South Africa case, there are no public policy considerations that would preclude this Tribunal from finding liability. In that case the court said:

"In order to avert the danger of limitless liability and to keep the cause of action within reasonable bounds, it is the duty of the court (a) to decide whether on the particular facts of the case there rested on the defendant a legal duty not to make a misstatement to the plaintiff (or, to put it the other way, whether the making of the statement was in breach of this duty and, therefore, unlawful) and whether the defendant in the light of all the circumstances exercised reasonable care to ascertain the correctness of his statement; and (b) to give proper attention to the nature of the misstatement and the interpretation thereof, and to the question of causation."

The Tribunal is satisfied, as already shown, that the Fund had a legal duty towards the Applicant which it failed to heed, and that it and the Fund Administrator failed to exercise reasonable care to ascertain the correctness of the benefit statements. What remains is the consideration of the question of causation.

Causation

6.23 The question is whether the Applicant has suffered a loss as a result of the misstatements contained in the benefits statements. She maintains that if the misstatement had not been made, that is, if she had known of the correct state of affairs and the amount she would receive as retirement benefit, she could not have opted for early retirement.

Written benefit statements


6.24 Much as the Tribunal would like to come to the Applicant's assistance, we consider that she cannot now, having been furnished by the Fund with the initial written benefit statement containing P2, 325, 363.66 in January 2016 when her notice period commenced, claim that a written benefit statement only furnished later by the Fund Administrator on 20 April 2016 showing her fund credit standing at P4, 401, 400.63 triggered her to opt for early retirement.

6.25 It is to be noted that by the time the Applicant received the written Fund Administrator's benefit statement, her notice period had lapsed and she had effectively retired from the public service, and was awaiting payment of her retirement benefit. Her early retirement could not, therefore, been triggered by the Fund Administrator's statement that was only produced post the Applicant's retirement date. In the premises, the Applicant's retirement was not caused by the misstatements in the benefit statements. Put differently, the Applicant has suffered no loss as a result of the misstatements.

Verbal advices

6.26 With respect to the Applicant's testimony that she was on a number of occasions in 2015, verbally informed by the Fund Administrator that her fund credit was P4 300 000, which caused her to opt for an early retirement, the Tribunal finds that, while oral communication may have ensued between the Applicant and the Fund Administrator, that is not the end of the matter.

6.27 For the Applicant to successfully prove the causal link between the Fund Administrator's verbal communication and the decision to opt for early retirement which caused her negative financial repercussions, it must be proven that the verbal information, assuming it was issued, amounted to issuance of benefit statement by the Fund Administrator in terms of the RFA, 2014.

 6.28 The duty to give adequate and accurate information to members is elaborately spelt in regulation 44 of the Retirement Funds Regulations. It is stated that a benefit statement should be provided to a member, at least once a year, and such a benefit statement should include the following:

- (a) details of the fund name, contact person and registration number;
- (b) details of benefits payable to the member;
- (c) rate of contribution by the member and the employer;
- (d) general information such as where to inspect the rules and financial statements;
- (e) a projection of the likely benefits on retirement in current purchasing power terms assuming realistic rates of expenses and investment return in excess of inflation; and
- (f) the rates of expense and investment return in excess of inflation and any other relevant assumptions must be stated.

6.29 Though it may not be highly improbable that the Applicant was on a number of occasions verbally informed of the value of her fund credit by the Fund, such verbal information appeared to have been incomplete as to meet the requirements of regulation 44 as set above. The Applicant repeatedly confirmed in her testimony that she was only told of the value of the fund benefit. All the information above (a)-(f) that make up a complete benefit statement were not stated to her.

6.30 Given that the verbal advices were incomplete and fell short of a complete benefit statement as provided for in terms of the Retirement Funds Regulations, the Tribunal holds that it was not open to the Applicant, absent written confirmation of the accurate and complete retirement benefit as contained in the benefit statement from the Fund Administrator, to opt to take early retirement. The Tribunal further holds that oral statements in respect of the value of fund credit should be used by members as a supplement to written benefit statements, rather than a replacement.

6.31 It is to be noted that in the event a Fund or a Fund Administrator issues verbal advices with respect to fund credit, the nature of benefit statements, and the contents therein dictate the need for a written confirmation before a member may act on such advices.

6.32 Therefore, the verbal advices, falling short of complete benefit statements, did not cause the Applicant to act to her prejudice. In the premises, the Tribunal finds that there is no causal link between the verbal utterances issued by the Fund Administrator and the financial prejudice that the Applicant claims to have suffered.



Damages


6.33 The Applicant claimed that she is entitled to be paid the higher retirement value as contained in the Fund Administrator's benefit statement. That claim could not be sustained even if the Applicant had successfully proven causation. It is to be noted that the appropriate remedy for a party who sustains pure economic loss as a result of a negligent misstatement is damages. In the premises, it was for the Applicant to prove that the damages claimed flowed from her proven premature or early retirement and represented proper compensation for her loss.

7. It is fitting at this point for the Tribunal to raise a concern regarding the manner in which the value attached to, and the importance of benefit statements was treated by the Fund, the Fund Administrator and the Respondent.

7.1 The circumstances of this case are a cause for serious concern. Benefit statements are intended to inform members of their rights, benefits and duties in terms of the rules of the fund. Funds have, as a matter of law, a legal duty to communicate adequate and appropriate information to members. The Fund in this case has shown scant regard for that legal duty and this is to be lamented by all in the retirement funds industry.


7.2 The Fund Administrator is also required by law to administer a fund in a responsible manner and to maintain such books of accounts and other records as may be necessary for purposes of administering the fund. The Fund Administrator is paid a fee to administer the business of the Fund. The business includes accurate and effective communication with members of the Fund. The Fund Administrator's conduct in this case is lamentable as that of the Fund. If the explanation by the Fund that the benefit statement issued by the Fund Administrator is the incorrect one is to be believed, then all benefit statements issued by the Fund Administrator along similar lines are misleading.

7.3 Surprisingly and interestingly, the Respondent, as the Regulatory Authority  seem not to have taken this up with the Fund and the Fund Administrator (as confirmed by Ms. Mpe), but rather turned a blind eye, whether by design or inadvertence, to these lapses of misstatements. It is not an excuse for the Fund and the Fund Administrator to simply say that the miscalculations were made honestly. It flies in the face of section 4 (1)(b) of the Non-Bank Financial Institutions Regulatory Authority Act, 2016 that requires the Respondent to regulate and supervise non-bank financial institutions so as to foster the highest standards of conduct and ensure fairness, efficiency and orderliness of the non-bank financial sector. 

7.4 The Respondent is accordingly ordered to relook into this matter and take necessary steps on the Fund and the Fund Administrator with a view to ensuring that such lapses do not occur in future or are repeated. 

7.5 Coming now to the manner in which the Respondent's determination/decision was fashioned in this matter.

7.6 The Tribunal notes that the Respondent went into details in its heads of argument to provide technical analysis and provided mathematical graphs to explain pension market performances for the year 2013, 2014, and 2015 in an attempt to demonstrate the inaccuracy and improbability of the Fund Administrator's benefit statement.

7.7 Chief to note is that this technical analysis and evaluation was excluded from the Respondent's decision as communicated to the Applicant. How then does the Respondent expect the Applicant and the public to hold it accountable and to trust its decisions? 

7.8 The most effective way of holding the Respondent accountable is through its determinations/decisions. In its decisions, the Respondent is obliged to furnish adequate reasons to explain how and why it arrived at certain decisions. It is crucial that such decisions be authored with simplicity, clarity and be adequately analysed so that they may stand scrutiny.

7.9 In addition, the furnishing of reasons serves another important objective of demonstrating to interested parties that the Respondent has applied its mind to the issues which were put before it and therefore the decision is not arbitrary. It bears highlighting that the only place for the Respondent to explain its findings is in its decision, not before the Tribunal during appeal hearings.

7.10 Therefore, the Respondent is urged to ensure that its decisions are well-reasoned, logical, clear, persuasive, and supported by evidence and the law.

8. **CONCLUSION**

For the foregoing reasoning and conclusions, the review application should fail; and it fails. 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.

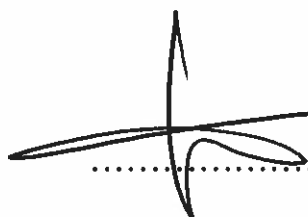
9. **ORDER**

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

9.2 The Respondent is ordered to relook into this matter and take necessary steps on the Fund and the Fund Administrator with a view to ensuring that misstatements lapses do not occur in future or are repeated.

9.3 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 23 DAY OF MAY 2023.



**M. BAOLEKI
CHAIRPERSON**

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

23 MAY 2023

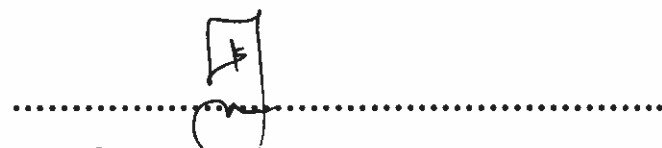
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REPUBLIC OF BOTSWANA

I AGREE:



**D. MAKATI-MPHO
DEPUTY CHAIRPERSON**

I AGREE:



**F. MOTLHANKA
MEMBER**