



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2025-014885

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
[REDACTED]	
<u>28/08/2026</u> DATE	
SIGNATURE	

OBI MUSIYIWA CLAUDE GADZIKWA

Applicant

and

THE FINANCIAL SERVICES TRIBUNAL

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

FUNDSATWORK UMBRELLA PENSION FUND

Third Respondent

OXFAM SOUTH AFRICA NPC

Fourth Respondent

Summary: Pension Funds Act 24 of 1956 — section 37D(1)(b) — retention of pension benefit pending employer's civil proceedings — Fund Rules requiring a *prima facie* case, a reasonable chance of success and absence of unreasonable delay in bringing proceedings to finalisation — review of Financial Services Tribunal ruling dismissed — incorrect reference to criminal proceedings not material to Tribunal's decision — subsequent progress of civil proceedings engaging Fund's continuing obligation under Rule 9.4.2.1.2 — just and equitable relief under section 172(1)(b) of the Constitution — Fund directed to determine whether requirements for continued retention remain satisfied — each party to bear its own costs.

JUDGMENT

SEKWAKWENG, AJ

Introduction

[1] This dispute concerns a pension benefit which has remained unpaid since May 2023. Mr Obi Musiyiwa Claude Gadzikwa became entitled to a withdrawal benefit when his employment with Oxfam South Africa NPC came to an end.

[2] The FundsAtWork Umbrella Pension Fund (“Fund”) withheld the benefit at Oxfam’s request. Oxfam alleged that the applicant had caused it financial loss through fraud, dishonesty, or misconduct and advised the Fund that it would institute civil proceedings against him. The applicant challenged the Fund’s decision before the Pension Funds Adjudicator (“Adjudicator”), but without success. His application for reconsideration before the Financial Services Tribunal (“Tribunal”) was also dismissed.

[3] The applicant now approaches this Court under section 235 of the Financial Sector Regulation Act.¹ He seeks the review and setting aside of the Fund’s decision, the Adjudicator’s determination and the Tribunal’s ruling, together with an order directing payment of his benefit. The Tribunal and the Adjudicator filed notices to abide. The Fund also abides. Oxfam alone opposes the application.

[4] The applicant seeks to impugn, first, the decision of the FundsAtWork Umbrella Pension Fund dated 2 May 2023 to withhold his pension benefit. He challenges, secondly, the determination of the Pension Funds Adjudicator dated 20 October 2023, which dismissed his complaint against the Fund. Thirdly, he challenges the ruling of the Financial Services Tribunal dated 8 August 2024, which dismissed his application for reconsideration of the Adjudicator’s determination.

¹ Act 9 of 2017.

[5] On 2 May 2023, when the Fund made its decision, Oxfam's forensic investigation was still incomplete and summons had not yet been issued. By the time the matter came before the Tribunal, the record had considerably improved. Oxfam's civil claim had been set out in the pleadings, the applicant had supplemented his grounds for reconsideration, and the CCMA award had also been made available to the Tribunal.

[6] The dispute before the Fund was whether Oxfam had placed sufficient information before it to justify withholding the benefit under section 37D of the Pension Funds Act ("Act")² and the Fund rules. The Adjudicator was later required to determine the applicant's complaint against that decision. The Tribunal was required to reconsider the Adjudicator's determination on the grounds advanced by the applicant and on the record before it.

[7] At the hearing of this matter on 4 June 2026, I asked counsel about the progress of Oxfam's civil action. The Court was informed that the action had not progressed beyond discovery. There had also been engagement under Rule 41A of the Uniform Rules of Court, but no party could say when the matter would be trial-ready or when it was likely to be heard. By then, the applicant's pension benefit had remained unpaid for more than three years.

Condonation

[8] The applicant seeks condonation for the late filing of the review application. The Tribunal dismissed his application for reconsideration on 8 August 2024. The review was formally issued on 5 February 2025, 181 days later.

[9] Section 7(1) of the Promotion of Administrative Justice Act³ ("PAJA") requires that review proceedings be instituted without unreasonable delay and, in any event, within 180 days of the conclusion of any internal remedy contemplated in section 7(2). Reconsideration before the Tribunal constituted such an internal remedy. Accordingly, the prescribed period therefore expired on 4 February 2025.

² Act 24 of 1956.

³ Act 3 of 2000.

[10] The application was submitted on Court Online for issue on 4 February 2025 at approximately 09h23. The Registrar issued it on 5 February 2025 at 10h08, and it was served electronically on the respondents the same day. On that basis, the review was instituted one day outside the 180-day period prescribed by section 7(1) of PAJA.

[11] Section 9(1)(b) of PAJA permits a court, on application, to extend the period prescribed in section 7(1), and section 9(2) provides that such an extension may be granted where the interests of justice require it. In *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others*,⁴ the Supreme Court of Appeal held that once the 180-day period has expired, the delay is unreasonable per se — the issue of unreasonableness is predetermined by the legislature. The court is therefore only empowered to entertain the review if the interests of justice dictate an extension in terms of section 9.

[12] Whether the interests of justice require an extension depends on the circumstances of the case. In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*⁵, the Supreme Court of Appeal held that an applicant seeking condonation must provide a full and reasonable explanation for the delay for the entire period. Relevant considerations include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue raised, and the prospects of success.

[13] In *Aurecon South Africa (Pty) Ltd v City of Cape Town*⁶, the Supreme Court of Appeal similarly confirmed that the enquiry is whether, having regard to all the circumstances, the interests of justice warrant an extension of the period prescribed by section 7(1) of PAJA.

[14] Following the Tribunal's ruling, the applicant's attorneys instructed counsel on 22 August 2024 to advise whether grounds existed to review the ruling. Oxfam delivered its discovery affidavit in the civil action on 6 September 2024. The applicant regarded that

⁴ [2013] 4 All SA 639 (SCA).

⁵ [2010] ZASCA 3.

⁶ 2016 (2) SA 199 (SCA) at para 17.

discovery as relevant to the contemplated review because no final ARC Sakhile forensic report was among the documents discovered. Counsel furnished advice on 24 November 2024, following which the decision was taken to institute the review.

[15] The first draft of the papers was considered on 11 January 2025. Counsel consulted during the week of 14 January 2025. The papers were finalised and signed on 4 February 2025, and submitted to Court Online the same day. They were formally issued the following morning.

[16] The explanation covers the period from the Tribunal's ruling to the institution of the review. The non-compliance was confined to one day. The papers were submitted to Court Online within the 180-day period, and the additional day arose between submission and formal issue by the Registrar. No prejudice arising from that delay has been identified by Oxfam or any other respondent.

[17] The application concerns an accrued pension benefit and the exercise of powers under section 37D of the Pension Funds Act read with the Fund Rules. The issues raised concern the basis upon which the benefit was retained, the information before the relevant decision-makers and the requirements governing its continued retention.

[18] The applicant has provided an adequate explanation for the delay. The non-compliance was limited to one day. The papers had been submitted to Court Online within the prescribed period, and no prejudice arising from the late formal issue has been identified. Having regard also to the nature of the proceedings and the issues raised, I am satisfied that the interests of justice favour an extension of the period prescribed in section 7(1) of PAJA.

[19] The period prescribed in section 7(1) of PAJA is accordingly extended, in terms of section 9, to 5 February 2025.

Factual background

[20] The applicant commenced employment with Oxfam on 1 May 2017 as a Finance Manager. He was also a member of the FundsAtWork Umbrella Pension Fund by virtue of his employment.

[21] Oxfam suspended the applicant on 12 September 2022. Disciplinary proceedings followed, during which he faced charges of breach of fiduciary duties, gross negligence, dishonesty and breach of contract. He was dismissed on 23 February 2023.

[22] On 9 March 2023 the applicant applied for payment of his withdrawal benefit from the Fund. His gross benefit was R1 019 693.92. After the applicable deductions, the amount available for payment was R673 014.00.

[23] Oxfam asked the Fund not to pay the benefit. At that stage, its request was supported by a letter dated 17 March 2023 from ARC Sakhile Chartered Accountants and Auditors Inc, which had been appointed to conduct a forensic investigation into allegations of fraud, financial mismanagement and possible dishonest conduct by members of Oxfam's senior staff, including the applicant.

[24] ARC Sakhile reported that its investigation was still ongoing. It said that its preliminary investigation indicated that the applicant had probably caused Oxfam financial loss and recommended that Oxfam request the Fund to retain his pension benefit. It also recommended that the matter be reported to the police.

[25] The amount of Oxfam's alleged loss had not yet been determined. ARC Sakhile said that it was still working on the quantum and expected to submit a draft report by 30 April 2023, with the final report to follow thereafter.

[26] On 3 April 2023, the Fund wrote to the applicant and invited him to explain why his benefit should not be retained. He responded on 6 April 2023. He said that he was unaware of any civil or criminal proceedings against him, had not been interviewed by a forensic investigator and had not been provided with any forensic report implicating him. He also explained that he was unemployed and that non-payment of the benefit would prejudice him.

[27] The applicant again sought payment of the benefit on 13 April 2023. The following day the Fund provided him with the ARC Sakhile letter and invited him to make further representations. He did not admit liability and maintained that there was no proper basis upon which his benefit could remain unpaid.

[28] On 2 May 2023, the Fund decided not to pay the benefit. It recorded that Oxfam's estimated claim exceeded the net benefit available to the applicant. The Fund required Oxfam to provide proof that summons had been issued by 23 May 2023 and to furnish quarterly reports on the progress of the proceedings thereafter. It also advised Oxfam that the position would be reconsidered if there was undue delay in pursuing the litigation.

[29] Oxfam was unable to provide summons by 23 May 2023 and sought an extension until 2 June 2023. Among the reasons given were the volume of documents which had to be considered, further engagement with the forensic investigators and the theft of files when an ARC Sakhile vehicle was hijacked. The applicant opposed the extension. The Fund nevertheless granted it.

[30] On 2 June 2023, Oxfam provided the Fund with an unissued draft summons. The summons was issued shortly thereafter and served on the applicant on 8 June 2023.

[31] Oxfam instituted proceedings in the Gauteng Local Division, Johannesburg. In its particulars of claim it alleged that the applicant had effected or facilitated a number of fictitious, unauthorised or unlawful payments during the course of his employment. The amount claimed exceeded the value of the pension benefit.

[32] The applicant delivered his plea on 8 August 2023 and denied the allegations upon which Oxfam sought to hold him liable. No replication was filed, and pleadings closed on 30 August 2023.

[33] While the civil action was pending, the applicant pursued his complaint against the Fund before the Pension Funds Adjudicator. The Adjudicator delivered her determination on 20 October 2023, dismissing the complaint. The Adjudicator concluded that the Fund had acted within the Act and its rules, that the applicant had been afforded an opportunity

to state his case, and that Oxfam had established a *prima facie* claim. Her determination also recorded that a criminal case had been reported against the applicant.

[34] The applicant separately challenged his dismissal at the CCMA. In a January 2024 arbitration award, the Commissioner upheld the dismissal. The Commissioner found, among other things, that the applicant had failed to enforce the financial controls for which he was responsible and had allowed fraudulent conduct by another employee to go unaddressed. The applicant disputes those findings and has taken the award on review to the Labour Court.

[35] Dissatisfied with the Adjudicator's determination, the applicant sought reconsideration from the Financial Services Tribunal. On 25 March 2024, he filed augmented grounds, expanding on the complaints he had raised against the Fund's decision and the Adjudicator's determination.

[36] He maintained that the Fund had acted before Oxfam's forensic investigation had been completed and before he had been given sufficient information to address the allegations against him. He also disputed the reference to a criminal case against him, relied upon his plea in answer to Oxfam's civil claim and complained about the progress of that action.

[37] Oxfam placed the CCMA award before the Tribunal and relied on the findings it contained concerning the applicant's conduct. The award had not formed part of the record before the Adjudicator.

[38] On 8 August 2024, the Tribunal dismissed the application for reconsideration. It found that the applicant had not addressed the substance of the allegations of misconduct against him and considered the CCMA award to provide *prima facie* support for Oxfam's case. It also rejected the applicant's complaint that Oxfam had delayed the prosecution of the civil action.

[39] Oxfam's civil action remained pending after the Tribunal delivered its ruling and, by the time this application was heard, had not reached trial readiness.

The applicant's grounds of review

[40] The applicant relies on the following grounds of review:

- 40.1. that the Fund was not entitled to retain his pension benefit in the absence of an anti-dissipation interdict;
- 40.2. that Oxfam had not established a *prima facie* case or a reasonable chance of success required by the Fund rules when the Fund made its decision;
- 40.3. that he was not given sufficient information to make meaningful representations before the Fund decided to retain his benefit;
- 40.4. that the Adjudicator proceeded on the incorrect factual premise that a criminal case had been opened against him under SAPS case number 352/3/2023;
- 40.5. that the Tribunal placed undue reliance on the CCMA award, which did not determine Oxfam's civil claim against him;
- 40.6. that Oxfam had not prosecuted its civil action without unreasonable delay as required by Rule 9.4.2.1.2, and that the Fund and the Tribunal failed to consider that complaint properly; and
- 40.7. that, viewed cumulatively, the Tribunal's ruling was procedurally unfair, failed to take relevant considerations into account, rested in part on a material factual error, and was not rationally connected to the information before it.

[41] Section 230(1)(b) of the Financial Sector Regulation Act⁷ expressly provides that reconsideration by the Tribunal constitutes an internal remedy for the purposes of section

⁷ Act 9 of 2017.

7(2) of the Promotion of Administrative Justice Act (“PAJA”).⁸ The applicant pursued that remedy before approaching this Court.

The review

Was an anti-dissipation interdict required?

[42] The applicant contends that Oxfam could not secure the retention of his pension benefit without first obtaining an anti-dissipation interdict. The submission is founded principally on Rule 9.4.2.1.3, with further reliance placed on authorities in which employers approached the High Court for interim relief pending the determination of their claims.

[43] Section 37D of the Act does not expressly confer a power to keep payment of a benefit in abeyance while an employer seeks to establish liability. In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*⁹, the Supreme Court of Appeal held that the power is implied because the protection afforded to an employer by section 37D could otherwise be defeated before judgment is obtained. Maya JA held:

“Such an interpretation would render the protection afforded to the employer by s 37D(1)(b) meaningless, a result which plainly cannot have been intended by the legislature.”

[44] Rule 9.4.2.1.3 provides a separate route for an employer to obtain an interdict against the Fund. It does not make an interdict a prerequisite whenever the trustees act under Rules 5.2 and 9.4.2.1.2. *Hansen + Genwest (Pty) Ltd v Corporate Selection Umbrella and Others*¹⁰ illustrates the availability of court protection; it does not convert that route into a jurisdictional condition for the Fund’s own decision.

[45] Oxfam was therefore entitled to approach the Fund directly, and an anti-dissipation interdict was not a prerequisite to the exercise of the Fund’s discretion.

⁸ Act 3 of 2000.

⁹ 2009 (4) SA 1 (SCA) at para 19.

¹⁰ [2023] ZAGPJHC 100.

Did Oxfam establish the required prima facie case?

[46] The applicant's pension benefit is protected by section 37A of the Act. Section 37D of the Act creates limited exceptions to that protection, one of which permits a deduction for loss caused to an employer by theft, dishonesty, fraud or misconduct where the member has admitted liability in writing or liability has been established by judgment.

[47] The power recognised in *Highveld Steel*¹¹ operates before either of those events has occurred. The Court therefore coupled the power with an express caution:

“Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim.”

[48] Section 13 makes the registered Rules binding upon the Fund, its members and participating employers. Rule 5.2 required the trustees, acting reasonably, to be satisfied that Oxfam had made out a *prima facie* case and that there was reason to believe that it had a reasonable chance of success in the proceedings. Rule 9.4.2 permitted the whole or part of the benefit to be retained while the claim was pursued.

[49] When the Fund made its decision on 2 May 2023, Oxfam relied primarily on the ARC Sakhile letter. The forensic investigation was still incomplete. The letter did not identify the individual payments subsequently pleaded in the civil action, attach the documents relied upon in support of those allegations, or quantify Oxfam's alleged loss.

[50] Neither section 37D of the Act nor the Fund Rules required a completed forensic report as a precondition to the Fund exercising its discretion. The absence of a final report nevertheless bore upon the weight and sufficiency of the information before the trustees. Although the *prima facie* enquiry is necessarily provisional, it must nevertheless be

¹¹ Above n5 at para 20.

supported by facts capable of sustaining the employer's claim; the seriousness of the allegations, without more, is insufficient.

[51] The further requirement that Oxfam have a reasonable chance of success required the trustees to consider the factual basis upon which Oxfam intended to establish the applicant's liability. In *Hansen + Genwest*,¹² Moultrie AJ observed:

“In considering whether the applicant has a reasonable chance of succeeding in the action against the third respondent, it is necessary to consider the evidence that it indicates it will adduce in support of its claim at the trial.”

[52] By the time the matter came before the Tribunal, Oxfam's case was no longer confined to the ARC Sakhile letter. Its particulars of claim identified the payments relied upon and the basis on which it sought to hold the applicant liable. The applicant had delivered a plea denying liability. The Tribunal also had before it the CCMA award, which contained findings concerning the applicant's responsibility for financial controls and his failure to address fraudulent conduct by another employee.

[53] The Tribunal addressed the applicant's contention that Oxfam had not established a *prima facie* case. It noted that the Adjudicator had considered the strength of Oxfam's claim, the pending civil proceedings and the applicant's response. It also had regard to the CCMA award, which it considered to provide, “at the very least”, *prima facie* evidence. By that stage, Oxfam's claim had been particularised in the pleadings and the Tribunal had before it a substantially fuller record than had been available to the Fund.

[54] The particulars of claim, read together with the CCMA award, provided a rational basis for the Tribunal to conclude that Oxfam had established the *prima facie* case contemplated in Rule 5.2 for purposes of section 37D. Whether Oxfam will ultimately establish the applicant's liability is a matter for determination in the civil action. I am therefore not persuaded that the Tribunal's conclusion on this issue is reviewable.

¹² Above n6 at para 44.

Procedural fairness

[55] The applicant complains about the procedure followed before the Fund made its decision. In particular, he contends that he was not furnished with sufficient information to enable him to make meaningful representations on the allegations relied upon by Oxfam in support of the retention of his pension benefit.

[56] On 3 April 2023, the Fund invited the applicant to explain why his benefit should not be retained. He responded on 6 April 2023, stating that he had not been interviewed by the forensic investigators, had received no forensic report implicating him and was unaware of any civil or criminal proceedings against him. After he again sought payment of the benefit on 13 April 2023, the Fund furnished him with the ARC Sakhile letter on 14 April 2023 and invited him to make further representations. His complaint is that the letter did not identify the transactions or payments subsequently relied upon by Oxfam in the civil action and therefore did not enable him to answer those allegations in any meaningful detail.

[57] Section 3 of PAJA requires administrative action which materially and adversely affects a person's rights or legitimate expectations to be procedurally fair. The content of that requirement is context-specific and depends, among other things, on the nature and consequences of the decision and the opportunity afforded to the affected person to make representations.

[58] When the Fund made its decision, it was not determining the applicant's civil liability to Oxfam. Its task was to decide whether, on the information then available, the requirements for retaining the benefit pending the institution of the contemplated civil proceedings had been met. The ARC Sakhile letter disclosed the nature of the allegations under investigation, its preliminary conclusion that the applicant had probably caused Oxfam financial loss, and the basis upon which Oxfam sought retention of the benefit.

[59] The applicant was therefore in a position to make representations on the proposed retention of his benefit and the prejudice it would cause, notwithstanding that the individual transactions later relied upon in the civil action had not yet been identified.

[60] The fact that the ARC Sakhile letter did not identify the transactions later pleaded in the civil action did not, in itself, render the procedure unfair. Neither the Act nor the Fund Rules required Oxfam, at that stage, to formulate its civil claim in final form. The relevant enquiry was whether the information before the Fund was sufficient to enable it to assess the strength of Oxfam's claim, balance the competing interests of the parties and determine whether Oxfam had a reasonable chance of succeeding in the contemplated proceedings.

[61] By the time the matter came before the Tribunal, the record had become considerably fuller. Oxfam had instituted the civil action and its particulars of claim identified the transactions upon which it sought to hold the applicant liable. The applicant had delivered a plea denying liability and, in his augmented grounds for reconsideration, expressly challenged the adequacy of the information furnished to him before the Fund made its decision. The CCMA award had also been placed before the Tribunal.

[62] The Tribunal found that the applicant had not made substantive submissions concerning the alleged misconduct and that he had been afforded an opportunity to state his case to the Fund. When the matter came before the Tribunal, however, Oxfam's case was no longer confined to the preliminary information contained in the ARC Sakhile letter. Oxfam's allegations had by then been particularised in its particulars of claim, the applicant had answered them in his plea, and his complaint concerning the adequacy of the information initially furnished to him was also before the Tribunal.

[63] The plea was the applicant's answer to Oxfam's pleaded claim and placed its allegations in dispute. The Tribunal was nevertheless required to determine, on the information before it as a whole, whether Oxfam had established the *prima facie* case required by the Fund Rules. In doing so, it was entitled to consider the plea together with Oxfam's particulars of claim, the applicant's augmented grounds and the CCMA award.

[64] The adequacy of the information initially furnished to the applicant was an issue before the Tribunal. By that stage, Oxfam's allegations had been particularised in its particulars of claim and the applicant had responded to them in his plea. The Tribunal

accordingly had before it both Oxfam's pleaded case and the applicant's answer when it determined the application for reconsideration.

[65] I am therefore not persuaded that the proceedings before the Tribunal were procedurally unfair, that the Tribunal failed to have regard to a relevant consideration, or that its conclusion lacked a rational connection to the information before it. The applicant has accordingly not established a ground of review under sections 6(2)(c), 6(2)(e)(iii) or 6(2)(f)(ii) of PAJA.

The SAPS case number and the CCMA award

[66] The Adjudicator recorded that a criminal case had been reported against the applicant. The applicant challenged that finding before the Tribunal. The record, however, shows that the case number related to the hijacking or theft of an ARC Sakhile vehicle during which investigation files were taken. Although ARC Sakhile had recommended that a criminal complaint be laid against the applicant, there is nothing in the record to show that a complaint against him was opened under that case number.

[67] The reference to a criminal case against the applicant was incorrect and was capable of lending additional support to Oxfam's allegations. The applicant raised the error before the Tribunal. Although the Tribunal did not expressly determine whether the SAPS case number concerned a complaint against him, its reasons do not indicate that the existence of such a criminal case formed part of the basis upon which it dismissed the application for reconsideration.

[68] The Tribunal did, however, rely on the CCMA award which Oxfam had placed before it. The award contained findings concerning the applicant's responsibility for financial controls and his failure to address fraudulent conduct by another employee. The fact that the award was under review did not render it irrelevant. Unless and until set aside, the award remained operative, and section 232 of the Financial Sector Regulation Act permitted the Tribunal to have regard to information relevant to the reconsideration.

[69] The CCMA proceedings and Oxfam's civil action concerned different issues. The Commissioner determined the fairness of the applicant's dismissal, whereas the civil

action concerns his alleged liability in respect of particular payments said to have been fictitious, unauthorised or unlawful. There was, however, an overlap in the conduct relied upon in the two proceedings, and the Commissioner's findings were relevant to aspects of the misconduct alleged by Oxfam.

[70] The Tribunal considered the CCMA award to provide, "at the very least", *prima facie* evidence. The findings in the award bore upon the allegations of misconduct advanced by Oxfam in the civil proceedings. The Tribunal was therefore entitled to take the award into account in determining whether Oxfam had established the *prima facie* case required by the Fund Rules.

[71] The applicant has established that the Adjudicator incorrectly recorded the SAPS case number as relating to a criminal complaint against him. He has not, however, shown that the error was material to the Tribunal's decision. The Tribunal's conclusion rested on other information properly before it, including Oxfam's pleaded claim and the CCMA award. The incorrect reference to the SAPS case number therefore does not provide a basis for setting aside the Tribunal's ruling.

Delay in the civil action

[72] The applicant also challenged the Tribunal's treatment of the delay in Oxfam's civil action. Rule 9.4.2.1.2 requires the trustees to be satisfied that the employer has instituted, or will institute, civil proceedings within a reasonable period and has not caused unreasonable delay in bringing those proceedings to finalisation. The applicant raised the delay in Oxfam's civil action before the Tribunal. He contended that the proceedings had not progressed with sufficient diligence to justify the continued retention of his pension benefit.

[73] When the Tribunal determined the reconsideration application in August 2024, the civil action had been pending for approximately fourteen months. The applicant had delivered his plea in August 2023 and the pace at which the proceedings were being pursued formed part of his augmented grounds for reconsideration. The Tribunal addressed the complaint in paragraph 35 of its ruling:

“As far as dilatory conduct of the Third Respondent in pursuing the lawsuit against him is concerned, the complaint lacks merit if regard is had to the chronology set out earlier, the irreparable harm that he claims he will suffer if his withdrawal benefit is withheld must be weighed against the harm that the employer will suffer, in the absence of evidence to discharge the prima facie case.”

[74] In weighing the prejudice asserted by the applicant against that which Oxfam would suffer if the benefit were paid while its claim remained unresolved, the Tribunal had regard to the history of the proceedings. The fact that the action had not been finalised by August 2024 did not, without more, establish that Oxfam had caused unreasonable delay in bringing it to finalisation.

[75] In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*, the Supreme Court of Appeal recognised the prejudice which may be suffered by a member whose pension benefit is retained while an employer pursues proceedings against him. At paragraph 20 the Court held:

“Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer’s claim. They may also impose conditions on employees to do justice to the case.”

[76] The same considerations inform the assessment of delay. As the proceedings continue, the Fund must remain attentive to the prejudice suffered by the member and the employer’s interest in preserving the benefit. The passage of time is relevant, but not decisive. The question is whether, having regard to the progress of the proceedings and the circumstances prevailing at the time, the employer has caused unreasonable delay in bringing them to finalisation.

[77] On the information before the Tribunal in August 2024, I am not persuaded that its rejection of the complaint of unreasonable delay was irrational, unreasonable or reached without proper regard to the relevant considerations. The applicant has therefore not established a reviewable error on this ground.

The subsequent delay and the Fund's continuing obligation

[78] By the time this application was heard on 4 June 2026, the circumstances had changed considerably. Almost three years had elapsed since Oxfam instituted the civil action. The Court was informed that the proceedings remained at the discovery stage, that there had been engagement under Rule 41A and that the matter had not reached trial readiness. Throughout that period the applicant's pension benefit remained unpaid.

[79] Rule 9.4.2.1.2 does not only require the employer to institute proceedings within a reasonable period. It also requires that the employer has not caused unreasonable delay in bringing those proceedings to finalisation. The continued retention of the benefit depended on the requirements of Rule 9.4.2.1.2 remaining satisfied. Whether that remained so had to be assessed in light of the subsequent progress of the civil action and any unreasonable delay in bringing it to finalisation.

[80] The Fund's decision of 2 May 2023 recognised that the enquiry would continue after the institution of proceedings. Oxfam was required to provide quarterly progress reports and the Fund recorded that it would reconsider its decision if Oxfam unduly delayed the proceedings. The issue was therefore not concluded once summons had been issued.

[81] In *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane NO and Others*¹³, the Court recognised the same principle. At paragraph 43 it held:

"Moreover, it is a well-established principle that the employer cannot be allowed to withhold the benefit indefinitely. Should the employer's liability not be determined within a reasonable period, the Fund is not entitled to withhold the benefits."

[82] The Court went on to require the Fund to investigate whether there had been unreasonable delay in bringing the proceedings to finalisation. The Fund's responsibility therefore continues for as long as the civil proceedings provide the basis upon which the benefit remains unpaid.

¹³ [2021] ZAGPPHC 773 paras 43 and 47.

[83] A delay which was not unreasonable in August 2024 may become unreasonable with the further passage of time and the subsequent course of the proceedings. The continued retention of the benefit therefore remained dependent on the requirements of Rule 9.4.2.1.2 continuing to be satisfied.

[84] The question of delay was raised in the applicant's complaint before the Tribunal and again in the founding papers before this Court. Oxfam engaged the issue and denied that it had caused unreasonable delay. The issue remained live throughout the proceedings and was again addressed at the hearing. The factual and legal basis for the Fund's continuing obligation under Rule 9.4.2.1.2 was therefore fully ventilated.

[85] The dismissal of the review means only that no basis has been established for setting aside the Tribunal's ruling of 8 August 2024. It does not determine whether the continued retention of the applicant's benefit remains justified in light of what has occurred since then.

[86] This Court nevertheless retains the power to grant relief appropriate to the circumstances now before it. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*¹⁴, the Constitutional Court held that the interpretation and application of PAJA constitute a constitutional matter because PAJA gives effect to the right to administrative action protected by section 33 of the Constitution.

[87] Section 172(1)(b) of the Constitution empowers a court deciding a constitutional matter to make an order that is just and equitable. In *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*¹⁵, the Constitutional Court explained at paragraph 96 that the enquiry is whether "*considerations of justice and equity in a particular case dictate that the order be made*". At paragraph 97 the Court made clear that this power is not confined to cases in which a declaration of invalidity has been made.

[88] Further or alternative relief may be granted where the factual basis for it is apparent from the papers and the affected parties have had a proper opportunity to address it. In

¹⁴ 2004 (4) SA 490 (CC) at para 25.

¹⁵ 2010 (2) SA 415 (CC) at paras 96–97.

*Godloza and Another v S*¹⁶, the Constitutional Court reaffirmed that principle. The prayer does not create a substantive power to grant relief, but it permits relief in a form different from that specifically formulated in the notice of motion where the case made and the issues ventilated justify it.

[89] The delay in the civil action and the Fund's responsibility to monitor its progress formed part of the dispute throughout. The issue was raised before the Tribunal, in the founding papers before this Court, engaged by Oxfam in answer, and addressed during the hearing. The relief contemplated does not determine that Oxfam has caused unreasonable delay or direct payment of the benefit. It requires the Fund to consider, in light of the circumstances as they now stand, whether the requirements for continued retention remain satisfied.

[90] The enquiry requires consideration of the progress of the civil action since August 2024, the reasons for the periods which have elapsed and any representations the applicant and Oxfam may wish to make. Those matters fall to the Fund for determination in the first instance, rather than to this Court.

[91] In the circumstances, it is just and equitable that the Fund now determine whether Oxfam has caused unreasonable delay in bringing the civil proceedings to finalisation and whether the requirements of Rule 9.4.2.1.2 for the continued retention of the applicant's pension benefit remain satisfied.

Costs

[92] The applicant has not established a basis for setting aside the Tribunal's ruling. The Court has, however, concluded that the Fund should consider whether, in light of the subsequent progress of the civil proceedings, the requirements for the continued retention of the applicant's pension benefit remain satisfied.

[93] The Tribunal, the Adjudicator and the Fund abided the decision of the Court. Oxfam opposed the application and was entitled to do so. Having regard to the outcome of the

¹⁶ 2026 (1) SACR 113 (CC) at para 109.

review and the further relief granted, I consider it appropriate that each party bear its own costs.

Order

[94] The following order is made:

1. The period prescribed in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 is extended, in terms of section 9, to 5 February 2025.
2. The application to review and set aside the ruling of the Financial Services Tribunal dated 8 August 2024 is dismissed.
3. The third respondent is directed, within 30 days of this order and after affording the applicant and the fourth respondent a reasonable opportunity to make representations, to determine whether the fourth respondent has caused unreasonable delay in bringing the civil proceedings under case number 2023-053228 to finalisation and whether the requirements of Rule 9.4.2.1.2 for the continued retention of the applicant's pension benefit remain satisfied.
4. Each party is to bear its own costs.



SEKWAKWENG AJ

Acting Judge of the High Court

Pretoria

Delivered: This judgment was prepared and authored by the Judge whose name is reflected herein and is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the date reflected above.

Date of hearing:

4 June 2026

Date of judgment:	28 August 2026
For the Applicant:	Adv L Phaladi Instructed by Schröter Inc. Attorneys
For the Fourth Respondent:	Adv M Phukubje Instructed by Phukubje Pierce Masithela Attorneys Inc.
First and Second Respondents:	No Appearance
Third Respondent:	No Appearance