



NBFIT RULINGS

2023 – 2024

A SUMMARY



Introduction

The Non-Bank Financial Institutions Tribunal (NBFIT), established under the Non-Bank Financial Institutions Regulatory Authority Act (CAP 46:08), commenced its operations in October 2022. As a statutory body, the Tribunal is vested with the authority to review decisions made by the Non-Bank Financial Institutions Regulatory Authority (NBFIRA), particularly in matters concerning financial services law. Its jurisdiction encompasses disputes involving pension funds, insurance companies, and a broad spectrum of other non-bank financial institutions.

Although still in its formative years, the NBFIT has already played a pivotal role in shaping the interpretation and application of Botswana's financial services laws. Its decisions often address novel and complex legal questions, producing rulings of considerable significance to both the general public and institutional stakeholders engaged in the financial services sector.

In recognition of the NBFIT's growing impact, Minchin & Kelly (Botswana) has prepared this summary report, compiling notable NBFIT rulings delivered between 2023 and 2024. This initiative reflects our unwavering commitment to excellence in legal research and advocacy, our collaborative approach to advancing access to justice and regulatory clarity, and our role in supporting clients and industry participants as they navigate an evolving legal landscape.

Our approach is both bold and proactive, offering this resource not merely as a law firm, but as an engaged contributor to the broader financial services ecosystem. Through these summaries, we aim to clarify the NBFIT's decisions, encourage informed discourse, and foster a deeper understanding of Botswana's financial services law.

Disclaimer

This summary of rulings has been prepared by Minchin & Kelly (Botswana) based on copies of the decisions delivered by the NBFIT. While every effort has been made to ensure the accuracy of the summary, we do not guarantee the correctness or completeness of any of the rulings or their interpretations. This document is intended for informational purposes only and does not constitute legal advice. We accept no responsibility or liability for any loss or damage of whatsoever nature and howsoever caused that may arise from any reliance placed on this summary or its contents.





TABLE OF CONTENTS

Part I – Pension Law Matters

1. Pelotshweu Modimopelo v Non-Bank Financial Institutions Regulatory Authority
(Annuity policy; pension encashment; Retirement Funds Act 2022; deferred member status)
2. Judith Gobodiwang v Non-Bank Financial Institutions Regulatory Authority
(Review determination; pension benefit; one-third commutation; ill health; statutory limits)
3. Adam Senyatsi Motseko v Non-Bank Financial Institutions Regulatory Authority
(Retirement benefits; encashment of pension; medical hardship; statutory restrictions)
4. Peggy Tsholofelo Mmopele v Non-Bank Financial Institutions Regulatory Authority
(Pension fund misstatement; negligent misrepresentation; causation; loss assessment)
5. Monthusi Debele v Non-Bank Financial Institutions Regulatory Authority & Alexander Forbes Financial Services Botswana
(Annuity policy; retrospective application of Retirement Funds Act 2022; lump sum request)
6. Tshegofatso Kgabanyane v Non-Bank Financial Institutions Regulatory Authority & First National Bank Botswana Pension Fund
(Urgent application; mortgage loan arrears; interpretation of section 52; housing foreclosure)
7. Mpuisang Kombani v Non-Bank Financial Institutions Regulatory Authority & Alexander Forbes Financial Services Botswana
(Retirement annuity; lump sum denial; irrevocable purchase; non-retrospective application)
8. Oarabile Mathaba v Non-Bank Financial Institutions Regulatory Authority & Bona Life Insurance Proprietary Limited
(Pension annuity; commutation denial; default on personal loan; applicability of section 52)

Part II – Insurance Law Matters

9. Botswana Insurance Company v Non-Bank Financial Institutions Regulatory Authority & ReseGoetse Pheresi
(Insurance repudiation; exclusion clause interpretation; breath specimen; policyholder protection)
 10. Hollard Insurance Company Of Botswana v Non-Bank Financial Institutions Regulatory Authority, Tswana Link (Pty) Ltd, & Complete Insurance Brokers
(Insurance repudiation; premium payment to broker; statutory deeming)
- 

PELOTSHWEU MODIMOPELO v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY

Date of Delivery

25 April 2023

Key Words

Annuity policy; pension encashment; Retirement Funds Act 2022; BTCL Pension Fund; deferred member; statutory interpretation; annuity contract.

Headnote

The Applicant sought to encash the balance of his pension which had been used to purchase an annuity from Botswana Life Insurance Limited. He argued that under the Retirement Funds Act, 2022, as a deferred member, he should be allowed to use his pension to settle personal loans and maintain his child. The Tribunal held that he ceased to be a deferred member upon retiring and signing the annuity contract. The Fund and Administrator had discharged their obligations and the law did not authorize the Tribunal to cancel annuities. The application was dismissed.

Summary of Facts

Modimopelo retired from Botswana Telecommunications Corporation Limited (BTCL) and received one-third of his pension as a lump sum. The remainder was used to purchase an annuity with Botswana Life Insurance Limited, paying him P1,356.81 monthly.

Facing arrears on a loan with Absa Botswana and being blacklisted, he applied to NBFIRA to encash his remaining pension benefit in a lump sum. He claimed he remained a deferred member because he was no longer contributing to the Fund and

believed he qualified under section 52 of the Retirement Funds Act, 2022.

NBFIRA denied the request, citing the irrevocable nature of annuity policies and the legal inapplicability of the 2022 Act to already-retired members with existing annuity contracts.

Tribunal's Analysis and Findings

Although Modimopelo claimed to be a deferred member, the Tribunal held he had already retired and was therefore a retired member, not entitled to rely on section 52 of the 2022 Act. Upon retirement and the signing of an annuity contract with a registered insurer, Modimopelo ceased to be a member of the BTCL Pension Fund. Rule 5.3.2 of the BTCL Fund Rules stipulates that once an annuity is purchased, the Fund and its Administrator have no further obligations.

The Tribunal confirmed that under both the 2014 and 2022 legislation, annuity contracts are irrevocable and enforceable. The law permits only limited commutation where the annual benefit is below P5,000. Modimopelo's annuity exceeded this amount. No statutory power exists to allow the Tribunal to cancel annuity agreements even for humanitarian reasons such as debt or family hardship.

The Interpretation Act prohibits retrospective application unless clearly stated. The 2022 Act did not apply to Modimopelo's case as his retirement and annuity purchase occurred before its enactment.

Operative Order

The application was dismissed.

JUDITH GOBODIWANG v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY

Date of Delivery

25 April 2023

Key Words

Review determination under Section 51 of the Non-Bank Financial Institutions Regulatory Authority Act 2016 and Regulations 12 & 27 of the Tribunal Regulations; pension benefit; retirement funds; one-third commutation; ill health; Income Tax Act; fund rules; lump sum denial; statutory interpretation; hardship claim.

Headnote

Gobodiwang, a retired public school teacher, filed a review application challenging NBFIRA's decision not to approve full withdrawal of her retirement benefits. She had previously received one-third of her benefit and requested the remaining two-thirds in lump sum, citing severe ill health, the need for surgery, and housing needs. NBFIRA declined the request, citing legal constraints under the Income Tax Act and Superannuation Fund Rules.

The Tribunal confirmed NBFIRA's decision. It held that the governing legislation only permits one-third commutation of pension benefits, with the remainder to be paid as an annuity unless exceptional approval is granted by the tax authority, not by NBFIRA. The Tribunal acknowledged Gobodiwang's plight but found it had no legal basis to authorize payment beyond what was permitted by law.

Summary of Facts

Gobodiwang retired from the public service on 31 December 2021 and received one-third of her retirement benefit. She later sought release of the remaining two-thirds as a lump sum, citing deteriorating health and the need for surgery, as well as financial hardship including debts and obligations.

Her appeal to NBFIRA was rejected on 31 October 2022. She filed a review with the Tribunal on 14 November 2022. NBFIRA submitted that it had no legal authority to approve further withdrawal, citing the Income Tax Act, the Retirement Funds Act, and the Botswana Public Officers Pension Fund Rules.

At the hearing, Gobodiwang reiterated her circumstances, pleading that the Tribunal exercise discretion and authorise the payout. She explained she needed the funds to pay for private medical care due to delays at Princess Marina Hospital and to build herself a home. NBFIRA maintained that the law did not allow for such discretion.

Tribunal's Analysis and Findings

The Tribunal examined the applicable legislation: Retirement Funds Act (2014) and Income Tax (Superannuation Funds) Regulations, noting that these were the governing instruments at the time of retirement.

Section 82(3) of the Insurance Industry Act and the Fund Rules explicitly limit lump sum payments to one-third of the pension benefit. The balance of the benefit must be used to purchase a pension annuity for life from an authorised insurer. This rule is mandatory, non-negotiable, and non-assignable.

The Tribunal found that no legal exception exists for payment based on humanitarian grounds. The Tribunal rejected arguments that a doctor's verbal advice or Gobodiwang's hardship justified overriding these statutory rules.

Operative Order

The application was dismissed.

ADAM SENYATSI MOTSEKO v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY

Date of Delivery

25 April 2023

Key Words

Retirement benefits, Pension fund, Botswana Public Officers Pension Fund, Encasement of pension, Income Tax (Superannuation Funds) Regulations, Legal entitlement, Discretionary powers, Medical hardship.

Headnote

Motseko challenged the refusal by NBFIRA to authorise encashment of the remaining two-thirds of his pension in a lump sum, citing ill health, financial obligations, and familial responsibilities. The Tribunal considered the governing legislation, including the Retirement Funds Act, 2014, and the Income Tax (Superannuation) Regulations, and found that the request did not meet the statutory requirements for such withdrawals. Motseko had already received a one-third lump sum as provided by law. The application was therefore dismissed.

Summary of Facts

Motseko, a former Lance Corporal in the Botswana Defence Force, retired on 31 December 2021. His retirement followed injuries from a car accident and age-related retirement. He had been paid a one-third lump sum from his pension (P236,283.95) and sought a ruling to allow withdrawal of the remaining two-thirds, citing the need to cover medical expenses, personal loans and maintenance for four minor children.

NBFIRA opposed the application, arguing that under the prevailing legislation and fund rules (including the Income Tax Superannuation Regulations, Retirement Funds Act 2014, and BPOPF Rules) no legal provision allowed for further lump sum withdrawal. Regulations permit full encashment only under specific conditions

which did not apply in this case.

The Tribunal reviewed arguments from both sides, including submissions on whether the 2022 amendment regulations applied (they did not, as Motseko retired under the 2014 framework). It held that Motseko had no entitlement to the additional funds in lump sum form and that the rules mandatorily convert the two-thirds balance into an annuity, which is non-commutable, non-assignable, and must be paid out over the pensioner's lifetime.

Tribunal's Analysis and Findings

The Tribunal held that the applicable laws only allow for the commutation of one-third of retirement benefits into a lump sum, with the remaining two-thirds mandatorily applied toward the purchase of an annuity from a registered insurer.

The Tribunal found that there was no legal exception permitting encashment of the remaining balance based on humanitarian or medical grounds. Motseko's personal circumstances, including health issues, outstanding debts, and obligations to maintain minor children, while sympathetic, did not constitute grounds for overriding clear statutory provisions.

The Tribunal rejected the argument that the 2022 legislative amendments (which offer broader withdrawal options) applied, since Motseko had retired under the 2014 framework.

The Tribunal concluded that neither it nor NBFIRA had the legal authority to authorize a lump sum withdrawal beyond the one-third permitted.

Operative Order

The application was dismissed.

PEGGY TSHOLOFELO MMOPELE v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY

Date of Deliver

23 May 2023

Key Words

Pension fund misstatement; early retirement; negligent misrepresentation; verbal assurance; statutory duty of Fund Administrator; benefit statement; condonation; Retirement Funds Act 2014; causation; loss.

Headnote

Mmopele, a retired Senior Communications Officer with the Botswana Defence Force (BDF), challenged the accuracy and legality of pension benefit statements provided by the Fund Administrator before her retirement on 31 March 2016. She claimed that the verbal and written advice misled her into retiring early based on an overstated pension value. The Tribunal acknowledged errors in the benefit statements and criticized both the Fund and its Administrator for failing in their statutory duty to communicate correct and complete information. However, the Tribunal held that Mmopele did not prove causation and that the misstatements directly caused her to suffer financial loss. The review was thus dismissed.

Summary of Facts

Mmopele was employed by the BDF from 1982 until her early retirement in March 2016. She alleged that multiple verbal assurances and a benefit statement issued in April 2016 indicated her fund credit exceeded P4 million. However, a later benefit statement issued in January 2016 and relied upon by NBFIRA quoted a much lower figure of P2,325,363.66. She claimed she opted for early retirement based on the inflated value repeatedly communicated by the Fund Administrator in 2015 and early 2016.

Her attorneys initiated action in 2017, which was eventually struck off the High Court roll in March 2020. She filed the present review in October 2022, over six years after the original decision, therefore requiring condonation. The Tribunal examined her reasons for the delay and accepted that she had attempted to pursue her matter through various legal and government channels without success, though it still noted the delay was excessive. Condonation was granted.

Tribunal's Analysis and Findings

The Tribunal acknowledged the delay but accepted the explanation due to Mmopele's efforts to resolve the issue through other channels, including the Ministry of Finance and the High Court. It granted Mmopele condonation.

The Tribunal held that the Fund and Administrator did issue conflicting benefit statements, which were misleading. Verbal communications provided by the Fund Administrator also lacked completeness and clarity. However, these errors did not meet the standard required to establish a legal claim unless causation and loss were also proven.

The Tribunal concluded that Mmopele had not proven she suffered actual financial loss directly caused by the benefit misstatements. By the time she received the overstated benefit statement, her retirement notice had already been accepted and was irreversible. It also found that earlier verbal assurances were insufficient to support a causation link.

Operative Order+

The application was dismissed.

MONTHUSI DEBELE v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY (NBFIRA) AND ALEXANDER FORBES FINANCIAL SERVICES BOTSWANA

Date of Delivery

25 July 2023

Key Words

Retirement benefits; annuity policy; commutation; retrospective application; Retirement Funds Act 2014; Retirement Funds Act 2022; pension threshold; statutory interpretation; circular 6 of 2022; deferred pension; lump sum.

Headnote

Debele retired under the Retirement Funds Act, 2014, and received one-third of his pension as a lump sum. He later sought to encash the remaining two-thirds as a lump sum rather than purchase an annuity, citing personal financial needs and the fact that the 2022 law raised the annuity exemption threshold. NBFIRA and Alexander Forbes rejected the request, pointing to the governing legislation at the time of his retirement. The Tribunal held that the 2022 legislation does not apply retrospectively to individuals who had already retired under the old law but had not completed their annuity procurement. The application was dismissed with no order as to costs.

Summary of Facts

Debele was a deferred pension member of both Minet Botswana and Alexander Forbes Retirement Funds following his retrenchments in 2014 and 2020 respectively. In 2021, while unemployed, he opted for early retirement and received one-third of his benefit from Alexander Forbes as a lump sum. He requested the

remaining two-thirds also be paid out in cash, arguing that the annuity options offered an inadequate monthly return which was not sufficient to sustain his livelihood or complete a residential project.

His request was rejected based on the Retirement Funds Act, 2014 and the Income Tax (Superannuation Funds) Regulations, 2001, which mandated purchase of an annuity where the annual pension exceeds P5,000. Debele challenged this, arguing that the new Retirement Funds Act, 2022 (effective 14 October 2022) should apply since he had not yet finalized his annuity procurement and the new law raised the threshold to P20,000.

Tribunal's Analysis and Findings

The Tribunal held that Debele's retirement was governed by the 2014 Act as he had drawn one-third of his benefit in 2021.

The Interpretation Act was cited to confirm that legislation does not operate retrospectively unless expressly stated.

The Tribunal rejected the argument that the 2022 Act applied merely because the annuity process had not yet been completed by the new law's commencement. It reaffirmed that the law applicable at the time of retirement governs the process, including the annuity requirement.

The Tribunal emphasized that Debele's delay in procuring the annuity did not exempt him from the obligation to do so under the old law.

Operative Order

The application was dismissed.

TSHEGOFATSO KGABANYANE v NON-BANK FINANCIAL INSTITUTIONS REGULATOR AUTHORITY AND FIRST NATIONAL BANK BOTSWANA PENSION FUND

Date of Delivery
4 August 2023

Key Words

Urgency; deferred retirement benefits; mortgage loan arrears; default; Retirement Funds Act 2022; section 52(1)[©] and (d); interpretation of “amount owed”; execution of judgment; fund credit; housing foreclosure.

Headnote

Kgabanyane sought urgent relief from the Tribunal to release part of her deferred pension to settle mortgage arrears of P157,795.61. The Fund declined her request, arguing that her accrued benefits of P235,535.05 were insufficient to cover the full mortgage debt of P1,344,334.19. NBFIRA upheld this decision based on the provisions of section 52 of the Retirement Funds Act, 2022.

Kgabanyane challenged this interpretation, arguing that only the arrears needed to be covered to prevent her home from being executed. The Tribunal disagreed, finding that the law required full coverage of the total mortgage loan, including principal and arrears. Given that FNBB had already obtained judgment and attached the property, the Tribunal concluded the matter was properly decided by NBFIRA.

Summary of Facts

Kgabanyane was retrenched from FNBB in September 2021 and became a deferred member of FNBB's pension fund. Owing to unemployment, she defaulted on a mortgage loan with FNBB, leading to arrears of P157,795.61 and a total debt of P1,344,334.19.

On 20 January 2023 she requested the release of a portion of her pension to cover the arrears and

halt foreclosure. The Fund declined, citing insufficient accrued benefits. NBFIRA agreed, stating that the law required pension benefits to cover the total mortgage loan, not just arrears.

Kgabanyane filed an urgent application before the Tribunal, arguing that the law only required arrears to be covered. She relied on section 52(1)[©], which allows for release of deferred benefits in cases of unemployment and default. She also presented a payment plan dated 8 February 2023 wherein FNBB agreed to suspend execution if arrears were paid

However, FNBB had already obtained a default judgment on 21 March 2023, and a Writ of Execution was issued on 20 May 2023, attaching her home.

Tribunal's Analysis and Findings

The Tribunal found the matter urgent due to the imminent loss of Kgabanyane's only home, but this did not affect the outcome.

The Tribunal considered both section 52(1)[©] and (d)(ii)(aa) of the Retirement Funds Act. It held that:

- Section 52(1)[©] allows deductions for other loans under specific conditions, but does not override section 52(1)(d).
- Section 52(1)(d) applies specifically to mortgage loans and requires that the total amount owed, not just arrears, be covered by the pension benefits.

The Tribunal held that both NBFIRA and the Fund had applied the law correctly and could not authorize partial loan payments.

Operative Order

The application was dismissed.

MPUISANG KOMBANI v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY AND ALEXANDER FORBES FINANCIAL SERVICES BOTSWANA

Date of Delivery

13 October 2023

Key Words

Retirement annuity; lump sum denial; Retirement Funds Act 2014; non-retrospective application; annuity contract; cancellation prohibition; section 13(c) Interpretation Act; irrevocable purchase; financial hardship.

Headnote

Kombani, a former employee of Botswana Accountancy College, applied to encash his two-thirds retirement benefit after already purchasing an annuity through Alexander Forbes with BLIL. He argued that the new Retirement Funds Act of 2022, with a higher annuitization threshold, should apply and permit full lump sum access. He also contended he never intended for the funds to be invested in an annuity and sought to redirect the money toward agricultural projects.

The Tribunal found that the Retirement Funds Act, 2014 governed his retirement since it occurred in September 2021. It held that the annuity policy had been validly executed and was now binding. The Tribunal stressed that the annuity contract, once concluded, could not be cancelled under the applicable law or fund rules.

Summary of Facts

Kombani retired from Botswana Accountancy College on 30 September 2021. He received one-third of his retirement benefit and later instructed Alexander Forbes to transfer the remainder to a personal ABSA investment account. However, he discovered that the two-thirds portion had instead been used to purchase an annuity policy from BLIL. He denied authorizing this and claimed he had no intention to invest in BLIL.

Alexander Forbes responded that a Retirement Consultant had presented them with annuity options, and

based on the existing statutory framework and his retirement sum, the annuity was the only viable choice. Documentation showed that Kombani completed and signed the application and annuity contract on 1 December 2021, listing his beneficiaries.

Kombani appealed to NBFIRA and then to the Tribunal, requesting cancellation of the annuity and a lump sum payout. He cited hardship, the inadequacy of the monthly pension, and plans to use the funds to purchase a truck and engage in livestock farming. He argued that under the 2022 Act's higher threshold (P20,000), he now qualified for full encashment since he had not yet drawn monthly payments.

Tribunal's Analysis and Findings

The Tribunal held that the 2014 Act applied to Kombani, not the 2022 Act, as his retirement and annuity contract occurred before the new law came into effect on 14 October 2022.

Section 13(c) of the Interpretation Act protects rights and obligations accrued under repealed legislation, preventing retrospective application. The annuity policy contract signed with BLIL on 1 December 2021 was legally binding. The Tribunal found no evidence that it was entered into unlawfully or without Kombani's consent.

The Tribunal clarified that pension is payable for life, and once the annuity is established, there is no "remaining" two-thirds benefit to be claimed. The law does not permit cancellation of the annuity, even if financial hardship or better investment opportunities arise. Any such cancellation would require statutory authority, which the Tribunal does not possess.

Operative Order

The application was dismissed.

OARABILE MATHABA v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY AND BONA LIFE INSURANCE PROPRIETARY LIMITED

Date of Delivery

23 January 2024

Key Words

Pension annuity; commutation; Retirement Funds Act 2022; default on personal loan; annuity policy; deferred member; lump sum denial; statutory interpretation; long-term insurer; tribunal jurisdiction.

Headnote

Every decision made by NBFIRA in terms of the relevant financial services laws may be subject to review by the Tribunal. The Tribunal may confirm, amend or revoke NBFIRA's decision.

Mathaba sought to overturn decisions by Bona Life Insurance and NBFIRA denying her request to use her monthly annuity payments to settle a P282,890.37 personal loan with Access Bank Botswana. She argued that section 52(1)(e) of the Retirement Funds Act, 2022 entitled her to such a deduction in the event of default. The Tribunal found that the law only applies to deferred fund members, not pensioners already in receipt of annuities. It also found that the annuity policy she entered into in 2017 could not be commuted, altered, or terminated prior to its expiration or her death. The review was dismissed.

Summary of Facts

Upon retiring from public service in 2016, Mathaba received one-third of her retirement benefit in cash. The balance, being below the annuity threshold was used to purchase an annuity policy with Bona Life Insurance on 11 July 2017. Under this policy, she received P8,178.00 monthly, with a 15-year guarantee.

Facing arrears on a personal loan from Access Bank, she requested in April 2023 that Bona Life release her annuity as a lump sum to settle the

debt. The insurer declined, citing legal restrictions. She appealed to NBFIRA, which also rejected the request on 13 June 2023. NBFIRA argued that:

- The law does not allow annuity commutation except upon the annuitant's death.
- Section 52(1)(e) only applies to deferred fund members.
- Mathaba was already an annuitant governed by a binding insurance contract under the Insurance Industry Act, 2015.

Mathaba then filed a review application before the Tribunal.

Tribunal's Analysis and Findings

The Tribunal affirmed that section 52(1)(e) of the Retirement Funds Act, 2022 applies only to deferred members of a fund, not to pensioners or annuitants such as Mathaba.

The Tribunal emphasized that Bona Life is a long-term insurer, not a licensed retirement fund, and thus cannot be compelled to act under provisions applicable to licensed funds. The annuity contract, as per its terms, only expires on the death of the annuitant or after the 15-year guarantee, whichever occurs later.

Regulation 28(1)(a) of the Retirement Fund Regulations (SI 38 of 2017) confirms that pension is payable for the life of the annuitant and cannot be varied mid-term. The Tribunal held that once an annuity is purchased, all obligations are transferred from the fund to the insurer, and Mathaba was no longer a fund member. Consequently, Mathaba had no legal recourse under the Retirement Funds Act to force a lump sum payout or annuity cancellation.

Operative Order

The application was dismissed.

BOTSWANA INSURANCE COMPANY v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY & RESEGOETSE PHERESI

Date of Delivery
23 May 2024

Key Words

Insurance law; repudiation; exclusion clause; breath specimen; interpretation of policy; failure to provide specimen; policyholder protection rules; tribunal review jurisdiction and powers; sufficiency of breathe specimen.

Headnote

BIC sought to overturn a directive by NBFIRA that it honour an insurance claim from a policyholder (Pheresi) whose claim was initially repudiated on grounds that he failed to provide a sufficient breath specimen for alcohol testing following a car accident. BIC relied on a clause of the motor vehicle insurance policy which excludes liability where the policyholder "fails to provide a breath specimen." The ordinary rules relating to the interpretation of a contract apply to the interpretation of a policy of insurance. The Tribunal found that the clause must therefore be interpreted according to its plain meaning and in line with the Policy Holder Protection Rules. Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted.

As Pheresi did in fact provide a breath specimen (albeit deemed insufficient by a machine), the exclusion clause did not apply. BIC's review application was dismissed.

On dealing with the extent of its powers, the Tribunal held that it is not restricted to the common law grounds of review. There are no limitations on the manner in which the Tribunal is empowered to review a decision placed before it.

Summary of Facts

Pheresi held a comprehensive motor vehicle insurance policy from BIC. On 1 September 2022 he was involved in an accident while driving his insured BMW vehicle. Following the accident, police charged him under the Road Traffic Act for

driving without due care and later for failing to provide sufficient breath specimens for alcohol analysis.

On 19 September 2022 Pheresi lodged an insurance claim with BIC for the repair/replacement of the vehicle. BIC repudiated the claim via a letter dated 23 November 2022, asserting that Pheresi had breached the policy by failing to provide a breath specimen to the police. This repudiation was based on clause 3.1 (1.2) of the policy, which excludes liability in such cases.

Pheresi contested the repudiation with NBFIRA. NBFIRA found in his favour and directed BIC to honour the claim. NBFIRA reasoned that although the breath specimen provided was insufficient for analysis, Pheresi had still complied with the request to provide a sample, as confirmed by the magistrate court judgment on 26 April 2023, which acquitted him of the offence due to lack of evidence of non-compliance.

BIC then applied to the Tribunal for a review, arguing that NBFIRA misinterpreted the exclusion clause and that failure includes insufficiency, thus entitling BIC to repudiate.

Tribunal's Analysis and Findings

The Tribunal emphasized that insurance contracts, particularly exclusion clauses, must be interpreted restrictively and in accordance with their plain and ordinary meaning. It held that providing a specimen, even if deemed insufficient by a breathalyser machine, was not equivalent to a "failure to provide" a specimen.

The Tribunal found BIC's reliance on the clause misplaced and unsupported by either the contract language or the principles of interpretation under the Policy Holder Protection Rules. It held that extending the definition of "failure" to include "insufficiency" would improperly broaden the exclusion and undermine consumer protection.

Operative Order

The application was dismissed.

HOLLARD INSURANCE COMPANY OF BOTSWANA v NON-BANK FINANCIAL INSTITUTIONS REGULATORY AUTHORITY, TSWANA LINK (PTY) LTD, AND COMPLETE INSURANCE BROKERS

Date of Delivery

24 June 2024

Key Words

Insurance repudiation; premium payment; insurance broker; section 82(3) Insurance Industry Act; statutory deeming; intermediary agreement; judicial review; broker-authorised collections; liability of insurer; premium remittance failure.

Headnote

Hollard repudiated Tswana Link's insurance claim on grounds that premiums had not been paid. Tswana Link complained to NBFIRA, which found in its favour, citing evidence that premiums were paid to an employee of Complete Insurance Brokers, the intermediary appointed by Hollard. Hollard challenged this decision, alleging that no payment was received. The Tribunal found that under section 82(3) of the Insurance Industry Act and the terms of the Intermediary Agreement, premiums paid to Complete (or its employee) were deemed received by Hollard. The Tribunal dismissed Hollard's review application and confirmed NBFIRA's directive.

Summary of Facts

Tswana Link (Pty) Ltd took out a motor insurance policy with Hollard through Complete Insurance Brokers. On 6 October 2022, Tswana Link lodged a claim following an accident involving its insured Toyota Hino truck. Hollard repudiated the claim on grounds that no premiums had been paid.

Tswana Link contested the repudiation before NBFIRA, arguing that premiums had been paid to

Complete Insurance Brokers, and specifically to its then-employee, Kitso Nkwe. NBFIRA found that payment had indeed been made and, relying on section 82(3) of the Insurance Industry Act, held that Hollard was liable.

Hollard filed a review application, disputing the sufficiency of evidence and arguing that premium payments were never remitted to it. It relied on contradictory statements from Complete, which both confirmed and denied receipt of premiums.

Tribunal's Analysis and Findings

The Tribunal emphasized that section 82(3) of the Insurance Industry Act deems payment to a broker (or their employee) as payment to the insurer, when the broker is authorised.

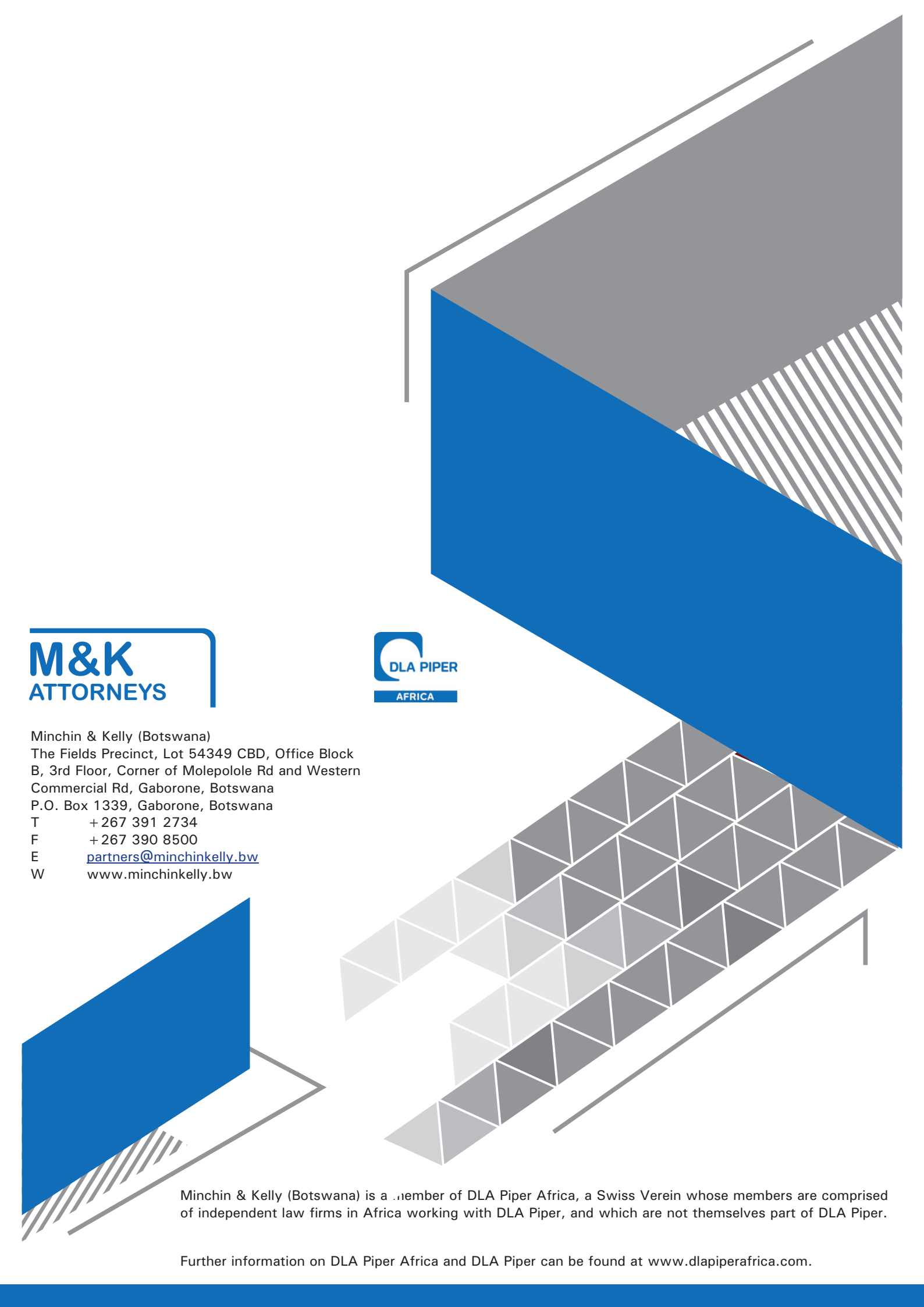
The Tribunal referenced the Intermediary Agreement between Hollard and Complete which explicitly permitted Complete to receive and deposit premiums on behalf of Hollard.

The Tribunal dismissed Hollard's reliance on Complete's conflicting statements, instead highlighting the undisputed fact that Kitso Nkwe, Complete's employee, received payments from Tswana Link. It held that this amounted to compliance with premium obligations and bound Hollard.

The Tribunal also stated that Tswana Link was not required to ensure that Complete remitted the premiums to Hollard. Failure of remittance is a matter between the insurer and broker.

Operative Order

The application was dismissed.



M&K ATTORNEYS

Minchin & Kelly (Botswana)
The Fields Precinct, Lot 54349 CBD, Office Block
B, 3rd Floor, Corner of Molepolole Rd and Western
Commercial Rd, Gaborone, Botswana
P.O. Box 1339, Gaborone, Botswana
T +267 391 2734
F +267 390 8500
E partners@minchinkelly.bw
W www.minchinkelly.bw



Minchin & Kelly (Botswana) is a member of DLA Piper Africa, a Swiss Verein whose members are comprised of independent law firms in Africa working with DLA Piper, and which are not themselves part of DLA Piper.

Further information on DLA Piper Africa and DLA Piper can be found at www.dlapiperafrica.com.