



The Quarterly DIGEST

www.pfa.org.za



INSIDE THIS ISSUE



FROM THE ADJUDICATOR'S DESK

As we close the last quarter of the 2022/2023 performance year and start a brand new performance year on 1 April 2023, one cannot help but acknowledge that its has been a demanding period. It appears as if complaint trends ... to **page 2**



OPFA JURISDICTION AND DIVORCE ORDERS

The Adjudicator is empowered to dispose of complaints as defined in the Pension Funds Act, 1956. The Adjudicator is a creature of statute and does not have jurisdiction to hear every ... to **page 3**



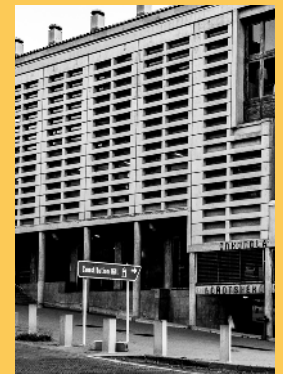
APPLICATION OF THE IN DUPLUM RULE TO ARREAR CONTRIBUTIONS

One of the biggest problems that the pension fund industry faces is the issue of the failure by some employers to comply with the provisions of section 13A of the ... to **page 5**



THE PAYMENT OF BENEFIT WHERE A MEMBER DIES OUT OF SERVICE

Section 37C of the Pension Funds Act 24 of 1956 ("the Act") governs the disposition of death benefits. It places a duty on the board to identify the beneficiaries of a deceased member ... to **page 7**



NOTE FROM A CASE OFFICER

I am a Case Officer at the Office of the Pension Funds Adjudicator ("OPFA"). My duties include assessment of complaints received by the office and ... to **page 9**

FROM THE ADJUDICATOR'S DESK

By: *Muvhango Lukhaimane (Pension Funds Adjudicator)*

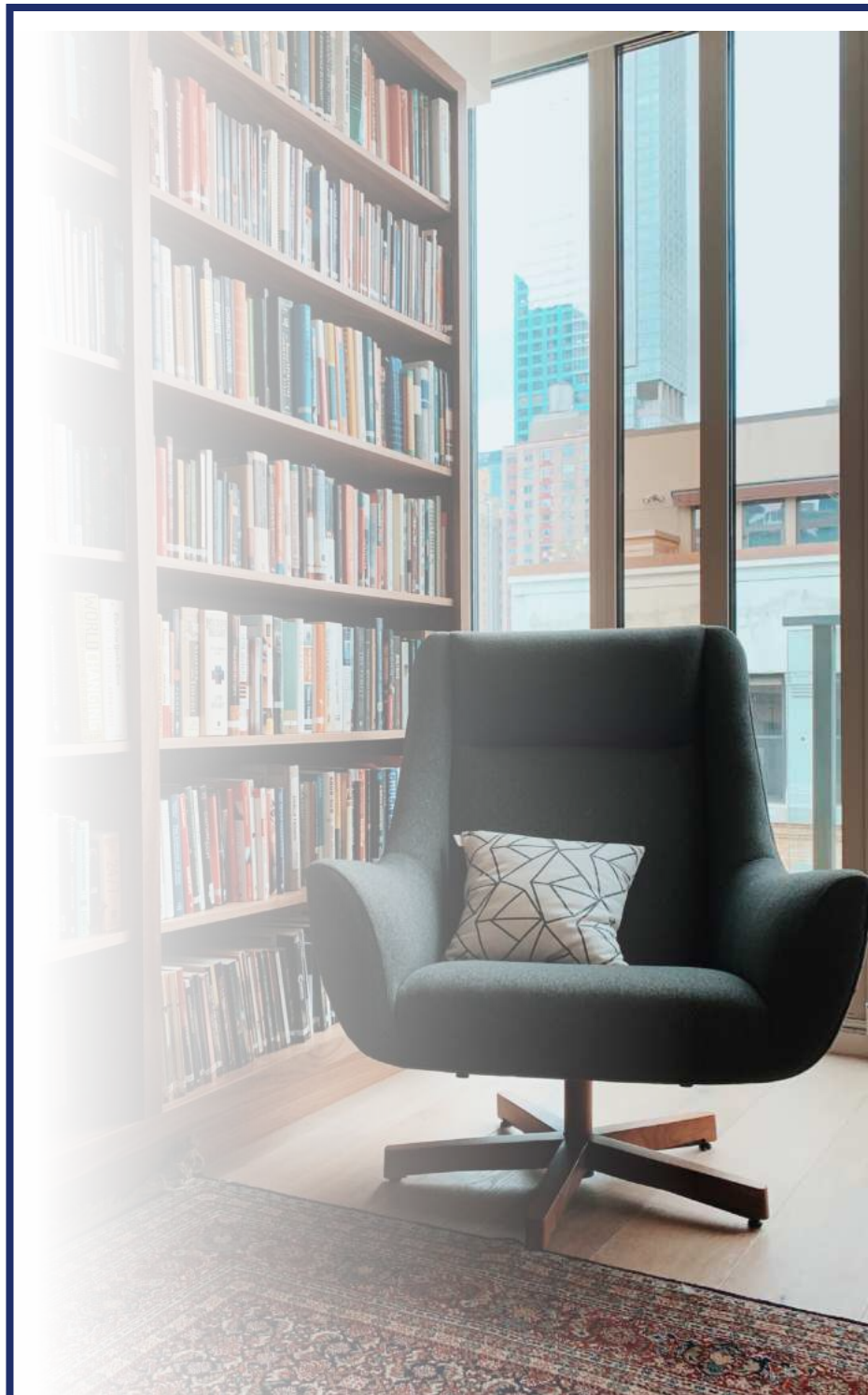


As we close the last quarter of the 2022/2023 performance year and start a brand new performance year on 1 April 2023, one cannot help but acknowledge that it has been a demanding period. It appears as if complaint trends have returned to pre-Covid levels with the Office of the Pension Funds Adjudicator (“OPFA”) having received 9 190 complaints for the year. 7 809 complaints were finalised with an increase in determinations of 13.36%.

A considerable amount of time was spent with stakeholders trying to understand their processes and explain our processes to ensure that responses are filed timeously. Parties are encouraged to make use of the early resolution process to resolve issues with complainants. This will go a long way in establishing much needed trust between funds/administrators/employers on the one hand and members on the other. A notable amount of matters would not have required formal determinations if only there was trust between the parties; sufficient for the member to accept an explanation from the fund/administrator/employer as valid.

Following the pronouncement by the Minister of Finance, indicating 1 April 2023 as the commencement date of the Financial Sector and Deposit Insurance Levies Act, No 11 of 2022 (“Levies Act”), and amongst others, section 237, 238, 241 to 249 of the Financial Sector Regulation Act, No 9 of 2017 (“FSR Act”), as well as amendments to sections 30R, 30S and 30T(1) of the Pension Funds Act, No 24 of 1956 (“the Act”). A key amendment was the change to the functionary of the accounting authority of the OPFA from the FSCA Commissioner to the Adjudicator. The OPFA and FSCA are busy developing transitional arrangements to facilitate implementation.

Thank you for the feedback you have provided on the newsletter – it is much appreciated. Enjoy this edition.



OPFA JURISDICTION AND DIVORCE ORDERS

By: Naheem Essop (Senior Legal Advisor)



The Adjudicator is empowered to dispose of complaints as defined in the Pension Funds Act, 1956. The Adjudicator is a creature of statute and does not have jurisdiction to hear every type of dispute relating to a retirement fund. For the Adjudicator to investigate a complaint, the grievance must satisfy the definition of “complaint” as set out in the Act and it must not be excluded from the jurisdiction of the Adjudicator by virtue of any other provision in the Act. Additionally, the Act provides that the Adjudicator shall dispose of complaints that are designated to her by the Ombud Council in terms of section 211 of the Financial Sector Regulation Act, 2017. If these requirements are not met, then an out-of-jurisdiction letter will be issued by the Office and the matter will be closed.

Section 1 of the Act defines “complaint” as follows:

“complaint” means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging:

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;*
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;*
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or*
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;*

but shall not include a complaint which does not relate to a specific complainant;

There are three parts to the definition. The first part requires that the complaint of the complainant must relate to either:

- the administration of a fund; or
- the investment of its funds; or
- the interpretation and application of its rules.

The use of the conjoin “or” means that to satisfy the first part of the definition, only one of the three requirements needs to be met. All three requirements do not need to be met. Conversely, if none of the three requirements are satisfied then the first part of the definition has not been met and the enquiry cannot proceed any further.

The question of what constitutes “the administration of a fund” often comes up. There is an incorrect view that anything contained in the administration agreement between the fund and the administrator constitutes administration. This cannot be correct. Administration has not been defined in the Act however section 13B(1) of the PF Act provides that *“No person shall administer on behalf of a pension fund the receipt of contributions or the disposition of benefits provided for in the rules of the fund, unless such person has been approved by the registrar and continuously complies with such conditions as may be prescribed.”* (added emphasis). It is therefore reasonable to conclude that, for the purposes of the Act, administration constitutes the receipt of contributions or the disposition of benefits provided for in the rules of the fund.

If one or more of the three requirements in the first part of the definition are met, then the second part of the definition must be considered. The second part of the definition requires that 1 of the 4 requirements set out in paragraphs (a) to (d) of the definition must be met. Again, note the use of the conjoin “or”.

OPFA JURISDICTION AND DIVORCE ORDERS (continued)

However, it should be noted that paragraph (c) of the second part of the definition provides for a dispute of fact or law that has arisen in relation to a fund, between the fund or any person and the complainant. The effect of this is that it is a catch-all provision which includes any type of dispute including the ones listed in (a), (b) and (d). Therefore, the second part of the definition should always be satisfied.

If the first and second part of the definition is satisfied, then the third and final part of the definition must be considered. This part excludes any complaint that does not relate to a specific complainant. The effect of the third part of the definition is to narrow the jurisdiction of the Adjudicator as an ombud that can only investigate a complaint where a person is aggrieved and is seeking some form of relief. The Adjudicator does not have wide powers to investigate an issue when there is no specific complainant – such a function would normally rest with the FSCA.

Divorce orders

Sometimes a complaint is received whereby it is alleged that a fund has not complied with a divorce order awarding a portion of the benefit to a non-member spouse. The enforcement of a court order does not relate the administration of a fund, the investment of its funds, or the interpretation and application of its rules. Therefore, it fails to meet the requirements of the first part of the definition. Furthermore, the Adjudicator cannot order a fund to do what it has already been ordered to do by the court itself. Neither is the Adjudicator empowered to amend or vary a court order in order to rectify any perceived defect. Such issues should be addressed with the court that issued the divorce order. Alternatively, the person may approach the FSCA to inform the FSCA that a fund is not complying with court orders.

*The Financial Services Tribunal has ruled on this issue a number of times, including the most recent at the time of writing this article, in **Momentum Retirement Annuity Fund & another/PFA & another** (PFA3/2023, 26 April 2023) wherein it stated inter alia:*

- *Court orders are enforced either by way of a warrant of execution or by way of contempt of court proceedings. In an endeavor to enforce a court order, an applicant cannot lodge a complaint with the PFA.*
- *The PFA is a creature of statute without inherent jurisdiction.*
- *The PFA does not have concurrent jurisdiction with a Maintenance Court or a High Court.*
- *The PFA's main object, as set out in section 3OD of the Pension Funds Act, 1956 ("Act") is to dispose of complaints lodged in terms of section 3OA(3) of the Act.*
- *The definition of "complainant" is provided for in section 1 of the Act and it states that a complaint must relate to one of three things: (a) The administration of a fund; (b) the investment of its funds; or (c) the interpretation and application of its rules.*

The term administration is not defined in the Act, however, section 13B(1) of the Act provides that administration relates to the receipt of contributions or the disposition of benefits. It does not relate to the enforcement of court orders.



Other issues where the jurisdiction of the Adjudicator may be ousted includes:

- The matter is time-barred in terms of section 30I of the Act (see a full discussion on time-barring in the July 2022 newsletter),
- The subject matter of the complaint was already pending before a court at the time when the complaint was lodged – section 30H(2) of the Act; and
- In terms of section 30H(4) of the Act, the Adjudicator shall not have jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B which relate to the decisions taken by the board or any stakeholder in the fund or any specialist tribunal convened in terms of section 15K.



APPLICATION OF THE *IN DUPLUM* RULE TO ARREAR CONTRIBUTIONS

By: Atlegang Tshidi (*Junior Assistant Adjudicator*)

One of the biggest problems that the pension fund industry faces is the issue of the failure by some employers to comply with the provisions of section 13A of the Pension Funds Act, 1956 (“the Act”).

In short, employers do not pay pension or provident fund contributions to the fund on their employees' behalf. This non-compliance with section 13A results in the employer falling into arrears with the fund in respect of payment of contributions. In terms of section 13A(7) of the Act, non-payment or late payment of contributions attracts late payment interest.

Retirement funds are encouraged to provide non-compliant employers with a computation of the outstanding contributions and this computation must include late payment interest. In terms of the now repealed regulation 33, interest on outstanding contributions had to be calculated in accordance with the formula set out in GN 397 in GG 33182 of 12 May 2010 signed by the former Registrar of Pension Funds. On 19 February 2023, FSCA Conduct Standard 1 of 2022 replaced regulation 33 and provided that late payment interest must be calculated at the rate of prime plus 2 %.

The *in duplum* rule provides that interest stops running when the unpaid interest equals the outstanding capital amount. Simply put, the interest on a principal debt cannot be more than the principal outstanding debt. For example, should an employer be in arrears in the amount of R6 000.00, the employer debt plus interest cannot exceed R12 000.00 as interest can only reach up to R6 000.00. It should be noted that as the employer pays the principal debt, the interest thereto must decrease as well to be in line with the *in duplum* rule.

APPLICATION OF THE *IN DUPLUM* RULE TO ARREAR CONTRIBUTIONS (continued)

In the matter of Paulsen and another v Slip Knot Investments 777 (Pty) Limited [2015] JOL 33026 (CC) at paragraphs [42] to [45], Madlanga J held:

[42] The *in duplum* rule is a longstanding and well established part of our law. It provides that arrear interest ceases to accrue once the sum of the unpaid interest equals the amount of the outstanding capital. For perspective, it is necessary to give a brief outline of the history of the *in duplum* rule in South African law. The rule has its origins in classical Roman law. The rule was carried through to Roman-Dutch law, reference to it being made by various old authorities, including, most pertinently for this case, Huber and Van der Keessel. Our common law is based on the same Roman law rule and the rule has been recognised in local case law as far back as 1830.

[43] More recently, in LTA Construction the rule was confirmed as still forming part of South African law, not having been abrogated by disuse. Indeed, in that case the appellate division noted that the *in duplum* rule is far from an anachronism and is in fact an aspect of daily economic life under our common law.

[44] As stated in numerous cases and academic writings stretching back over centuries, the overarching purpose of the rule is to protect debtors from being crushed by the never-ending accumulation of interest on an outstanding debt. As Tuchten AJ neatly put it in Bellingan:

“[T]he jurisprudential foundation for the restriction [of interest to the duplum] was the policy consideration that debtors whose affairs are declining should not be entirely drained dry.”

[45] Similarly, as the appellate division stressed in LTA Construction, the rule serves generally to aid debtors in adverse financial positions:

“Dit vorm deel van ons daaglikse ekonomiese lewe. Dit vervul ‘n ekonomiese funksie om skuldenaars wat hulle in finansiële verknorsing bevind, te help.”

In Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation) 1998 (1) SA 811 (SCA) at 827G-H, the Supreme Court of Appeal stated that:

“It provides that interest stops running when the unpaid interest equals the outstanding capital. When due to payment interest drops below the outstanding capital, interest again begins to run until it once again equals that amount.”

This reaffirms the application of the in duplum rule and its use in calculating the outstanding debt by employers to their respective funds. In the matter of Overnight Logistics (Pty) Ltd v Transport Sector Retirement Fund and Others (PFA/GP/00056795/2019/YVT), the Adjudicator dealt with the in duplum rule and held that late payment interest prescribed in terms of section 13A(7) of the Act is subject to the in duplum rule.

In the Adjudicator’s efforts to issue determinations sounding in money, the Adjudicator requested in OPFA Communication 1 of 2021 that funds who are responding to complaints relating to an employer’s arrear contributions should provide a computation of the outstanding contributions pertaining to the complainant. This computation by the fund should include late payment interest with due consideration to the *in duplum* rule.

It is important for the Adjudicator and funds to apply the *in duplum* rule as these entities have a duty to be fair and impartial, not only to members of the fund but to the employers that participate in funds as well. In light of the *in duplum* rule, it cannot be considered fair for an employer to pay interest that exceeds its principal debt. Employers are encouraged to lodge complaints against funds that ignore this common law rule.

THE PAYMENT OF BENEFIT WHERE A MEMBER DIES OUT OF SERVICE

By: Nontobeko Bihla (Junior Assistant Adjudicator)

Section 37C of the Pension Funds Act 24 of 1956 (“the Act”) governs the disposition of death benefits. It places a duty on the board to identify the beneficiaries of a deceased member and vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, in effecting an equitable distribution, the board is required to consider relevant factors and to exclude irrelevant ones from consideration.

Section 37C(1) provides as follows:

“Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner...”

Information Circular PF No. 2 of 2010, issued by the Financial Sector Conduct Authority (“FSCA”) provided that the provisions of section 37C were only applicable to lump sum benefits which become payable by the fund in terms of its rules as a result of the death of a member. When a member exited the fund as a result of resignation, dismissal, retrenchment or retirement the relevant withdrawal or retirement benefit accrued in terms of the rules of a fund. If the member died after the date of accrual of the withdrawal or retirement benefit, but before the benefit can be paid or before the member could make an election for the benefit to be transferred to another fund, the legal nature of the benefit did not change and the provisions of section 37C were therefore not applicable.



The “default regulations” were issued with effect from 1 September 2017 and all default arrangements not consistent with the regulations were required to be aligned to it by 1 March 2019. The default regulations provided the concept of a paid-up member i.e. a member who has not yet retired but has left the service of the employer concerned prior to normal retirement date, as defined in the rules, leaving in the fund the member’s rights to such benefits as may be defined in the rules.

On 12 December 2018, the FSCA issued PFA Guidance Notice No. 8 of 2018 – Guidance on the Application of the ‘Default Regulations’ contained in Regulations 37, 38, 39 and 40. Paragraph 4.6(e) of the Guidance Notice provides that “Section 37C of the Act is applicable to a paid-up member’s benefit, in the same manner that it would apply to any other death benefit payable by a fund.” The FSCA indicated that it received numerous enquiries concerning paragraph 4.6(e) of the Guidance Notice and the applicability of section 37C to paid-up.

THE PAYMENT OF BENEFIT WHERE A MEMBER DIES OUT OF SERVICE *(continued)*

On 25 March 2020, the FSCA issued FSCA Interpretation Ruling 1 of 2020 (RF): Interpretation and Application of Section 37C of the Pension Funds Act. The purpose of the Interpretation Ruling is to promote legal certainty and to ensure clear and consistent interpretation and application of section 37C. In this interpretation ruling the FSCA indicated that Section 37C does not provide the way any benefit that is payable upon the death of a member must be calculated and the calculation of such benefit must be done in accordance with the registered rules of the fund concerned. Further, Section 37C applies despite anything to the contrary contained in any law or the rules of a fund. Therefore, if a registered rule is in conflict with section 37C, the latter prevails.

So, what happens when a member dies out of service, but the rules of a fund provide for the payment of a death benefit whilst the member is in service? The Interpretation Ruling provides clarity on this as follows:

“Reference to “payable ...upon the death of a member” in section 37C means that it is the death of the member that resulted in the benefit becoming payable. If the fund received a written instruction from the member to pay out or to transfer the benefit prior to the member’s death, then it is that written instruction that caused the benefit to be payable (not the death of the member) and accordingly section 37C will not be applicable.”

Therefore, in an instance where a fund received the member’s withdrawal claim form prior to his/her passing, section 37C does not apply. However, if a paid-up member dies such member’s paid-up benefit must be dealt with in terms of Section 37C.

The Interpretation Ruling also withdrew Information Circular PF No. 2 of 2010.



*In the matter of **TE CELE PFA/KN/00082591/2021**, the Adjudicator found that the complainant’s death benefit is not subject to Section 37C of the Act, as the deceased passed away after the termination of her employment with the employer and a written instruction was received by the fund at the date of her passing. Therefore, the Adjudicator ordered the fund to pay the fund credit it was holding into the deceased’s estate late account.*


*Where a fund submits that a lumpsum benefit is not payable in terms of Section 37C, the Adjudicator will require proof in the form of a withdrawal claim form, that the member gave the fund a written instruction prior to his/her passing. In the matter of **TE MOHALE PFA/GP/00090393/2022**, the fund received the complainant’s claim after the complaint was lodged with the Adjudicator. The Adjudicator found that a death benefit became payable to her beneficiaries in terms of section 37C and although the complainant was not entitled to the risk portion of the benefit, he was entitled to a lumpsum benefit of the fund credit available. Therefore, the Adjudicator ordered the fund to complete its investigation, proceed with the allocation and distribution of the death benefit, and pay the death benefit to the identified beneficiaries within twelve months of the date of the determination.*

Therefore, as per the FSCA’s Interpretation Ruling, where the fund did not receive the member’s withdrawal claim form prior to his/her passing, a death benefit becomes payable to his/her beneficiaries in terms of section 37C.



NOTE FROM A CASE OFFICER

By: *Polo Shwaepane (Case Officer)*



I am a Case Officer at the Office of the Pension Funds Adjudicator (“OPFA”). My duties include assessment of complaints received by the office and conducting thorough investigations in respect of same, attending to walk-in clients, and advising them of their rights and duties in terms of the law. Whilst investigating complaints, I engage with the complainants to get clarity on ambiguous cases, serve the relevant parties who are in most cases the funds and employers, and also send acknowledgement letters to the complainants so that they are aware that their complaints are being attended to and who the relevant person is at the OPFA to contact for an update on their complaints. I assess responses or other correspondence from the parties to a complaint, such as administrators, pension funds, trustees of the funds, or business rescue practitioners etc. In certain instances I am able to confirm that the complaint is settled and request the complainant to confirm in writing that the complaint can be closed. Once confirmation is received, I draft a settlement letter. However, if after assessment the complaint is not resolved, I then allocate it for adjudication for a determination to be issued.

My responsibilities are not limited to the above-mentioned but also to constantly make follow ups where responses or further information are outstanding. In order to resolve matters expeditiously as we are expected to, making telephone calls is always the fastest and easiest way to engage with the parties and get the required results. Since some complainants encounter challenges in getting or submitting required information from/to the fund, I assist them with such submissions or getting the information they need to either make further enquiries or enforcement of the determinations. Where the complaints fall out of OPFA jurisdiction, I assist complainants with referring same to the relevant forums.

It feels very fulfilling when complaints I am entrusted with are resolved to the complainants’ satisfaction, because it shows that the OPFA gives hope where it is lost, and we are the reason people are smiling at the end of the complaint. As OPFA’s Case Officers we know that a person does not exist in isolation but through collaboration and the existence of a powerful team which relies on each other. All complainants are welcome to contact the OPFA and the professional and competent staff members will always be of great assistance. At the OPFA we pride ourselves on respect, excellent service delivery, honesty, integrity, empathy, and professionalism.



HERE'S A STEP-BY-STEP GUIDE TO CHECK THE COMPLAINT STATUS ONLINE:

HOW TO LODGE A COMPLAINT WITH THE OPFA?

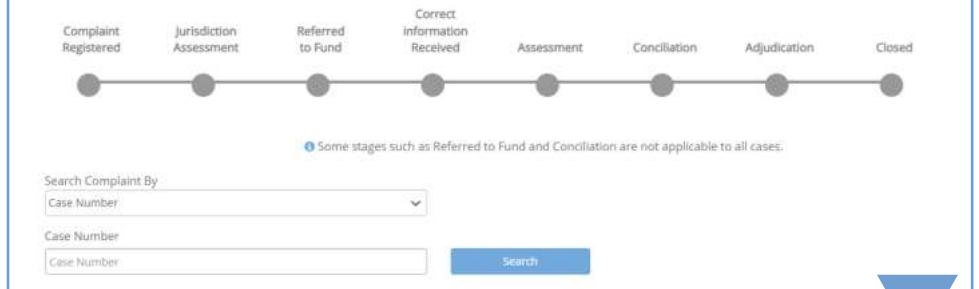
The OPFA's services are provided free of charge. A complaint must be lodged using an official complaint form. You may lodge a complaint in one of the following ways:

- Visit our offices at:
4th Floor, Block A, Riverwalk Office Park, 41 Matroosberg Road, Ashlea Gardens, Pretoria
- Submit your complaint online:
<https://www.pfa.org.za/Complaints/Pages/Lodge-a-Complaint.aspx>
- Email your complaint to:
enquiries@pfa.org.za
- Fax your complaint to:
086 693 7472
- Post your complaint to:
Office of the Pension Funds Adjudicator, PO Box 580, Menlyn, 0063

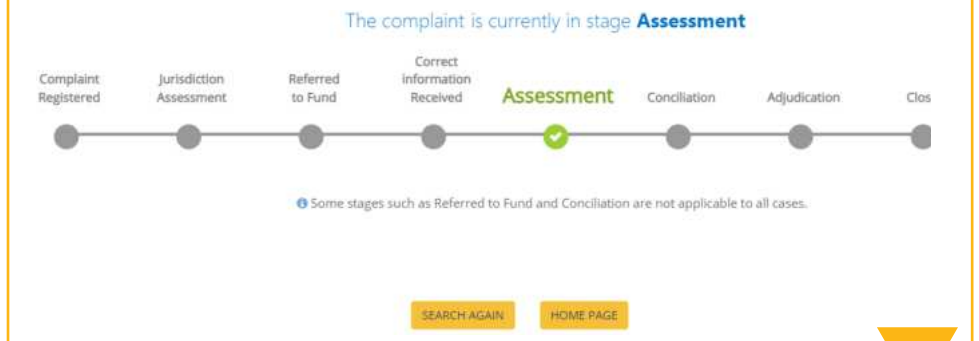
1. Go to the PFA website <https://www.pfa.org.za/> and click **Check Complaint Status**



2. Enter the ID/Passport Number or case reference number and Search.



3. The current stage of the case will be displayed.



4. Refer to the complaint stages for more information about the stage of the complaint.



Block A, 4th Floor,
Riverwalk Office Park,
41 Matroosberg Road,
Ashlea Gardens, Pretoria, 0081

012 748 4000
012 346 1738
www.pfa.org.za

enquiries@pfa.org.za
[opfa_sa](https://www.facebook.com/opfa_sa)
[OPFA SA](https://twitter.com/OPFA_SA)