ISSUE – JANUARY 2023

PFA Pension Funds Adjudicator

Est. 1998

The Quarterly DIGEST

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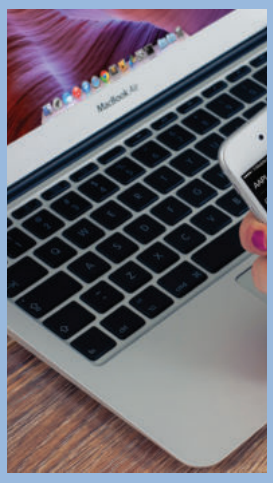

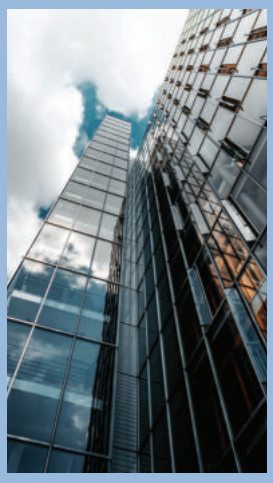

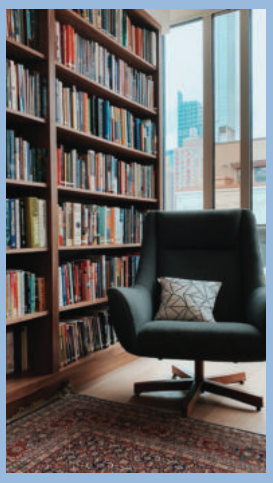

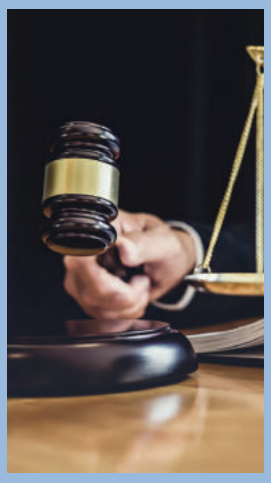

The mandate of the OPFA is to ensure a procedurally fair, economical and expeditious resolution of complaints. Our services are free.

FROM THE ADJUDICATOR'S DESK

By: ***Muvhango Lukhaimane*** *(Pension Funds Adjudicator)*

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: 086 693 7472
- Post your complaint to: Office of the Pension Funds Adjudicator, P.O. Box 580, Menlyn, 0063

The quarter October to December 2022 presented me with some of the biggest challenges that one may confront as Adjudicator – issuing default determinations owing to want on disregard of the law. From early 2021, this office has received a significant number of complaints concerning the Chemical Industries National Provident Fund (CINPF). These ranged from failure to provide benefit statements, failure to pay withdrawal/retirement benefits, failure to pay death benefits, to the failure to consider requests for section 14 transfers. In the meantime, the fund had changed hands in terms of administration from NBC to Akani Retirement Fund Administrators then to Momentum Retirement Administrators. The fund also has a dedicated legal representation ostensibly to provide responses to complaints.

Since early 2021, this office has used its meagre resources to repeatedly request for responses to complaints including enlisting the assistance of the Financial Sector Conduct Authority (FSCA), to no avail. Both the administrator(s) and the legal representatives failed to submit the required responses. This is as a result of the various transfers of the administration that has led to data not being handed over in a proper format.

I was therefore forced into the undesirable situation of handing down default determinations. Issuing a determination based on one-sided allegations without receiving input from the fund (a regulated entity) comes with its own challenges and is potentially to the substantial prejudice of the fund, its members and their families that continue to suffer owing to this situation. The helplessness of the participating employers is palpable in their replies. We have complainants who have since passed on months after retiring without the benefit of their payouts, some are unemployed and cannot access their benefits – which can make a meaningful difference in their lives.

It is therefore opportune that a matter is currently before the courts that might assist our office in instances where parties fail to provide responses to complaints, depending on how the court chooses to finalise the matter. In Mamogale v MEPF and Another, the complainant has taken our office to court for failing to finalise a complaint against the MEPF. From our filed court papers, despite repeated requests to the fund for a response to the complaint, none was forthcoming. Owing to the nature of the complaint, a default determination would not have resolved the complaint and therefore we continued to request a response.

One would be forgiven for thinking that, over time, the job of the Adjudicator becomes easier – but that is not the case. It becomes complex but the ability to form an overall picture of the administration of the office, and its impact on members, beneficiaries, funds and administrators, results in value for all concerned.

Lastly, I suspect that this financial year is shaping up to be one of the busiest. In the period to end March 2023, we will endeavor to resolve as many complaints as possible to realise our mandate of finalising matters expeditiously. To all those that have embraced the refer to fund process, we are indebted to you and hope to continue to provide you with an acceptable service.

Where there are delays, we should hopefully be able to provide a reasonable explanation. Some of these delays leave us with overly disgruntled complainants who resort to abusing OPFA staff. Whilst the frustration is understandable, it is never acceptable to transfer anger to OPFA employees who are really trying to do their best. Some complainants have unfortunately become abusive and it remains to be seen how we can all best respond to this.

I wish you a pleasant and productive 2023!

NEW REQUIREMENTS RELATED TO THE PAYMENT OF PENSION CONTRIBUTIONS

By: ***Naheem Essop*** *(Senior Legal Advisor)*

On 19 August 2022, the FSCA published the FSCA Conduct Standard 1 of 2022 (RF) ("the Standard") which will come into effect on 19 February 2023 (6-months) or such later date as determined by the FSCA. The Standard is intended to replace regulation 33 of the Pension Funds Act, 1956, and introduces new requirements that are inter alia designed to mitigate against the escalation of arrear contributions and of unclaimed benefits.

The FSCA allowed a period of 6-months from the date of publication of the Standard for funds to implement the changes necessary for compliance. It said that if implementation becomes a widespread problem across the industry as a whole because the 6-month period is insufficient, the FSCA would be able to extend the implementation period to a later date.

Annual notification and reports

In terms of the new Standard, the FSCA was required to determine the format in respect of certain notifications and reports required in terms of the Conduct Standard. These include:

- Notification to and request from employer by pension fund;
- Reporting of contraventions to the Financial Sector Conduct Authority; and
- Reporting contraventions to the South African Police Services.

On 30 September 2022, the FSCA published its determination of the aforesaid in FSCA RF Notice 14 of 2022, with the effective date being 19 February 2023.

Funds are required to notify every participating employer prior to the commencement of such employer's participation in the fund, and on an annual basis thereafter, of the employer's duties, obligations and liability under section 13A of the Act and the Conduct Standard. This includes informing the employer of its duty to pay contributions by the 7th and submit contribution schedules by the 15th; the duty of the monitoring person to report to the board and, in turn, the duty of the board to report non-compliance to the affected members, the FSCA and the SAPS; as well as the criminal sanctions for non-compliance including the potential personal liability of persons mentioned in section 13A(8) and 13A(9) of the Act.

The Standard requires that any material failure by the employer to pay contributions or submit contribution schedules to the fund must be brought - in writing - to the attention of each affected member, in an appropriate manner, within 30 days of the board being informed of such failure. The FSCA declined to prescribe the wording of such written notice citing concerns about being overly prescriptive however inserted a principle-based criterion that requires the notification to be appropriate. This, it said, will provide the necessary flexibility for funds while also ensuring that the communications contain appropriate content. The intention is that such notice to members must be written in plain and understandable language.

The format of the report to the FSCA has been determined and it requires that the board report the name of the defaulting employer and the nature of the contravention. The fund must also inform the FSCA of its proposed course of action to rectify the contravention/s, the date by which such action is expected to be completed, and the name of the person at the employer who is personally liable for payment of contributions as well as their contact details. Details of the proposed course of action and case umber must also be uploaded onto the Pensions Online System.

The FSCA has also determined the format of an affidavit to be submitted to the SAPS, in FSCA RF Notice 14 of 2022, when reporting a contravention of section 13A. In this regard, it said that the SAPS/NDPP were consulted and some of the wording and structure was suggested by those authorities.

Contribution statements

Most of the requirements relating to the Initial Contribution Statements have been carried over into the new Standard, with some additions. In this regard, the contact person responsible at the employer or pay-point dealing with enquiries relating to contribution statements and payment of contributions must be added as well as the identity of persons who are to be held personally liable for contributions.

Additional personal information relating to the member must be provided in the Initial Contribution Statement including the employer pay or industry number; income tax number; contact number, including (where available) cellular phone number; e-mail address (where available); postal address; residential address; and annual pensionable emoluments.

Subsequent Contribution Statements must include all the information required in terms of the Initial Contribution Statement, save that the name of the person personally liable for payment of contributions should only be provided if that has changed. The Subsequent Contribution Statement should also contain the

membership number allocated to each member of the fund, and an indication of any changes (as compared to the contribution statement for the previous period) showing any differences in the data, including additions as a result of new members, reductions as a result of membership terminations, adjustments as a result of changes in pensionable emoluments, the payment of additional voluntary contributions, corrections due to error or any other information that may be relevant.

Importantly, all contribution statements must be accompanied by a declaration by the employer that all employees eligible to be members of the fund are accurately reflected in the minimum information.

Late payment interest

Compound interest on late payments or unpaid amounts must be calculated from the first day following the expiration of the period in respect of which such amounts were payable, until the date of receipt by the fund and is prescribed to be the prime rate plus two percent. Whilst this information is not contained in the prescribed annual notice to the employer, it is suggested that funds should, nevertheless, inform their participating employers of same.

Such interest will constitute investment income for the fund and must be payable to the fund by no later than the end of the second month following the month in respect of which the amount is payable, or the amount is transferable, as the case may be.

Outsourcing of the recovery of arrear contributions

Funds should take an active role in recovering arrear contributions. It should not be left to the individual member to realise that, upon exiting the fund, all contributions payable in respect of him/her have not been timeously paid. Unfortunately this is the case, all too often, and members then turn to the Adjudicator for assistance. A failure by the board of the fund to take all reasonable steps to ensure that contributions are paid timeously to the fund is a failure to carry out its fiduciary and statutory duties.

Lodging a complaint with the Adjudicator is the most viable form of recovery. It is inexpensive, does not require legal representation, and is more expeditious than approaching the courts for assistance. In addition, some unscrupulous lawyers tend to overcharge pension funds for their services. Funds are encouraged to quickly identify non-compliances and lodge complaints with the Adjudicator for relief.

In the unlikely event that it becomes necessary to appoint an attorney to recover arrear contributions, the Standard has set out stringent requirements. This is most likely as a result of the FSCA identifying abuses - some of which were sought to be addressed in PF Directive No. 8.

The Standard reiterates the requirement to avoid conflicts of interests in the appointment of attorneys. It goes further to state that an agreement entered into with an attorney must contain a requirement that any amount recovered by an attorney in respect of arrear contributions must be transmitted into the fund's bank account within 7 (seven) business days of receipt of by the attorney.

The fees payable to attorneys are required to be reasonable and commensurate to the service provided, and not impede the delivery of fair outcomes to members and the fund. This means that boards of funds will have to test the market to ensure that the fees paid to attorneys for the collection of arrear contributions is commensurate. In this regard, there are various firms of attorneys that either wholly or partially specialise in collections. Fees for collections are normally a fraction of normal litigation costs never mind the costs of so-called pension law experts. Thus, a comparison of fees for the collection of arrear contributions should be done against collections law firms.

Pension funds entering into contingency fee arrangements with attorneys is an exceptionally extraordinary measure, and will be hardly justifiable for a trustee exercising their fiduciary duty. This is especially so given the low cost involved with lodging a complaint with the Adjudicator and the low fees charged by collections law firms.

Conclusion

The Conduct Standard is consistent with the objective of treating customers fairly and seeks to protect the interests of members of funds and hold the boards of funds, authorised persons and contractors accountable. In addition, the reporting requirements and further information in respect of members should go a long way towards mitigating against arrear contributions and unclaimed benefits. It remains the responsibility of boards of funds to ensure the timeous payment of contributions by participating employers.

MODE OF PAYMENT OF A DEATH BENEFIT ALLOCATED TO A MINOR BENEFICIARY

By: **Tshepo Dooka-Rampedi** *(Senior Assistant Adjudicator – Team Leader)*

When a member of a retirement fund dies, the benefit (death benefit) becomes payable to the member's dependants and/or nominees if it is permissible in terms of the rules of the fund.

Section 37C of the Pension Funds Act 24 of 1956 ("the Act") regulates the distribution and payment of death benefits payable on the death of a member of a pension fund, provident fund, pension and provident preservation fund, and retirement annuity fund.

One of the duties imposed by section 37C is that the board must determine an appropriate mode of payment to each of the beneficiaries. A distinction must be drawn between minor and major beneficiaries.

Payment in respect of a minor child's benefit to a guardian should occur in the normal course of events unless there are cogent reasons for depriving the guardian of the duty to administer the financial affairs of his/her minor child. Before a death benefit can be paid to any other person or institution other than the guardian of a minor child, such as a beneficiary fund, the guardian's ability to administer the monies on behalf of the minor child must be investigated. The Adjudicator in **Ramanyelo v Mine Workers Provident Fund** [2005] 1 BPLR 67 (PFA) ("Ramanyelo matter") reiterated that the board must consider inter alia the following factors in determining whether to pay a benefit to the guardian or a beneficiary fund:

- The amount of the benefit;
- The ability of the guardian to administer the monies;
- The qualification (or lack thereof) of the guardian to administer the monies; and
- The benefit should be utilised in such a manner that it can provide for the minor until she attains majority.

MODE OF PAYMENT OF A DEATH BENEFIT ALLOCATED TO A MINOR BENEFICIARY *(continued)*

In Moremi v Metal Industries Provident Fund PFA/GP/00084483/2022/MM ("Moremi matter"), the fund paid the children's benefit into a beneficiary fund. It submitted that the complainant confirmed that she is unemployed and sometimes helps people with their laundry, cleaning etc to make a living. The fund advanced the following reasons for its decision to transfer the minors benefits to the beneficiary fund:

- The deceased provided financial support for the children on a monthly basis, and it is reversing the financial burden caused by the deceased's death by ensuring that the children's benefit will be paid monthly until they attain the age of majority or become self-supporting.
- If it continues to pay R1 250.00 per month, the benefit will provide for the minor children until they attain the age of majority.

In Moremi, the fund stated that it is in the children's best interest to receive their benefits in instalments. It stated that the complainant may apply for advances for school fees, clothing etc. It did not appear that the board assessed the complainant's ability to administer the benefit on behalf of the minor children. The board did not provide reasons for paying the minor children's benefit into a beneficiary fund other than the fact that the complainant is unemployed. Her unemployment status did not automatically mean she cannot administer the funds if same was paid to her. It appears that the board of the fund used a blanket approach in paying the minor children's benefit to the beneficiary fund due to the fact that the guardian was unemployed which could not be justified and goes against the factors set out in the Ramanyelo matter.

From the fund's reasons for paying the benefit into a beneficiary fund, it was of no use for funds to manage death benefits in such a manner that current needs are sacrificed so as to ensure that there is a pay out to the beneficiaries when they attain the age of majority. The funds should be used to defray current legitimate needs especially as the complainant was unemployed (see **JV MIclean v FundsAtWork Umbrella Provident Fund and Others** PFA/GP/00078895/2021).

Therefore, the decision of the fund to pay the minor children's portion of the death benefit into a beneficiary fund was assailable on the evidence submitted and the Adjudicator finds it appropriate to set it aside (see **Lebepe v Premier Foods Provident Fund and Others** [2007] 3 BPLR 325 (PFA)).

It should be noted that the discretion by the board, to pay minor children's benefit into a beneficiary fund without conducting a thorough investigation on the guardian's ability to manage the financial affairs, amounts to an improper exercise of power or maladministration of the fund by the board. The board must always exercise proper care and diligence in the mode of payment of the death benefit.

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WITHHOLDING OF A BENEFIT CANNOT STAND IF AN EMPLOYER HAS ONLY INSTITUTED CRIMINAL PROCEEDINGS

By: ***Thabang Mabule*** *(Assistant Adjudicator)*

Introduction

It goes without saying that the object of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 is also to protect an employer's right to pursue recovery of loss suffered at the hands of their employees during the course of their employ (see **Twigg v Orion Money Purchase Pension Fund** (1) [2001] 12 BPLR 2870 (PFA) at paragraph 21 and **Charlton v Tongaat-Hulett Pension Fund** [2006] 2 BPLR 94 (D) at 97I-98B). The loss may arise as a result of theft, fraud, dishonesty or misconduct committed by the member. In this case the employer may be entitled to compensation by the member and such compensation comes from the member's benefit. The compensation amount will be dependent on the amount of the loss suffered and such amount will be deducted from the member's benefit on the date of the member's retirement or upon the date he ceases to be a member of the fund.

Withholding is done by the fund at the request of the employer to allow it an opportunity to pursue a judgement that will entitle it to a deduction in terms of section 37D(1)(b)(ii) of the Act. For the withholding to pass legal scrutiny, it has to meet the requirements outlined in the relevant case law. Same was discussed in the previous newsletter and will not be repeated here. This article only examines the reliance of funds on criminal proceedings instituted by the employers against members to withhold their benefits.

Reliance on criminal cases alone

If there is no admission of liability by the member, or they refuse to admit liability of the alleged misconduct, then the only recourse available to the employer would be to institute legal proceedings against the member. In most cases the employers would only institute criminal charges. Reliance on criminal cases alone have in the past proven to be challenging regarding the withholding of the members' benefits. The challenges of criminal cases are, but not limited, to the following:

- The length of the criminal investigations.
- Whether or not the Director of the Public Prosecution would prosecute.
- Criminal convictions are not a judgement against a member that qualifies for compensation in respect of damages caused. Further, costs are not against persons convicted.

Withholding of members' benefits cannot be indefinite; they should be withheld for a reasonable period. Sometimes investigations take time to be completed. In addition, depending on the outcome of the investigation, the Director of Public Prosecutions ("DPP") may decide not to prosecute and, even when he decides to prosecute, it may not lead to a conviction and a criminal conviction will not assist as indicated above.

It has been a long-standing practice in the retirement fund industry to interpret the reference to "judgement in any court including a magistrate's court" in section 37D(1)(b)(ii) of the Act, to include both a civil court judgement and a criminal court judgement issued under section 300 of the Criminal Procedure Act 51 of 1977. It has also been a practice of some funds to withhold members' benefits on receipt of proof that an employer has instituted only criminal proceedings against a member under section 37D of the Act.

It is also worth mentioning that previously, in her determinations, the Pension Funds Adjudicator ("PFA") held on numerous occasions, that funds may withhold members' benefits pending the finalisation of not only civil proceedings but also criminal proceedings, subject to an employer obtaining a compensatory order in terms section 300 of the Criminal Procedure Act. However, law is a developing regular process and the jurisprudence on section 37D has also evolved. Same has been indicated in recent rulings by the Adjudicator and the Financial Services Tribunal ("FST").

In support of the above argument, the FST has ruled that relying on a criminal case alone cannot withstand legal scrutiny regarding lawfulness of the withholding.

In **DSV Flexi Retirement Fund (Pension Section) v Pillay and Others** PFA 62/2020, the FST held that criminal proceedings on its own were not sufficient to justify the withholding of a member's benefit. The FST also relied on the latter decision in the matter of **Ithuba Holdings (RF) (Pty) Ltd v Pillay and Others** PFA 60/2021 confirming its previous decision. In the matter of **Fundsatwork Umbrella Provident Fund v Ngobeni and Another** PFA 64/2020 relying on the Supreme Court of Appeal ("SCA") in the matter of **Highveld Steel and Vanadium Corporation Ltd v Oosthuizen** [2009] 1 BPLR 1 (SCA), the FST held that a fund is not entitled to withhold payment because a criminal case has been opened or even upon conviction. A conviction is not a judgement against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted. The latter was also confirmed in the matter of **FundsAtWork Umbrella Pension Fund v Matjiane and Others** PFA 39/2020.

Further, in the matter of **Tape Aids for the Blind v Palhad and Others** PFA 3/2022, wherein the Deputy Chairperson of the Tribunal, Judge Harms, relied on the matter of **Kader v Minister of Police** 1989 (4) SA 11 (C) held that criminal proceedings are instituted by the State through the prosecuting authorities. Laying a charge has no legal consequences. It does not initiate legal proceedings. Legal proceedings may or may not follow depending on the decision of the prosecutor. In this matter the FST dismissed an application by Tape Aids for the Blind for the Adjudicator to reconsider her determination setting aside the Fund's decision to withhold the withdrawal benefit of the member concerned.

Conclusion

In light of the above, it is clear that funds can no longer withhold a benefit if the employer has only instituted criminal proceedings against a member. Further, it is apparent that, based on the FST's interpretation of section 37D(1)(b)(ii) of the Act, funds should only be allowed to withhold a member's benefit if the employer had instituted civil proceedings, or has obtained an interdict preventing payment of a benefit. If the member did not sign an admission of liability, or the employer has not provided a civil judgement, the employer must provide proof that it has instituted a civil court action against the member.

NOTE FROM A CASE OFFICER

By: ***Neo Mashigo*** *(Case Officer)*

I am a Case Officer at the OPFA. My role is to interact with complainants, funds and employers concerning complaints lodged with the OPFA. To contribute to the resolution of complaints, I am responsible for serving the relevant parties to the complaint. In doing so, I give them the opportunity to file responses. Once responses are received, I assess them and filter the ones that need to be referred for adjudication for a ruling. I also draft settlement letters on matters where all the parties have confirmed resolution of the complaint and out of jurisdiction letters where the OPFA does not have jurisdiction to deal with the complaint.

My role is not restricted to just the above-mentioned responsibilities. It is often that the OPFA receives similar complaints against a particular employer and fund. I engage both the fund and the employer and encourage them to file bulk responses (instead of not filing responses at all) due to administrative challenges.

I also assist the complainants by facilitating the submission of their withdrawal claim forms and all the necessary documents to the fund, and follow up on their behalf until their benefit payment is processed and finalised. I do the same with complainants who require computation of their benefits from the fund to enforce a determination or obtain a writ of execution, I request same from the fund on their behalf.

Case Officers and Senior Case Officers from the OPFA are suitable people to get in contact with for any assistance with the progress of the complaint or on how to go about obtaining relevant information regarding lodging a complaint and the necessary process to be followed.

It is satisfying and gives me great relief when a complaint is resolved expeditiously, and the complainant expresses their satisfaction with the resolution of his/her complaint. Teamwork and collaboration in the investigation and adjudication of complaint can only make us stronger as an organisation.

PFA
Pension Funds Adjudicator

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