



The Quarterly DIGEST

From the Adjudicator's desk



Muvhango Lukhaimane, Pension Funds Adjudicator

INSIDE THIS ISSUE

- **From the Adjudicator's desk** p1
- **Funds must assist members in executing writs relating to section 13A interest** p2
- **Fraudulent claims: Fiduciary duties on boards of funds to combat same..** p4
- **Know your limits on retirement annuity surrender values** p7
- **Note from the Case Officer**..... p8
- **Quarterly Stakeholder Engagement Activities** p9

As the OPFA ends the 2023/24 performance year, we do so with pride at the strides the organisation made during the year. As previously stated, we are firmly back to pre-Covid 19 complaints' levels, with 9 177 complaints lodged in the year and a total of 9 713 complaints finalised (some complaints were carried over from the 2022/23 year).

The recent increased interest from most stakeholders; following the release of the updated list of non-compliant employers by the Financial Sector Conduct Authority with regards the payment of contributions (section 13A), and the discussions at the 2024 Pension Lawyers Association Conference have garnered much needed attention, on this issue. It is hoped that this will prompt boards of management of funds to improve on their interventions in order to improve compliance – resulting in overall improvement on governance. In addition, it is hoped that members are prompted to actively monitor their employers' compliance with the law.

We now prepare for the implementation of the two-pot retirement system in September 2024, and funds need to improve their communication around the system and ensure that their record keeping is up to date. The importance of record-keeping cannot be overemphasized.

Thank you to those that participated in our stakeholder engagement survey. The time you spent providing us with feedback on our services is much appreciated. We look forward to sharing your feedback with you in the near future and more importantly the action plans that we will put in place to improve where we might have fallen short. Happy reading!



Funds must assist members in executing writs relating to section 13A interest

Nondumiso Ntshangase, Senior Legal Advisor



A determination made by the Adjudicator is akin to a civil court judgment.

If an employer fails to pay contributions into a pension fund, a member may lodge a complaint with the Adjudicator. If the Adjudicator rules in favor of the member and the employer still fails to pay following the ruling, the member can request the court clerk or registrar to issue a writ of execution. The sheriff of the court can enforce this writ.

Decisions made by the Adjudicator can be enforced according to section 300 of the Pension Funds Act No. 24 of 1956 ("the PF Act"), which reads as follows:

"300. Enforceability of determination. — (1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.

(2) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the

date of the determination, on condition that no application contemplated in section 30P has been lodged."

The Johannesburg High Court, in the case of *Mafoko Security Patrols (Pty) Ltd v Moeketsi and Others (2023-076255) [2024] ZAGPJHC*, recently ruled that interest calculated in terms of section 13A (7) of the PF Act constitutes investment income for the fund. The member is not a judgment creditor in respect of the interest payable and is therefore not entitled to the interest.

In this case, the employer lodged an application with the High Court, seeking among other things, to interdict the member from executing a writ related to a determination issued by the Adjudicator for outstanding arrear contributions and late payment interest ("LPI"). The employer argued that the member was not a judgment creditor entitled to execute the writ and that the member was not entitled to LPI in terms of s 13A (7).

“

The member is the ultimate beneficiary of the determination and is entitled to issue and execute the writ against the employer.

Members must therefore execute the writ only in respect of contributions, not LPI.

Regarding the contributions, the High Court held that the benefit had accrued to the member and not the fund. As such, the fund suffered no loss and was simply a conduit through which the benefit would be paid to the member. The member is the ultimate beneficiary of the determination and is entitled to issue and execute the writ against the employer. However, the proceeds of the sale in execution must be paid over to the fund in accordance with the determination, and not directly to the member.

In determining the interest issue, Justice L. Windell held that the Adjudicator's determination instructed the fund to re-calculate the LPI on the arrear amount according to section 13A (7) and provide same to the employer for payment. Section 13A (7) does not stipulate that the LPI payable is for the member's benefit. Regulation 33(7), which applied to these arrear contributions, provides that the interest constitutes investment income for the Fund.

LPI calculated in terms of section 13A (7) differs from the interest which the Adjudicator can award to complainants in section 30N where a determination consists of an obligation to pay an amount of money. Section 30N interest is paid to the complainant. The High Court concluded that the member is accordingly not entitled to the LPI in terms of s 13A (7). The amount reflected on the writ of execution is therefore incorrect, as it included the LPI.

The High Court's conclusion poses a challenge for a member who successfully obtains a determination against an employer failing to comply with section 13A, as the member cannot execute the writ in respect of the LPI. Members must therefore execute the writ only in respect of contributions, not LPI. When a member approaches a fund for a calculation to execute a writ, the fund must only provide a calculation regarding contributions and exclude LPI. The judgment confirms that the fund would become the judgment creditor in respect of the interest. Therefore, it is the responsibility of funds to assist members in enforcing determinations against non-compliant employers, to ensure that members receive their full benefits.

Once the outstanding contributions are paid, funds must ensure that members are paid their benefits in accordance with fund rule, regardless of whether the employer has paid the LPI.





Thabang Mabule, Assistant Adjudicator

Fraudulent claims: Fiduciary duties on boards of funds to combat same

Introduction

Recently, the Adjudicator has noted an increasing trend of fraudulent claims relating to withdrawal benefits. At the beginning of this financial year alone, the Adjudicator has already dealt with six complaints concerning fraudulent claims. In some cases, there are incidents of identity theft syndicates targeting funds and fraudulently claiming benefits of members. In recent matters, the Adjudicator dealt with cases where withdrawal benefits were claimed while members were still employed and one where the member was incarcerated. One of the matters included an employer who made an unlawful section 37D(1)(b)(ii) deduction.

It is against this background that this article will be dealing with the fiduciary duties of boards of funds to combat these increasing fraudulent claims. Before dealing with any subject, it is always important to define the key concepts. In this article, fiduciary duty, fraud, and identity theft are identified among the key concepts.

Fraud is defined as dishonestly making a false representation to gain or intent to cause loss¹. It should be noted that fraud can be both under civil law and criminal law. Identity theft occurs when someone wrongfully obtains the personal information of another individual without their knowledge to commit theft or fraud².

The fiduciary duties of trustees / boards of funds

Fiduciary duty is a legal obligation to act in the best interest of another rather than one's self³. It should be noted that fiduciary duties have been developed over time by the courts and have also been established through legislation. The obligations and duties of the board of a fund are regulated by section 7C and section 7D of the Pension Funds Act 24 of 1956 ("the Act"). However, the only relevant ones to the topic in the main would be discussed. Section 7C(2)(a), (b) and (c) of the Act provides the following in respect of the object of the board:

¹ Oxford Dictionary of Law, Seventh Edition.

² F Cassin, Protecting personal information in the era of identity theft: Just how safe is our personal information from identity thieves? Potchefstroom Electronic Law Journal (PELJ) Vol 18 Number 2, 2015.

³ <https://ethicsunwrapped.utexas.edu/glossary/fiduciary-duty> (Accessed 19 April 2024).

“(2) In pursuing its object the board shall –

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

(b) act with due care, diligence, and good faith.”

(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act.”

5.8 In turn Section 7D(1)(a) and (b) of the Act provides the following:

“(1) The duties of a board shall be to:

(a) ensure that proper registers, books, and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board;”

In summarising all the duties above, it is clear that boards of funds must hold assets for the benefit of the fund and its members. Only members and their beneficiaries must benefit from the fund’s assets. The board must ensure that the beneficiaries are entitled to the benefits they receive. Thus, the fund has a fiduciary duty to exercise its functions with care, due diligence, and good faith. Therefore, the standard of care is greater than the standard that a reasonable person would exercise. The duty to act diligently means that there must be quality in the work done and that it must be done carefully with much effort put into it.

In addition, the fiduciary duty to take greater care in managing the assets of the fund is that they must exercise proper care and diligence when making decisions, including decisions in the payment of benefits.

Therefore, the fund must avoid any form of negligence when processing payment of benefits. One of the first things the fund should do is liaise with its members and their employers upon receiving exit documents to confirm the authenticity of the claim documentation they receive.

The fund’s failure to comply with section 7D(1) of the Act amounts to an improper exercise of its powers and maladministration as contemplated in the definition of a complaint (see *Joshua v Dunlop Africa Pension Fund* [2001] 4 BPLR 1852 at 1857F-G (PFA)). Therefore, it must ensure that proper mechanisms, checks, and balances are implemented to combat corrupt and fraudulent activities. The High Court in the matter of *Johannesburg Municipality Pension Fund v NBC Employee Benefits (Pty) Ltd (Unpublished case) Case No (74/01) [2001] ZAGPHC 2 (unreported)* held that what is plain from the above-mentioned provisions of the Act is that the board occupies a position of trust and has a fiduciary duty towards the members of the fund on whose behalf the assets of the pension funds are administered.

In *Baloyi v Dichawu National Provident Fund and Others* PFA/GA/4141/2005/RM the Adjudicator held that where the member suffered a loss due to the fund’s maladministration, the latter must place the member in a position he/she would have been in had the maladministration not occurred. Thus, it is important to emphasise the fund’s duty to act with care, diligence, and in good faith. In the matter of *Moropa and Others v Chemical Industries National Provident Fund and Others* [2022] ZAGPJHC 420, the second matter the court had to deal with related to the statutory and fiduciary duties of the trustees. The court found that the duties of the trustees to the fund are governed both by the common law principles and by statutory law, notably section 7C of the Act, which provides in the relevant parts that the object of the Board is to direct, control and oversee the operations of a fund in accordance with the applicable laws and its rules.

In pursuing its object, the board is enjoined to take all reasonable steps to ensure that the interests of members in terms of its rules are protected and the provisions of the Act are protected at all times. Further, the funds must make sure that the benefits promised in terms of the rules are delivered. Reasonably members expect funds to protect their benefits and not to find out when the benefit is due that it has already been paid out.



“the Deputy Adjudicator ordered that the member should be paid his withdrawal benefit that was unlawfully deducted.

One of the recent matters the Adjudicator dealt with, *Mpambani v Municipal Gratuity Fund and Another* PFA/GP/00103055/2023/TBM, involves a member whose benefit was fraudulently claimed between June 2018 and September 2018 while incarcerated. He had been incarcerated since November 2016. His fund credit was paid out on 07 September 2018 to an incorrect person. When he was released in July 2023, he proceeded to claim his withdrawal benefit. However, to his surprise, he was informed that he was already paid in September 2018.

Another matter, *Mgudu v The Private Security Sector Provident Fund and Another* PFA/NW/00100067/2023/TBM concerns a member whose withdrawal benefit was also fraudulently claimed while still employed and a contributing member of the fund. In this matter, the member was employed from November 2016 until July 2023. However, on 21 April 2020, her fund credit was paid to an incorrect person.

Another matter, *Tyengeza v Fundsatwork Umbrella Provident Fund and Another* PFA/GP/00102885/MM was where the employer made an unlawful claim in terms of section 37D(1)(b)(ii) of the Act by submitting a forged Acknowledgment of Liability (“AOL”). The fund relied on the AOL received from the employer and the complainant’s full withdrawal benefit was paid to the employer.

It is common cause that the fund was not aware of the discrepancies with the AOL when it gave effect to same and relied on the good faith of the employer. However, the fund has a fiduciary duty to scrutinise any request received for the deduction of a member’s benefit in terms of section 37D(1)(b)(ii).

In the former two matters, the Adjudicator held that it was not the complainants who were defrauded but the fund. Thus, the fund was ordered to reinstate their fund credits with interest and subsequently be paid to them. In the latter matter, the Deputy Adjudicator ordered that the member should be paid his withdrawal benefit that was unlawfully deducted.

Conclusion

A fiduciary duty is a very high duty of care, and it involves a high degree of trust and honesty towards members by the board of the fund. Thus, funds must take extra care to avoid having to pay a benefit more than once. These fraudulent claims mean that funds are faced with a risk, and they must come up with measures to mitigate the risk as they have to protect their members.

Know your limits on retirement annuity surrender values



Many South Africans have retirement annuities as an extra tool for saving towards their retirement

By simply paying a monthly premium towards their retirement annuities, they can receive one-third of their full fund benefit in a lump sum and the remaining two-thirds will be used to purchase an annuity where they will receive monthly payments once they reach the normal retirement age.

The interesting thing about retirement annuities is that (unlike a pension or provident fund where you can access the fund upon exiting the service of your employer) one does not have access to their funds in a retirement annuity until you reach the normal retirement age of 55, in accordance with the Income Tax Act 58 of 1962 ("Income Tax Act"). However, there are exceptions to this provision, namely: when a member is permanently disabled and submits a disability claim; when a member's total value in the fund is less than R15 000.00 (surrender value); or when a member formally emigrated from South Africa and provides the fund with the necessary documentation. This article will focus on the exception relating to when a member's total value in the fund is less than R15 000.00 in a particular retirement annuity and wants to claim or has already claimed a surrender value from multiple other retirement annuities.

In *Mpkhothu v The South African Retirement Annuity Fund and another* [2023] 2 BPLR 33 (PFA), the complainant

had a retirement annuity that was issued on 02 October 2018. Her retirement annuity amounted to R11 874.44 on 09 October 2021. On 11 October 2021, she elected to claim her full surrender value. However, the fund informed her that the tax directive from the South African Revenue Service ("SARS") was declined on the basis that she had exceeded the R15 000.00 surrender value. She lodged a complaint with the Adjudicator concerning the non-payment of the surrender value on the basis that her retirement annuity benefit was R11 874.44 and did not exceed R15 000.00 threshold.

The fund responded indicating that it indeed attempted to proceed with the payment choice that the complainant elected of payment of her full surrender value. However, as advised to the complainant, the application to obtain a tax directive from SARS had been declined on the basis that she had exceeded the R15 000.00 surrender value claim. It submitted that upon further investigation, it discovered that the complainant has a previous retirement annuity where she claimed and received a surrender value of R3 571.08 on 12 August 2018. It submitted that the complainant's surrender value for both the previous and current retirement annuity exceeds the amount of R15 000.00.

The legal question before the Adjudicator was whether the complainant was entitled to her surrender value of R11 874.44, considering that she had already claimed a surrender value of R3 571.08 on 12 August 2018.

The definition of “retirement annuity fund” in section 2 of the Income Tax Act prohibits a retirement annuity fund from paying any benefits to a member before the age of 55 years, except in the circumstance stated above. Part (b)(v) of the definition provides that:

“no member shall become entitled to the payment of any annuity or lump sum benefit prior to reaching normal retirement age”

In turn, “normal retirement age” is defined in the Income Tax Act as follows:

“in the case of a member of a retirement annuity fund, a pension preservation fund or a provident preservation fund, the date on which the member attains 55 years of age”

In terms of Government Gazette Notice 44640, the prescribed amount was increased from R7 000.00 to R15 000.00 with effect from 01 March 2021.

As stated above, the Income Tax Act prohibits the payment of a retirement annuity to a member under the age of 55 years, except in the case of a member who becomes permanently incapable through infirmity of mind or body of carrying on his occupation or if

the lumpsum fund value is equal to or less than the prescribed amount.

The complainant had not reached normal retirement age, nor was her claim based on disability or emigrating to another country. The complainant’s claim for payment of her retirement surrender value was based on her understanding of the Income Tax Act, which allowed her to receive a surrender value of her retirement annuities provided that the value thereof did not exceed R15 000.00.

The Adjudicator dismissed the complaint as it was clear that the above provisions apply to a member’s total surrender benefit (even from multiple retirement annuities) which must be less than the prescribed amount. Therefore, if a member had more than one policy in the same fund, the value of both policies could not exceed the prescribed amount. Neither the fund rules, nor the provisions of the Income Tax Act, permitted the payment of the complainant’s policy value in cash. Thus, the fund could not accede to the complainant’s request.

As mentioned in the title, it is important for members to be aware of the limits associated with their retirement fund benefit. In this case, proper member education by retirement funds and advisors can help manage member expectations. It is always recommended that one consults with a financial advisor before committing to any financial product to ensure that it is the best financial product suited for you.

Note from the Case Officer



Nthabiseng Sathekge, Case Officer

As a Case Officer, I am entrusted with the most crucial part of the process of resolving complaints efficiently and expeditiously. Investigating a case means understanding the complaint itself, serving the respondents for replies within set time frames, gathering the necessary information, and assessing responses. Only when a case is thoroughly investigated, the Adjudication team can draft the determination without any further delays.

What I appreciate about this role is my interaction with our stakeholders, pension funds, administrators, trustees, and employers. It is thus of paramount importance to establish a healthy working relationship with them as we have one common goal, which is to resolve complaints to the satisfaction of the complainants, and we act together professionally to reach that goal.

At OPFA, we pride ourselves on excellent service delivery, respect, and integrity, values I hold dearly in my capacity as well.



Zimasa Majola,
Communications Practitioner

Quarterly Stakeholder Engagement Activities

Introduction

In the fourth quarter, the OPFA actively engaged stakeholders through consumer education awareness initiatives, aimed at educating the public about its services and pension-related issues. To this end, there were community outreach initiatives in the North-West Province, which included a radio interview and mall activations. Additionally, participation in the Rand Show Expo allowed the OPFA to reach a wider audience. Below is an overview of the initiatives carried out this quarter.

North-West Outreach activities

In February 2024, the OPFA took part in various community engagements in the North-West Province. These efforts commenced with a community radio interview on Mahikeng FM, where the team conveyed information about OPFA's services, with a particular emphasis on safeguarding retirement benefits. Speaking in the local language, Thabang Mabule, Assistant Adjudicator detailed the process of lodging complaints, and how to contact the OPFA. Additionally, listeners were informed about upcoming mall activations in the region.



In order to increase awareness of the OPFA's presence in the province, the team conducted mall activations at the Crossing Shopping Centre in Mahikeng and Rustenburg Mall in Rustenburg. The mall activations were aimed at facilitating face-to-face interactions with individuals eager to address concerns ranging from failure to be registered with pension funds to unresolved withdrawal benefit claims.

Complaints received varied from employers failing to register employees with funds to individuals encountering difficulties in claiming their full pension fund benefits. In addition, incidents of non-compliance with the Adjudicator's rulings brought to light the difficulties that many complainants face, with many seeking help to resolve the matter.

Rand Show

To further enhance its outreach initiatives, the OPFA participated in the Rand Show Expo held in Johannesburg from 28 March 2024 - 01 April 2024. The Rand Show known for bringing together people from different backgrounds and communities, provided a space for the OPFA to interact and create meaningful dialogue with visitors, and provided a great opportunity for the OPFA to network with stakeholders. The aim of the exhibition was to educate attendees about the role of the Adjudicator and to promote consumer awareness about retirement fund issues.

The OPFA leveraged on the Rand Show's crowd-pulling events to create visibility and increase brand awareness. Engaging with over 600 participants, the OPFA made use of the platform to provide vital information on the pension fund sector as well as foster consumer engagement.



Furthermore, the expo gave the OPFA's volunteer staff a chance to gather insightful comments and feedback from visitors, which will help to improve the experience of future participants.

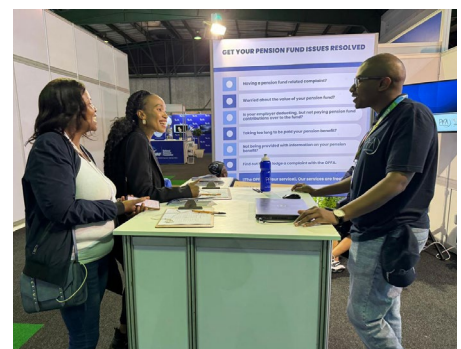
Significant concerns regarding delayed payment of pension benefits, particularly after changing jobs emerged as a recurring theme. This highlighted the necessity for increased public awareness campaigns and strengthened regulatory enforcement measures. In addition, several people had questions regarding the effects of the two-pot retirement system, which is scheduled to take effect on 01 September 2024, with many seeking clarification on how the two-pot system will be implemented and whether it would negatively impact their future retirement earnings.

Conclusion

To sum up, the stakeholder activities carried out by the OPFA in the most recent quarter demonstrated the need of having regular conversations with stakeholders. Mall activations and exhibitions provide a platform for organisations to connect with their target audience and increase brand awareness. The input gathered from these engagements highlights the necessity for continued advocacy and enforcement of pension fund regulations.

As the OPFA enters a new financial year, it is imperative to build and leverage upon these stakeholder engagements, addressing any identified challenges, whilst continuing to advocate for the protection of retirement benefits.

By empowering individuals with knowledge and information, and facilitating access to necessary recourse mechanisms, the OPFA continues to play a crucial role in safeguarding the financial well-being of pension fund contributors.





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.



Some stages such as Referred to Fund and Conciliation are not applicable to all cases.

Search Complaint By

Case Number

Case Number

Please select the preferred method of contact to send the OTP

Cell Number

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

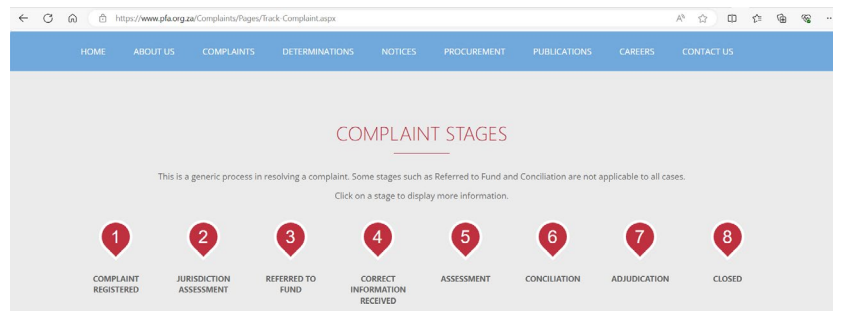
The complaint is currently in stage **Assessment**



Some stages such as Referred to Fund and Conciliation are not applicable to all cases.

[SEARCH AGAIN](#) [HOME PAGE](#)

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**
✉ **opfa_sa**