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Pension Funds Adjudicator

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From the **Adjudicator's Desk**

It was all hands on deck in preparation for the implementation of the two-pot system on 1 September 2024. As some administrators and funds initially battled with the influx of claims, from the OPFA's side, it was a matter of fielding enquiries to ensure that members are aware of where and how to claim.

A welcome unintended consequence of the two-pot implementation was that members are now interested in their funds on a continuous basis and not only at claims stage. It is a welcome development given the struggles of non-compliance with section 13A by employers across many sectors. This interest has now galvanised more role players to join efforts to resolve the issue that affects both private and public sector employees.

For this part, except for 1 144 enquiries received from 1 September 2024 to 31 October 2024, the OPFA is yet to see formal two-pot related complaints. The enquiries that members have contacted us on relate to withdrawal procedure, payment status, updating personal details, available fund credit, tax query, delay in payment and fund system error.

The OPFA is thankful for the efforts from the National Treasury, Financial Sector Conduct Authority ("FSCA"), Batseta, Institute of Retirement Funds Africa ("IRFA"), Pension Lawyers Association ("PLA"), the Ombud Council and other role players for ensuring that the two-pot system is implemented with relative ease and members are kept informed of developments.

On behalf of the OPFA staff, I take this opportunity to thank all stakeholders that have worked closely with us throughout the year. For those that will be taking a well-deserved break during December and January, the OPFA wishes you a joyous, restful time with family and friends.

Muvhango Lukhaimane,
Pension Funds Adjudicator

Nondumiso Ntshangase, Senior Legal Advisor

The Adjudicator's approach to compensation orders in terms of section 300 of the Criminal Procedure Act

Introduction

Before the Financial Sector Tribunal ("FST") decision in FundsAtWork Umbrella Provident Fund v EE Ngobeni and Another (PFA64/2020, FST – 3 December 2020) ("Ngobeni"), the pensions industry, including the Office of the Pension Funds Adjudicator ("OPFA"), interpreted section 37D(1)(b)(ii)(bb) of the Pension Funds Act ("the Act") to include both judgments obtained in civil courts and compensation orders granted in terms of section 300 of the Criminal Procedure Act.

This industry practice was supported by the case of Highveld Steel and Vanadium Corporation Ltd v Oosthuizen (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA); [2009] 2 All SA 225 (SCA) ("Highveld Steel"). However, this position was changed following the Ngobeni decision wherein the FST ruled that a fund may only withhold a member's benefit pending civil proceedings and not pending a criminal case against a member.

The Ngobeni decision

In the Ngobeni decision, the FST held that section 37D(1)(b)(ii) of the Act deals with admissions of liability and civil judgments. The FST concluded that Highveld Steel, only dealt with withholding payment pending the finalisation of civil proceedings. In addition, the FST held that Highveld Steel did not hold that a fund is entitled to withhold a member's benefit where a criminal case has been opened or even upon conviction. The FST noted that a conviction is not a judgment that quantifies compensation for damages caused, and costs are not awarded against the convicted person.

The OPFA adopted this interpretation and applied it in subsequent determinations. Consequently, some funds amended their rules to allow the withholding of benefits where an employer had instituted only civil proceedings.

New amendments to the Act

Amendments to the Act through the Pension Funds Amendment Act No. 31 of 2024, effective 1 September 2024, state that a judgment in terms of section 37D(1)(b)(ii) obtained against a member includes a compensation order granted in terms of section 300 of the Criminal Procedure Act.

This means that where an employer has lodged a criminal case, the fund may allow the employer time to pursue the recovery of misappropriated funds through a section 300 compensation order. However, this does not absolve the fund of the duty to exercise its discretion with care, balance the competing interests and give due consideration to the strength of the employer's case against the member. These amendments necessitate a change in the approach adopted by funds in the application of section 37D(1)(b)(ii). However, the amendments are not retrospective.

Complaints lodged before 1 September 2024 will continue to follow the previous approach, where benefits could not be withheld based on criminal cases. Complaints lodged after 1 September 2024 will apply the new position even if the decision to withhold was made prior to 1 September 2024.

The Adjudicator is aware of pending High Court cases seeking to clarify whether pension funds can withhold members' benefits based on criminal cases lodged by the employer. The outcomes of these cases will guide us in ensuring a consistent approach.

Conclusion

These amendments mark a significant shift with far-reaching implications. Since criminal cases often take longer to resolve, funds must ensure that they closely monitor the progress of the criminal cases and ensure that there is no unreasonable delay occasioned by the conduct of the employer.

Nomfanelo Munyu
Assistant Adjudicator

Dispelling misconceptions about the two-pot system

While there are many misconceptions regarding the Two-Pot Retirement System, I aim to highlight the areas of misunderstanding and miscommunication that the OPFA frequently encounters. Here's a look at some of the most common myths circulating among fund members and a brief explanation of how the two-pot system operates.

The new system applies to all active retirement fund members in private and public sector funds, except for the old generation or legacy retirement annuity policies or funds with no active participating members, such as funds in liquidation, beneficiary funds, closed funds, or dormant funds. The system does not apply to pensioner members.

Another class of people automatically excluded from the two-pot system are members of provident funds who were 55 years or older on 1 March 2021 and have remained members of the same provident fund. These members can choose to opt into the two-pot system. They have until 1 September 2025 to decide.

The two-pot system applies to pension, provident, preservation, and retirement annuity funds, as well as defined benefit and defined contribution funds. It does not apply to beneficiary funds and unclaimed benefit funds.

The two-pot legislation also provides for the exemption of "legacy" or "old-generation" RA funds. Essentially, legacy RAs are contracts held by an RA fund entered before 1 September 2024 that include a pre-universal life or universal life component. These funds can apply to the FSCA for an exemption from the two-pot system.

Two-pot system with three pots?

The name of the new system has created confusion. Only people who join a retirement fund for the first time on or after 1 September 2024 will have two "pots," which is a misnomer because the final legislation calls them "components." These members will have a savings pot and a retirement pot.

> *"People who contributed to a retirement fund before 1 September 2024 will have three pots: savings, retirement, and vested.*

Another class of members who will have only two pots in a fund are deferred pensioners, people who resigned and opted to leave their money in the fund until retirement. These members will have a vested pot and a savings pot. They will not have a retirement pot because they are no longer making contributions. Their savings pot will consist entirely of seed capital.

Vested rights will not be taken away.

The purpose of the vested pot is to protect members' rights that were in place before 1 September 2024. Nevertheless, misconceptions exist about how the two-pot system affects members' savings accumulated before 1 September 2024.

Old rules apply to retirement savings accumulated before 1 September 2024. A member still has full access to accumulated retirement savings, which will be in the vested pot, when resigning. This can be taken as cash (subject to tax) or transferred to another retirement fund. A member can also still access what is in the savings pot after resignation. The retirement component is not accessible when a member resigns.

> *Members are permitted one withdrawal per tax year, not a calendar year. The tax year starts on 1 March and runs to the end of February. The two-pot system came into effect on 1 September 2024, meaning members have six months to make their first withdrawal (if they choose to do so).*

Taxation

Pre-retirement withdrawals from the vested pot will still be taxed according to the withdrawal benefit tax table, where only the first R27 500 is tax-free.

After 1 September 2024, savings pot withdrawals are taxed at the individual's marginal tax rate, which applies to various income levels.

Another misconception is that members who leave their accumulated savings in the vested pot will be worse off regarding investment returns. Although no further contributions can be made to the vested pot from 1 September 2024, the money in this pot will remain invested and continue to earn returns. The same annuitisation requirements will continue to apply to benefits in the vested pot at retirement.

At retirement, the cash lump-sum withdrawal of up to one-third of a member's savings will still be taxed according to the retirement fund lump-sum benefits table. The first R550 000 is tax-free.

Minimum and maximum withdrawals.

As at 1 September 2024, one-third of a member's contributions are allocated to the savings pot and two-thirds to the retirement pot. This split was compulsory across all funds that qualified for the two-pot system.

The rand amount of the allocations to the savings and retirement pots is net (after) the deduction of administration expenses and any group risk cover.

The funds in the savings pot can be accessed before retirement (in the case of an occupational fund, without having to resign). Members of RA funds now also have access to their savings before retirement, without specific extenuating circumstances having to apply.

At retirement, any money remaining in the savings pot can be withdrawn as a lump sum or transferred to the retirement pot and used to buy an annuity.

Members are permitted one withdrawal per tax year, not a calendar year. The tax year starts on 1 March and runs to the end of February. The two-pot system came into effect on 1 September 2024, meaning members have six months to make their first withdrawal (if they choose to do so).

The minimum withdrawal is R2 000.

Maximum of R30 000

The cap of R30 000 on the seed capital is not the maximum annual withdrawal from the savings pot. There is no maximum withdrawal amount from the savings pot. The savings pot will continue to grow as one-third of the contributions are added, and investment returns are earned on these contributions. Members can withdraw whatever is in the savings pot, subject to the R2 000 minimum.

Seeding is a once-off event.

The savings pot is seeded using the accumulated savings in the vested pot. Therefore, the seed capital will reduce the balance of the vested pot and be reflected in the savings pot.

Seeding is a once-off event; it occurred only when the two-pot system was implemented on 1 September 2024.

The seeding amount is 10% of the accumulated savings valued on 31 August 2024, and the maximum transfer is R30 000.

Fund members were not required to do anything to seed their savings component. By law, the fund will perform the seeding.

It's not a use it or lose it situation.

The annual withdrawal from the savings component is not "use it or lose it." Members who choose not to make a withdrawal do not forfeit access to the amount they could have withdrawn in subsequent years. The balance in the savings component remains available for withdrawal in any subsequent tax year.

A member is entitled to make a savings pot withdrawal from each fund of which he or she is a member that falls under the two-pot system. For example, a member who belongs to an employer-sponsored umbrella fund and two RA funds can withdraw from each of these funds' savings components, subject to meeting the R2 000 threshold in each fund.

These withdrawals are taxed at a member's marginal tax rate (personal income tax table applies). The relevant tax rate is applied after the fund administrator has deducted its fee to process the withdrawal.

At retirement, lump-sum withdrawals from the savings pot are taxed according to the retirement fund lump-sum benefits table. The first R550 000 is tax-free. Pre-retirement withdrawals do not erode the R550 000 tax-free benefit. However, they do erode the cash the member will have available at retirement.

The South African Revenue Service (SARS) has indicated that if a member who makes a pre-retirement withdrawal owes SARS tax, SARS may deduct not only the tax at the marginal rate but also the outstanding tax. SARS may not deduct arrear tax if the member has entered a repayment plan with SARS, but it is a possibility.

The administrator will deduct a fee.

Many, fund administrators charge a fee to process withdrawals from the savings component. Different providers have decided on various fee arrangements, either a fixed fee, a sliding scale or a percentage of the withdrawal amount.

Note from a Case Officer

Gift Mudau, Case Officer

As a case officer, complainants are primarily in contact with me by telephone, email or simply when they walk into the office to enquire about the progress of their complaint, until it is resolved by the OPFA.

I may also advise on the finalisation of a complaint by way of settlement. When a complainant lodges a complaint, they want to know that the OPFA will be responsive and deal with their complaint efficiently and expeditiously. More importantly, they look to the OPFA for justice.

In most instances, complainants want the OPFA to bring their complaints to the attention of the employer and the fund. Further, they want assurance that someone at the OPFA who is skilled and professional will liaise with them until their complaint is resolved. This is where, as a Case Officer, I enjoy one of my responsibilities, which is to explain the OPFA's procedures and processes to complainants. When complainants come to the OPFA, they have already tried to resolve the matter themselves with no success.

Most complainants are either aware of the employer's non-compliance with the Act or have not been paid their withdrawal benefit by the fund. The complainants require the OPFA to assist them in addressing the employer's non-compliance and to get their benefits paid by the fund.

My responsibility as a Case Officer is fascinating as in the bulk of complaints, usually, three parties are involved: the complainant, the employer, and the fund. I ensure that the complaint is brought to the attention of the employer and the fund. Further, each party's submissions in the complaint are brought to the attention of all the other parties.

After an involved, rewarding day, I enjoy spending time with my daughter to relax, gather my thoughts and prepare for the next day, week, and month.

Getting to know the Ombud Council and NFO

For more information on the NFO visit https://nfosa.co.za/

To enhance efficiency, coordination, and clarity within the financial ombudsman system, four main industry ombud schemes amalgamated. The Credit Ombud, the Office of the Long-Term Insurance Ombud, the Office of the Short-Term Insurance Ombud, and the Ombudsman for Banking Services merged to form the National Financial Ombud Scheme (NFO). With the Ombud Council's recognition of the NFO, the scheme now holds the same status as the predecessor schemes, operating as a recognised industry scheme under the Financial Sector Regulation (FSR) Act.

The Ombud Council initially implemented an advertising campaign to create awareness of the NFO which featured digital advertisements in online publications and live reads on national radio stations. As part of the second phase of the campaign, the Ombud Council is now expanding its outreach with live reads on community radio stations and advertisements in local and community newspapers. This broader media approach ensures that the NFO reaches a diverse audience, enhancing public understanding of the scheme's role in resolving complaints about financial institutions in relation to financial products, financial services, and services provided by market infrastructures.

OPFA's Quarterly Stakeholder Engagement Activities

In the second quarter, the Office of the Pension Funds Adjudicator (OPFA) engaged stakeholders through various outreach activities to raise awareness about its mandate and services. These initiatives also focused on financial literacy and educating the public through mall activations during the annual Money Smart Week SA campaign. This article summarises these key activities, focusing on the OPFA's commitment to promoting financial literacy and protecting the rights of pension fund members.

Ms Fezile Sithole sharing essential information about the OPFA's mandate and services.

To kick off its quarterly stakeholder engagement activities, the OPFA participated in a consumer financial education initiative organised by the Banking Association South Africa (BASA) for senior club members in Soweto. The invitation for the event was extended to all the National Consumer Financial Education Committee (NCFEC) members, including the OPFA. During the initiative, Ms Fezile Sithole shared essential information about the organisation's mandate and services. This engagement was particularly beneficial for senior citizens, ensuring they were well-informed about their rights.

In addition to focusing on seniors, the OPFA reached out to younger audiences at the Tshwane University of Technology (TUT) Career Expo. This event provided an excellent platform for the OPFA to engage with students and various exhibitors. By sharing insights about the OPFA's mandate and the career opportunities within the organisation, the OPFA facilitated valuable connections between students and industry professionals. This initiative raised awareness about the Office and inspired students to explore potential career paths in the future.

OPFA engaged with students at the TUT Career Expo, providing information about the organisation and various career opportunities.

Another significant event this quarter was the BATSETA Winter Conference, where the Deputy Pension Funds Adjudicator updated industry stakeholders on the OPFA's complaints handling process and shared key statistics regarding the organisation's role within the pension fund sector.

2024 Money Smart Week SA

The Money Smart Week campaign aims to promote financial literacy and empower individuals to make informed financial decisions. This year's theme, "Protect Your Money. Secure Your Future," emphasizes the importance of safeguarding personal finances against risks and planning for the future. As part of this initiative, the OPFA conducted mall activations at several locations, including Denlyn Mall in Mamelodi, Alexandra Plaza in Alexandra, and Meadow Point Shopping Centre in Soweto. These activities created a platform for the OPFA to engage directly with community members. In Mamelodi, the OPFA collaborated with the National Financial Ombud Scheme South Africa (NFOSA) and the Office of the Ombud for Financial Services Providers (FAIS Ombud) to promote pension fund rights and consumers' rights in the financial services industry.

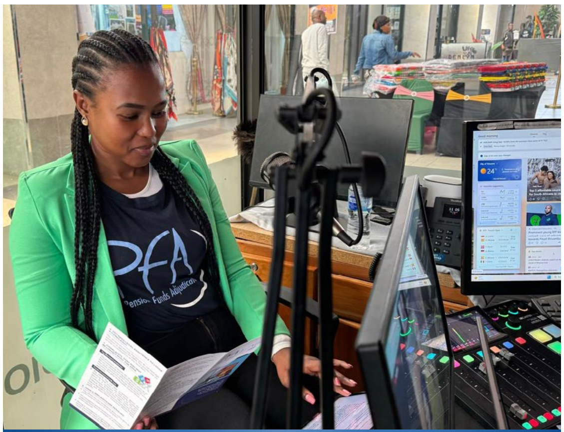
The OPFA also participated in a joint webinar with the NFOSA, FAIS Ombud, and Ombud Council, where it discussed the role of the Pension Funds Adjudicator in protecting financial services customers. Through these initiatives, participants gained valuable insights into the roles of each organisation and how to lodge a complaint if they are aggrieved.

Furthering its commitment to public education, the OPFA was also invited to a Two-Pot Activation Day in Gandhi Square, Johannesburg. This event focused on the two-pot retirement system that commenced on 01 September 2024. The activation aimed to educate security personnel and the public about the new rules and legislation so that they could make informed decisions about their pensions and understand the impact of early pension fund withdrawals.

To kick-off the 2024 Money Smart Week SA campaign, the OPFA, NFOSA and FAIS Ombud conducted a joint mall activation in Denlyn Mall, Mamelodi.

Mr Tinyiko Shihundla assisting complainants to complete the complaint forms during a mall activation in Alexandra Plaza, Johannesburg.


OPFA staff educating members of the public during a mall activation at the Meadow Point Shopping Centre in Soweto, Johannesburg.


The OPFA conducted a community radio interview at Capital Live 99.0 FM in Mamelodi, Pretoria.

Conclusion

In conclusion, the OPFA's outreach activities in the second quarter of the year demonstrated its commitment to financial education and stakeholder engagement. By prioritising financial literacy and the dissemination of crucial pension fund information, the OPFA not only empowers individuals but also strengthens its overall footprint in the pension fund industry. The OPFA looks forward to continuing these important initiatives in the coming months through ongoing efforts and collaboration with stakeholders. For individuals seeking more information about the OPFA's services or wishing to engage with the organisation further, you can visit our website or contact our offices.


OPFA staff engaging with the public during the Two-Pot Activation Day in Gandhi Square, Johannesburg.

The OPFA welcomes new interns

Lebogang Mabala joined as our new Supply Chain Management Intern in April 2024, reporting to Mr. Wonder Dila. A Logistics graduate with a National Diploma from Tshwane University of Technology (TUT), she brings over 3 years of theoretical knowledge in supply chain management. Lebogang is eager to gain practical experience and is passionate about service delivery.

Funnwell Dayimani joined as our new legal intern in July 2024, reporting to the New Complaints Unit Supervisor. He holds an LLB from the University of South Africa (UNISA) and gained practical experience through a mentorship programme at a local law firm, applying legal research and writing skills to real-world issues. Funnwell describes himself as friendly, articulate, and professional, with strong integrity. He is capable of working under pressure and managing a demanding workload.

Teddy Raolane joined as our new legal intern in July 2024, reporting to the New Complaints Unit Supervisor. He holds an LLB degree from the University of South Africa (UNISA) and a certificate in Fraud and Corruption Prevention in Public Procurement from IACA. With over 2 years of relevant experience, including roles in public institutions and at the Pretoria Magistrate's Court, Teddy is passionate about legal research and drafting. Outside of work, he enjoys playing soccer and watching news headlines.

Xolile Ndlovu joined as our new ICT Intern in July 2024, reporting to Mr. Clement Manenzhe. Xolile is a Tshwane University of Technology (TUT) alumna with a National Diploma in Information Technology and a software development major, Xolile has 6 months of experience as a Software Development Trainee at NTiD Technologies (Pty) Ltd. Passionate about the tech industry, she aims to gain practical experience and deepen her knowledge of IT systems and tools.

Lutricia Lynch joined as our new Human Resources Intern in July 2024, reporting to Mr Bulelani Makunga. She holds a Bachelor of Social Science with majors in Industrial Psychology and Psychology, as well as a Postgraduate Diploma in Labour Law from the University of Free State (UFS). Lutricia brings valuable knowledge of HR and Labour Law from her academic background and is passionate about recruitment, eager to expand her expertise in this area and other aspects of Human Resources.

Kgothatso Bongani Maleka joined as our new Finance Intern in July 2024, reporting to Mr Wonder Dila. He holds a Bachelor of Commerce in Accounting from Eduvos, graduating in 2023 with a top 3 achievers' certificate in financial management. Bongani has a passion for numbers and enjoys contributing to team success. He is known for being joyful, trustworthy, and easy to work with.

Maharula Muluvhahothe joined as our new Legal Intern in July 2024, reporting to the New Complaints Unit Supervisor. He is a recent graduate with a BA in Law and International Relations, an LLB, and a Postgraduate Diploma in Information and Communication Law from the University of the Witwatersrand. Maharula aims to apply the skills he gained through past work experiences, student leadership roles, and volunteer work to advance his career and contribute to the community.

Sharlotte Ramokone Manganye joined as our new Legal Intern in July 2024, reporting to the New Complaints Unit Supervisor. She holds an LLB degree from the University of South Africa (UNISA). Sharlotte is skilled at resolving problems resourcefully to reach beneficial agreements and has experience in clerical roles. Passionate about customer service, she describes herself as a hardworking and dedicated individual committed to adding value to the organisation.

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, 0181
- **Submit your complaint online:**
  https://www.pfa.org.za/complaints
- **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
- **For queries contact:**
  012 748 4000 / 012 346 1738

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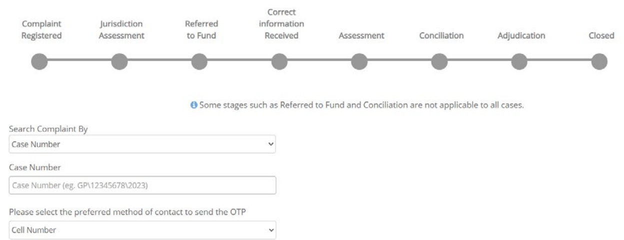
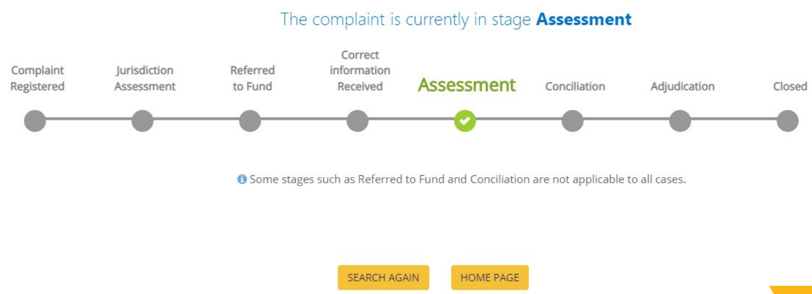
HERE'S A STEP-BY-STEP GUIDE TO CHECK THE COMPLAINT STATUS ONLINE:

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

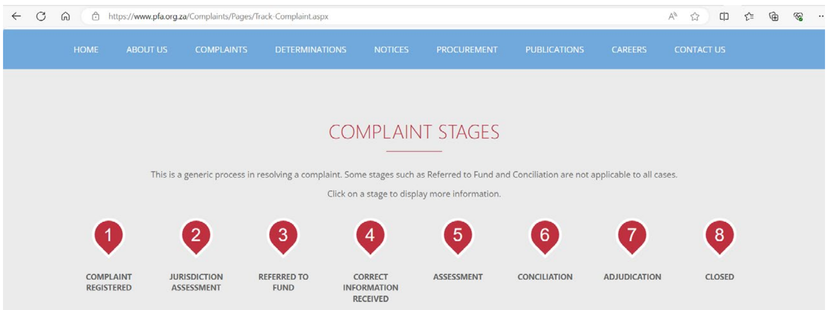
2. ***Enter the ID/Passport Number or case reference number and Search.***



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.***



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