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PFA Pension Funds Adjudicator

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The Quarterly DIGEST

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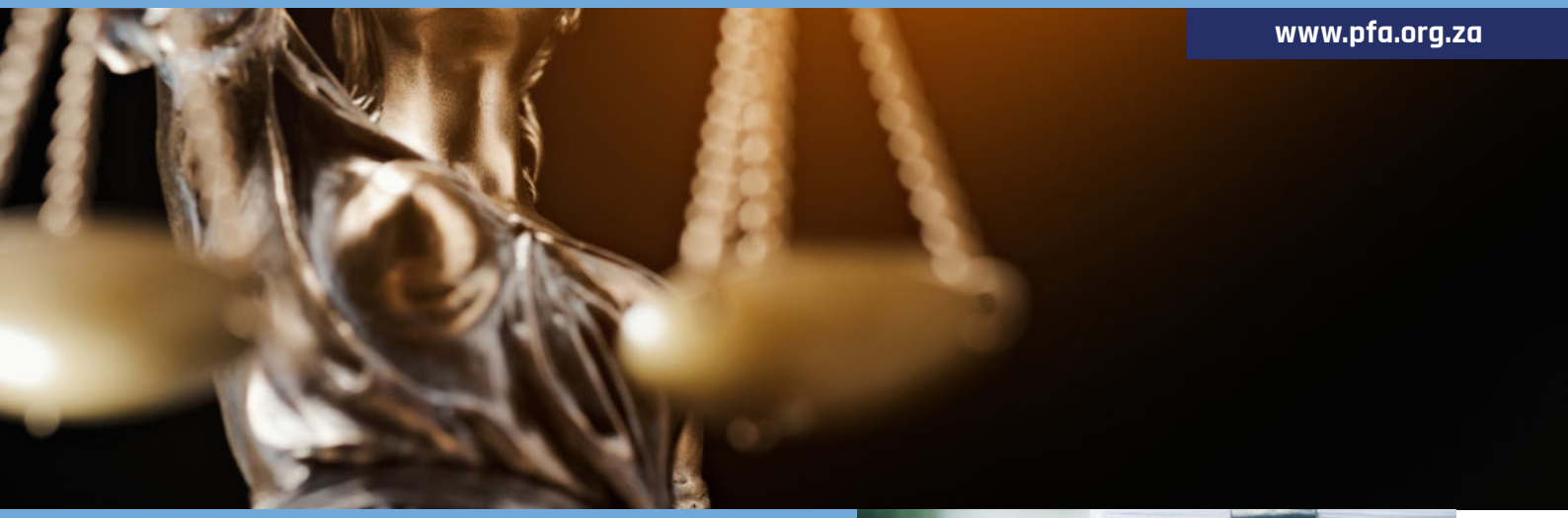

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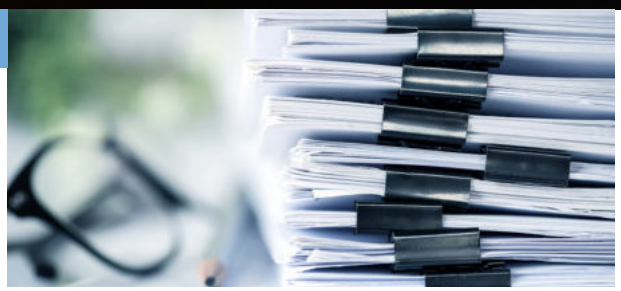

Prescription and time barring

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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

Muvhango Lukhaimane
Pension Funds Adjudicator

As at 30 June 2022, the OPFA had 2 654 outstanding complaints, 69 of those over the six month period. We continue to struggle with receiving responses to complaints against the Chemical Industries National Provident Fund ("CINPF") owing to the dismal arrangements made with the transfer of the fund through several administrators in the past few years. This had a significant impact on our ability to meet the contracted turnaround times.

The OPFA continues on its recruitment drive to augment the skills and competencies with the placement process for the Deputy PFA approaching interview stage. It is hoped that a suitable candidate would be on board by the end of the calendar year.

Naheem Essop, our Senior Legal Advisor is reviewing our internal control processes in light of the review application by Bokamoso Retirement Fund that clarified that it is not only a formal determination that rises to the level of decision by the decisionmaker, rather all communication including settlement letters and matters deemed out of jurisdiction.

Further, the downward review of the initial response times from 30 and 15 days to 20 and 10 days for initial request for a response and follow-up letters, respectively is bearing fruit. The orders sounding in money are also progressing as expected. In the next few weeks, the OPFA will meet with several funds and administrators to ensure that further efficiencies are achieved in this regard.

On a lighter note, it was good to be back on the conference and workshop circuit in person. It was also good to see many of you hard at work given the effect of the Covid-19 pandemic on the retirement fund sector and its members.

The OPFA will be releasing its Annual Report shortly and I would like to convey my gratitude to all of you that continue to contribute to our success by discharging your duties as expected.

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

PRESCRIPTION AND TIME BARRING

By Naheem Essop
(Senior Legal Advisor)

Section 30I of the Pension Funds Act, 1956 ("PF Act") imposes a three-year time bar on complaints that may be investigated by the Adjudicator. The time bar is not applied uniformly, and section 30I of the PF Act provides that the provisions of the Prescription Act, 1969 ("Prescription Act") relating to a debt applies in the calculation of the three-year period.

Prescription is the process by which legal rights are acquired or lost because of a failure to exercise such rights within a specified period. There are two types of prescription viz. acquisitive prescription and extinctive prescription. This article deals with the latter since it is more relevant to retirement fund benefits.

What is the purpose of prescription?

The Supreme Court of Appeal in - ***Uitenhage Municipality v Molloy*** 1998 (2) SA 735 (SCA) at 742I – 743A, said:

"One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted."

The Constitutional Court has also said:

"This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence."

See ***Road Accident Fund and Another v Mdeyide*** *2011 (1) BCLR 1 (CC) at para [8]*

Extinctive Prescription

In general terms, section 10 of the Prescription Act provides that a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. By the prescription of a principal debt, a subsidiary debt which arose from such principal debt shall also be extinguished by prescription. Notwithstanding the aforesaid, payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

Section 11 provides that the period of prescription for a debt (as referred to in section 30I of the PF Act) is three-years.

Prescription begins to run as soon as the debt is due. The Prescription Act says that a debt shall not be deemed to be due until:

(i) the creditor has knowledge of the identity of the debtor; and

(ii) of the facts from which the debt arises;

provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

The Prescription Act also says that if the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

Knowledge of the debt

In relation to complaints to the Adjudicator, there are several sources of knowledge from which a complainant could reasonably acquire knowledge of the facts from which a complaint arises. The following are examples (not exhaustive) of same:

- communication by the fund;
- annual benefit statements;
- salary advices;
- contribution statements;
- reports by monitoring person in terms of regulation 33(3); and
- notification to affected members in terms of regulation 33(4)(a).

In the instance where a fund fails to notify affected members of the fact that their employer has failed to pay over monthly contributions, the fund may be held to have willfully prevented the affected members from becoming aware of the debt. Prescription will therefore not commence to run until the members are made aware of the debt.

In ***Links v Member of the Executive Council, Department of Health, Northern Cape Province*** [2016] JOL 35593 (CC) the Constitutional Court dealt with section 12 of the Prescription Act and the issue of when the applicant in that matter became aware of the facts from which the debt arose. The applicant was found to have only become aware of the facts relating to negligence and causation in a delictual claim (for the amputation of his thumb and loss of the use of his left arm) after he had received a report from a medical doctor advising him of such, years after the incident took place.

The Court said at paragraphs [42] and [47] respectively:

"To require knowledge of causative negligence for the test in section 12(3) to be satisfied would set the bar too high. However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises…

"Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. It seems to me that it would

be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice."

Similarly, there are specialist areas in retirement funds that may not automatically give rise to suspicion of a claim until such time as specialist advice is received. In ***Roestorf and Another v Johannesburg Municipal Pension Fund and Others*** [2012] 3 All SA 68 (SCA), the applicants were medically boarded and qualified for retirement benefits. They received the pensions as calculated until 2003, when they were advised by a consultant that that they were entitled to full benefits as if they had remained in the employment until the age of 63 years. They then approached the fund's actuary, who advised them that they were wrong in their interpretation of the fund's rules.

However, their doubts about the correctness of the computation of their benefits were again aroused in 2005, when they received a communication from the fund about proposed changes. On 8 February 2006, they filed a complaint with the Pension Funds Adjudicator.

The complaint that the complainants' retirement benefits had been incorrectly calculated in contravention of the rules of the fund was upheld by the Adjudicator, who ordered the fund to compute the benefits correctly in terms of the rules and to pay the revised pension and arrears together with interest to the appellants.

Dissatisfied with the Adjudicator's determination, the fund successfully applied to the High Court as contemplated in section 30P of the Act for an order reviewing and setting aside the determination and confirming the fund's computation of the appellants' pensions. The appellants applied in reconvention for declaratory relief regarding, inter alia, the number of years of service to which they were entitled in terms of the fund's rules, and their entitlement to have their benefits calculated up to their normal retirement age of 63.

The High Court upheld the appeal against the determination of the Adjudicator on the ground that the complaint was time-barred in terms of section 30I of the Act and had prescribed in terms of section 12 of the Prescription Act 68 of 1969. Matter was taken on appeal to the SCA.

The SCA held that at the time of the termination of their employment in 1995 neither appellant possessed actual knowledge or an understanding of the correctness or defectiveness of the calculation of his pension entitlement. The conversation with their consultant in 2003 gave rise to the first doubts in that regard. The fact that the details of their benefits were provided to the appellants in 1995 did not mean that the deeming provision kicked in, as the computation of the benefits was a complicated matter which the appellants would have been unlikely to understand.

The appellants possessed no knowledge or expertise in relation to the fund's rules. They relied entirely, as they were entitled to do, upon the good faith, care and expertise of the officials of the fund. The date from which prescription would have started to run was therefore in 2003.

Acknowledging the debt

Section 14 of the Prescription Act says that the running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor. If the running of prescription is interrupted then prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.

In ***Roestorf*** (supra), the court held that the only rationale for the fact that the fund commenced payments in 1995 and had done so ever since, was the rules of the fund to which the appellants had been contributing members. However, each payment constituted a tacit acknowledgement of the Fund's obligation to pay according to its Rules.

"To interrupt prescription an acknowledgement by the debtor must amount to an admission that the debt is in existence and that he is liable therefor. " - ***Petzer v Radford (Pty) Ltd*** 1953 (4) SA 314 (N) at 317H. The fund, in ***Roestorf***, satisfied both requirements each month as it has paid the appellants' pensions pursuant to the rules. The consequence had been a continuing and ongoing interruption of prescription in relation to every amount each appellant was entitled to claim as his correctly calculated benefit.

If prescription has run its course, the debt cannot be revived by an express or tacit acknowledgement of debt:

"An acknowledgement of debt post completion of prescription does not revive the debt."

N.I.V. Okpugo v SALA Pension Fund (PFA70/2020 - 2 February 2021)

The issue of a "continuing wrong"

The question of whether certain types of conduct constitute a continuing wrong often comes up in the retirement funds' space. The question is succinctly answered by the SCA in ***Singh and Others v Companies and Intellectual Property Commission and Others*** 2019 (5) SA 432 (SCA) at para 17, where it is stated:

"See also Barnett & others v Minister of Land Affairs & others [2007] ZASCA 95; 2007 (6) SA 313 (SCA) para 20-21 and Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A) at 330H-331G which judgments accept the description of a continuing wrong as one which still is in the course of being committed and is not to be located wholly in a single past action."

The Constitutional Court too had occasion to clarify further in ***Makate v Vodacom Ltd*** 2016 (4) SA 121 (CC) at paragraph 192 where it stated:

"In the case of a continuing wrong there can be no question of prescription even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred at a past time the wrong itself continues for so long as it is not abated. But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed. Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered. The result is that the impact of prescription on claims having their source in the same right may differ depending on the nature of the claim."

Based on the aforesaid, the Financial Services Tribunal in RS Gurney N.O. and Others v Z Mkhize and Others (PFA 43/2021 – 7 September 2021), when dealing with a matter pertaining to the non-payment of monthly pension contributions, held that each non-payment was a wrong on its own and the fact that the same or similar wrongs were successively committed does not mean that the wrong was "continuing" in the above sense.

Impediments to Prescription

Section 13 of the Prescription Act lists the occasions when prescription is said to have been impeded. Impediments include, but are not limited to, when the creditor is a minor or is a person with a mental or intellectual disability, disorder or incapacity, or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription.

When an impediment is present, the creditor is allowed a further year from the date on which the impediment is uplifted, to sue to recover the debt. However, if the impediment is alleviated with more than one year of the normal three-year prescription period remaining, the impediment will not affect the running of prescription.

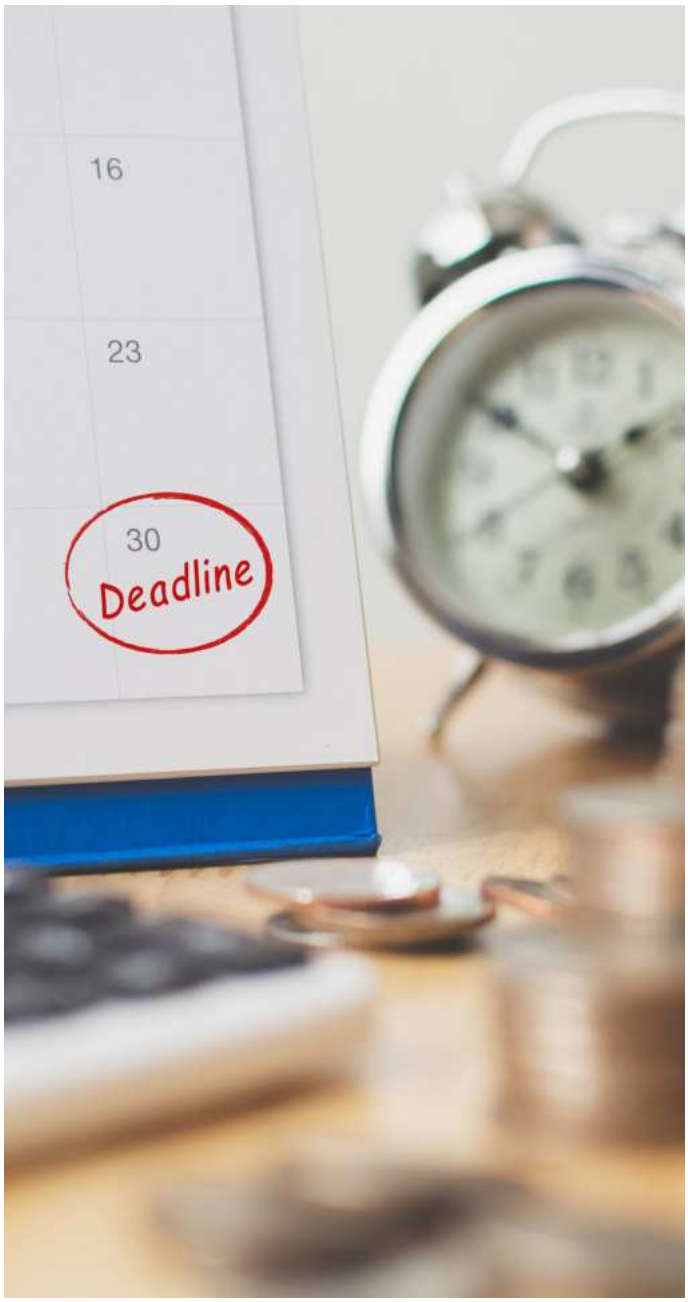
As an example, if prescription begins to run on 01 January 2023 and the creditor then suffers an impediment on 1 June 2025 (being the 3rd year of prescription), the creditor will have a further year after the impediment is uplifted to sue for the recovery of his debt. However, if the impediment is uplifted on 01 June 2024, there will still be more than a year within which prescription would have normally run and the impediment would therefore not affect the running of prescription.

Prescription to be raised by parties but not for time barring

Section 17 of the Prescription Act prohibits a court from taking notice of prescription of its own motion. This means that for a party to rely on prescription as a defence in a court of law, that party must raise the issue.

Insofar as retirement fund complaints are concerned, there is no similar prohibition on the Adjudicator taking notice of time-barring on her own. In fact, section 30I places a positive obligation on the Adjudicator not to investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

This means that the Adjudicator must consider whether the complaint is time barred, and if so, she will issue an out of jurisdiction letter informing the parties of her finding.



Can a fund's rules contain time limitation provisions for the lodging of complaints?

By Naheem Essop
Senior Legal Advisor

Imagine having to wait until the eleventh hour of a three-year time bar period to receive a complaint pertaining to the equitable distribution of a death benefit. A board of a fund would have to recall its documents, refamiliarise itself with the facts supporting its decision, and hope that those who had made submissions to it just short of three years prior are still available or contactable.

If it cannot do that, then it risks its decision being overturned and the possibility of not being able to recover monies that have already been paid pursuant to its decision on an equitable distribution. This may be to the detriment of the fund and its members.

It is certainly not unheard of that complainants approach the Adjudicator one or two years after a decision has been made and the Adjudicator is obliged by law to investigate such a complaint. The question then arises as to what measures can be taken by a fund to mitigate against such risks? One of the possible ways to deal with the issue is to consider the law relating to time limitation provisions and whether such principles may be extrapolated for inclusion in retirement fund rules i.e. can the rules of a retirement fund contain time limitation provisions for the lodging of complaints?

Contractual time limitation clauses

In ***Barkhuizen v Napier*** [2008] JOL 19614 (CC), the Constitutional Court dealt with a short-term insurance contract that contained a time limitation clause. The insurer relied on the said clause in its special plea and the plaintiff replicated that the time-limitation clause was unconstitutional and unenforceable because it violated his right under section 34 of the Constitution to have the matter determined by a court.

In determining the matter, the Court said:

"[28] Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, "is a cornerstone" of that democracy; "it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom".

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.

[48] I can conceive of no reason either in logic or in principle why public policy would not tolerate time limitation clauses in contracts subject to the considerations of reasonableness and fairness…"

The Court held that in general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. There are two questions to be asked in determining fairness:

- The first is whether the clause itself is unreasonable.
- Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.

The time limitation clause must afford the claimant an adequate and fair opportunity to seek judicial redress. If the term of a contract provides an impossibly short period of time for the dispute to be referred to a court of law, that term will be contrary to public policy and unenforceable. This is because our Constitution recognises the importance of disputes being resolved by courts and independent tribunals.

As to fairness, the Court said that many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness. The inquiry is whether in all the circumstances of the case having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause.

Insisting on compliance with a 90-day time bar clause against a claimant who, shortly after repudiation lapsed into a coma and recovered six months later, would no doubt be unfair, and its enforcement would be contrary to public policy. By contrast, insisting on compliance with a 90-day time bar clause against a claimant who deliberately neglected to comply with it, would not be unfair.

The Constitutional Court said that while it is necessary to recognise the doctrine of pacta sunt *servanda*, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant's position to demonstrate that in the circumstances it would be unfair to insist on compliance with the clause.

Is there a difference with a statutory time limitation?

In ***Barkhuizen*** (supra), the Constitutional Court also discussed statutory time limitations. In this regard, the Court said:

*"[50] In **Mohlomi**, this Court had to consider the constitutional validity of a time limitation contained in section 113(1) of the Defence Act 44 of 1957 ("the Defence Act"). That provision required legal action to be instituted within six months from the time when the cause of action arose and also within that time required a month's prior notice before the commencement of legal action. The provision was challenged on the ground, among others, that it was inconsistent with section 22 of the interim Constitution, the equivalent of section 34. The court held that consistency with the right of access to court:*

". . . depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances . . . to a real and fair one."

This test, the court added:

". . . lends itself to no hard and fast rule which shows . . . where to draw the line."

[51] In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. Broadly speaking,

*the test announced in **Mohlomi** is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu. It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.*

[52] In my judgment, the requirement of an adequate and fair opportunity to seek judicial redress is consistent with the notions of fairness and justice which inform public policy. There is no reason in principle why this test should not be applicable in determining whether a time limitation clause in a contract is contrary to public policy.

[55] I accept that there is a conceptual difference between a statute which introduces a limitation on the period within which a preexisting right may be prosecuted and a contract which establishes rights and time periods within which those rights must be prosecuted. That conceptual difference, however, cannot have the consequence suggested by the Supreme Court of Appeal. Such a consequence would undermine the importance of the right of access to courts. In each case, of course, the question will be whether the contract contains a time limitation clause which affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law." (footnotes omitted)

Time limitation provisions in retirement fund rules

An amendment to the rules of a fund must not affect the rights of a creditor (other than as a member or shareholder thereof), not render the fund financially unsound, and must not be inconsistent with the PF Act (see section 12 of the PF Act). Implicitly, an amendment to the rules of a fund must also be constitutionally valid since all law, including the PF Act, must be consistent with the Constitution of the Republic of South Africa, 1996 (as amended).

Section 13 of the PF Act provides that the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming. It is well established through the case law that the Adjudicator is not empowered to rule on the validity of an amendment. This is a decision that is taken by the Financial Sector Conduct Authority and if a person is aggrieved thereby, it may be referred to the Financial Services Tribunal.

It appears that what is central to the issue of time limitation provisions is whether the provision is reasonable and whether its enforcement would be fair. There needs to be some recognition in the provision that a court of law or the Adjudicator could make a finding that the enforcement of such a time limitation is unfair. It would accordingly be a "soft" requirement as opposed to a hard and binding one.

In keeping with the traditions of treating customers fairly, the issues of reasonableness and fairness must be determined by taking into account factors such as whether the opportunity that is afforded to a complainant to lodge a complaint is reasonable and fair taking into account all factual considerations of the particular case. The time limitation provision would also have to be adequately communicated to members and potential complainants.

Provided the aforesaid is met, it is difficult to conceive a reason either in logic or in principle why public policy would not tolerate time limitation clauses in the rules of a retirement fund subject to the considerations of reasonableness and fairness.

RTF PROCESS: Are you utilising it effectively?

By Lalita Jadoonandan
Early Resolution Manager

Section 30A of the Pension Funds Act, 1956 requires that members of pension funds who have a complaint against their respective funds or employers should approach the fund directly to resolve the complaint before approaching the Office of the Pension Funds Adjudicator ("OPFA"). Funds are required to properly consider the complaint and respond to the member in writing within 30 days. If a member remains dissatisfied, he or she may then approach the OPFA for a resolution of the dispute.

To give effect to this legislative requirement, the OPFA created an internal unit referred to as the Referred to Fund ("RTF") unit whereby pension funds are first given an opportunity to resolve the complaint by using their internal dispute resolution mechanisms before the intervention of the Adjudicator. The process was implemented to assist complainants who may not be aware of the legislative requirement and to not simply turn them away for want of compliance with section 30A(1). It provides funds with an opportunity to engage directly with their members without the intervention of the Adjudicator. Following the referral, funds are requested to provide the OPFA with a response to the complaint indicating whether the matter was amicably resolved between the parties to the satisfaction of the complainant and the steps that were taken to resolve the complaint. In turn, the OPFA formulates a resolution letter indicating to all the relevant parties that the matter is deemed to have been resolved. In cases where the matter cannot be resolved, a formal investigation by the OPFA will ensue.

A year into the RTF process and certain challenges have been encountered along the way. RTF referrals are sometimes not given the proper attention required by retirement funds despite there being a legislative requirement for same. The most noted challenge is that funds do not utilise the 30-day period, from receipt of the complaint, to resolve the complaint directly with the complainant. Most complaints received by the OPFA relates to non-payment of withdrawal benefits, computations, and the employer's failure to complete and submit withdrawal claim forms. These are matters that ought reasonably to be resolved at the RTF stage. Yet responses received from funds often do not provide the complainant with a proper explanation of the membership details and how benefits were calculated. Furthermore, where a complaint relates to the unavailability of a withdrawal claim form, the form is not submitted with the response and the complainant is not advised how to access it. In instances where the claim form is provided, the member is not informed of the process that will follow pursuant to the submission of the claim forms. In most cases, it appears that there was very little or no interaction with the complainant to attempt to resolve the complaint. The 30-day period afforded to resolve the complaint should be utilised to resolve the complaint directly with the complainant and a response to the OPFA should follow thereafter.

Funds that have embraced the RTF process with ease and earnestly utilise the opportunity to resolve complaints directly with the complainants enjoy the fruits of such endeavour and the matter is resolved and closed by the OPFA without a formal investigation. This is something that funds should be taking advantage of to enable them to better treat their members fairly.

Withholding of a member's retirement savings with a view to compensate an employer for loss caused by the member

By Tsebiso Makgabo
Senior Assistant Adjudicator

Section 37A of the Pension Fund's Act No. 24 of 1956 ("the Act") prohibits the reduction, cession, transfer or judicial attachment of retirement fund savings. There are exceptions to the prohibition contained in the Act. Some of the exceptions are contained in section 37D of the Act.

The exception in section 37D(1)(b)(ii) of the Act provides that the fund may deduct any amount due by a member to the employer for loss suffered because of the member's theft, fraud, dishonesty or misconduct. The member must either admit liability in writing to the employer or the employer must obtain a judgement against the member in any court for the deduction to be made.

The member often leaves employment before admitting liability in writing or the employer has obtained judgment in a court. In such circumstances, the fund is invariably requested to withhold the member's retirement savings while the employer secures judgment from court or a written admission of liability from the member. Section 37D(1)(b)(ii) provides for a deduction of the amount of loss caused to the employer by the member. It does not provide for the withholding of the retirement savings by the fund while the employer secures the relevant order or admission of liability.

Section 37D(1)(b)(ii) was given a purposive interpretation by the Supreme Court of Appeal in the matter of ***Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*** [2009] 1 BPLR 1 (SCA) ("Highveld Steel case"). The court in the Highveld Steel case determined that section 37D(1)(b)(ii) must be understood to include the power of the fund to withhold a member's benefit to afford the employer an opportunity to get a written admission of liability or the relevant court order.

The court in the Highveld Steel case went on to say that retirement fund boards have a discretion whether to withhold a member's retirement savings for the purpose of affording the employer an opportunity to obtain the relevant court order or written admission of liability. From the Highveld Steel case, three requirements that must be met to justify the withholding of a member's retirement

savings. Firstly, the discretion must be exercised with due care, this means that the fund must carefully scrutinise the claims made by the employer. Secondly, the fund must balance the competing interests of the member and the employer and, lastly, the fund must have due regard to the strength of the employer's claim.

In the matter of ***SA Metal Group (Pty) Ltd v Jeftha and Others*** [2020] 1 BPLR 20 (WCC), the court determined that before a fund exercises its discretion whether to withhold a member's retirement savings or not, the employer's case must be put to the member to afford him an opportunity to respond. If the fund does not do so, it cannot be said to have applied its mind appropriately, impartially and in a balanced manner.

In several complaints that have come before the Adjudicator, boards tend not to comply with the 3 requirements set out in the Highveld Steel case, in that they do not afford the affected member an opportunity to be heard prior to making the decision to withhold his retirement savings. Scrutinising the employer's claims, balancing the competing interests of the parties, and having due regard to the employer's case require that the board also afford the member an opportunity to be heard. If the member is not heard, the board has failed to comply with the Highveld Steel case and the withholding is wrongful and will be set aside if challenged.

In a complaint before the Adjudicator concerning a section 37D withholding, the Adjudicator will determine whether the decision was justified and compliant with the requirements of the Highveld Steel case. A fund will not be able to amend any shortcomings in the process it followed, after the fact (see ***KPMG Services (Pty) Ltd v M Maseti and 2 Others*** (PFA42/2020) FST – 17 September 2020).

The board of a retirement fund is required to be independent where the employer requests it to exercise discretion to withhold a member's retirement savings. Being independent is achieved through the board complying with the 3 requirements in the Highveld Steel case. As part of its efforts to comply with the 3 requirements, the board must give the affected member a chance to be make representations on the employer's submissions.

The Highveld Steel case requirements necessarily entail the fund hearing from the member as to the prejudice the member will suffer if the benefit is withheld and as to the member's response to the employer's case. If this is not done, the fund cannot be said to have properly balanced the competing interests. Nor is it able properly to assess the strength of the employer's claim if it had not informed itself of anything that may gainsay or undermine it.

The fund's decision moreover has the potential greatly to prejudice the rights of a member and it is incumbent on the fund to apply the rules of natural justice before making such a decision.

The duty of natural justice arises from the fiduciary relationship between the fund and its members. It applies unless excluded by legislation.

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