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PFA Pension Funds Adjudicator

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From the Adjudicator's Desk

Muvhango Lukhaimane
Pension Funds Adjudicator

The Office of the Pension Funds Adjudicator (OPFA) just released its annual report for 2021-2022. It is also our first integrated report with a hope of bringing more understanding and appreciation of our work to stakeholders.

The OPFA received 8 858 new complaints, an increase of 26% compared to the previous year when the Covid level 4 and 5 lockdowns were implemented. 2 109 cases were carried over from the previous financial year.

8 382 cases were closed in this period, 94% of which were wrapped up within six months to ensure timeous relief could be provided to complainants; and 45% of which were resolved by way of formal determinations.

As at 31 March 2022, there were 2 259 active cases and only 102 (4%) were older than six months.

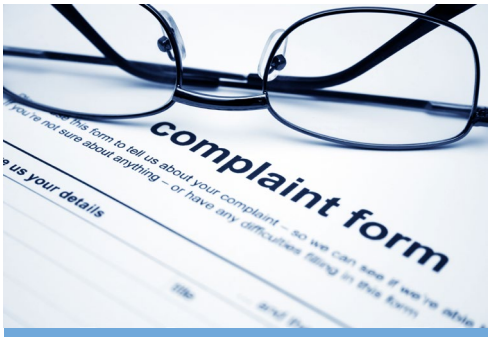
The PFA, said the number of complaints received in the financial year under review was still lower than pre-Covid levels. We had expected a larger number of complaints due to job losses and financial difficulties by employers and funds aggravated by Covid-19, which would have had a direct impact on benefit withdrawals and employer contributions. However, it seems that most of the issues are resulting in liquidations.

She said the majority of the 8 382 complaints related to withdrawal benefits (45%) and section 13A compliance (40%) where there was non-payment of contributions by employers and funds not adequately discharging their obligation to ensure collection of these contributions.

This is of great concern to the OPFA as fund non-compliance and section 13A matters have been a consistent feature over the years and continue unabated to the detriment of pension fund members.

The OPFA continues to engage funds and administrators that contribute the most to these matters and provide them with guidance on how to resolve some of the issues raised. There is regular engagement with the Financial Sector Conduct Authority management on trends that emanate from the complaints management process and identification of funds that require intervention from the regulator.

You are welcome to visit our website for the full report and feel free to email us your feedback.



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

Causal event charges imposed on retirement annuity funds

By Yolande van Tonder
(Senior Assistant Adjudicator)

Causal events charges, are charges that an insurer is permitted to levy when an event takes place before a retirement annuity policy reaches the end of its term.

Many of the expenses in respect of a retirement annuity policy are not recovered upfront. Instead, these expenses are recovered by deducting charges in small portions over the full contract term of the policy. This arrangement of recovering expenses in small portions over the full life of the policy generally is to the advantage of the policyholder. However, if an event occurs before a policy reaches maturity, the insurer may deduct the outstanding expenses as a lumpsum from the fund value of the policy.

The following events may trigger causal event charges:

- Contributions ceased and the retirement annuity policy becomes paid up;
- Reduction of contributions;
- Cancellation of the policy before the contractual end date; and
- Transfer of the policy to another approved retirement annuity fund.

The basis for imposing causal event charges needs to be determined and it must be decided whether the causal event charge that would be levied by the fund is fair and reasonable. In this regard Fourie J, in *Old Mutual Life Assurance Company (SA) Ltd v Pension Funds Adjudicator and Others* [2007] 1 BPLR 117 (C) at paragraph 35, noted that the fact that the policy does not specify a formula according to which the paid-up reduced benefit is to be calculated, does not mean that a fund has an unfettered discretion to arbitrarily determine a value in a manner that is unfair, unreasonable, or capricious.

In this regard, the Long-Term Insurance Act No. 52 of 1998 provides that the paid-up reduced benefit to which a member is entitled must be calculated in accordance with generally accepted actuarial principles and practice.

The court confirmed that causal event charges may be imposed by underwriting insurers.

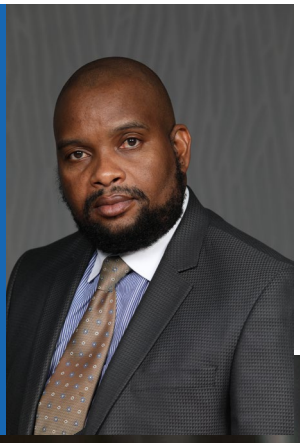
Section 52 of the Long-Term Insurance Act prescribes the manner in which long-term policies are to be dealt with in the event of premature cessation of contributions. The insurer must have rules approved by the statutory actuary that prescribe a sound actuarial basis and the method to be used to value a long-term policy in the event of a causal event occurring. Thus, the benefits and values attaching to a prematurely terminated policy, and any distinctions between it and policies that do not prematurely terminate, must be actuarially sound.

In addition to the requirement that causal event charges must be computed using the generally accepted actuarial principles that ensure the actuarial soundness of the insurer, on 1 December 2006 the Minister of Finance promulgated regulations in terms of the Long-Term Insurance Act that stipulate maximum causal event charges in respect of causal events that occurred on or after 1 January 2001.

Sub-regulation 5 that was inserted in Regulation 5.3 of the Long-Term Insurance Act further provides that a maximum early termination charge of 20% of the investment value may be deducted on early termination of retirement annuity policies prior to 1 January 2009. However, the causal event must have occurred on or after 1 January 2018 but before 1 January 2019.

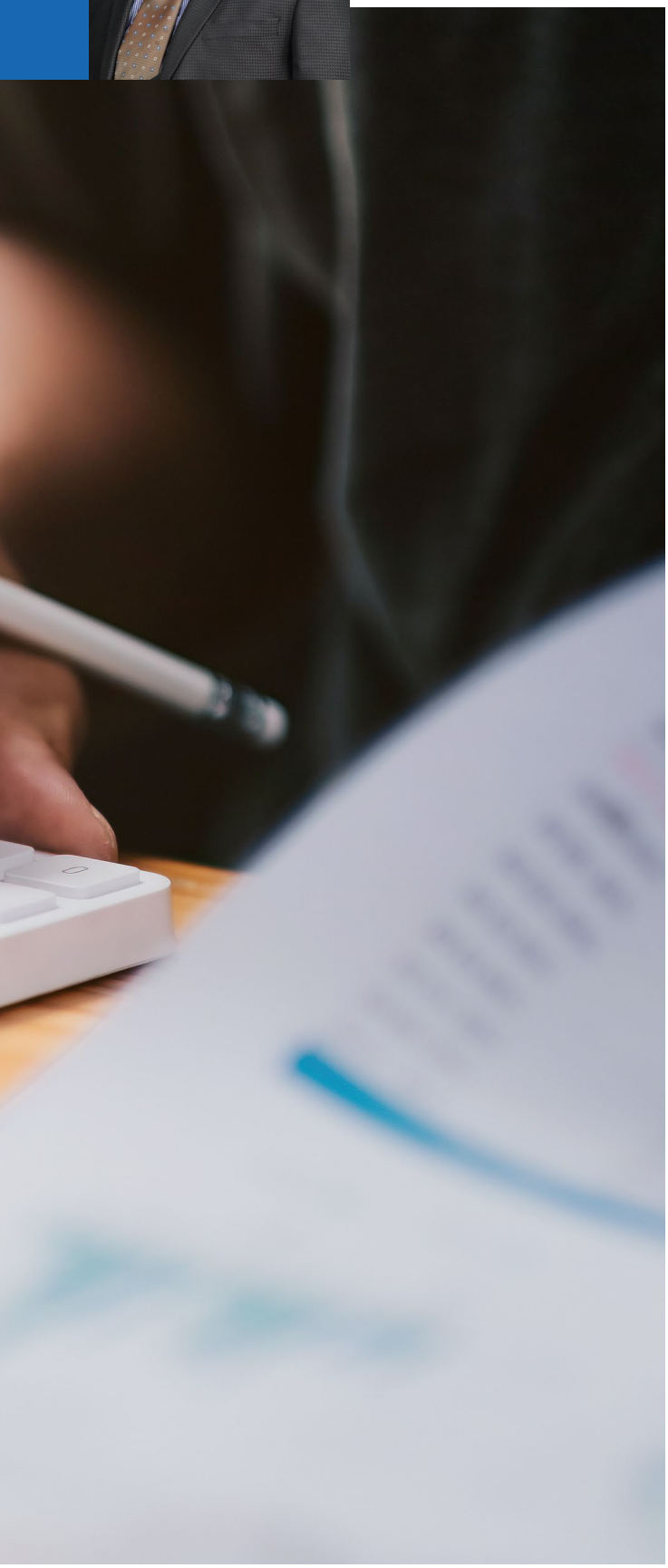
Further, Regulation 5 of the Long-Term Insurance Act prescribes that the early termination charge may not be more than an amount equal to 16% of the fund value. The reduction of causal event charges to the maximum of 16% with effect from 1 January 2020 to be reduced yearly until it reaches 5% on 1 January 2029. Causal event charges are 12% for the current period.

There is a duty on the part of a retirement annuity fund to provide a member with adequate information regarding his/her benefits in terms of section 7D(1)(c) of the Act for him/her to make an informed decision in a form of a benefit quotation. This duty becomes more compelling when the complainant has to plan, which may have adverse consequences for him/her (*De Bruyn v Telkom Retirement Fund* [2000] 11 BPLR 1220 (PFA)). Therefore, the member needs to be placed in a position whereby he or she can make an informed decision regarding the consequences arising from the early termination of his or her membership (*Van Veenhuyzen v ABSA Group Pension Fund* [2002] 4 BPLR 3381 (PFA)).



The duty of the fund to provide members with benefit statements

By Nndwakhulu Kutama
(Senior Assistant Adjudicator – Team Leader)



Section 7D(1)(c) of the Pension Funds Act, 24 of 1956 ("the Act") imposes a duty on a fund to ensure that adequate and appropriate information is communicated to members and beneficiaries of the fund by informing them of their rights, benefits, and duties in terms of the rules of the fund, subject to such disclosure requirements as may be prescribed. Further, section 7C(2)(a) directs the board of a fund to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times.

There are also minimum communication requirements set out by the Financial Sector Conduct Authority ("FSCA") in Pension Fund Circulars No. 86 and No. 130. Pension Fund Circular No. 86 provides that all active members of a fund must receive benefit statements within six months of the fund's financial year-end. Pension Fund Circular No. 130 deals with good governance requirements of retirement funds and provides that communication to members should be done in an adequate and appropriate manner to afford them the opportunity to understand the information and make informed decisions. It further provides that the board of a fund should communicate aspects of the operation of the fund which are of relevance to members, and which will assist members to assess the credibility and trustworthiness of the administration of the fund and the delivery of benefits.

From the above, it is clear that there is a duty on the board of a fund to properly communicate with its members. The minimum information in this regard includes annual benefit statements. Funds account to their members in various ways including furnishing them with benefit statements on a regular basis in order to give them information regarding their benefits, contributions and other relevant information which would enable them to have an overall view of their retirement benefits. The amounts reflected on a benefit statement are often the most accurate figure that a fund can provide but without binding itself to such amounts. This is because it is often difficult to give an accurate figure because of *inter alia* market movements etc. Therefore PF No. 86 has made it a requirement that a benefit statement contains a disclaimer stating that if the benefit statement conflicts with the rules, the rules will prevail.

A benefit statement should also contain the procedures for internal dispute resolution and access to the Pension Funds Adjudicator.

The duty to disclose adequate information to members is also important for the purposes of accountability and provision of access to information (see section 32(1)(b) of the Constitution of the

Republic of South Africa 1996 and *Wentworth v GG Umbrella Fund and Others* [2009] 1 BPLR 87 (PFA)).

It is not uncommon for funds to dispatch annual benefit statements to employers for their onward distribution to members. However, funds must be mindful of their duties as legislated, which talk to communication with their members, and not employers. Thus, they must make every effort to properly communicate with members and ensure that annual benefit statements reach each member in order to comply with legislative requirements in this regard. Members must be made aware of their rights in respect of the minimum information to which they are entitled. As such, they will be better positioned to hold funds accountable in this regard, failing which they are encouraged to approach the Office of the Pension Funds Adjudicator for further assistance on the matter.

In *Lebenya v Contract Cleaning National Provident Fund and Others* (GP/00082605/2021/YVT) and *Booysen v The Private Security Sector Provident Fund and Another* (MP/00084932/2022/YVT), the complainants requested copies of their benefit statements. They were no longer members of the funds, however, the Adjudicator still reminded the funds of their duty to provide members with their benefit statements. The Adjudicator then ordered the funds to provide the complainants with detailed breakdowns of their withdrawal benefits.

In *Ncobela v The Private Security Sector Provident Fund and Another* (NW/00079332/2021/YVT), the complainant was not registered as a member of the fund whilst he ought to have been when his employment commenced. He indicated that he did not receive benefit statements from the fund. The Adjudicator ordered that following his registration with the fund and receipt of contributions from the employer, the fund must provide the complainant with his annual benefit statements. In her reasons, she relied on the fund's duty in terms of section 7D(1)(c) of the Act.

Note from a Case Officer

Tinyiko Shihundla
(Case Officer)

I am a Case Officer at the OPFA. Part of my job is to interact with complainants, funds and employers on complaints that have been filed. My responsibilities include serving documents to parties to a complaint to give them the opportunity to file responses, draft settlement letters and out of jurisdiction letters, to contribute to the timely and expeditious resolution of complaints.

I don't only restrict myself to fulfilling the obligations listed above; I take on additional ones as well. I often engage the fund and the employer to submit a bulk response rather than submitting one at a time when I have multiple similar complaints against the same employer. This is because there is a possibility that the fund and the employer will experience several administrative challenges when submitting multiple responses on a similar complaint. When it is necessary for the complainant to acquire a computation of their benefits from the fund to enforce a determination, I occasionally help them in doing so. Feel free to get in touch with such people for help with the development of your complaint whenever you see the designation Case Officer on a letter from our office.

When a complaint is addressed within the timeframe, I feel relieved and satisfied. I believe in teamwork and collaboration since I can learn something new from my colleagues every day.

How to improve section 37C of the Pension Funds Act?

By Naheem Essop

Senior Legal Advisor

Not so long ago, National Treasury published its updated draft of the COFI Bill which included proposed consequential amendments to section 37C of the Pension Funds Act, 1956 ("Act"). The proposal re-orders the wording of section 37C in a manner that attempts to simplify but retain the *status quo*. Section 37C has always presented challenges for retirement fund trustees, not so much because of the wording of the section, but rather because of the duties that it places on boards of retirement funds to conduct a proper investigation and to effect an equitable distribution.

Death benefits have always been difficult terrain for retirement fund trustees and the need for clarification on its proper implementation has been there long before the COFI Bill. Given the important societal function that section 37C enables (per ***Mashazi v African Products Retirement Benefit Provident Fund*** [2002] 8 BPLR 3703 (W)), it would perhaps be better for National Treasury to embark on a separate and comprehensive consultative process aimed at addressing the problems experienced in implementing section 37C rather than bundling it up together with all other issues relating to the COFI Bill. This has been the primary submission of the OPFA in respect of the COFI Bill's consequential amendments to section 37C.

A survey of Adjudicator determinations relating to death benefit complaints will reveal that the most common issues relate to the investigation conducted by retirement funds. The investigation first has to identify all potential beneficiaries. To this end, the board must be satisfied that all dependants and nominees have been identified and traced. In the South African context, this presents a challenge and one only needs to look at the now nearly R50bn unclaimed benefits problem to realise the extent of it. Without guidance and the use of broad language in the legislation, retirement fund trustees can be forgiven for using a "guess and check" method to get things right.

The now famous judgment by Wallis JA in ***Fundsatwork Umbrella Pension Fund v Guarnieri and Others*** [2019] JOL 42094 (SCA), held that if a retirement fund makes payment pursuant to an incorrect decision by the board (which could arise because of an inadequate investigation), it is still liable for payment of the full benefit to the correct or lawful beneficiaries. This is so because the fund has a right of recourse against the person incorrectly paid and the death benefit is "*not a distinct and separate sum of money, but a claim against the assets of the Fund*". Whilst that may be theoretically correct in law, one must appreciate that the prospects of recovery once a benefit payment has been set aside are minimal. At the end of it all, someone (in a mostly defined contribution environment) must foot the bill which then increases the burden on trustees to make the correct decision the first time given the substantial financial consequences that could flow. Therein lies the importance for policy-makers to address the issues and provide certainty.

The model adopted in the Administration of Estates Act, 1965 is fairly straightforward and uncontroversial. In summary, an advert is placed in a local newspaper/s (depending on where the deceased resided in the 12 months prior to his or her death) and the Gazette calling upon creditors to lodge a claim within 30 days. Thereafter, a second advert advertising the manner in which the estate is to be liquidated and distributed and calling for objections within 21 days is published. All of this is supported by documents lodged with the Master of the High Court including next-of-kin affidavits. There is no broad-language and undefined investigation that an executor must complete which could be subjected to a challenge up to three years (or more) after the decision has been taken and payment

has been made.

By no means is it suggested that a section 37C distribution should be dealt with in the same manner as a deceased estate and there is no suggestion that the social underpin in section 37C should be removed. However, reference is made to the relatively simple procedure followed in the administration of deceased estates because of the certainty it provides to executors and the recognition that it gives to the need for payments to be made as early as possible. What needs to be addressed in section 37C is how a board can be satisfied that a proper investigation has been done and whether the law needs to prescribe certain steps that must be taken by a board in conducting a proper investigation.

Consideration should also be given to the scope and meaning of "dependant" and whether any limitations should apply to facilitate efficient processing of death benefits, with some degree of certainty, providing financial relief to identified beneficiaries within a quick turnaround time. Limitations may include whether a person can cease to be considered a dependant if they are not identified after the lapse of a certain period subsequent to a proper investigation having been conducted. Recognition thereby being afforded to the likelihood that a person dependent on a deceased member would likely actively seek out any form of financial relief that is available to them after losing the support provided by the deceased.

For example, the Act could be amended to include a definition for "*death benefit investigation*" to mean:

i. Within 6 (six) months of the fund being notified of the deceased member's death, an interview conducted with the deceased's immediately identifiable dependants and/or nominees to ascertain the basis upon which they may be entitled to an equitable share of the death benefit and whether there are any other potential dependants; and

ii. An interview conducted with such other potential dependants of the deceased identified in terms of sub-paragraph (i) or this sub-paragraph, within 1 (one) month thereafter to ascertain the basis upon which they may be entitled to an equitable share of the death benefit and whether there are any other potential dependants; and

iii. An advert published in one or more newspaper circulating in the area where the deceased last resided and was last employed, 12 (twelve) months prior to the member's death calling upon all potential dependants to lodge their claim with the fund within 60 (sixty) days, provided that such an advert will not be necessary if the death benefit does not exceed R10 000.00; and

iv. Any other method that a board may in its discretion decide is appropriate for tracing a deceased member's beneficiaries, provided that such other method must be completed not later than 6 (six) months after the fund was notified of the deceased member's death; and

v. A report by the principal officer of the fund to the board indicating the results of the processes set out in (i), (ii), (iii) and (iv) above which should include a motivation for accepting or rejecting any claim which report must be provided as soon as is reasonably possible; and

vi. If the board raised any queries with the report referred to in (v) above, a further report by the principal officer to the board addressing such queries within 3 (three) months of such queries being raised.

By no means is it claimed that the above proposals are perfect and undoubtedly there will be several legitimate views on it. However, it is a basis for commencing a discussion on the issues plaguing retirement fund trustees. Naturally, when one places defined requirements in legislation the question turns to the costs of satisfying such requirements. In this regard, it is suggested that the costs of conducting interviews can be curtailed by the fund in-sourcing the function alternatively using its economies of scale to negotiate a reasonable fee with a third-party service provider. The cost of an advert would not, in the normal course, be negotiable but some mitigation of costs is attempted by addressing this through a *de minimis* requirement of R10 000.00.

One would also not want to restrict the board's ability to decide on an alternative method of investigation if it deems it appropriate to do so. It does not oblige a board to utilise an alternative method and leaves it within the board's discretion simultaneously providing a guide for the board. One should also balance the costs of the approach with the principle that emerged from the *Guarnieri* case and the possible cost to a fund in the event of it not getting a decision correct the first time.

A further possible amendment to the definition of "*dependant*" would be welcomed in the form of a proviso at the end of the current definition stating:

"provided that a person will cease to be a dependant upon the expiry of 6 (six) months after a fund has completed a death benefit investigation and such person has not been identified by the fund as a dependant."

The purpose of such a proviso would be to provide certainty to funds that have followed all of the prescribed steps in conducting a death benefit investigation that they may safely and without the risk of a beneficiary turning up at the eleventh hour making a claim against the assets of the fund.

It is clear that there are several polycentric issues requiring consideration which enhances the need for a comprehensive consultative process on one of the most important areas in retirement funds law requiring review. This article does not purport to canvass every issue but hopes to motivate the comprehensive consultative process required.

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