



## Financial Services Tribunal cases

### Section 14 transfer – effect of certification

*Nampak Group Pension Fund v Nampak Contributory Provident Fund and The Pension Funds Adjudicator*<sup>1</sup>

A section 14 transfer application between the two Nampak funds was approved by the Financial Sector Conduct Authority (FSCA). The transfer did not include a portion of the overfunded risk reserve account and neither did a subsequent 'agterskot' section 14. The receiving fund complained to the Adjudicator that a portion of the risk reserve should have been included.

The Adjudicator analysed the section 14 application and approval and concluded that no provision was made for an inclusion of a share of the risk reserve account in the transfer value. The FSCA had approved the section 14 transfer as such and issued a certificate in terms of section 14(1)(e) of the Act, confirming that it was satisfied that the provisions of section 14 were complied with. The Adjudicator cannot overrule a transfer of assets between funds under section 14, whether directly or indirectly and cannot order the board of management to transfer assets not permitted by a section 14(1) certificate.

The case was subsequently referred to the Tribunal for reconsideration, but the Tribunal agreed with the Adjudicator that she could not override an approved section 14, and the case was dismissed.

Once a section 14 transfer has been approved and certified by the FSCA, the Adjudicator cannot overrule such approval. The Adjudicator cannot exercise a discretion on behalf of a board and order it to transfer assets that are not permitted in terms of the section 14 certificate.

The boards of both funds agree to a transfer and subsequent 'agterskot', whereafter the necessary application is made to the FSCA. Boards should familiarise themselves with what they are agreeing to prior to submission.

### Distribution of death benefit

*Tsakani Nkuna v the Pension Funds Adjudicator*<sup>2</sup>

In the case of *Nkuna v Palaborwa Pension Fund*, the

Adjudicator found that Ms Nkuna was married to the deceased member in terms of customary law but at the time of his death, had not been living together with the deceased for four years, and was accordingly not entitled to be recognised as a beneficiary in terms of section 37C of the Pension Funds Act.

The case was referred to the Tribunal for review, where it was found that there is no dispute that Ms Nkuna and the deceased member concluded a customary union marriage (lobola marriage) during 2013. This was confirmed by a certificate of the Chief/Headman of the Ndindani Traditional Council. In terms of section 4(8) of the Recognition of Customary Marriages Act 2006 (RMCA), it is unnecessary to have regard to other proof of the marriage.

In 2018 Ms Nkuna left the matrimonial home to reside with her family. The Fund found that the marriage appeared to have been dissolved and she was therefore not included as beneficiary in the distribution of the death benefit. The Adjudicator agreed with this decision. The Tribunal however, found that the Fund and the Adjudicator did not consider section 8(1) of the RMCA, which states that a customary marriage may only be dissolved by a court in a decree of divorce. The marriage of Ms Nkuna and the deceased was not dissolved by a court, which was brought to the attention of the Adjudicator. The Tribunal pointed out that the law is clear and customary law cannot override an express statute that deals with the matter. The marriage therefore still existed, and Ms Nkuna was still a legal dependant for the purposes of section 37C of the Pension Funds Act. The decision to exclude her from consideration to share in the death benefits, was incorrect. The Tribunal set aside the Adjudicator's determination and referred the case back for reconsideration.

In an additional point, Ms Nkuna sought information about the distribution of the death benefit, which the Fund refused, a decision upheld by the Adjudicator. The Tribunal could see no reason for this. Ms Nkuna is the mother and legal guardian of the child born of the marriage, who is a beneficiary of the deceased. As the mother (and now a dependant), she

<sup>1</sup> Nampak Group Pension Fund v Nampak Contributory Provident Fund and The Pension Funds Adjudicator, 40/2022 (PFA Ref: WC/00082200/2021NVT)

<sup>2</sup> Tsakani Nkuna v the Pension Funds Adjudicator, Palaborwa Pension Fund and Sanlam Life Insurance Limited, PFA36/2022

is entitled to know how and why the allocation was done to establish whether the child was fairly dealt with.

A customary marriage continues, even if ended in terms of customary law, until dissolved by a court in a decree of divorce.

The mother of a child who is a beneficiary to a death benefit, is entitled to know how and why the allocation was done, to establish whether the child was fairly dealt with.

## Adjudicator cases

### Payment of a withdrawal benefit to foreign bank account

*Cousins (Complainant) v South African Retirement Annuity Fund (the Fund) and another (the Administrator)* <sup>3</sup>

The Complainant ceased contributions to her South African retirement annuity fund in 2006 when she moved to Canada. The retirement annuity had a maturity date of March 2016 and on 14 December 2019, she requested a transfer, or payment of the proceeds of her retirement annuity into a foreign bank account in Canada. The Administrator informed the Fund that the benefit could only be paid as a lump sum if she had fully emigrated to Canada, and therefore could only be paid to a South African bank account. The Complainant lodged a complaint with the Adjudicator.

The Adjudicator requested an opinion from a taxation specialist and found that in terms of the Fund's rules and the provisions of the Income Tax Act, a member who discontinues his or her contributions and emigrates to another country is entitled to a lump sum benefit. There was no evidence that the Complainant completed an emigration form provided by the South African Reserve Bank (Reserve Bank) in terms of which foreign capital allowance was applied for. Consequently, the Administrator acted in accordance with the rules of the Fund and the tax guide issued by the South African Revenue Service that was applicable when the Complainant lodged her complaint.

With effect from 1 March 2021, the Taxation Laws Amendment Act 23 of 2020 amended the definition of "retirement annuity fund" to remove reference to such emigration being recognised by the Reserve Bank. The new test makes provision for the payment of lump sum benefits when a member ceases to be a South African tax resident as defined in the Income Tax Act and such member has remained a non-resident for an uninterrupted period of three years or longer. The concept of "emigration" for exchange control purposes has been phased out and the Complainant's benefit could be paid.

The Adjudicator applied the new test that provides for the payment of lump sum benefits when a member ceases to be a South African tax resident and such member has remained a non-resident for an uninterrupted period of three years or longer.

<sup>3</sup> Cousins v South African Retirement Annuity Fund and another PFA/FC/00071402/2020/SB

### Provision of benefit statement

*Mahlangu (Complainant) v Private Security Sector Provident Fund (PSSPF)* <sup>4</sup>

The Complainant is employed in the private security sector and is a member of the PSSPF. He complained that he has never received a benefit statement and doesn't even know which fund he belongs to.

The Adjudicator held that the Complainant's entitlement to be provided with adequate and accurate information is based on the duties of the board in terms of section 7D(1)(c) of the Pension Funds Act, where it is stated that the board will ensure that adequate and appropriate information is communicated to members and beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund.

The duty to disclose adequate and accurate information to members and beneficiaries is important for the purposes of accountability and provision of access to information in accordance with section 32(1)(b) of the Constitution of the Republic of South Africa, 1996.

The PSSPF averred that the Complainant's benefit statement was provided to the employer. However, the evidence indicates that the Complainant did not receive it. It is the duty of the PSSPF to provide members with benefit statements and not that of the employer. The PSSPF was ordered to provide the Complainant with his latest benefit statement.

It is the duty of a fund to provide members with benefit statements. If benefit statements are provided by a fund to the participating employer, the fund must ensure that the benefit statements reach the members.

### Beneficiary funds

*Mohapi (Complainant) v Private Security Sector Provident Fund (PSSPF)* <sup>5</sup>

The deceased fund member passed away in 2014. A portion of the death benefit was paid to a beneficiary fund on behalf of the Complainant, who was a minor at the time. The Complainant stated that she was informed that she could claim the rest of the death benefit when she turned 18 years old. However, on attaining majority, she was told by the beneficiary fund that it had no record of her. The current administrator of the beneficiary fund stated that no take-on data was received from the previous administrator in respect of the Complainant when it took over the administration of the beneficiary fund in 2019. It also submitted that it enquired with the beneficiary fund concerning the records relating to the Complainant, without success.

The Adjudicator held that section 7D(1)(a) of the Pension Funds Act places a duty on a board to keep proper books and records of its operations. The board of the beneficiary fund is ultimately responsible for proper record keeping, even if it appoints service providers. The administrator

<sup>4</sup> Mahlangu v The Private Security Sector Provident Fund and others [2022] 4 BPLR 78 (PFA)

<sup>5</sup> Mohapi v The Private Security Sector Provident Fund and others [2022] 4 BPLR 81 (PFA)

is a separate legal entity, appointed by the board, whose operations the board should oversee and for whose conduct the board can ultimately be held accountable. Therefore, the beneficiary fund failed to comply with section 7D(1)(a) of the Act. A beneficiary fund must ensure that changes in administrators does not prejudice members.

On the strength of the evidence before the Adjudicator, showing that the portion of the death benefit allocated to the Complainant was transferred to the beneficiary fund, the Adjudicator held that the beneficiary fund's liability is established, and it must pay the Complainant the balance of the benefit.

A fund must keep proper records. The board of the fund remains responsible for this duty, even if delegated to a service provider. Changes in administrators must not prejudice members.

## High Court case

### Distribution of death benefit

*Groenewald and others (Applicants) v Momentum Retirement Annuity Fund (the Fund) and the Pension Funds Adjudicator and Chrisna Auret*<sup>6</sup>

The Applicants are the former spouse and children of the deceased member of the Fund. The respondents are the Fund, the Adjudicator and Ms Auret, the life partner of the deceased member. The board of the Fund allocated the entire death benefit to Ms Auret, whereafter the Applicants lodged a complaint with the Adjudicator. The Adjudicator agreed with the board's decision and the Applicants subsequently took the case to court.

Ms Auret and the deceased lived together since 2015 and shared household expenses. The Applicants' grievance was that the full benefit was awarded to Ms Auret solely on the

basis that they lived together, with no investigation into her financial circumstances.

Both the Adjudicator and the High Court found that the board of the Fund did in fact investigate all factors, did not consider any irrelevant factors, and complied with their fiduciary duties. The board investigated the nature and extent of material support and financial needs (including age, other sources of income, special circumstances and future income-earning capacity) of all possible beneficiaries. They also appointed a forensic team to interview persons who knew the deceased and Ms Auret to ascertain the nature of their relationship. They found that Ms Auret and the deceased were co-dependent, and she qualified to be included in the benefit distribution as both financial dependant and permanent life partner. The deceased's minor children and former spouse will benefit from the family trust that was set up at the deceased's death. The trust holds assets of approximately R40 million and the deceased's children are the beneficiaries of the trust. The Fund benefit in turn is only R1,2 million. The Adjudicator and court agreed to the distribution of the full death benefit to only Ms Auret.

### Nomination of a trust

The court remarked that the deceased had nominated the family trust as beneficiary of his Fund death benefit, but such nomination was of no force and effect as the death benefits must be distributed in terms of section 37C of the Pension Funds Act, which serves a social purpose, so a fund member cannot nominate a juristic or inanimate entity to receive a death benefit.

The fact that the deceased's children are beneficiaries of a large trust is a relevant consideration to exclude them from the distribution of the death benefit.

A trust cannot be nominated to receive the death benefit, although a trust may, under certain circumstances, be a mode of payment to a beneficiary.

<sup>6</sup> Chene Groenewald, Brendon Groenewald, Henro Groenewald, Sanet Groenewald and Johanna Christina de Swardt v Momentum Retirement Annuity Fund, Momentum Metropolitan Life Limited, Pension Funds Adjudicator and Chrisna Auret, case 7777/2021