SIMEKA

member of Sanlam group

In Perspective

3/2025

Pension Funds Adjudicator case

Employer must inform members of their membership in the fund

HD Auret (Complainant) v Metal Industries Provident Fund[1]

The Complainant was the deceased member's spouse and was dissatisfied with the Fund refunding the deceased's contributions instead of paying her a death benefit. The deceased member contributed to the Fund after being re-employed by his employer after he had reached normal retirement age.

Upon the deceased's death, the Complainant received a letter from the Fund informing her of the death benefit that was due to her. After receiving the letter, the Complainant received a call from the Fund informing her that there was no death benefit payable because the deceased previously received his retirement benefit and that it would refund all the contributions made in respect of the deceased member since his re-employment. It added that upon re-joining the Fund at age 65, the employer should have notified the deceased accordingly or contacted the Fund for advice.

The Adjudicator referred to the Fund's rules and found that the deceased did not meet the eligibility criteria for membership of the Fund as he had already reached the normal retirement age when he re-joined the Fund. The Adjudicator was concerned with the Fund's failure to properly screen potential members to ensure they meet the membership requirements before accepting them as members.

It is the responsibility of the employer to ensure that the employees are informed of their membership in a fund that accommodates their remuneration structure and employment conditions. It is further the responsibility of the employer to ensure that the employees it appoints who do not qualify for membership of the fund are so informed, thereby avoiding the financial prejudice associated with not participating in a retirement fund.

Therefore, the Adjudicator held that no death benefit was payable, and the Fund should refund the contributions made on behalf of the deceased to the deceased's estate.

The employer has a responsibility to check who qualifies to be a member of the fund according to their employment contract before registering them on the fund. The employer must take extra caution to inform those members who do not qualify for membership of the consequences of not belonging to a fund.

The fund is responsible to properly screen potential members to ensure they meet the membership requirements before accepting them as members.

Tribunal cases

Death claims – arbitrary 5% allocations

Semenya v Old Mutual Superfund and the Pension Funds Adjudicator[2]

The deceased member of the Fund was survived by his mother (79), wife, stepdaughter and four sons (between 8 and 29 years). He had nominated his wife to receive half the benefit, and the remainder between his children, excluding his 23-year-old son.

Following investigations and submissions made to the Fund, the Fund decided to not follow the nomination form strictly but to add the 23-year-old son and the deceased's mother, allocating 5% to each.

The deceased's wife referred the case to the Adjudicator, where the Fund's distribution decision was confirmed. The case then progressed to the Tribunal.

- **Mother of the deceased**

The Tribunal found that children have a responsibility to support their parents and grandparents, but a parent who claims support from a child must prove their need. The support of parents must be confined to the basic needs, namely food, clothing, shelter, medicine and care in times of illness[3].

1 PFA/KN/00081666/2021/TAM

2 Case PFA31/2024

3 Van Vuuren v Sam 1972 SA 633 (A) 642

The deceased member's mother was 79, not working, and dependent on an old age pension. She did not receive any significant support from her other children. She was found to be a person in respect of whom the deceased would have become legally liable for maintenance and the Fund allocated 5% to her as factual dependant. The Tribunal could not fault this allocation.

- **23-year-old son**

The son is employed and was not factually dependent on the deceased. The Fund defended their allocation by stating that he could have become unemployed in future, thereby becoming a factual dependant. The Adjudicator found this to be in order, but the Tribunal found that it was speculative to argue that he might become unemployed and might have become dependent on the deceased. This should have been further investigated to serve as reason, and it was not.

The Tribunal set aside the allocation of 5% to the deceased's son and referred back to the Adjudicator for reconsideration.

Funds should be able to justify every allocation based on dependency and should avoid arbitrary allocations to persons who do not qualify as factual or legal dependants or nominees.

Withholding of benefit

Edward Snell & Company (Pty) Ltd (Employer) v PFA & others[4]

Mr Sbiya was a member of the NBC Umbrella Retirement Fund until his dismissal from employment.

A case of gross misconduct had been opened by the Employer against Mr Sbiya for the role he played in the alleged fraudulent removal and distribution of company stock. After a disciplinary hearing, Mr Sbiya was dismissed. His withdrawal benefit was withheld by the Fund following a request by the Employer.

Mr Sbiya submitted to the Adjudicator that it is unreasonable for the Fund to withhold his benefit as he did not benefit from any fraudulent activities and submitted that he had volunteered to assist the South African Police Service in the matter.

In her determination, the Adjudicator stated that her duty is to consider whether the Fund correctly exercised its discretion with care and whether the Fund's decision had been justified at the time when the decision was taken.

The Adjudicator held the following:

1. The laying of a criminal charge has no legal consequence. It does not begin legal proceedings. Legal proceedings may or may not follow depending on the decision of the prosecutor.
2. The newly amended section 37D(1)(b)(ii) of the Pension Funds Act states that a judgment obtained against a member includes a compensation order in terms of section 300 of the Criminal Procedure Act. This means that when an employer has instituted criminal proceedings, the fund must allow the employer time to pursue the recovery of the misappropriated funds through a section 300 compensation order. The amendment to the Act was, however, not retrospective. Therefore, claims dealt with prior to the amendment coming into place on 1 September 2024 will be dealt with in accordance with the law at the time. Since the complaint was received on 27 March 2024, before the amendment took effect, thus the law at the time before the amendment will be applied.
3. The Fund must pay Mr Sbiya his withdrawal benefit.

In its application for reconsideration, the Employer submitted that the Adjudicator cannot exercise a discretion that must be exercised by the Fund.

The Employer inter alia summarised its grounds for reconsideration as follows:

- By ordering the Fund to make payment to Mr Sbiya, the Adjudicator usurped the discretion that can only be exercised by the Fund exclusively.
- The Fund did not receive Mr Sbiya's response to the Employer's request to withhold payment of his benefits in the Fund. As a result, the Fund have not been able to exercise their discretion whether to withhold Mr Sbiya's benefit.
- By ordering the Fund to pay Mr Sbiya's benefit in terms of section 37D(1)(b)(ii) of the Act, the Adjudicator effectively usurped the discretionary function of the Fund, which is impermissible in law.

The Tribunal agreed that the discretion to be exercised is the discretion of the Fund. It stated that the Adjudicator should have been aware that the Fund had not yet exercised its discretion as the Fund was not in receipt of Mr Sbiya's response. The duty of the Adjudicator was, amongst other things, to determine whether the Fund had exercised its discretion correctly, yet it could not have made this determination when no such discretion had yet been exercised by the Fund.

The Tribunal held that the Adjudicator's determination was premature because the Fund was not able to consider the matter and to properly exercise its discretion.

The determination was as a result set aside and the matter was remitted to the Adjudicator.

The duty of the Adjudicator is to consider whether a fund has correctly exercised its discretion and whether a fund's decision is justified at the time of the decision. The Adjudicator cannot make a determination if the evidence shows that a fund was not able to properly exercise its discretion.

4 Edward Snell & Company (Pty) Ltd v PFA & others (Case No: PFA77/2024)

Medical boarding by an employer is no guarantee for disability insurance payouts

In a recent media statement by the National Financial Ombud Scheme (NFO), it was emphasised that a medical report does not automatically entitle an employee for disability insurance.

It often happens that an employee has been dismissed due to incapacity or is medically boarded by their employer, and it is then assumed that if the employer's doctor has declared the employee disabled for work, the insurer would pay the disability benefit.

However, the employer's boarding or incapacity process and the application for disability benefits from an insurer in terms of the insurance policy are two distinct processes.

The NFO highlighted two cases where complainants were boarded by their employers, but their disability claims were declined by the insurers because they did not meet the criteria of the policy.

Case 1

A Code 14 truck driver started to lose sight in his right eye and submitted a claim for income disability benefits to the insurer of their group scheme. While undergoing further treatment with a specialist, his employment was terminated by the employer a year later due to ill health.

The claim with the insurer was however declined on the basis that it was not a valid claim according to the policy definition.

In this case, the criteria of the policy required the complainant to be disabled for his **own occupation** as a truck driver. However, the policy further states that if a member practices a certain type of occupation, such as a driver, pilot, diver, seaman, security person, sportsperson, or performing artists, reference to **own occupation** will be a reference to **any occupation**. Any occupation in the policy *"means …, any other occupation with any employer in the open labour market which the Employee could reasonably be expected to follow…"*

In assessing the claim for **any occupation**, the insurer acknowledged the complainant's limitations and that he is restricted in terms of driving the heavy-duty truck. However, the insurer was of the view that he was still able to perform other duties, including driving a light motor vehicle.

The NFO considered the medical facts of the case and questioned whether it was reasonable to expect the complainant, who worked as a Code 14 truck driver for 13 years, to re-enter the open labour market at the age 57 years, and to seek alternative employment with severely impaired vision in the right eye, even though he had functional vision in the left eye, which was also affected by the disease.

In this case the insurer agreed to pay the claim after intervention by the NFO.

The NFO remarked that in deciding on disability claims, insurers have a responsibility to be fair and unbiased. The insurer should consider the individual's specific circumstances and attributes when assessing a claim.

Case 2

In another complaint that came before the NFO, the complainant was deemed disabled from his job as an underground load driver on a mine by the occupational medical practitioner (OMP) due to a respiratory condition.

In this case the policy criteria required the complainant to be *continuously, permanently and totally* incapable of engaging in his *own occupation or a suitable alternative occupation* with his current employer; or unable to *fulfil the minimum standards of fitness to perform work at a mine as per the mandatory code of practice*.

The insurer noted that his respiratory pathology was mild, and that the complainant was deemed unfit from working underground. No restrictions were placed on him in terms of operating the load driver vehicle. His condition further improved with treatment and his prognosis was considered good. His claim was therefore declined.

The complainant argued that he was declared unfit for work by the mine doctor and that he was therefore entitled to the lump sum disability benefit.

The medical evidence however showed that he met the minimum standards of fitness for working in the mine. The OMP declared the complainant permanently incapacitated and unfit for underground work but fit for surface work. The employer could not offer him an alternative position on the surface due to unavailability of work and proceeded to terminate the complainant's services.

The NFO agreed with the insurer that the availability of work within the mine and or in the open labour market is not a relevant factor in determining whether a person is disabled in terms of the policy. In this instance the medical evidence did not support that the complainant was permanently unfit to work as a load driver or take up a suitable alternative occupation.

The complaint was therefore dismissed.

While medical reports are crucial evidence, the employer's medical boarding policy could differ from the criteria used by the insurer for determining eligibility for disability benefits. Even if an employee is medically boarded by the employer, it does not mean that their insured disability claim will succeed.

Insured disability benefits are considered not only as a medical decision but is based on the terms and conditions of the contract entered between the policyholder and the insurer.