



In Perspective

3/2023

Pension Funds Adjudicator Complaints Online System

Complaints may be lodged online on the Pension Funds Adjudicator’s website www.pfa.org.za. The website now also allows the viewing of the status of complaints. Complaints have been divided into these stages:

- Complaint registered
- Jurisdiction assessment
- Referred to fund
- Correct information received
- Assessment
- Conciliation
- Adjudication
- Closed

Any stage can be clicked on for information, and all stages will not always be applicable (such as ‘Referred to Fund’ or ‘Conciliation’).

Appeal Court case

Death benefits – allocation to an estranged spouse

Sidimela (Applicant) v Marage ¹

The deceased was a member of the Municipal Gratuity Fund. He was married in community of property to the Applicant, but the two were estranged since 2002. From 2008, the deceased cohabited with another woman until his death in 2010. Two children were born of the marriage, and they were nominated as the only beneficiaries of the death benefit. The Applicant (estranged spouse) was specifically excluded from being allocated a portion of the death benefit. During the investigation process, three other children were traced, and they were also found to be deserving beneficiaries.

The board of management (the board) of the fund distributed 28% of the benefit to the cohabiting partner and the balance to all the children of the deceased proportionately. The estranged spouse was dissatisfied with the decision taken by the board and went to court to have it set aside. The estranged spouse contended that she was entitled to 50% of the benefit by virtue of her marriage in community of property and wanted the deceased’s cohabiting partner to be excluded as a beneficiary. In agreement with the estranged spouse’s contention, the court of first instance (the court *a quo*) found that the benefits form part of the joint estate of the deceased and his estranged spouse by virtue of their marriage in community of property. The judge ruled in favour of the estranged spouse and remitted the matter to the board with an order that the board reconsider the distribution of the benefits. The case was then taken on appeal.

On appeal the court found that:

- Although married in community of property, the spouse of the deceased left him in 2002.
- There was no evidence before the court *a quo* that despite the separation, the estranged spouse had been dependent on or was financially supported by the deceased.
- The fact that the parties had not divorced, and the marriage persisted, was of no consequence.
- The court *a quo* erroneously found that the death benefit forms part of the joint estate of the deceased and the estranged spouse by virtue of their marriage in community of property. It is clear from the wording in the Act that the matrimonial property system will not have any effect on how section 37C is applied.

The appeal was upheld and the order of the court *a quo* was dismissed.

The Appeal Court found that the deceased’s estranged spouse had already left him in 2002 and there was no evidence that she was dependent on the deceased. The fact that they remained married was of no consequence and she was not entitled to 50% of the death benefit.

¹ Sidimela and others v Marage [2023] JOL 58140 (GP)1

Financial Services Tribunal case

Fiduciary duties of a principal officer

*Zibi v FSCA*²

Mr Zibi applied for reconsideration of a decision taken by the FSCA in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (the FSR Act) in which it directed the termination of his appointment as principal officer (PO) of the Private Security Sector Provident Fund (PSSPF), as he was found not to be fit and proper to hold office as contemplated in section 8 of the Pension Funds Act.

Mr Zibi asserted that as PO he does not owe any fiduciary duties to the PSSPF. He did not have any decision-making powers and accordingly could not attract blame or liability. He added that the FSCA was aware of the operations of the PSSPF and therefore was effectively in control of it.

The Tribunal found:

- Section 8(5)(c) of the Act provides that the FSCA may, in assessing whether a PO is a fit and proper person, have regard to the competence and soundness of judgment of the person for the fulfilment of the responsibilities of the particular office and type of fund; the diligence with which the person concerned is likely to fulfil those responsibilities; and previous conduct and activities of the person in business or financial matters.
- Pension Fund Circular 130 places a duty on the PO to ensure that the decisions of the board are executed, to ensure that the fund complies with the formal requirements of the law, to liaise with service providers to the fund and to contribute at board meetings.
- It further provides that the fiduciary duty owed by the board and the PO requires that they avoid conflicts of interest.

The Tribunal also found that Mr Zibi failed to demonstrate competency and sound judgment in the fulfilment of his role as PO for the following reasons:

- He deems himself not only subservient to the board, but duty bound to follow its decisions blindly, without the exercise of his own judgment.
- His duties as the PO are not limited to the execution of the decisions of the board but include the duty to act with utmost good faith towards the PSSPF and in the best interest of all members, to ensure that the board gives full and proper effect to the rules of the PSSPF and to deal with all matters relating to the PSSPF and its members in accordance with his fiduciary duties. It is the duty of a PO to oversee the general workings of the fund, which includes the duty to oversee service providers and ensure that they are performing their tasks.

If Mr Zibi had done this, he would have been aware of the improprieties at the PSSPF.

The following *inter alia* took place:

- Service agreements were entered with Salt Employee Benefits (Pty) Ltd in breach of the PSSPF's procurement policies as Salt was appointed after a closed bid process, which required written substantiation that was to be submitted and approved by the board. The required process was not followed.
- Mr Zibi is the director and owner of Vendicure (Pty) Ltd. Payment was effected by the PSSPF into the account of Vendicure, purportedly for section 14 services and secretarial services that Mr Zibi was providing to the PSSPF. Such services were plainly outside the scope of his role as PO.
- Ms Kele Zibi, daughter of Mr Zibi, was appointed as a junior secretary by the PSSPF. Her offer of employment was co-signed by Mr Zibi, in his capacity as PO, a direct breach of the PSSPF's Recruitment and Selection Policy.
- In terms of the agreement between Mr Zibi and the PSSPF, he was responsible for the monitoring and reporting of payment of contributions in terms of section 13A of the Pension Funds Act. No such reporting was done during 2015 and 2016 although the annual financial statements for the period ended 29 February 2016 reflected non-compliance with section 13A.
- During his term as PO, the financial statements reflected the board of fund expenses as R25 212 683 for the 2017 financial period and R21 058 032 for the 2016 financial period. The FSCA conducted a comparison of these expenses to various other funds in the retirement funds industry for the period and it appeared the board expenses for the PSSPF were excessive and disproportioned and no explanation was given.

The Tribunal found that Mr Zibi did not exhibit sound judgement or execute his duties as PO diligently and agreed with the FSCA that he is no longer fit and proper to act as the PO of the PSSPF and the application for reconsideration was dismissed.

A principal officer's duties are not limited to the execution of the decisions of the board but include the duty to act with utmost good faith towards the fund and in the best interest of all members, to ensure that the board gives full and proper effect to the rules of the fund and to deal with all matters relating to the fund and its members in accordance with their fiduciary duties.

Adjudicator determinations

Death after retirement results in payment to deceased estate

*Wasserfall (Complainant) v Corporate Selection Umbrella Pension Fund*³

The Complainant's father retired from employment on 28 February 2019 and passed away on 1 May 2019. The

² Zibi v Financial Sector Conduct Authority and Another (A41/2022) [2023] ZAFST 59

³ Wasserfall v Corporate Selection Umbrella Pension Fund: Participating Employer Robecor Manufacturers (Pty) Ltd and another [2023] 1 BPLR 20 (PFA)

deceased's family requested that his fund benefit be used to purchase a living annuity for his surviving spouse as she was dependent on the proceeds of the benefit and was not a beneficiary of the deceased's estate.

The Fund responded that since the deceased had passed away after electing to retire from the fund and transfer to a preservation fund, but before transfer of his benefit was effected, the benefit was payable to his estate. Section 37C of the Pension Funds Act (the Act) was not applicable because the deceased instructed the Fund to transfer his benefit from the fund. Should the fund not pay the benefit to the deceased's estate, the executor would have recourse against the fund for the value of the amount paid.

The Adjudicator agreed that when the deceased passed away, he had already instructed the Fund to transfer his benefit from the Fund to another financial vehicle. If a fund member passes away after already having communicated that his benefit be paid or transferred, but before payment or transfer is effected, then section 37C of the Act does not apply to the payment of such benefit. The benefit in this matter was therefore payable to the deceased's estate and the complaint was dismissed.

The Adjudicator determined that if a member dies after retirement and having made a choice to exit from the fund and transfer his benefit to another vehicle, the benefit is not payable in terms of section 37C of the Act.

Comment: This corresponds with the FSCA's Interpretation Ruling 1 of 2020.

However, if the member dies after retirement but before having made a choice to retire or to withdraw from the fund, the member would be a deferred retirement member and his benefit would be payable in terms of section 37C of the Act.

Adjudicator's jurisdiction

*Teane (Complainant) v NBC Umbrella Retirement Fund*⁴

The Complainant submitted that she had obtained a court order on 11 April 2022, wherein the Fund was ordered to attach an amount of R100 000 from the member's retirement benefit in respect of future maintenance for the Complainant's minor child. The Fund replied that it could not give effect to the order as it could only deduct an amount in respect of arrear maintenance.

The Adjudicator held that in terms of section 30H of the Pension Funds Act, it may not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of investigation. Since maintenance proceedings had been instituted in the Magistrate's Court, the Adjudicator could not make a determination.

⁴ JM Teane v NBC Umbrella Retirement Fund and Retirement Investments and Savings for Everyone (Pty) Ltd T/A Rise GP/00089030/2022

The Adjudicator referred to the Supreme Court of Appeal case of Cape Town Municipality v South African Local Authorities Pension Fund⁵ where the court found that the purpose of section 30H is to deal with cases where civil courts and the Adjudicator have concurrent jurisdiction and the case was lodged with a court first. In such a case, priority is given to the court by excluding the jurisdiction of the Adjudicator. This was because the court could in any event override the decision of the Adjudicator in proceedings under section 30P of the Pension Funds Act.

The complaint was therefore dismissed.

The Adjudicator cannot determine a case where proceedings have already been instituted in court, such as the enforceability of a maintenance order.

Comment: The same concept applies to divorce orders. In the Adjudicator's quarterly digest of April 2023, it was communicated that the Adjudicator cannot order a fund to do what it has already been ordered to do by the court itself. The Adjudicator can also not amend a divorce order to make it enforceable by a retirement fund.

Distribution of death benefit

*IA & TP Magoleng (Complainants) v Alexander Forbes Retirement Fund*⁶

In this case the deceased member left two major children, the Complainants, aged 25 and 26. The deceased completed a nomination form wherein his two children were nominated to receive 25% each and 50% of the benefit to Ms Mashiane. The board allocated 21.5% of the benefit to each child and 57% to Ms Mashiane, who the Fund found to be the deceased's life partner.

The Complainants contended that Ms Mashiane was not the deceased's life partner, and they did not live together. She owned a business and could not prove financial dependence and should therefore not share in the benefit.

• Life partners

The Adjudicator found that the Pension Funds Act does not define "life partner" and it will therefore need to be decided on the facts of each case. However, cohabitation is not decisive. Parties in many marriages or other unions do not live together due to, for instance, economic circumstances.

The Fund contended that interviews with fellow church members and friends of the deceased member revealed that the deceased and Ms Mashiane were in a long-term relationship and intended to marry. They attested that the deceased and Ms Mashiane did live together, and she was financially dependent on him as she was unemployed.

The deceased member's sister stated in an affidavit that lobola proceedings were underway and were to be settled by

⁵ 2014 (2) 365 (SCA)

⁶ IA & TP Magoleng (Complainants) v Alexander Forbes Retirement Fund and Alexander Forbes Financial Services FA/GP/00093592/2022/YVT

the second week of February 2021, but could not continue due to the deceased's sudden death.

- **Nomination form**

The Fund contended that it deviated from the percentages in the nomination form as a nomination form is only a guideline and is not binding on a board. The Adjudicator referred to [Swart v Lukhaimane](#)⁷ where the court stated that a wish in a nomination form should not be lightly ignored. It is a substantial factor to be taken into consideration.

In this case it is unclear to the Adjudicator why the nomination form was deviated from as the fund failed to carry out proper investigations. The nomination form can only be deviated from if following it will lead to inequitable consequences.

- **Making use of a benefit calculator**

The Fund used a section 37C calculator to determine financial dependency and allocate the death benefit based on the dependency. The calculator lists each beneficiary's share of the deceased's monthly salary that they needed from him as well as the possible length of dependency. It then calculates how much each beneficiary would need, reduced proportionately considering the amount of the benefit available.

The Adjudicator found that the Fund could not merely rely on a calculator that predetermines entitlements based on portions of the deceased's salary, it should rather actively investigate Ms Mashiane's dependency on the deceased. The board did not investigate income from other sources, such as the allegation that she owned a business.

The Adjudicator therefore found that the Fund failed to conduct thorough investigations and essentially left it to a calculator to tell them what to do. The board's allocation was set aside, and the case was referred back to them to re-exercise their discretion.

If a board decides to deviate from the contents of the nomination form, the investigation must show why they decided to do so. The nomination form can only be deviated from if following it will lead to inequitable consequences.

Thorough investigation remains paramount, distribution cannot be based on a calculator.

Life partners do not have to live together, many partners in marriages and unions do not live together. The intention to be committed to spend the rest of their lives in a permanent conjugal relationship, is sufficient to prove permanent life partnership.

⁷ Swart N.O. (nee Van der Merwe) and others v Lukhaimane N.O. and others [2021] JOL 49952 (GP)