



Pension Fund Adjudicator cases

Jurisdiction of the Adjudicator to determine the validity of a will

*V E/L S Naiker (Complainant) v Absa Pension Fund (Fund) and Suraya Karim*¹

The complaint concerns the allocation of a death benefit by the fund upon the death of Mr S Naiker (“the deceased”), who was a member of the fund until he passed away on 19 July 2021. The deceased was survived by his mother (the Complainant), fiancé and nephew. The deceased did not complete a beneficiary nomination form.

Upon the death of the deceased, a death benefit of R1 274 222.16 became available for allocation to his dependants in terms of section 37C of the Pension Funds Act (the Act). The board resolved to allocate 60% of the death benefit to the Complainant, 40% to his fiancé and 0% to his nephew.

The complainant was dissatisfied with the fund’s investigation and that the deceased’s fiancé was also allocated a portion of the death benefit. The Complainant further submitted that the deceased was never married or engaged and did not have any children.

According to the board it had conducted a thorough investigation and its decision was equitable and within the ambit of section 37C of the Act and it took relevant factors into account. There was an ongoing dispute between the family and the fiancé about the validity of the last will and testament of the deceased. Because the deceased never completed a nomination form, the board used the latest will of the deceased dated 27 November 2020 to determine the wishes of the deceased.

After the allocation decision of the death benefit was communicated to the beneficiaries, the Complainant lodged a complaint contesting the deceased’s will and testament and disputing that the deceased had a fiancé. The fund further stated that the family contesting the will and disputing that the deceased was engaged, were irrelevant factors due to it being a family dispute.

The primary issue for determination was whether the board discharged its duties imposed by section 37C of the Act in that it had considered all relevant factors and ignored irrelevant ones. The Adjudicator agreed with the fund that

the Complainant’s dispute regarding the validity of the will and the relationship of the deceased and his fiancé were irrelevant factors due to them being part of a family dispute. The fiancé was seen as financially dependent on the deceased before he passed away since they shared a common household for almost a year.

The Adjudicator dismissed the complaint for the following reasons:

- The Adjudicator was satisfied that the board conducted a thorough investigation taking into account relevant factors and ignoring irrelevant ones;
- A decision by the board cannot be interfered with merely on the basis that the Adjudicator would have made a different allocation;
- It is not the duty of the Adjudicator to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision. A decision can only be reviewed if the board acted irrationally;
- The fiancé was considered to be financially dependent on the deceased before he passed away;
- The Adjudicator does not have jurisdiction to determine the validity of a will. The issue is a matter that can be raised in court and not with the fund.

Comment: *The Adjudicator does not have jurisdiction to determine the validity of a will. It is not the duty of the Adjudicator to decide what the fairest or most generous distribution is, but rather to determine whether the board acted rationally and arrived at a proper and lawful decision. A decision can only be reviewed if the board acted irrationally.*

Non-payment of spouse’s pension

*Matlala (Complainant) v Municipal Employees Pension Fund*²

The Complainant was married to a pensioner of the Municipal Employees Pension Fund, who passed away in 2020. She applied for a spouse’s pension but was informed by the Fund

1 PFK/KN/00095025/2023/FN

2 PFA/MP/00084383/2022/MM [2023] 3 BPLR 49 (PFA)

that since the death certificate of the deceased indicated that he wasn't married and the copy of the registration of their customary union was not legible to ascertain date of marriage, she needed to prove that she was married to him. For this she needed to submit policy documents taken out by the deceased prior to his retirement, citing her as his spouse, as well as joint bank accounts opened by the deceased prior to his retirement, property ownership or lease documents in both their names, and proof that she was listed as the deceased's spouse on his medical aid prior to his retirement.

The Complainant did not have these documents and the Fund declined payment of the spouse's pension. The Complainant approached the Adjudicator to order the Fund to pay the spouse's pension to her.

The Adjudicator found that although the Fund has a right to seek information and proof as it may deem necessary in terms of its rules, it could have just requested the Complainant to contact the Tribal Authority and request a letter confirming the existence of the marriage to satisfy itself of the legitimacy of the information. It could have further engaged the deceased's family to verify the existence of the marriage at the time of the deceased's death ³.

The Adjudicator ordered the Complainant to provide a letter from the Tribal Authority confirming the existence of the marriage and submit it to the Fund. The Fund must verify the marriage with the deceased's family. Upon verification of the marriage, the Fund must pay the spouse's pension.

Comment: To fulfil its fiduciary duty to act in the best interests of members and beneficiaries, a retirement fund should do more to verify a marriage, for instance it can request a beneficiary to contact the relevant Tribal Authority to provide proof of a marriage. It can also request confirmation of marriage from family members.

Supreme Court of Appeal cases

Fund not provided opportunity to state its case

Municipal Gratuity Fund v the Pension Funds Adjudicator ⁴

The late Mr Mutsila was a member of the Municipal Gratuity Fund (the Fund) prior to his death in 2012. A dispute arose as to the distribution of the death benefit payable by the Fund. Through its investigation, the Fund determined that the deceased had a wife (Ms Mutsila) with whom he shared five children and a life partner (Ms Masete), who had three children of her own. The distribution proposal by the Fund was that the benefit be allocated between these beneficiaries.

Ms Mutsila filed a complaint with the Adjudicator, stating that Ms Masete's two minor children resided with their biological father, who contributed towards their maintenance. Ms Masete in turn alleged that a custody application was underway and that their father had failed to make meaningful contributions towards the maintenance of his two children.

The Fund responded that consideration of the complaint should be held in abeyance until the conclusion of the custody application, and that the Fund be allowed an opportunity to respond 30 days after the conclusion of that application. Contrary to the Fund's suggestion, the Adjudicator considered the complaint and made a determination. This triggered the litigation that eventually ended up with the Supreme Court of Appeal (SCA).

The SCA found that the Fund had not been afforded an opportunity to respond fully as provided in section 30F of the Pension Funds Act before its distribution decision was set aside by the Adjudicator. The SCA therefore agreed that the *audi alteram partem* principle was not adhered to.

The SCA remarked that close to a decade had lapsed and the battle over the custody of the children has not come to an end. The beneficiaries are entitled to finality. The SCA therefore considered the custody application in which Ms Masete explained the strained relationship between her and the children's father and that they did not stay together for several years and that he had not contributed to the maintenance of the children, as well as the fact that the deceased contributed R2 000 per month to Ms Masete's household. The SCA found that Ms Masete and her children were factual dependants and should be included in the distribution of the benefit.

Comment: The Adjudicator must apply the audi-principle and afford funds the opportunity to be heard before making a determination.

Reinstatement vs re-employment

SA Municipal Workers' Union National Provident Fund (Fund) v Dihlabeng Local Municipality (Municipality) and Municipal Employees Pension Fund (MEPF) ⁵

Employees of the Municipality had engaged in an unprotected strike resulting in their subsequent dismissal on 31 July 2009.

The Municipality and the employees then entered into a settlement agreement wherein the following was agreed:

- The employees who were dismissed would be employed by the Municipality with effect from 8 October 2009, in their previous positions.
- No salary, benefits or compensation would be paid for the period that the employees were unemployed.
- No retrospective salaries/benefits would be paid by the Municipality.
- The parties agreed that the employees' previous years of service would be recognised as if the employees were employed continuously.

The employees who were affected by the settlement agreement were allocated new employee numbers, their annual leave cycles commenced on 1 October 2009, and the commencement date of their employment for increases

³ Dhlanguisa v Municipal Employees Pension Fund PFA/GP/00037514/2017/UM in paragraph 5.6)

⁴ Case no 364/2022 [2023] ZASCA 116 (31 July 2023)

⁵ South African Municipal Workers' Union National Provident Fund v Dihlabeng Local Municipality and Others (65/2022) [2023] ZASCA 55

was 1 October 2009. These employees were afforded an opportunity to elect the pension fund towards which the Municipality would pay their pension fund contributions.

Two years after the settlement agreement, in 2011, the affected employees approached the Fund, and requested payment of their withdrawal benefits on the basis that the benefits accrued to them because of their dismissal on 31 July 2009. The Fund refused to pay their benefits, stating that the employees were reinstated and not re-employed. The affected employees referred the complaint to the Pension Funds Adjudicator, who dismissed the complaint, stating that the employees were in continuous employment (i.e., re-instated) with the Municipality, as there was no break in their service or their membership with the Fund.

The case was then referred to the High Court which found that the employees of the Municipality were re-employed instead of re-instated. The Fund then appealed against this decision of the High Court. The Fund argued that on a proper interpretation of the settlement agreement, the employees were reinstated and not re-employed. The general rule is that reinstatement amounts to the restoration of the *status quo ante*, as if the employees were never dismissed. It argued further that reinstatement amounts to a restoration of an employment relationship even if it is with effect from the date of the settlement agreement as opposed to the date of dismissal and even if the restoration of the relationship is not necessarily on identical terms. The Fund then also claimed payment of alleged arrear pension fund contributions from the Municipality.

The Municipality argued that the employees had, when they ceased to be members of the Fund, validly elected to change their retirement fund in 2009 and elected to become members of the MEPF because of them being re-employed as opposed to being reinstated.

The Supreme Court of Appeal held:

- If an employee is reinstated, he or she resumes employment on the same terms and conditions that prevailed at the time of dismissal. The period during which the employees were out of work is regarded as a suspension of the employment contract. Re-employment, on the other hand, entails new terms and conditions of employment contracts. Benefits arising from the past employment relationship are not extended to the new employment relationship. Re-employment is not a defined term. Re-employment would also occur where it is decided to regard the previous employment relationship as terminated and the replacement thereof with new employment, which may or may not be on different terms.
- The rules of the Fund are clear, a member may not withdraw from the Fund while he remains in service. In terms of the rules of the Fund, when an employee is dismissed, his membership in the Fund terminates. In July 2009 the employees were dismissed for engaging in an unprotected strike.
- The purpose and surrounding circumstances of the settlement agreement were that the employees received new employee numbers; the employees freshly elected a pension fund to which their pension fund contributions would be made; the employees freshly elected a medical aid fund; and their annual leave and sick leave cycles

commenced on 1 October 2009. These factors and the circumstances in which the settlement agreement was concluded, as well as the conduct of the parties after its conclusion, are clearly at odds with reinstatement.

- Given the context in which the agreement was concluded, and the conduct of the parties after its conclusion, it could not be disputed that the intention of the Municipality and the employees was that the affected employees were in fact re-employed and not reinstated. It had been recognised that where an employee is re-employed on a different medical aid, it is re-employment and not reinstatement.
- No salary benefits or compensation were payable between the date of dismissal and the date of re-employment and therefore the employees were re-employed.
- It then means that no contributions needed to be deducted for payment to the Fund for the period that the employees were unemployed. Accordingly, the Fund was not entitled to enforce payment of such contributions. It also cannot revive the membership of the employees based on the arrangement they had with the employer, except if provided for in the settlement agreement or the Fund rules (if/where legally permitted to do so).
- The only possible interpretation which can be given to the settlement agreement is that the High Court's findings that the employees were re-employed and not reinstated is correct. The appeal on this ground cannot therefore succeed, therefore the appeal was dismissed.

Comment: *Re-employment entails new terms and conditions of employment which result in no arrear contributions and withdrawal benefits may accrue to members.*

Re-instatement is to put the employee back into the same job or position and terms and conditions of employment, which could result in a liability for arrear contributions as it does not result in the termination of membership of the fund. Therefore, there will be no accrual of withdrawal benefits.

Pension Funds Adjudicator Integrated Report

The Office of the Pension Funds Adjudicator (OPFA) issued its integrated report on 17 October 2023 for the 2022 - 2023 year.

On 24 March 2023, the Minister of Finance proclaimed 1 April 2023 and 01 June 2023, as applicable, to be the commencement date of the Financial Sector and Deposit Insurance Levies Act, and the commencement of certain provisions of the Financial Sector Regulation Act (FSR Act) as well as amendments of the Pension Funds Act (PFA). In essence, these new provisions assign the Pension Funds Adjudicator the role of accounting authority for the OPFA, while the Minister will directly consider the OPFA's budget and will have to concur with other aspects, as opposed to the previous arrangement where such matters were overseen by the FSCA Commissioner. These changes aim to improve governance and funding for the OPFA, and a transitional plan will be formulated and implemented to ensure the smooth implementation of the new amendments.

- **Noteworthy legislative changes**

- **Ombuds System Revision**

Amendments to the Financial Sector Regulation Act (“FSR Act”) have been proposed in the FSR Act Ombuds Revision Bill which will have a direct effect on the OPFA. It is proposed that Chapter VA of the Pension Funds Act, which established the OPFA, be transferred into the FSR Act. Similar proposals have been made in respect of the Ombud for Financial Service Providers (FAIS Ombud). It has also been proposed to change the name of the Adjudicator to the “Retirement Funds Ombud” and for the PFA to be renamed the “Retirement Funds Act”. This is in line with the project that has been underway by National Treasury and the FSCA to eliminate unnecessary jargon and for all types of pension funds to fall within the umbrella term “retirement fund”.

The OPFA continues ongoing consultations with the Ombud Council to improve reporting requirements and procedural rules to enhance the objective of a known and trusted financial ombud system in South Africa.

- **COFI Bill**

Whilst the FSR Act was intended to legislate the manner in which regulators and ombuds conduct themselves, the Conduct of Financial Institutions Bill (“COFI Bill”) is intended to legislate the manner in which financial institutions such as retirement funds are expected to conduct themselves. In the COFI Bill, certain consequential amendments to the PFA were proposed which, if passed, would likely have a significant impact on the OPFA’s mandate. Of importance were the proposals made pertaining to section 37C of the PFA which deals with the manner in which death benefits in a pension fund should be disposed of. The OPFA proposed that a full consultation process takes place which must include workshops held with relevant stakeholders in the retirement fund industry before any amendments to section 37C are effected.

A significant impact of the proposed amendments is the inclusion of receiving oral complaints by the OPFA. The OPFA is not currently set up to receive oral complaints and having to adjust to the proposal will entail a significant financial impact including the cost of running a call centre and maintaining records of oral complaints.

It is intended that all conduct issues will be exported from the PFA into the COFI Bill as an overarching piece of legislation that applies to the conduct of all financial institutions, including retirement funds. The sectoral legislations, i.e. conduct issues in the PFA is expected to be repealed either in whole or in part. It is also expected that the prudential issues relating to the financial soundness of retirement funds will remain within the PFA. Conduct issues pertaining to specific types of financial institutions are expected to be addressed in conduct standards issued by the FSCA.

The COFI Bill, when passed, will introduce codified Treating Customers Fairly (TCF) principles relating to retirement funds and their members. This will enhance the OPFA’s ability to deliver fair outcomes in respect of complaints lodged by retirement fund members. The

COFI Bill will also bring within the ambit of the OPFA’s jurisdiction complaints in respect of the Government Employees Pension Fund.

The OPFA will prevail on the FSCA to issue conduct standards under the COFI Bill that will penalise the failure to comply with information requests by the OPFA.

- **OPFA’s Outlook**

Over the medium term, the key strategic priorities for the OPFA are in the main to reduce the administration related to complaints by improving stakeholder engagements and encouraging complainants to use internal dispute resolution processes before lodging a complaint with the OPFA; find innovative ways to intensify outreach programmes for more consumer awareness; develop service standards to measure the impact of the service offering to complainants and other stakeholders; and optimise the resources of the office to meet the increased mandate and high number of complaints.

- **Governance report**

- **The Accounting Authority and its role**

Section 30T of the PFA was amended to appoint the Pension Funds Adjudicator, and no longer the FSCA Commissioner, as the accounting authority effective 1 April 2023. The accounting authority remains primarily responsible for the leadership of the OPFA and for strategic direction and policy, operational performance, financial matters, risk management and compliance.

- **Operational report**

- **Complaints outcomes**

There’s been an increase in new complaints in comparison to the previous year, indications are that the current trend is moving towards pre-pandemic levels.

There was an increase in complaints lodged via the self-serve function on the OPFA website following its launch on 12 December 2022. The self-serve function enables complainants to track the progress of their complaint on the website through the different investigation steps.

The Private Security Sector Provident Fund, membership of which is compulsory in the private security sector by virtue of a collective agreement, remained the largest contributor to new complaints.

The Chemical Industries National Provident Fund’s change of administrators has also contributed to a delay in finalising some of the complaints timeously. This brings to the fore the need for a regulatory instrument, in line with the TCF principles, that regulates the conduct of section 13B administrators during a transfer of administration to avoid members’ best interests being sacrificed at the altar of profit-driven motives.

Complaints pertaining to withdrawal benefits continue to be the most dominant category of complaints investigated and closed, together with non-compliance with section 13A (non-payment of contributions by participating employers). Jointly, these two categories constitute 84% of the total closed complaints categories.

A new trend has emerged in terms of which the “Covid-19 relief” provided by the FSCA that enabled funds to amend their rules to suspend contributions payable by employers has been exploited by unscrupulous employers that continued to deduct contributions from members’ wages but failed to pay them over to the fund because of the amendment allowing non-payment of contributions (other than for risk benefits).

- **Financial Services Tribunal**

Persons aggrieved with the outcome of complaints decided by the OPFA have the option of applying to the Financial Services Tribunal (FST) for reconsideration. Learnings from decisions of the FST are implemented by the OPFA to continuously improve on processes.

• **The legal desk**

- **The Refer-to-Fund (RtF) process**

The RtF process whereby the OPFA facilitates the lodging of a complaint by a complainant with the fund for internal dispute resolution, has proven successful with a notable number of disputes being resolved before a formal complaint is registered. The RtF process allows the fund an opportunity to resolve a dispute directly with a potential complainant before the complaint is formally registered as such. This process allows funds to get closer to their members and understand their grievances. It creates an opportunity for learning and improvement to systems. This has assisted the OPFA to close a notable number of cases without formal intervention because funds have grabbed the opportunity to deal with their members directly. Members’ trust in the process has also been enhanced because they have learnt that the people charged with the control of their retirement funds are in fact accessible and willing to resolve their complaints.

However, some funds are guilty of failing to take advantage of the RtF process as there appears to be very little or no attempt at all on their part to resolve complaints directly with their members. Other funds have been habitually uncooperative by failing to provide proper responses to complaints. Failure to provide proper responses to complaints delays the outcome

of investigations and thereby erodes trust. The OPFA continues to report these habitual offenders to the FSCA for regulatory intervention.

- **Member communication**

The communication by funds to members around the proposed two-pot retirement system is crucial and forms part of a fund’s duty towards its members. It is important that members understand what they will be entitled to under the new system and what they will no longer be entitled to. The tax implications should also be communicated.

Funds should optimise the reach that they have to members by issuing communication that is complete and paints the full picture for members. It is worth mentioning that the OPFA still receives a notable number of complaints pertaining to early access to retirement annuities. This is an indication that the laws pertaining to early access were not efficiently communicated to members by the respective retirement annuity funds. Failure to communicate the full effects of the two-pot system is, therefore, likely to result in an escalation of complaints on a similar basis. Actions to mitigate such an outcome should, therefore, be implemented.

- **Record keeping**

Funds record keeping measures will need improvement. The lack of adequate responses to the RtF process or complaints is often attributed to poor record keeping which in turn creates fertile ground for disputes. The OPFA’s experience is that record keeping is generally of a poor standard. This is another source of concern as members in the two-pot system will need to be kept updated on the value of their benefits and which parts thereof form the vested component, savings component, and retirement component as well as the effect thereof. Administration systems will need to cater for records that are accurately reflected and continuously updated with changes in the value of benefits due to investment return and/or new contributions in each component. If this is not handled correctly, dissatisfaction and mistrust in the proposed system is likely to ensue.