



### Policy on Expediated Complaints and Vulnerable Complainants

The Office of the Pension Funds Adjudicator (OPFA) issued a draft Policy on Expediated Complaints and Vulnerable Complainants (the Policy) for comments by the public by 9 February 2024.

The mandate of the OPFA in terms of section 30D of the Pension Funds Act, is to ensure a procedurally fair, economical, and expeditious resolution of complaints. To this end, all complainants that approach the OPFA are important and must be treated fairly with dignity and respect. The OPFA recognises that most complainants are in some way or the other vulnerable however, there is a need, under certain circumstances which is defined in the document, for some complaints to be expedited and not follow the OPFA's ordinary first in first out basis of complaints-handling. This may be justifiable based on the circumstances of the complainant or the complaint.

The Policy provides guidelines on how the OPFA will identify vulnerable complainants and complaints that may be expedited. It outlines the processes and protocols in place to assist vulnerable complainants whose complaints are to be expedited.

The following complaints will be considered to be expedited:

Complaints in respect of complainants that are:

1. older than 65 years;
2. physically or mentally challenged;
3. seriously ill (life threatening);
4. children who are the head of their households;
5. in exceptional need of financial assistance and the expeditious resolution of the complaint has the potential to provide such assistance;
6. in need of an outcome from the OPFA to make an important decision that is time sensitive, for example, causal event charges where a complainant is still to decide if the benefit should be made paid up or not; and
7. retirement funds complaining about the non-payment of contributions by a participating employer.

Complaints relating to:

1. requests for information, including benefits statements, where no other issue is at stake;
2. the withholding of a benefit by a fund, where the accrual date is older than 12 months;
3. delays in finalising a s37C allocation / distribution, where the member's death occurred more than 24 months prior to lodging the complaint.

When a complaint is lodged with the OPFA, the submitted or recorded information will be considered to identify and flag whether the complaint should be expedited. The complaints so identified will display a special identifying indicator (flag) on the case management system at every stage of the complaints process from the stage at which it was so identified. The Policy makes provision for certain timeframes within which such identified complaints should be finalised.

Vulnerable complainants, which include a complainant who is blind or who cannot read or write, or a complainant experiencing a language barrier, will be assisted.

The Policy is a living document and will be reviewed as the OPFA gains more insight and experience on complaints that may be expedited and conducts more research into the unique needs of vulnerable complainants and how the OPFA can best meet them as an organisation and as individuals.

### Pension Funds Adjudicator cases

#### Transfer out of a fund – fund's duties

*Bhinka (Complainant) v Chemical Industries National Provident Fund (Fund)*<sup>1</sup>

The Fund offered members the opportunity to transfer to the Sasol Pension Fund and the Complainant made use of the window period offered to transfer out of the Fund. It was a condition that those members who wished to transfer, attend a compulsory information session, and complete a transfer form. The Complainant fulfilled these requirements and had also signed an attendance register. The transfer however never transpired, and the Complainant received no communication in this regard. He subsequently lodged a complaint with the Adjudicator.

The Fund claimed that its failure to transfer the affected members out of the fund was due to insufficient data and a lack of information when it changed administrators. The Adjudicator determined that section 7C(1) of the Pension Funds Act places a positive duty on the fund to act in the best interests of its members. This includes exercising an oversight function over its administrator and ensuring that processes occur efficiently and seamlessly without adversely

<sup>1</sup> *Bhinka v Chemical Industries National Provident Fund and another* [2023] 4 BPLR 64 (PFA)

affecting members of the fund. In addition, section 7D(1) of the Act holds the fund responsible for ensuring proper record keeping and proper control systems are employed by it or on behalf of it. The board failed in both these duties.

The Adjudicator found that the Fund contravened the Act, including dereliction of duty in that the transfer took more than ten years. The Fund was ordered to engage the transferee fund and complete all the necessary section 14 transfer documentation and submit the application to the FSCA, within six weeks of the determination. It must also provide the Complainant with relevant information pertaining to the transfer of his benefit and with regular updates regarding the transfer as well as a breakdown of his contributions, fund credit, and latest benefit statement within four weeks of the determination.

[Funds must supply transferring members with information regarding the transfer of their benefits and complete the transfer without delay. A transfer that takes ten years to complete, constitutes a dereliction of duty.](#)

[The duty to disclose adequate information to members and beneficiaries is important for the purposes of accountability and provision of access to information.](#)

[A fund appoints its administrator and cannot distance itself from the administrator as the board of management remains accountable to fund members.](#)

### Termination of investment policy

*Kellogg's Provident Fund (the Fund) v 27Four Life Ltd<sup>2</sup>*

In August 2019, the Fund resolved to move all its assets from 27Four Life Ltd (27Four) to a new investment manager and gave notice of termination of its investment policy to 27Four on 3 September 2019. 27Four only transferred the value of the underlying assets to the new investment manager, Retirement Investments and Savings for Everyone (Pty) Ltd (RISE), on 2 October 2020. The Fund complained to the Adjudicator that it had suffered a loss of investment return as a result.

The Fund contented that the policy sets out the right of the Fund to terminate subject to 30 business days' written notice to 27Four and that 27Four had a contractual obligation to settle the underlying assets, as defined in the policy, in its entirety within the notice period. If due to liquidity issues, 27Four then has the right to extend the 30 business days' notice period for payment of the illiquid assets for a period of up to six months. Since 27Four did not transfer the assets to RISE by 3 March 2020, the extended deadline, the Fund calculated its loss in investment returns to be R120 819.00 for the period 3 March 2020 to 2 October 2020.

27Four responded that the policy does not oblige it to pay the termination value within 30 business days after the expiry of the notice period. It merely requires that 27Four endeavour to do so. In the event of any liquidity issues, termination will be subject to receipt of settlement values of the underlying assets. The six-month extension period only applies in instances where liquidity of the portfolio is impaired by cash outflow. The liquidity issues relating to the Fund's disinvestment was rather due to the inherently illiquid nature of the underlying assets. The Fund's illiquid assets were held in the 27Four Black Business Growth Fund, an illiquid private equity fund of funds with a fixed

term of ten years or longer, and preference shares in Nkhohli Consolidated Investments (Pty) Ltd, with a redemption date of 31 October 2023. The payment of underlying assets took place upon the liquidation of the once illiquid assets.

The Adjudicator agreed with 27Four that the policy does not provide a specific termination date, and that it was always subject to receipt of the settlement values of the underlying assets. Although the Fund gave 30 business days' notice of termination to 27Four on 3 September 2019, it did not result in the underlying assets held by the Fund becoming payable within 30 business days. The extension of the period to six months, within which it endeavours to make payment, only applies where the portfolio is experiencing a cash outflow (due to withdrawal or otherwise) which impairs the liquidity of the portfolio. 27Four was therefore required to endeavour to pay within 30 business days, *subject to receipt of the settlement values of the underlying assets*.

The Adjudicator found that 27Four acted within the provisions of the investment policy and the complaint was dismissed.

[Upon termination of an asset manager and transfer of assets, funds must pay close attention to the termination provisions of the investment policy and have realistic expectations regarding the disinvestment of illiquid assets.](#)

## High Court case

### Claim for full lump sum following retirement

*Lekota (Applicant) v Sentinel Retirement Fund (Fund)<sup>3</sup>*

The Applicant retired early from the Fund in 2018. He completed the documentation and exercised an irrevocable option to receive the maximum cash lump sum of one-third of his benefit and a pension with the remaining two-thirds.

Four years later the Applicant wanted the Fund to make full payment of his benefit to him. He approached the Financial Sector Conduct Authority and Pension Funds Adjudicator. The Adjudicator dismissed his complaint, ruling that his election is irrevocable, and that he could not commute his monthly pension, which he was already receiving, to a cash lump sum. He was bound by his signature on the application form and the rules of the Fund.

The Applicant then took the case to the High Court and claimed that he did not know that only one-third of the benefit would be paid to him. Had he known, he would not have exercised such an option.

The High Court found that the Applicant is not only bound by the election he made at the time he applied for his retirement benefit, which was an irrevocable option to receive a maximum lump sum payment equivalent to one-third of his pension benefit and for the remainder to be paid on a monthly basis as a lifelong annuity, but that he is also bound by the Adjudicator's determination, the rules of the Fund and the Income Tax Act. The Act only allows for the entire retirement interest to be taken as a cash lump sum if it does not exceed the amount of R247 500, which the Applicant's retirement benefit exceeded.

[A member's written choice to take one-third of their retirement benefit as a cash lump sum and purchase a pension with the balance, is irrevocable, and the member is bound by their election, the legislation, and the rules of the fund.](#)

<sup>2</sup> Kellogg's Provident Fund v 27Four Life Ltd (previously Prescient Life Ltd) and others [2023] 5 BPLR 87 (PFA)

<sup>3</sup> Lekota v Sentinel Retirement Fund [2023] 5 BPLR 82 (GJ)

## Constitutional Court case

### Divorce – marriages outside of community of property without accrual

*EB v ER<sup>4</sup> and KG v Minister of Home Affairs<sup>5</sup>*

These cases before the Constitutional Court (CC) concerns the constitutionality of section 7(3) of the Divorce Act. This section provides that where spouses married out of community of property and profit and loss and without accrual, get divorced, the divorce court may make an equitable order that assets of the one spouse be transferred to the other (a “redistribution order”), but only where the marriage was entered into before 1 November 1984. For a redistribution order to succeed, the claiming party will need to produce evidence to support their claim.

The CC heard the cases of *EB v ER* and *KB v Minister of Home Affairs* together as both concern the same section in the Divorce Act. In *EB v ER* the issue was the absence of the possibility of a redistribution order in the case of death and in *KB v Minister of Home Affairs*, it was the absence of a redistribution remedy where the marriage is entered into on or after 1 November 1984.

### Matrimonial Property Act

The Matrimonial Property Act (MPA) came into force on 1 November 1984. Most couples who entered into an antenuptial contract before the commencement of the MPA were married subject to complete separation of property and without the marital power. Since the coming into operation of the MPA, a marriage which is entered into with an antenuptial contract which excludes community of property and community of profit and loss is automatically subject to the accrual system. If the spouses do not wish the accrual system to apply to their marriage and want to be married subject to complete separation of property, they have to stipulate this in their antenuptial contract.

#### • **EB v ER**

Mrs B married her husband, Mr B, in April 1983 (before the MPA) in terms of an ANC (therefore complete separation of property). In March 2015, she instituted divorce proceedings against him. She claimed a redistribution order in terms of the Divorce Act. Mr B died in April 2016, by which date the divorce action had not been finalised. Mrs B claimed a redistribution order, but the executor of Mr B’s estate said that a redistribution order cannot be granted as Mr B died before the divorce was finalised and the marriage was therefore ended by death and not divorce. A redistribution remedy for marriages entered into before the MPA was enacted could be granted when the marriage was dissolved by divorce only.

In 2019 the High Court found that a claim for redistribution was not extinguished by death and that section 7(3) of the Divorce Act was unconstitutional for failing to provide a redistribution remedy in such a case. Mrs B and her daughter (the beneficiary of the estate) came to a settlement agreement, but the executor felt that the High Court’s

decision should be confirmed by the CC, so Mrs B took the case to the CC.

After careful consideration, the CC declared section 7(3) of the Divorce Act inconsistent with the Constitution and invalid to the extent that it fails to include the dissolution of marriage by death.

#### • **KG v Minister of Home Affairs**

Mrs G married Mr G in 1998, after the MPA came into force. She began divorce proceedings in 2017, which are still pending. She alleges that in many ways, mainly non-financial, she has contributed to the increase in her husband’s estate and that he is now very wealthy. In 2021 she approached the High Court for an order declaring section 7(3)(a) of the Divorce Act unconstitutional as it limited redistribution orders to ANC marriages entered into prior to the MPA. The High Court agreed, and Mrs G referred the matter to the CC for confirmation.

The CC declared paragraph (a) of subsection 7(3) of the Divorce Act as unconstitutional and decided that the underlined words should be excluded: “(a) ***entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded.***”

The MPA in turn must be read as including wording stating that where a marriage out of community of property is dissolved by the death of a party to the marriage, a court may order that such assets of one party as the court may deem just, be transferred to the other party.

The CC suspended the declaration of invalidity for 24 months to enable Parliament to take steps to effect the changes.

[The Constitutional Court has ruled that section 7\(3\) of the Divorce Act is unconstitutional.](#)

[Firstly, it is unconstitutional in that it fails to include the dissolution of marriage by death. Secondly, all persons in marriages out of community of property and excluding profit and loss without accrual, and not only those married prior to 1 November 1984, should be able to apply to court for a redistribution order if they can prove that they contributed directly or indirectly to the other’s estate.](#)

[This does not apply retrospectively and therefore only applies to divorces after the decision of the court on 10 October 2023.](#)

[Unfortunately, the CC did not deal with the division of pension interest in their decision, and it remains unclear whether it will be included in the assets of one party that the court may order to be transferred to the other party.](#)

<sup>4</sup> *EB (Born S) v ER (Born B) N.O. and Others*, Case CCT 364/21

<sup>5</sup> *KG v Minister of Home Affairs and Others*, Case CCT 158/22