



Death benefits

Financial Services Tribunal

Board can rely on affidavits

*CS Ndubana (Complainant) v Corporate Selection Umbrella Retirement Fund*¹

The member passed away in 2020 and a death benefit became payable. The Fund decided to allocate 20% of the benefit to the first customary wife of the deceased member. The Complainant is the second wife of the member, who complained to the Adjudicator that the claim to share in the death benefits by the first wife was fraudulent as the relationship or marriage did not exist anymore at the time of death of the member and that the first wife was not dependent on the deceased member.

The Adjudicator considered the investigations by the Fund, where the Fund identified both the first wife as well as the second wife as legal dependants by virtue of them being spouses of the deceased member. The first wife provided an affidavit to the Fund wherein she claimed that she was during 2018 and 2019, when the member was critically ill, responsible for managing the financial affairs of the deceased member, including paying maintenance to the two minor children of the Complainant. The first wife further stated under oath that she was financially dependent on the deceased member and was in receipt of R5 000 per month from the deceased member.

The Adjudicator came to the conclusion that the first wife was still in a relationship with the deceased and did qualify as a dependant, as her affidavit was not challenged. Further, the affidavit provided by the brother of the deceased was consistent with that of the first wife.

The submissions by the Complainant did not indicate that the decision of the Fund was arrived at based on consideration of improper, irrelevant, or irrational considerations.

The Tribunal came to the conclusion that there was a valid customary marriage between the deceased member and the first wife, and such customary marriage was still in existence at the time of the death of the member. The discretion of the board of trustees was not vitiated by irrelevant, improper, or irrational factors and the Tribunal found no basis to interfere with the discretion of the Fund regarding the apportionment of the death benefits of the deceased member.

Boards may rely on affidavits, especially where affidavits by different people are consistent. Affidavits are statements under oath and unless they are challenged, should be accepted as evidence of, for instance, financial dependency.

High Court

Differentiation between members may be justified - spouse's pensions in polygamous marriages

*FM Seloana ("surviving spouse") v Government Administration Agency and GEPP*²

The member retired in 1991 and upon his retirement received a pension until he passed away in 2003. He was married in terms of customary law to two wives. When the member passed away, the two wives each became entitled to a half portion of the spousal pension. One of the wives passed away in 2017, which brought an end to the payment of her portion of the spousal pension.

The surviving spouse requested the GEPP to recalculate her spousal pension with the view that she would start receiving the full benefit, which request was denied. The surviving spouse challenged the rule on which the decision taken by GEPP was based, because it unlawfully discriminates against women in polygamous marriages.

In terms of the rules of the GEPP the spousal pension terminates upon the death of a spouse. The court had to determine whether the rule providing that it does not cater for recalculation of pension benefits when one of the spouses dies, must be declared invalid based on unfair discrimination.

The following stages of enquiry is required to determine whether conduct, law or policy discriminates unfairly:

1. Does the provision differentiate between people or categories of people? If so, is there a legitimate purpose of the differentiation?

¹ Cynthia Ndubana v Corporate Selection Umbrella Retirement Fund and Participating Employers Silulumanzi (RF) (Pty) Ltd and the Pension Funds Adjudicator, Case No: PFA67/2022

² Florence Seloana v Government Administrator Agency, Government Employees' Pension Fund, Minister of Finance and Minister of Justice and Correctional Services, case 7633/21

2. Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - i) Does the differentiation amount to discrimination, i.e. is it based on one of the specified grounds or does it have the potential to impair the fundamental human dignity of persons or to affect them adversely in a comparable serious manner?
 - ii) If it amounts to discrimination, does it amount to unfair discrimination? The test of unfairness focusses primarily on the impact of the discrimination on the person in their situation.
3. If the discrimination is found to be unfair, a determination will have to be made as to whether the provision can be justified.

The surviving spouse argued that she is indirectly discriminated against on the basis of gender and marital status, because the refusal to recalculate her benefit puts her in a less favourable position than those persons who are married in non-polygamous marriages.

The court indicated that the rule achieves a legitimate purpose by protecting the interests of both or all women in such marriages. The said rule treats women who are in polygamous marriages differently to those who are not. The test in has therefore been satisfied in that the rule treats women in different categories differently. On the question whether the differentiation constitutes unfair discrimination, the court held that although the surviving spouse was seemingly treated less favourably compared to women who are not in polygamous unions in that she is receiving a lesser benefit, the rule does serve a legitimate purpose. The rule attempts to strike a balance between women in polygamous marriages and those in monogamous marriages to ensure that they derive equal benefit in terms of the rules. This is, in the court's view, a legitimate purpose that the rules serve. The court found that the benefits accrued fully when their pensioner husband died and the subsequent death of one of the wives does not trigger a recalculation of pension benefits. The payment of the lesser benefit starts at the death of a pensioner and continues until the spouse also passes on.

The court was not satisfied that the rules discriminate unfairly against women in polygamous marriages and that they ought to be declared invalid. The application therefore failed.

[Where rules differentiate between different members or beneficiaries, it does not necessarily mean that a fund discriminates unfairly and that the rule can be declared invalid. If the rules serve a legitimate purpose, the differentiation may be justified.](#)

Pension Funds Adjudicator

Death benefits may only be paid with death certificate or presumption of death order

*N Krishna (Complainant) v Mondi Mpack Group Fund Provident Section*³

The Complainant's husband was a member of the Mondi Mpack Group Fund Provident Section (the Fund). The

Complainant submitted on 15 September 2023 that her husband went missing in September 2020. She requested the Fund to release his benefit. The Complainant submitted that a death certificate has not been issued and that she may only apply for presumption of death after a period of seven years. However, she needs money to pay living expenses.

The Fund declined her request and submitted that section 37D of the Act prohibits payment of a benefit to a third party. In the event of the death of a member, the board of management may allocate the benefit in terms of section 37C, but only if the death was confirmed with a certificate from the Department of Home Affairs.

The Adjudicator found that in South Africa, when a person goes missing and there is no indication that they died from unnatural causes, the next-of-kin must apply to the High Court for a presumption of death declaration. The granting thereof depends on the facts of the case. However, until a death certificate is issued, or a such declaration is granted, a missing person's affairs are in legal limbo and dependants may have no access to funds and debts will remain unpaid.

In this case no death certificate or presumption of death order has been granted and the Fund may therefore not pay the death benefit.

[In South Africa, when a person goes missing and there is no indication that they died from unnatural causes, the next-of-kin must apply to the High Court for a presumption of death declaration. Without either a death certificate or a presumption of death order, a retirement fund may not pay any death benefits.](#)

Section 37C - death benefit allocation - nomination form

*Winter (Complainant) v SAPPI Pension Fund*⁴

The Complainant's life partner was a member of the SAPPI Pension Fund (the Fund) until he passed away in January 2022. The deceased had nominated the Complainant to receive 80% and his mother 20% of the death benefit that became payable, and the Fund's board decided to allocate the death benefit as indicated in the nomination form. Dissatisfied with the allocation, the Complainant stated that he was the sole dependant of the deceased. He stated that the board should have taken the outstanding debt of the deceased's estate as well as his dependency into consideration and not only the beneficiaries as listed on the nomination form when determining the payment of the death benefit. He was also of the view that the deceased's mother was not a dependant of the deceased.

The Fund recommended that the deceased's death benefit be distributed as per the deceased's wishes as specified in the nomination form dated 1 October 2014 where the deceased initially allocated 50% to his mother and the Complainant, and the nomination form dated 29 July 2021, allocating 80% to the Complainant and 20% to his mother. The Fund also took into consideration the financial information and the outstanding debts as submitted by the Complainant. In addition, the Fund provided the beneficiaries with an opportunity to raise any objections regarding the

³ PFA/KN/00099138/2023/YVT

⁴ Winter v SAPPI Pension Fund and another [2024] 1 BPLR 20 (PFA).

allocation of the death benefit and no objection was received by the Fund.

The issue for determination was whether the board considered all relevant factors and ignored irrelevant ones. In deciding on an equitable distribution, a fund may take into consideration the financial dependency of the beneficiaries as well as the wishes of the deceased placed in a nomination form. In this regard, the Adjudicator relied on the *Swart*⁵ case where the court stated the following:

"although I accept that the Fund is not bound by the wishes of a deceased person, the wish expressed in a nomination form or in a will is not to be lightly ignored. It is one of a number of factors to be taken into account, but it is a substantial factor. Therefore, before the Fund decided to ignore the nomination, it should have considered whether there were compelling reasons to do so. If it would result in an injustice or be inequitable should the deceased's wishes be given effect to, then the Fund would be justified in deviating from the deceased's wishes. Here there is no evidence that the Fund placed any weight at all on the nomination."

The Adjudicator emphasised that the purpose of section 37C is to serve a social function and protect dependency. Therefore, had the Fund purely relied on the nomination form to allocate the benefit then it would have been incorrect to do so. The Fund cannot blindly follow the nomination form and must consider whether following the nomination form would result in an inequity.

The Adjudicator held that its duty is not 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. In the circumstances the Adjudicator was satisfied with the allocation made in respect of the deceased's death benefit and that the board did not unduly fetter the exercise of its discretion and had exercised its powers reasonably and properly. As a result, the Adjudicator did not find it necessary to interfere with the Fund's wide discretionary powers.

The Adjudicator will not interfere with a fund's wide discretionary powers if it can be shown that the board exercised its powers reasonably and properly.

Employer's duties

Financial Services Tribunal

Employer's duty to submit contribution statements timeously

*Creda Communication (Applicant) v Pension Funds Adjudicator*⁶

The member became a member of the GTC Group Pension Fund (the Fund) in 1992. On 31 December 2019 he was retrenched and became entitled to a benefit from the Fund. The duly completed claim form was received by the Fund on 3 February 2020 but payment of the benefit to the member

could not be made before contributions and membership data had been reconciled. The necessary information however remained outstanding from the employer for December 2019. The member only received his benefit on 27 April 2020 and alleged that as a result of the delay in the employer submitting the information, he suffered a loss of R340 000 due to decreased market performance.

The Adjudicator determined that the member had completed and submitted the claim form to the Fund on 3 February 2020, but the balance of information was only sent to it by the employer on 14 February 2020. The Fund had 15 working days from 14 February 2020 to pay the benefit, therefore 6 March 2020. Full membership information for December 2019 was however only received on 18 March 2020.

The Fund and its administrator averred that the investment risk lies with the member. The Adjudicator disagreed and said that he should only have been at risk for the period that his benefit should have been invested in the market, not for the period that the employer's failure caused a delay. However, the Adjudicator found that although the employer's failure factually caused the member's loss, the loss did not result in legal liability as there is no legal causation.

The case progressed to the Financial Services Tribunal, where it was found that public policy considerations, based on the norms and values of our constitution do point to the employer being liable, subject to the legal causation test being met (whether the member's loss was closely linked to the employer's conduct).

Section 13A of the Pension Funds Act (the Act) places a legal duty on the employer to submit data to the Fund. The employer also undertook to provide the information in terms of its agreement with the Fund and administrator. The employer could also have foreseen that not providing the relevant information timeously could have had a diverse impact on the value of the benefit. There is therefore a causal link between the employer's failure and the member's loss. The Tribunal ordered the employer to pay the amount of the loss to the member.

An employer must pay contributions and submit membership data within the period stipulated in the Act and any agreement with a fund. Failure to do so, could result in the administrator not being able to reconcile and invest contributions. This in turn could lead to members exiting the fund being paid late. The employer could be held liable for the impact any negative market movements during such time could have on an exiting member's benefit.

Fund duties

High Court

Withholding of benefit - claim by the employer

*Umgungundlovu District Municipality v Natal Joint Municipal Pension Fund and another*⁷

In this matter before the High Court, the court had to

⁵ Swart N.O (néé Van der Merwe) and others v Lukhaimane N.O and others [2021] JOL 49952 (GP)

⁶ Creda Communication (Pty) Ltd and Pension Funds Adjudicator, MMA Lukhaimane N.O, GTC Group Pension Fund, GTC Employee Benefits Administration (Pty) Ltd, Noel Dominique Mcshane PFA/61/2022

⁷ Umgungundlovu District Municipality v Natal Joint Municipal Pension Fund and Another (7187/2022P) [2023] ZAKZPHC 142 (23 November 2023)

determine whether the Umgungundlovu District Municipality (the Municipality) was entitled to interdictory relief pending the outcome of an already instituted action by the Municipality against the employee, the second respondent. The action relates to a claim of damages arising from an overpayment to the employee arising from his misconduct.

The employee was a member of the Natal Joint Municipal Pension Fund (the Fund) as a result of his employment with the Municipality.

There was a pending action against the employee for damages which arose from an overpayment of travel allowances in the amount of R416 213.82 to the employee. Pursuant to disciplinary hearings, the employee was charged with ten counts involving gross dishonesty, gross misconduct, and gross dereliction of duty.

It was during the disciplinary hearings, that the Municipality discovered that the employee had received an overpayment of his travel allowance. Four months after the disciplinary hearings, the Municipality discovered that the employee had exited the Fund and claimed his pension benefits. At no stage prior to this had the Municipality been informed by the employee that he intended to withdraw his pension benefits from the Fund.

After confirming with the Fund that the employee had filed a claim to withdraw his pension benefits, the Municipality wrote to the Fund invoking the provisions of section 37D of the Pensions Fund Act requesting the Fund to withhold payment of the employee's pension benefits pending the finalisation of its civil claim for damage.

The requirements for a final interdict

The court confirmed the requirements for a final interdict and listed them as follows:

- There must be a clear right;
- There must be an injury actually committed or reasonably apprehended; and
- The absence of similar protection by any other ordinary remedy.

The court found that the Municipality had made a case in terms of the first two requirements. However, the court was of the view that the Municipality had failed to make a case that there was no alternative remedy. Because the Fund had failed to provide the Municipality with a proper response as to whether it will be withholding the benefit, it could not be inferred that the Municipality was provided with a final refusal by the Fund to withhold the benefit. Thus, the court reasoned that once the Fund had made a final decision on whether to withhold the benefits, the Municipality can always approach the Pension Funds Adjudicator as an alternative remedy.

The court ordered that the Fund was interdicted from paying the amount of R416 213.82 to the employee pending the Fund making a final decision on the Municipality's written request to withhold the amount.

It is important that a fund provide an accurate and final response to an employer's request to withhold a member's benefit so that it is clear from the communication whether the fund is refusing the request or not. Once a fund has made a final decision to release the benefits, the procedure relating to a referral to the Pension Funds Adjudicator will serve as an alternative remedy which is available to the employer.