SIMEKA

member of Sanlam group

In Perspective

2/2025

High Court cases

Payment of contributions - personal liability of management of employer

EIPF and MIPF (the Funds) v Installair (Employer) and PR and SM Orso (Directors)[1]

The Funds sought payment of arrear contributions of R93 715 from the Employer and its Directors for a period where contribution schedules were received, but contributions were not paid to the Funds. The Directors argued that contributions were deducted but not paid over to the Funds to subsidise employee salaries, referred to as an "adjustment of payment of employee compensation".

Section 13A of the Pension Funds Act places an obligation on the employer to pay members' contributions deducted from the members' remuneration and any contribution for which the employer is liable in terms of the rules to the fund in full, not later than seven days after the end of the month for which the contributions are payable.

The Financial Services Laws General Amendment Act of 2013 introduced criminal sanctions on those who fail to comply with section 13A. Sections (8) and (9) were added to section 13A, to enable retirement funds to identify and hold certain persons who are in control of, or regularly involved in, the management of the employer's overall financial affairs, accountable and personally liable for any non-compliance with s13A and for the non-payment or short payment of fund contributions.

The court found that the respondents cannot unilaterally decide not to pay contributions or excuse themselves from these serious statutory obligations. The two-pot retirement system has again exposed the failure of employers to pay contributions, and the court added that the Directors' defence was far-fetched and untenable, and the court could not let members suffer.

The Directors further contended that one of them, although listed as a director, was not involved in the affairs of the Employer and an order should not be granted against her. The court found that this assertion cannot stand. She was a director of the Employer and had to accept the responsibilities that come with it. The court ordered the Directors in their personal capacity to pay the outstanding contributions as well as the legal costs of the court application.

Management of institutions can and will be held personally liable for non-payment of contributions. The court will not accept excuses, the law will need to be followed so as not to prejudice members and retirees.

Using artificial intelligence

Mavundla v MEC: Department of Co-Operative Government and Traditional Affairs KZN[2]

Although not strictly a case pertaining to retirement funds, the High Court case of Mavundla does provide some interesting principles for boards of management to note regarding the use of artificial intelligence.

The case was a request for leave to appeal. However, in perusing the court cases cited in the arguments of the attorneys of the applicant, the court struggled to find the cases that were referred to. The judge gave the attorneys an opportunity to present the cases they relied upon, but they could not. The judge asked whether they used ChatGPT to assist with research, but they denied it.

After further investigation, the court found that the cases did not exist and remarked that when counsel cites a case as authority, it is at least expected that they would have read the case. The attorneys' conduct was referred to the Legal Practice Council to investigate further.

In the judgement, the court referred to an article by Associate Professor M van Eck titled *Error 404 or an error of judgment? An ethical framework for the use of ChatGPT in the legal profession*[3], which contains a comprehensive exposition of the legal position in South Africa and various international jurisdictions when it comes to the use of artificial intelligence technologies in legal research, and particularly the use of ChatGPT. The author remarked that despite promises by ChatGPT of legal efficiencies and benefits within the legal sector, it is not known for its reliability as often "information produced in response to prompts has been shown to be fabricated or fake, especially when such prompts relate to legal information".

1 Case 1633/2023

2 Mavundla v MEC: Department of Co-Operative Government and Traditional Affairs KwaZulu-Natal and Others (7940/2024P) [2025] ZAKZPHC 2

3 M van Eck 'Error 404 or an error of judgment? An ethical framework for the use of ChatGPT in the legal profession' (2024) 4 TSAR 469

The judge remarked that attorneys are bound by values of integrity and honesty and have a duty to not mislead the court.

Artificial intelligence can "hallucinate". This includes generating nonsensical text, making contradictory statements, and even fabricating information.

Boards of management of retirement funds are also bound by fiduciary and legal duties of honesty and integrity and should also not mislead fund members. Should artificial intelligence be used to generate any fund documentation, such as member communication, boards of management should note from the Parker[4] case: *In this age of instant gratification … the efficiency of modem technology still needs to be infused with a dose of good old-fashioned independent reading.*

Pension Funds Adjudicator case

Employer's request to withhold benefit

Maseko (Complainant) v Discovery Life Pension Umbrella Fund[5]

Upon the termination of the Complainant's employment, he became entitled to receive a withdrawal benefit. However, his employer had requested that the Fund withhold payment of the benefit based on an allegation of theft committed by the Complainant, arising from his alleged unauthorised use of the employer's credit card.

The Fund submitted that it was satisfied that a prima facie case had been made against the Complainant, which provided sufficient grounds to withhold his benefit until a court order was obtained. However, the Complainant submitted that when he lodged his complaint with the Adjudicator, no criminal or civil proceedings had been instituted against him because there was no basis for such. The employer only initiated criminal proceedings more than four months after his resignation. The Complainant contended that it was grossly unfair that his benefit had been withheld for more than four months due to an unsubstantiated claim by the employer.

The Adjudicator confirmed that it was not their function to determine whether there was merit to the employer's claim against the Complainant, but that it only had to be determined whether the Fund complied with its duties before taking a decision to withhold the Complainant's benefit.

The process of balancing the competing interests of the employer and the Complainant can be achieved by assessing the potential harm that will be suffered by the employee if the 37D withholding is granted as compared with, or balanced against, the potential harm to the employer if the 37D withholding is not granted.

Any claim that would deprive a member of the use and enjoyment of their benefit must be carefully scrutinised. That can be done by weighing the parties' competing interests after allowing a member to place his case properly before the Fund. That also ensures that a fund does not abuse the system or merely rubber-stamp the employer's request to withhold a member's benefit without investigating the merits of the allegations or the financial prejudice a member may suffer.

The Complainant exited employment on 29 March 2024. The employer opened a criminal case with the SAPS in late July 2024. It instituted civil proceedings in August 2024 and served the Complainant at his residence on 22 August 2024. The Adjudicator found that there was no undue delay by the employer in instituting a civil claim against the Complainant as it had to do its own investigation first.

The new amendments to the Pension Funds Act, which became effective 1 September 2024, now state that a judgement obtained against a member for purposes of a section 37D deduction includes a compensation order granted in terms of section 300 of the Criminal Procedure Act. The Adjudicator received this complaint on 9 June 2024 and therefore the Adjudicator applied the law and the interpretation applicable to this matter before 1 September 2024, meaning that the Fund may not withhold the benefit based on a criminal case alone.

The Adjudicator found that the Fund in this case complied with their duties and the complaint was dismissed.

It is important that each request for a section 37D withholding due to a potential damage claim be carefully scrutinised by a fund. This ensures that a fund does not abuse the system or merely rubber-stamp the employer's request to withhold a member's benefit without investigating the merits of the allegations or the financial prejudice a member may suffer.

The importance of the decision regarding the mode of payment of a minor's death benefit allocation is illustrated in the following two cases:

Pension Funds Adjudicator case - Payment to beneficiary fund

Williams (Complainant) v Hortors Group Pension Fund[6]

The Complainant's life partner (the deceased) was a member of the Fund. Following the death of the deceased, a death benefit became available for allocation to his beneficiaries. The deceased had three children – two were minors aged 7 and 14 and a third major daughter aged 18.

The Complainant was aggrieved by the mode of payment that was used and with the allocation of the death benefit and submitted that she was not informed as to why the minor children's benefit was paid to a beneficiary fund. She also stated that the major child was allocated a large portion of the death benefit, even though the major child was not financially dependent on the deceased.

- **Payment to legal guardian versus payment to beneficiary fund**

Payments to a minor child's guardian should be effected in the normal course of events unless there are clear reasons

4 Parker v Forsyth NO and others (Regional Court, Johannesburg, Gauteng) unreported case no 1585/20 (29 June 2023) (Parker), and reported on Law Library South Africa as Parker v Forsyth NO and others [2023] ZAGPRD 1

5 [2024] 6 BPLR 111 (PFA)

6 PFA/NW/00112163/2024/TBM

for not making payment to the guardian (Fanteso case In Perspective 3 of 2024).

In determining whether the benefits will be used in the minor's best interests, the fund must assess the guardian by considering the -

- Nature of care, whether the guardian is a parent/legal guardian/caregiver;
- Education level of the guardian;
- Employment status and stability of employment;
- Financial position (credit record/assets and liabilities income and expenditure);
- Health of the guardian;
- Signs of substance abuse and mental health issues.

Based on the above factors, it was not clear why the Fund paid the minor children's benefit into a beneficiary fund and whether the Fund even assessed the Complainant's ability to administer the minor children's benefit.

As a result, the Adjudicator found that the mode of payment adopted by the Fund was unreasonable and set it aside and the Fund was ordered to investigate the Complainant's ability to administer the minor children's benefit.

- **Major child's dependency on the deceased**

The deceased's major child qualified as his legal dependant by being the child of the deceased and consequently qualifies to be considered for an allocation of the death benefit, although any allocation will be subject to the factors of dependency on the deceased. The child was also nominated by the deceased to receive 5% of the death benefit. The Adjudicator held that as a nominee, the major child has a right to be considered in the allocation of the death benefit. In addition, there is no need for nominees to provide proof of financial dependency as their right to be considered flows from their nomination. The Adjudicator dismissed the complaint.

Section 37C places a duty on the board of a fund to decide on the most appropriate mode of payment of a benefit payable to a minor. This decision warrants an investigation into the different modes available and whether the benefit will be used in the best interest of the minor. An extensive factual investigation into the affairs of every beneficiary, and of the guardian in cases where the beneficiaries are still minors, is required.

Financial Services Tribunal case - Death benefit of a minor paid to grandmother

BS Sibanda (Complainant) v SACCAWU National Provident Fund (Fund)[7]

Upon the death of the Complainant's mother in 2008, he was still a minor of 6 years old. The deceased had two dependants, being the Complainant and his grandmother. The Complainant was awarded 90% of the benefit and his grandmother 10%. Initially the Fund made a decision to pay his benefit to a beneficiary fund. However, for reasons not disclosed in the case, the Fund eventually paid the Complainant's portion, on his behalf as a minor, to his grandmother. The Complainant was unhappy about the payment of his benefit to his grandmother.

The Complainant lodged a complaint with the Pension Funds Adjudicator, arguing that the payment to his grandmother was unwarranted, but his application was dismissed.

The Complainant turned 18 on 26 November 2020, which is the date when prescription started to run. The Complainant lodged his complaint with the Pension Funds Adjudicator 9 January 2024, which is more than three years after the prescription period started running.

The Tribunal agreed with the Adjudicator that the Complainant was out of time when he lodged his complaint.

The Complainant had several failed attempts to obtain information on the payment of his death benefit from the Fund and its providers and finally was forced to approach the High Court to obtain an order on 2 May 2023. The order obtained among others for the Fund to "pay the applicant any available benefit which is due and payable".

The Tribunal also agreed with the Adjudicator that it had no jurisdiction to deal with the matter, as a High Court matter had been instituted which related to the same subject matter of the Complainant's complaint.

The application for reconsideration was dismissed as a result.

This case, on the available facts, shows how the system failed this dependant:

- His portion of the death benefit was presumably paid to his grandmother without the Fund ensuring that the benefit will be exclusively utilised for his benefit. They should keep in mind that once a minor's benefit is paid to the guardian, those funds form part of the estate of the guardian. Thus, although the guardian may be well qualified to handle their own finances, if the fund benefit is not kept separate for the benefit of the minor, it could become integrated into the estate of the guardian. Therefore, apart from the list of factors to be considered, retirement funds should ensure that the money allocated to the minor is ring-fenced for the benefit of the minor if it is paid to the guardian, especially in the event of the death or divorce of the guardian.

- After the Complainant turned 18, he struggled for years to get information on his benefit from the Fund, so much so that he had to approach the High Court. It does not seem that the High Court judgment addressed his real concern, i.e. to locate what had happened to the death benefit of his mother. This information could have assisted him to timeously formulate and lodge a complaint regarding the mode of payment of his allocation.

7 PFA64/2024

- As a result of technicalities, the Pension Funds Adjudicator and the Financial Services Tribunal could not provide any relief to him. On the face of the matter, it does not seem that the case in the High Court was the subject matter of the complaint lodged with the Adjudicator. The High Court case ruled that all available benefits must be paid to the Complainant. His portion of the benefit was paid and, by paying it to a guardian or caretaker in terms of section 37C(2), it is deemed to be paid to him. There does not appear to be a dispute in the case lodged with the Adjudicator about the benefit being paid. The dispute is rather about the mode of the payment, and whether it is warranted.

- Regarding whether the case had prescribed and whether the Adjudicator still had jurisdiction, section 30I of the Pension Funds Act previously contained a power for the Adjudicator to condone non-compliance with the 3-year time-bar, provided good cause existed. The Pension Funds Amendment Act, 2007 which came into effect on 13 September 2007, removed that power and the provisions of the Prescription Act have been made applicable to the calculation of the period within which a complaint must be lodged. Although one would agree that the provision regarding prescription creates legal certainty and allows funds to move forward without the constant threat of old claims resurfacing, in this instance it worked unfairly against the Complainant. Also, although the Adjudicator must apply the principles of equity in terms section 30D, an equitable jurisdiction cannot be used to override other provisions of the Act.

OPFA Quarterly Digest newsletter January 2025

In their latest newsletter, the Office of the Pension Funds Adjudicator (OPFA) addressed the following:

- **Protection of Personal Information Act (POPIA):**

  It was reiterated that during the complaints process, boards of management must provide the OPFA with all relevant information considered in their decision. POPIA does not justify withholding such information from the OPFA, as POPIA permits that information may be provided in proceedings conducted by any tribunal. This ensures that sufficient information is available to the OPFA to confirm the fund's considerations on an allocation.

- **Wrongful withholding due to a spouse's wrongdoing:**

  The OPFA discussed a case where the complainant and her husband were employed by the same employer, and the husband admitted guilt for defrauding the employer. The fund withheld the wife's benefit because she was a person of interest in the case being investigated by the Hawks and because they were married in community of property. The OPFA reminded funds that they must ensure that the requirements of section 37D(1)(b) are met when they receive requests from an employer to withhold a member's benefit.