



The Pension Funds Adjudicator

MA Lukhaimane

27 February 2020

Introduction

Essence of a retirement fund

- Provide savings vehicle
- Predominantly occupational funds therefore characterised by uneven power
- Determination of benefits
- Governance of fund
- Knowledge imbalance therefore overreliance on service providers

Why a Pension Funds Adjudicator

- Resolve complaints, expeditiously
- Allow all parties opportunity to make representations
- Add to other measures to improve governance
 - Representation on boards

Introduction

Why a Pension Funds Adjudicator

- Located as an Ombud
- The law vs Helping people

Establishment of the OPFA

- The OPFA was established by an amendment to the Pension Funds Act with effect from 19 April 1996 - Chapter VA.
- There was a need for an alternative dispute resolution forum due to lengthy court procedures.
- The functions of the OPFA are performed by the Pension Funds Adjudicator (PFA).
- The PFA is appointed by the Minister of Finance in consultation with the Board of the Financial Sector Conduct Authority (“FSCA”) Previously FSB.

Establishment of the OPFA

- The OPFA reports to the Minister of Finance through the Commissioner of the FSCA.
- The Commissioner is the Accounting Authority of the OPFA.
- The Commissioner must ensure that the OPFA complies with the Public Finance Management Act, 1998 and all other good governance prescripts.
- The FSCA collects levies from all members of retirement funds registered in terms of the Act to fund the OPFA.

Establishment of the OPFA

- The OPFA is a creature of statute and therefore, has no inherent jurisdiction.
- It is not a court of law, but an administrative tribunal performing a judicial function.
- The Adjudicator has the same powers as a High Court judge in respect of matters over which he or she has jurisdiction.

Object of the PFA

- To dispose of complaints lodged, in a procedurally fair, economical and expeditious manner (sec 30D).
- The Adjudicator has jurisdiction to determine disputes that fall within the definition of a “complaint” in terms of the Act.

Jurisdiction – definition of complaint

“Complaint” means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (a) that the decision of the fund or any other person purportedly taken in terms of the rules was in excess of the powers or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund;
- (c) that a dispute of fact or law has arisen in relation to a fund ; or
- (d) that an employer who participates in a fund has not fulfilled its duties;

but shall not include a complaint which does not relate to a specific complainant

Jurisdiction – definition of complaint

A complainant is defined in section 1 of the Act as follows:

- a) any person who is, or who claims to be –
 - i. a member or a former member of a fund;
 - ii. a beneficiary or a former beneficiary of a fund;
 - iii. an employer who participates in a fund;
 - iv. a spouse or a former spouse of a member or former member of a fund;
- b) any group of persons referred to in paragraph (a) (i), (ii) or (iv);
- c) a board of a fund or member thereof; or
- d) any person who has an interest in a complaint.

Jurisdiction - limitation

- Prescription
- Where a fund is in liquidation.
- The employer is undergoing business rescue procedure in terms of sec 129 of the Companies Act 71 of 2008.
- Section 30H - if similar proceedings have already been instituted in any civil court before the lodging of a complaint, the Adjudicator shall not investigate such complaint in terms of section 30H. (*Madihlaba v PSSPF PFA/GA/9806/2006*).
- Where a complaint relates to the approval of a section 14 transfer or amalgamation. This Tribunal lacks jurisdiction to review certain decisions taken by the Registrar (see *Joint Municipal Pension Fund and Another v Grobler and Others [2007] 1 BPLR 1 (SCA)*).

Jurisdiction - limitation

- Complaints relating to the apportionment of surplus in terms of sec 15B. A Special Tribunal is established in terms of section 15K to deal with this issue.
- Funds to which the State contributes e.g. GEPF, Transnet Pension Fund, Post Office Pension Fund, the Social Assistance Pension Scheme and Funds in a foreign country.
- There are certain benefits that are provided to members not in terms of the rules. These benefits are referred to as unapproved benefits.
 - Income Protection
 - Death and Disability
 - Funeral

Dispute Resolution Procedure

- Complainants may give an employer/fund an opportunity to consider the complaint before lodging same with the Adjudicator.
- A complaint must be in writing.
- The Adjudicator shall give the other parties an opportunity to comment on the allegations.
- The parties may first be referred to conciliation

Dispute Resolution Procedure

- After the investigations are completed, a matter may be settled;
- if not, a determination will be made by the Adjudicator
 - a signed copy of the determination and the reasons therefore are sent to all the parties and to the Registrar of the High Court for filing purposes
- Appeal to Financial Services Tribunal (Financial Sector Regulation Act)
- Appeal to the High Court (section 30P)

Types of complaints lodged with the OPFA

- Retirement and Withdrawal benefits (non-payment/amount)
- Pension interest complaint (non-payment/amount)
- Causal event charges complaint (excessive charges)
- Death benefits (delay in payment, allocation or distribution)
- Disability benefits (non-payment)
- Section 14 transfers (delay)

Types of complaints lodged with the OPFA

❑ Pension interest

- *Kana v VW Provident Fund* (PFA/EC/00050141/2018) – delay in payment of pension interest (divorce order not valid or enforceable as benefit does not relate to pension interest)
- *Swart v Absa Pension Fund* (PFA/WC/00045184/2018) – computation of pension interest (non-member spouse not entitled to growth and interest on pension interest)

❑ Causal event charges

- *UA Engel v SA Retirement Annuity Fund* (PFA/WC/00058255/2019) – Legal basis for deduction of causal event charges (member not informed of the computation of the causal event charges)

Types of complaints lodged with the OPFA

- *AH Fuhner v Lifestyle Retirement Annuity Fund* (PFA/KN/00041261/2018) - Failure of fund to provide information regarding computation of causal event charges

- ❑ **Death benefit**
 - Deceased must be an active member on the date of death
 - Beneficiaries must be alive when distribution is made
 - Board must have regard to extent of dependency
 - Dependency is critical at the date of death (*Matodzi v FundsatWork Umbrella Provident Fund* (PFA/LP/00051277/2018) – board fettered its discretion by allocating a benefit to a partner who could not proof financial dependency
 - *Wilkinson v SA Retirement Annuity Fund* (PFA/GP/00051062/2018) – Board distributed benefit to adult

Types of complaints lodged with the OPFA

children who are financially independent and had no relationship with the deceased

- *Dalien Pretorius v The Pension Funds Adjudicator and Others* (Financial Services Tribunal) Case No: PFA 58/2019 (21 January 2020) – OPFA has power to substitute decision of board with own if board failed to exercise discretion properly or the board has shown to be egregiously incompetent, biased and irrational
- *Voogt v The Pension Funds Adjudicator and Others* (Financial Services Tribunal) Case No: PFA 59/2019) (11 December 2019)- Refusal of a beneficiary fund to release funds to a guardian of a minor beneficiary to purchase a vehicle found to be reasonable and lawful. Funds to be used solely for the benefit of beneficiary

Types of complaints lodged with the OPFA

- Disclosure and access to information
- **Withholding of benefits**
 - *SA Metal Group (Pty) Ltd v Deon Jeftha* (Western Cape High Court) Case No: 20298/2018 (12 December 2019) –
 - Duty of funds to act impartially and in a balanced manner when dealing with request for withholding of benefits
 - Complainant to be given an opportunity to be heard before the withholding decision
 - Fund cannot merely rubber-stamp the employer's request to withhold benefit without any investigation into the merits of the allegations and the prejudice to a member

Types of complaints lodged with the OPFA

- Fund to guard against abuse of the statutory provision in the interest of a member
- Employer's duties in terms of the Act and the rules (section 13A of the Act)
- Deductions from benefits (housing loans, employer deductions)
- Maladministration

Notable Determinations

- Others
 - Failure to follow nomination form (no grounds for review)
- (*Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W))
 - A will or nomination form merely serve as a guide and board is not bound by it
 - Board to exercise discretion properly and equitably

Punitive Costs

- Circumstances
 - Unjustifiable delay in payment due to negligence or dereliction of fiduciary duties by the board (*Nodude v Bosele National Provident Fund* [2013] 2 BPLR 241 (PFA) - (late payment interest ordered)
 - Where board acted in bad faith and grossly unreasonable (*Seymour-Smith v Maxam Dantex SA (Pty) Ltd and Others* 2008 JDR 0362 (W). (cost order made against the board)
 - Compensatory damages for delay in investigation (*Claase v Information Officer, SA Airways (Pty) Ltd* 2007 (5) SA (SCA) 469 at 240 and *Ramohapi* (PFA/NC/00023068/2016-unreported)

THANK YOU