



### Supreme Court of Appeal case

#### Cybersecurity – plaintiff could have taken steps to prevent the cyberattack <sup>1</sup>

*Edward Nathan Sonnenberg Inc. (ENS) and Judith Mary Hawarden*

The Supreme Court of Appeal (SCA) in this case overturned an order of the High Court from January 2023.

Ms Hawarden purchased a property for the sum of R6 million on 23 May 2019. After verifying banking details, she paid a deposit of R500 000 to Pam Golding Properties, the estate agent mandated by the seller to market the property. Based on a warning from Pam Golding Properties as to fraud and cybercrime, she called Pam Golding Properties to verify the banking details.

To register the property in her name, Ms Hawarden had to transfer the remaining R5.5 million to ENS, the conveyancers. An email was sent by ENS to Ms Hawarden with an attached letter setting out the necessary guarantee requirements and their banking details. Unbeknown to both ENS and Ms Hawarden, that letter was intercepted by a cyber-criminal, who had gained access to Ms Hawarden’s email account. In emails that followed, and Ms Hawarden failed to notice that the word “africa” in the email had been changed to “afirca”. She only learned later that the email had been manipulated, the banking details of ENS altered and the warning letter from her bank had been removed. In effecting the payment, Ms Hawarden used the banking details provided in the fraudulent email and transferred the monies into the fraudster’s bank account, in the belief that she was making a payment into the banking account of ENS. The fraud was only discovered on 29 August 2019. Ms Hawarden instituted action against ENS for the recovery of the R5.5 million. Her action succeeded in the High Court and was taken on appeal by ENS to the SCA.

The SCA found that Ms Hawarden suffered loss because hackers had infiltrated her email account and fraudulently diverted her payment meant for ENS into their own account. She had been warned by Pam Golding Properties about this very risk. In that instance she heeded the warning and verified the account details, but three months later failed to do so in respect of ENS and was unable to explain this failure. It would have been easy for Ms Hawarden to have avoided this risk about which Pam Golding Properties had warned her.

A finding that ENS’ failure to warn Ms Hawarden attracts liability would have profound implications not just for the

attorneys’ profession, but all creditors who send their bank details by email to their debtors. Also, after weighing up her options Ms Hawarden elected to forego a bank guarantee for a cash transfer. As she had ample means available to her, she must take responsibility for her failure to protect herself against a known risk. There is therefore no reason to shift responsibility for her loss to ENS. It follows that Ms Hawarden’s claim cannot succeed and the appeal lodged by ENS succeeded.

A finding that a creditor attracts a liability for failure to warn a debtor of the possibility of fraudulent banking details, would have profound implications for all creditors. Debtors have a duty to verify banking details telephonically. Funds should be more vigilant and warn employers that funds’ banking details will not change and that they should verify details should an email to that effect be received.

### Pension Funds Adjudicator cases

#### Payment into beneficiary fund for minor child

*Fanteso (Complainant) v Consolidated Retirement Fund for Local Government (Fund)* <sup>2</sup>

The Complainant’s husband was a member of the Fund who had passed away. As a result, a benefit of R2.3 million became payable. R1 305 791 of the benefit was allocated to the Complainant and R303 434 was allocated to the minor child (five) and paid to a beneficiary fund, with the balance to various other beneficiaries. The Complainant complained to the Adjudicator that she had requested the beneficiary fund to increase the maintenance payments to her in respect of the minor child and that the child’s school fees for 2022 and 2023 wasn’t paid, although she had submitted the necessary documents. She wants the beneficiary fund to pay the school fees, aftercare and increase the maintenance payments.

The Fund responded that where maintenance is paid monthly, the guardian can still apply for ad hoc payments.

<sup>1</sup> Unreported, case no: 421/2023

<sup>2</sup> [2024] 2 BPLR 25 (PFA)

The Fund's budget for such ad hoc payments provides for additional payments but also to retain funding for when the minor turns 18. If more than these amounts are paid, it will deplete the benefit too soon. This budget is done on an annual basis and was provided to the Complainant. The Fund also advised that it is willing to pay the full amount to the Complainant, and that she undertook to respond but didn't. The Fund was doubtful about the Complainant's ability to manage the funds if she didn't even reply to their correspondence, which included SMS and phone calls. She also has large outstanding debts even after having received the death benefit and while being employed.

The Adjudicator found that section 37C of the Pension Funds Act (the Act) states that payment to a beneficiary fund on the death of a member, shall be deemed payment to the beneficiary. Section 18(3) of the Children's Act provides that a parent who acts as guardian of a minor child must administer and safeguard the child's property and interests. Payment to the minor's parent or guardian should be made in the ordinary course of events unless there are compelling reasons to deprive the parent or guardian to take charge of the minor's financial affairs.

In the Ramanyelo<sup>3</sup> case, the Adjudicator held that the following factors should be considered:

- the amount of the benefit;
- the qualifications or lack thereof of the guardian to manage monies;
- the ability of the guardian to manage monies; and
- that the benefit should be used in such a manner as to provide for the minor when they reach majority.

Where the board has deviated from this standard practice, they should be able to show good cause as to their apprehension that the guardian will fail in their duties towards the child.

In the current case, the Adjudicator found that although the Fund made an offer to the Complainant to pay the full benefit to her, they did not thoroughly investigate her capacity to administer the monies on behalf of the minor.

As a result, the Adjudicator set aside the board's decision to pay the monies to a beneficiary fund. The Fund was ordered to properly assess the Complainant's ability to administer the monies. Should it be found that there is no good reason not to pay the benefit to her, the Fund is ordered to pay the balance of the benefit to the Complainant within six weeks of the determination.

The mode of payment of a death benefit to a minor is a separate decision to be made by the board of a fund. The considerations are:

- the amount of the benefit;
- qualifications and ability of the parent or guardian to manage the monies on behalf of the minor;
- protection of the funds to provide for the minor when they reach majority;
- costs; and

- the fact that once a minor's benefit is paid to the guardian, those funds form part of the estate of the guardian.

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, retirement funds should get confirmation that the money allocated to the minor will be ringfenced 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.

## Registered rule amendment applies to all members

*Leamy (Complainant) v Eskom Pension and Provident Fund (Fund)*<sup>4</sup>

The Complainant became a deferred member of the Fund on 1 May 1995. He turned 55 years of age on 24 January 2017. On 5 July 2021, the Fund registered a rule amendment in terms of which a deferred member under the age of 55 years may elect to receive their entire lump sum in cash and issued communication to members informing them of the rule amendment. The Complainant said that there was no consultation allowing him to comment on the rule amendment and that he too wanted to withdraw his entire benefit in cash.

The Fund submitted that the amendment to the rules was registered by the FSCA on 5 July 2021 and came into effect on 1 April 2021 and the Complainant did not qualify for the withdrawal.

The Adjudicator referred to the matter of *Municipal Employees Pension Fund v Mongwaketse*<sup>6</sup>, stating that the rules of a fund are its constitution, and that the Fund may not act outside of its rules. Even if the Fund consulted the Complainant prior to the rule amendment, it would not have applied to him as he was already 55 years old, long before the effective date of the rule amendment.

Registered rule amendments apply to all members and funds may not make exceptions as its rules is its constitution.

## Approved risk benefits - members are only entitled to the benefits in the fund rules

*Mtshontshi (Complainant) v SABC Pension Fund (Fund)*<sup>5</sup>

The Complainant worked for the SABC from 2008 to 2018, when her fund membership was terminated due to her resignation, and she was paid a withdrawal benefit from the Fund. The Complainant contended that she was paid a withdrawal benefit but that she was suffering from mental illness and the Fund failed to pay her a lump sum disability benefit.

The complaint was submitted to the Adjudicator after the expiry of the allowed three-year period.

3 Ramanyelo v Mineworkers Provident Fund [2005] 1 BPLR 67 (PFA)

4 PFA/GP/00082289/2021/YVT

5 [2024] 2 BPLR 31 (PFA). OPFA case number PFA/GP/00101335/2023/YVT

6 [2020] ZASCA 118

The Complainant submitted that she was mentally incapacitated and in a mental institution for over a year and was unaware of the existence of the Office of the Pension Funds Adjudicator. Based on this argument, the Adjudicator condoned the late submission of the complaint.

The Fund averred that since the Complainant resigned, she was not entitled to a disability benefit as her employment was not terminated by the employer due to medical disability. The rules only provide for the payment of a disability benefit if the member's service was terminated due to medical disability and the board was satisfied the member was incapable of performing their duties as a result of such disability. The Adjudicator referred to the SCA case of *Municipal Employees Pension Fund v Mongwaketse* <sup>6</sup>, where it was held that the rules of a fund is its constitution. If the fund rules do not afford the fund the legal power or capacity to do something, then such an act would be null and void.

The rules of this Fund provide that a disability benefit is payable if a member's membership is terminated by the employer due to medical disability. The Complainant resigned and received a withdrawal benefit from the Fund and is not entitled to any additional benefit.

The rules of a fund is its constitution. If the rules state that when a member resigns, they become entitled to a withdrawal benefit, such member is no longer entitled to any approved risk benefits offered by the fund.

## Entitlement of a third party to claim a member's benefit

*Van Eijck (Complainant) v Alexander Forbes Unclaimed Benefit Pension Preservation Fund (Fund)* <sup>7</sup>

The Complainant is the son of a member of the Fund who wants the Fund to pay his father's unclaimed benefit into his bank account, as his father doesn't know how unclaimed benefits work, is 82 years old, and lives in the United Kingdom. The Complainant indicated that he offered to pursue the unclaimed benefit for his father and that he would give it to his father. The Complainant submitted that he did all he could to prove his identity and that of the member.

The Adjudicator referred to section 7C(2) of the Act, which provides that the board of management of a fund will take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times. They will act with due care, diligence and good faith. Section 7D in turn states that the board will ensure that proper control systems are employed by or on behalf of the board.

Retirement funds must liaise with members upon receiving exit documents to confirm the veracity and authenticity of the claim documentation. In this case, the Fund received the member's withdrawal claim forms signed by the Complainant on behalf of the member together with an affidavit purported to be deposed by the member giving the Complainant authority to claim the benefit on his behalf.

Section 37A(1) of the Act prohibits a member's benefit from being reduced, ceded, transferred, pledged, or hypothecated, except for deductions allowed in terms of section 37D of the Act. Section 37D is not applicable in this matter. Further, section 37A(4)(a) provides that a fund may direct that a member's or beneficiary's benefit may be paid to a third party if that member or beneficiary provides sufficient proof that he or she is not able to open a bank account. The Adjudicator agreed that there appeared to be no reason why the member could not open a bank account of his own. The member was able to depose an affidavit, and therefore it is not clear why he is unable to open a bank account. It is not a requirement to open the account in South Africa.

It was therefore found that the Fund was correct in not acceding to pay the member's unclaimed benefit to the Complainant.

A fund may only pay the benefit of a member to a third party if the member can provide sufficient proof that they are *unable* to open a bank account. A member giving a third party authority to claim the member's benefit, is not sufficient.

<sup>6</sup> [2020] ZASCA 118  
<sup>7</sup> [2024] 2 BPLR 38 (PFA)