

## In Perspective

4/2024



### Office of the Pension Funds Adjudicator (OPFA) Integrated Report 2023/2024

The OPFA published its Integrated Report in October 2024. Some noteworthy information:

#### Complaints received

A total of 9 177 new complaints were received for the 2023/24 financial year, a slight decrease when compared to the previous year, of which 5 379 determinations were issued. 77% of complaints were finalised within six months.

#### The refer-to-fund (RtF) process

The RtF process ([In Perspective 3 of 2020](#)) is one of the ways in which the OPFA seeks to maintain the trust between funds and their members. A notable number of disputes have been resolved in this manner without the need for a formal complaint being registered and investigated. The RtF process has been largely welcomed by the industry and the OPFA hopes that all funds will fully embrace the RtF process as a means of addressing dissatisfaction by their members and increasing trust in the system.

#### Methods of lodging complaints

The most preferred methods used by complainants to lodge a complaint with the OPFA are via email and the OPFA website. Walk-in complainants also contribute a notable number of complaints. There was an increase of 40% in complaints lodged via the self-serve function on the OPFA website when compared to the previous year, after its launch on 12 December 2022. The self-serve function also enables complainants to track the progress of their complaints on the website throughout the investigation steps.

Short Message Service (SMS) technology was introduced and is used to send text messages to complainants, providing them with unique complaint reference numbers as soon as their cases are registered. This functionality aims to improve customer experience and reduce the turnaround time from two days to within 24 hours to acknowledge a case and issue a reference number to the complainant. The complaint reference numbers can subsequently be used to monitor the complaint status on the website. This technology will augment the process of sending acknowledgement letters to complainants. For the website, the SMS functionality furnishes complainants with a One-Time Password (OTP) when they check the status of their complaints on the website. This addition will enhance security through multi-factor authentication and safeguard the website from

undesired automated activities, such as using bots to extract data and content from a website.

#### Financial Services Tribunal (FST)

Persons aggrieved with the outcome of complaints decided by the OPFA have the option of applying to the FST for reconsideration. Learnings from decisions of the FST are implemented by the OPFA to continuously improve on processes. During the year, 81 applications for reconsideration were submitted by persons aggrieved with OPFA decisions. The FST issued a total of 69 decisions, of which 54 upheld decisions of the OPFA and 15 were remitted for reconsideration.

#### Stakeholder Survey

In its rolling Strategic Plan 2023-2028, the OPFA committed to a comprehensive stakeholder engagement plan to improve the client service experience and achieve meaningful engagements with its diverse stakeholders. The OPFA achieved an 84% stakeholder satisfaction rating. Almost all industry bodies who participated in the survey noted that they were satisfied with engagements and interactions with the OPFA, for all the main strategic goals of the organisation.

#### OPFA feedback at the IRFA annual conference

The OPFA provided feedback at the IRFA conference held in Cape Town from 7 to 8 October 2024. The following was mentioned:

- Complaints regarding arrear contributions form 83% of complaints received by the OPFA. It is the view of the OPFA that it is the responsibility of the board of management to collect contributions and the suggestion was made that some penalty/responsibility should be directed towards boards of management, and not only against employers.
- The OPFA expects complaints relating to the two-pot retirement system to escalate during November 2024.
- The OPFA encourages the industry to make use of the FST when parties want to appeal OPFA determinations and only resort to court proceedings if not in agreement

with the FST, because court proceedings are expensive, and many complainants may not be able to partake.

- The OPFA is considering a process where the names of funds or employers who regularly receive determinations against them, are published. This will however be done in a regularised manner by making available a framework on which prior consultation will take place.

## Pension Funds Adjudicator cases

### Death benefits - children born as result of artificial insemination

*Pheto obo 2 Minors (Complainant) v Old Mutual Wealth Retirement Annuity Fund (Fund)*<sup>1</sup>

A member of the Fund was a sperm donor for the purpose of artificial insemination of the Complainant, upon which the Complainant gave birth to twins. The member passed away three months into her pregnancy.

Upon the death of the member, the Fund excluded the twins from the deceased member's death benefit allocation.

The Complainant submitted that despite the deceased signing a sperm donor consent form, the completion of the form was a mere formality and she and the deceased member agreed to co-parent the twins, the deceased member paid for most of her medical expenses and the deceased member was actively preparing financially to care for the children.

It was held that in terms of section 40(3) of the Children's Act, 38 of 2005, a sperm donor does not acquire parental rights and responsibilities to the children born off their sperm contributions unless the person was married to the woman giving birth to the child. The twins can therefore not be regarded as the deceased's legal dependants. The twins could also not be regarded as factual dependants as the deceased member did not contribute to their financial needs and there was no evidence that the member intended to be financially responsible for the twins.

The Adjudicator was therefore satisfied that the Fund took into account relevant factors and did not fetter its discretion in the allocation of the deceased member's death benefit.

For a fund to recognise children born as result of artificial insemination, members who are donors should clearly indicate their wish to acquire parental rights and responsibilities to those children by entering into a parental responsibilities and rights agreement, especially where the member is not married to the woman giving birth.

It is further interesting to note that in terms of the Children's Act, whenever cells for human reproduction of any person have been used for artificial fertilisation of a person who is married to someone else, any child born from the fertilisation will be regarded to be the child of the two married spouses as if the generative cells of those spouses were used. It will further be presumed that both spouses gave the relevant consent for such fertilisation.

## Section 37D deductions - performance bonus

*SS Ratlala (Complainant) v Bokamoso Retirement Fund (Fund) and Akani Retirement Fund Administrators (Employer)*<sup>2</sup>

Upon the Complainant's resignation, he was informed that he owed his Employer R17 305 as a refund of the performance bonus paid to him during his employment. He was requested by the principal officer of the Fund and the finance manager of his Employer to authorise the Fund to deduct the amount from his withdrawal benefit. He knew that the deduction was not permissible in terms of the Pension Funds Act (the Act) but granted the authorisation anyway so that his withdrawal benefit could be paid.

The Complainant complained to the Adjudicator and his Employer submitted no response, but the Fund referred to correspondence it had received in which the Complainant authorised payment of "approximately R17 000" to his Employer.

The Adjudicator pointed out that section 37A of the Act prohibits deductions from pension benefits, but section 37D(1)(b)(ii) provides one of the exceptions to this general rule. A retirement fund may deduct from the benefit payable to the member any amount due by a member to their employer on the date of ceasing fund membership. However, the amount due must be in respect of compensation for any damage caused to the employer by reason of any theft, dishonesty, fraud, or misconduct by the member and the member should have admitted liability to the employer in writing or judgment should have been obtained against the member.

The Adjudicator found that the receipt of a performance bonus by the Complainant does not relate to damage suffered by the Employer due to any theft, dishonesty, fraud, or misconduct perpetrated by the Complainant and ordered the Fund to pay the member's full withdrawal benefit to him.

- A performance bonus that needs to be paid back to the employer cannot be regarded as damage caused as a result of theft, dishonesty, fraud, or misconduct and may not be deducted in terms of section 37D.
- A member cannot give permission for a deduction that does not comply with section 37D.

## Allocation of death benefits - third party payments

*F Sayed (Complainant) v Old Mutual Superfund Provident Fund (Fund)*<sup>3</sup>

The Complainant is the life partner of the deceased, who was a member of the Fund until he passed away in 2021. A total death benefit of R21 308 051.38 became available for allocation to the deceased's beneficiaries. The Fund resolved to allocate the benefit equally between the deceased's two major daughters.

The Complainant submitted that she had been in a romantic relationship with the deceased since 2007. She had resigned from her employment and the deceased supported her and

<sup>1</sup> [2024] 4 BPLR 76 (PFA)

<sup>2</sup> PFA/GP/00030663/2017/MD

<sup>3</sup> F Sayed v Old Mutual Superfund Provident Fund and Others (PFA/GP/00102413/2023/AT)

her child from her previous marriage by giving her the same amount she used to earn while employed. The Complainant also acquired property through her divorce from her former spouse. The property still had an outstanding bond, and the deceased assisted her in paying off the mortgage bond by giving her R700 000. Subsequently, she sold the property and stayed with the deceased. She and the deceased entered into a cohabitation agreement and in terms of the agreement both parties waived their right to claim from each other's retirement benefits. The Complainant was of the view that she was no longer bound by the cohabitation agreement after the deceased's death and as a result she was entitled to any benefit that may arise from the deceased's death. The Complainant also submitted that even though she had received a life insurance policy payout of R7 000 000 following the deceased's death, it was not enough to cover all living expenses and potential unforeseen costs.

The Adjudicator found that the Complainant was the deceased's life partner for 17 years until four years prior to his death when he moved out. However, because he continued to support her financially until his passing, she qualifies as a factual dependant. The Adjudicator emphasised the fact that a person qualifies as a legal or factual dependant does not automatically give them the right to receive a portion of the death benefit. The Fund was correct in taking the amounts received by the Complainants into account as the life policy was sufficient to cover the Complainant's future financial needs. The Fund was also correct that the life policy she received did not form part of the deceased's estate in terms of section 4(q) of the Estate Duty Act and emphasised that the Complainant was placed in a better position due to the third-party payment she received. Furthermore, although she has not worked for a long time, the Complainant can still find employment as she has prior work experience and tertiary level-education. Therefore, the Fund was correct in not allocating a portion of the death benefit to her. Regarding the cohabitation agreement, the Adjudicator held that the Complainant is presumed to have known or understood the consequences of signing the agreement and the implications thereof. The terms of the agreement clearly show that the parties agreed that there would be no sharing of retirement benefits, and the Fund was correct in considering this in the allocation of the death benefit. The Adjudicator dismissed the complaint.

A retirement fund may exclude a dependant from the allocation of the death benefit if that dependant has received payments from third parties that adequately addresses their future dependency needs. In terms of the cohabitation agreement, the complainant waived her rights to claim any pension benefit from the deceased. The Fund was correct in considering the provisions of the agreement in the allocation of the death benefit.

#### *Smith (Complainant) v Old Mutual Superfund Provident Fund (Fund) and Another (Participating Employer)* <sup>4</sup>

The Complainant left service of the Participating Employer and was paid a withdrawal benefit by the Fund, without the Complainant's authorisation.

In terms of the rules of the Fund, the Participating Employer had to notify the Fund of the Complainant's exit from service as he ceased to be an eligible employee. The Participating Employer completed a withdrawal claim form electronically on behalf of the Complainant and indicated on the form that the Complainant's benefit option is "full benefit in cash". The Fund then paid the withdrawal benefit to the Complainant in accordance with these instructions.

The Complainant was dissatisfied with the payment made by the Fund as he was not afforded the opportunity to elect to transfer his benefit to another fund in which his new employer participates.

The Adjudicator remarked that payment of the Complainant's benefit was not unlawful as the Fund acted upon the instructions it received and within its rules. However, the Fund should amend its claim process to allow members the choice as to what they wish to do with their benefit. This is not a matter to be decided by a participating employer and the Fund should not accept withdrawal claim forms without members' signatures.

The Participating Employer acknowledged that the Complainant was the first employee to exit their service since their participation in the Fund and they were unaware that there are other options than cash payment available to members. They indicated that going forward they will not submit claim forms to the Fund without having obtained the signature of the member so that members are afforded the opportunity to select what they want to do with their benefits.

It is important for funds to incorporate a two-way exit process, whereby not only the employer, but also the member notify the Fund of its leaving employment.

Funds should provide training to their participating employers so that they understand the options members have and the process when employees exit their service.

## High Court case

### Deduction of arrear tax (IT88)

*Piet (Applicant) v Commissioner for the South African Revenue Service (SARS)* <sup>5</sup>

During August 2023, the Applicant applied to Allan Gray for a withdrawal from his retirement annuity fund as he had reached the age of 55. He was informed a week later that the full amount due had been paid over to SARS towards the settlement of his tax debt following the receipt of a notice in terms of section 179(1) of the Tax Administration Act (the TAA) (so-called IT88 notice). The Applicant approached the High Court for an order that SARS repay the amount on the basis that it contravened section 37A(1) of the Pension Funds Act (the Act) and violated his constitutional right to have access to social security. The Applicant was also of the view that SARS did not comply with its obligations in terms of section 179 of the TAA. The Applicant argued that section 37A of the Act prevents any deduction in terms of section 179 of the TAA as the section only refers to a deduction in terms of the Income Tax Act.

4 [2024] 4 BPLR 79 (PFA)

5 Piet v Commissioner for the South African Revenue Service (3090/2023) [2024] ZAE-CQBHC 51 (27 August 2024)

The court referred to the purpose of section 37A which is to protect retirement funds from reduction, transferability, or executability. However, one of the exceptions is a deduction permitted by the Income Tax Act. The payment made by Allan Gray was made in terms of section 179 of the TAA and not the Income Tax Act. In this regard the court pointed out that when section 37A was inserted in the Act in 1976, section 99 of the Income Tax Act provided for third party notices and for the payment of any tax to SARS. This was the case until 2011 when those provisions were moved to section 179 of the TAA. The court held that the Act must be interpreted as having permitted SARS to declare Allan Gray as the third-party agent of the taxpayer who was required to make payment of the tax due by the taxpayer.

Regarding the taxpayer's argument that SARS acted unconstitutionally, the court held that it failed to consider the limitation of rights in section 36 of the Constitution. Section 37A curtails the protection afforded to retirement benefits deliberately and carefully. The court concluded that the

powers conferred upon SARS in section 179 of the TAA constitutes a reasonable and justifiable limitation of the right to have access to social security.

It was concluded that SARS may recover a tax debt from the taxpayer's retirement benefit through a section 179 notice when the benefit falls due.

The Pension Funds Act was amended with effect from 1 September 2024 to specifically refer to the Tax Administration Act.

Once a fund is presented with a third-party notice, a fund has no choice but to act upon the notice. Failure to act upon the notice, will render the fund liable for the payment of the taxpayer's tax debt. The attachment of the retirement benefit is a justifiable limitation of the taxpayer's right to social security.