



### Pension Funds Adjudicator cases

#### Fund's recourse for overpayment to pensioner

*Faber (Complainant) v Vrystaat Munisipale Pensioenfonds (Fund)*<sup>1</sup>

The Complainant retired in 2012 with a pension from the Fund. In March 2024, the Fund informed him that the pension that he is receiving, is overstated due to a calculation error. The board of management of the Fund felt that it would prejudice the Complainant to recover the overpayment as a lump sum and informed him that it would rather recoup the overpayments from a six-month pension bonus payment still due to him and thereafter from any future surplus and bonus payments, as well as by reducing his monthly pension.

The Complainant referred the matter to the Adjudicator, stating that he should not be prejudiced by the Fund's own error.

The Adjudicator found that it is an established principle of South African law that a person cannot claim entitlement to an incorrect benefit. However, section 37A of the Pension Funds Act prohibits the Fund from making a deduction from a member's benefit.

The Adjudicator ordered the Fund to pay the Complainant the correct pension benefit going forward and to use normal debt recovery options available to any creditor outside of the Fund to recover the overpayment.

Overpayments to members unfortunately do happen, but deductions from future benefits are not allowed as method of recovery, funds may only use the normal debt recovery options available to any creditor.

#### Withholding of withdrawal benefit

*Garaba (Complainant) v Acumen Provident Fund (Fund)*<sup>2</sup>

The Complainant was a member of the Fund until his dismissal in 2023. When he enquired about the payment of his withdrawal benefit, he was informed that it was being withheld. According to his employer, he worked as a driver and was a key figure in the planning and execution of the hijacking of its truck. This was proved via WhatsApp communications and the Complainant's eventual admission of facilitating the hijacking.

The employer instituted both civil and criminal proceedings, but all attempts to serve him with the summons failed.

The Adjudicator referred to the Jeftha judgement ([In Perspective 3/2020](#)) where it was found that a fund is required to inform the member of the employer's request for a withholding of his benefit, prior to the fund reaching the decision to withhold his benefit. In the current case, the employer gave the Complainant an opportunity to respond to the allegations during the disciplinary hearing, but this did not absolve the Fund of its obligation to grant the Complainant an opportunity to respond to the employer's allegations before the Fund. The Fund failed to comply with the *audi alteram partem* rule.

The Adjudicator remarked that failure by the Fund should not prejudice the employer in circumstances where the employer has done everything that is reasonable to pursue its claim against the member. It would be inequitable to order the Fund to make payment of the benefit. The Adjudicator therefore ordered that the Fund's decision to withhold the benefit is set aside and that the Complainant is directed to place his version of events before the Fund in writing within four weeks, after which the Fund is ordered to reconsider its decision to withhold the benefit.

Although boards of management are aware that the *audi alteram partem* rule must always be followed when withholding a benefit as set out in the Jeftha case, boards should note that even if the employer gave the member the opportunity to state their case, this does not absolve the fund from the duty to request the member to state their case. It is a separate duty of the board and must be exercised prior to the decision to withhold.

#### Fund's duties in allocation of benefit

*Klein (Complainant) v University of Cape Town Retirement Fund (the Fund)*<sup>3</sup>

The Complainant was the life partner of the deceased member of the Fund. Following the death of the member,

<sup>1</sup> PFA/WC/00112372/2024/YVT

<sup>2</sup> PFA/GP/00105527/2023/GM

<sup>3</sup> PFA/WC/00114434/2024/AT

a death benefit became available for allocation to his beneficiaries. The exclusion of the Complainant from the Fund's allocation of the benefit was the basis of the complaint to the Adjudicator.

The Complainant submitted that she is the deceased's life partner and that the deceased bequeathed his entire estate to her, including his flat and retirement fund death benefit. According to the Complainant, she and the deceased had been together since 2013 which was prior to his divorce from his wife. As a result of the financial strain from the divorce, the Complainant had no expectation for the deceased to assist her financially. This was also the reason why they could not move in together. However, they spent weekends together and saw each other during the week and they had long-term plans to move in together. The Complainant was of the view that she and the deceased were dependent on each other in every other way romantically.

The Fund submitted that it identified the Complainant, the ex-spouse, and the deceased's daughter as potential dependants of the deceased. The Fund established that the deceased divorced his ex-spouse, therefore ceasing her legal dependency on the deceased. His daughter is still a legal dependant and was financially assisted by the deceased at the time of his death. The Fund was correct in identifying the daughter as the deceased's dependant in terms of section 37C of the Act.

The Fund also considered the Complainant as a potential dependant of the deceased, but the fact that a person qualifies as a legal or factual dependant does not automatically give them the right to receive a portion of a death benefit as the deciding factor is financial dependency. Even though the facts indicated that the Complainant was the deceased's life partner, the deceased did not financially assist her in any way, nor did they share a common household where they were financially co-dependent on each other.

Based on the above, the Adjudicator held that the Fund was correct in excluding the Complainant from the allocation of the death benefit and the complaint was dismissed.

The definition of spouse in the Pension Funds Act refers to the term permanent life partner. A permanent life partnership can be defined as an intimate relationship between two people living together without formalising their union through marriage. Evidence that will support the existence of a life partnership will for example include the following:

- i. a joint account;
- ii. proof of things purchased together;
- iii. proof that one of the partners is a dependant in any insurance policy or medical aid;
- iv. proof of any financial support of any kind;
- v. proof of co-ownership of property, movable or immovable.

However, all matters will have to be considered on its own merits after the fund has investigated the factual matrix of the relationship.

## Payment into estate, funeral costs

*Rossouw (Complainant) v Momentum Retirement Annuity Fund (the Fund)*<sup>4</sup>

The deceased member of the Fund was divorced and had no children. The board of management decided to pay the death benefit to her two siblings in equal shares based on her nomination form. The Complainant submitted to the Adjudicator that he had lived with the deceased and was financially supported by her but could offer no proof of such support. He stated that upon the deceased's death, he became responsible for the maintenance and management of the deceased's estate and incurred costs for the deceased's funeral as well as other costs. He was of the view that even though he received R2 350 000 from a life policy, it did not mean that he should bear the costs of the estate.

In its response to the Adjudicator, the Fund indicated that the deceased's estate was not insolvent, it only had a cash shortfall. A shortfall means that the estate didn't have sufficient liquidity to cover the administration costs, such as the fees for the executor and the Master, as well as any outstanding liabilities from debts incurred by the deceased. However, the assets in the estate exceeded the liabilities and it was therefore solvent. The shortfall could be rectified by selling the assets to cover the shortfall or the heirs to the estate could pay money into the estate. The Fund therefore need not pay the benefit to the estate but could by law pay it to the two siblings as nominated beneficiaries and the Complainant was not responsible for payment of the shortfall in the estate.

The Adjudicator found that the fact that a person qualifies as a legal or factual dependant doesn't automatically give them the right to receive a portion of the death benefit. The Complainant had benefitted from a life insurance policy, which considerably improved his financial position. The costs that the Complainant incurred for the deceased's funeral could not be defrayed from the death benefit. The estate was responsible for covering such costs, and the Complainant had to submit a claim to the executors of the estate to be reimbursed for the expenses he incurred for the deceased's funeral and any other costs he might have incurred.

The complaint was dismissed.

- If a member has no dependants and only nominees, it must be established whether the deceased estate is solvent before any distribution can be made to the nominees. Any deficit in the estate must be settled first before payment is made to nominees of the deceased. However, should the estate not have sufficient liquidity to cover its administration costs, it does not mean that the estate is insolvent. The question is rather whether the assets in the estate exceed the liabilities. Liquidity issues can be addressed in many ways, such as the heirs paying into the estate or by selling assets in the estate to cover the shortfall.
- A beneficiary cannot demand to be reimbursed for the cost of a member's funeral from a death benefit, the estate is responsible to cover such costs.

<sup>4</sup> PFA/GP/00114109/2024/AT

## Financial Services Tribunal Determination

### Non-payment of contributions resulting in no risk premiums being paid

*James (Applicant) v South African Authorities Pension Fund (Fund) and Others*<sup>5</sup>

This matter is an application for the reconsideration of the Adjudicator's decision relating to the Fund's non-payment of the group life assurance benefit ("insured portion") following the death of the deceased.

The Applicant's deceased husband was a member of the Fund by virtue of his employment with Kopanong Municipality (the employer). The employer failed to remit the premiums in respect of the insured portion to the Fund despite deducting it from the deceased's salary. As a result of the non-payment, the benefit lapsed, and the Fund did not pay the insured portion following the death of the member.

The Applicant was of the view that the Fund should pay the insured benefit even though the employer did not pay the member's contributions to the Fund. The Adjudicator disagreed with the Applicant and ordered the employer to pay the insured portion of the death benefit together with the penalty interest to the Fund within four weeks of the determination. The Fund was ordered to make payment of the death benefit to the deceased's dependants within eight weeks.

In its ruling, the Tribunal stated that a Fund's rules is its constitution and that the Fund can only act in accordance

with its rules. The rules of the Fund provided that no insured death benefit will be payable should the relevant risk insurance premiums not be paid in full within 30 days of the premium falling due. The Tribunal held that because the Fund did not receive the insurance premiums from the employer, the Fund cannot, in terms of its rules, make payment of the insured benefit. Instead, the Applicant should instruct her legal advisors to take the necessary legal steps to ensure that the employer complies with the Adjudicator's determination.

The application for reconsideration was dismissed.

- Where employers fail to pay any contributions on behalf of members, funds can be ordered to compute the benefits as if contributions had been paid timeously and determine the benefit each beneficiary would have received in terms of section 37C of the Act. The employer will be ordered to pay these amounts.
- The Adjudicator's determination that the employer makes payment to the Fund of the insured portion has the effect of a civil judgment. Section 30(O) of the Pension Funds Act provides that any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law and that a writ or warrant of execution may be issued by the clerk or the registrar of the court after six weeks of the date of the determination upon failure by the employer to comply with the Adjudicator's determination.

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5 PFA34/2023 [2023] ZAFST 116 (14 September 2023)