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The Quarterly DIGEST

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The mandate of the OPFA is to ensure a procedurally fair, economical and expeditious resolution of complaints. Our services are free...

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Welcome to the first edition of our quarterly newsletter. The aim of the newsletter is to keep you, our valued stakeholder informed of the going-ons in the office on a regular basis.

What to Note - COVID-19 Relief to Employers

The devastating effect of the Covid-19 Pandemic on the finances of individuals and companies has been a topic of discussion for some time. Since the advent of the Pandemic, several institutions have introduced various credit and payment relief options to alleviate financial burdens. Although there are drawbacks related to such relief options, some individuals and companies have experienced, and continue to experience, a partial or complete loss of income, and therefore have no other alternative but to consider exploring credit and payment relief options. Page 3

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From the Adjudicator's Desk

Covid 19 has clearly affected all of us in previously unimaginable ways. As we try to navigate ourselves to some sense of normality, the OPFA will keep you informed and up to date on complaints' management processes and procedures, notable determinations and trends in complaints received.

Since the implementation of the Referred to Fund (RtF) process in September 2020, the turnaround times for resolving complaints have improved. The OPFA finds itself in a position where funds / administrators are constantly reminded to submit overdue responses for complaints that require determination. Those that are resolved between the parties alternatively, are closed pretty quickly without going through an extended investigation process.

The process has been able to free up funds / administrators that have always been doing the right thing to focus on other issues instead of preparing formal responses to complaints. Funds / administrators plagued with compliance problems continue to be left behind in terms of an improved service to members.

We look forward to interacting with you through this newsletter and other platforms.

Feel free to provide feedback on the newsletter and also distribute it further to your own stakeholder in order to share the knowledge and insights.

DETERMINATIONS

The Office of the Pension Funds Adjudicator (OPFA) was established in terms of section 30B of the Pension Funds Act No.24 of 1956.

What to Note - COVID-19 Relief to Employers

In the retirement fund space, employers in financial distress are given temporary relief by way of a reduction or suspension of contributions.

Section 13A of the Pension Funds Act, 24 of 1956 ("the Act") places an obligation on the employer to pay contributions due on behalf members to the fund. In turn, the fund has an obligation to ensure contributions are received from the employer timeously. In March 2020, the Financial Sector Conduct Authority ("FSCA") issued FSCA Communication 11 of 2020 ("the RF") where it agreed to accept urgent rule amendments related to Covid-19 relief for employers and members who were unable to pay full contributions in terms of section 13A of the Act and the funds' rules.

The rules of the fund must allow for the suspension or reduction of contributions.

Most funds have existing rules in place for employers who are experiencing financial difficulties. However, it is important to note that not all funds have the same rules in place and that employers are required to consult with the fund to ascertain which rules (if any) will apply to them for Covid-19 relief purposes.

Where existing rules do not contain such provision, the fund must submit appropriate rule amendments to the FSCA: The FSCA has urged funds to maintain risk benefit cover for the employees despite the reduction or suspension of contributions in the applicable period.

In **M Erasmus v Transport Sector Retirement Fund (KN\00070194\2021),** the fund drafted an urgent rule amendment allowing for a "contribution break". The rule amendment was approved by the FSCA. The Adjudicator found that, in light of the rule amendment read together with the approval granted by the fund, the employer was not required to full pay contributions to the fund for the relief period. The costs of risk cover and fund expenses remained due and payable as per the rule amendment.

In **L Sefani v Old Mutual Superfund Provident Fund (WC\00070671\2021)** the employer requested a suspension of both member and employer contributions. The fund relied on the temporary absence rule, contained in its Master rules for the suspension of member contributions. However, the evidence revealed that the member was not temporarily absent from employment, without pay. Members received their salaries for the period during which contributions were suspended. Therefore, the Adjudicator found that the fund incorrectly relied on rule 5.4 of the Master rules when granting relief to the employer for the suspension of member contributions. The Master rules, however, appropriately catered for the suspension of employer contributions as requested by the employer. The Adjudicator was satisfied that the fund correctly relied on the Master rules in respect of the suspension of employer contributions.

COMPLAINTS

Simply complete our complaint form and return same with a copy of your ID and proof of fund membership

Employers must apply to the board of fund for temporary relief.

Where funds have rules in place for the suspension or reduction of contributions, an employer must apply to the fund for temporary relief. That is, it is not an automatic reduction or suspension of contributions and usually requires strong motivation by an employer who requests same. The employer's request must be approved by the board of fund before the relief can be implemented.

Funds are required to notify members of the employer's request for temporary relief.

Upon receipt of a request from an employer for temporary relief, the fund is required to notify its members, within 30 days, of the employer's intention to reduce or suspend contributions.

The Adjudicator has received numerous cases where members are "in the dark" about the relief granted to the employer. They are first alerted about the reduction or suspension of payment of contributions after lodging a complaint with the Adjudicator. This is especially noticeable in cases where, despite the relief granted to employers, the full contributions were deducted from members' salaries as per normal.

The relief to employers is temporary.

A request for relief must specify the period for which contributions will be suspended or reduced. That is, contributions may not be reduced or suspended indefinitely. In most cases, employers request relief for a period of between 3 and 6 months. However, complaints received by the Adjudicator, indicate that employers fail to resume the payment of full contributions beyond the relief period applied for and granted by the fund. This is not permitted, and employers are required to resume with the payment of full contributions upon the expiry of the relief period. Some fund rules allow the employer to make a further application to extend the relief period. However, in the absence of such application for an extension, followed by the fund approval, full contributions are due and must be paid to the fund.

In CD Minnie v The Private Security Sector Provident Fund (WC/00077589/2021), the fund submitted that the employer was granted relief for the period March 2020 to May 2020. Thus, reduced contributions were due for this period. However, a close inspection of the employer's request revealed that the employer was granted relief for the period April 2020 to June 2020. The fund therefore afforded the employer relief, outside of the relief period, where full contributions were in fact due to the fund. Funds are required to put measures in place to ensure that payment of reduced or suspended contributions are limited to the relief period granted. Full contributions are due to the fund outside of the relief period

Risk premiums and fund expenses must be paid during the relief period.

Where a portion of the contribution is applied towards the cost of risk cover, such portion is due, during the relief period despite the relief granted to the employer. Where risk premiums are not maintained, the risk policy will lapse. In the event of death or disability, the insurer will not honour claims since there would have been no payment toward this. Once a fund approves an application for temporary relief, it should monitor the employer's compliance with this requirement.

Information for Stakeholders

Making enforcement easier

What happens after a complainant has been successful in obtaining relief from the OPFA?

This is the question that the OPFA had to consider after it had been joined as an interested party in a number of High Court applications whereby "successful complainants" were seeking to force compliance with PFA orders by a defaulting employer and sometimes the fund.

The issue is most prevalent in matters whereby it is found by the PFA that an employer has not paid over monthly contributions to the fund in respect of a particular complainant. The formulaic relief has been to order an exchange of information between the employer and fund, a calculation of the amount due, and finally an order requiring payment by the employer to the fund and by the fund to the complainant. What this means is that for the complainant to obtain the actual relief that he or she seeks, there are various steps to be taken before that can happen.

And if the other parties to the complaint fail to take the steps that they have been ordered to take, the complainant must then make a substantive application to the High Court, at significant costs, to force the parties to do what they are supposed to do failing which they will be in contempt of court.

Making enforcement of PFA orders easier, means that the OPFA needs to consider ways in which it can alleviate the burden on "successful complainants" that find themselves in such an invidious position.

An order by the PFA has the same status as a court order and can be enforced in the same manner as a court order. Accordingly, the OPFA has decided to approach matters pertaining to arrear contributions in a manner that enables it to make orders sounding in money. This will mean that the information that would have normally been ordered to be exchanged between employer and fund will be requested from the parties by the OPFA thus enabling the PFA to make an order sounding in money.

How does this make enforcement easier?

A successful complainant armed with an order sounding in money is able to obtain a writ of execution over the counter from the registrar of the High Court. Once a writ has been issued, the complainant can then instruct the sheriff to attach goods to the value of the judgment reflected in the PFA order.

It negates the requirement to make a substantive application to the High Court thereby saving time and money for the complainant.

It may not always be possible for the PFA to make an order sounding in money especially in instances where the non-compliance is ongoing and, in such instances, the PFA may have to revert to the previous formula.

This is because it is easier to make an order sounding in money when there is a fixed period for non-compliance as the outstanding contributions can be easily calculated by reference to the fixed period. When there is an ongoing non-compliance, there is a challenge in making an order sounding in money since there is no fixed period to refer to in calculating the outstanding arrears.

The non-compliance may be continuing even as the OPFA investigates the complaint and each month that passes by, new contributions become payable and the outstanding arrears grows. Hence the need to revert to the original formula.

It should however be appreciated that the intention of the Adjudicator is to, as far as possible, make orders sounding in money to enable easier enforcement of such orders by successful complainants.

WHAT IS THE RTF PROCESS?

Treating customers fairly includes the requirement for a fund to interact closely with its members and understand the issues that may give rise to their grievances. Perhaps this is what the legislature had in mind when it made provision in the Pension Funds Act for members to first lodge their complaints with their respective funds for internal resolution before they can approach the OPFA for relief.

Funds are required to provide the member with an answer within 30 days and if the member remains dissatisfied, he or she may then approach the OPFA for a resolution of the dispute.

Many members are not aware of the requirement to exhaust the internal dispute resolution mechanism of a fund first before approaching the OPFA for relief. And it would just not be within the spirit in which the OPFA operates to turn away would be complainants without offering some type of assistance. Accordingly, the OPFA has created the RTF (refer-to-fund) unit. This is an OPFA unit that is dedicated to assisting members of retirement funds to access their respective funds' internal dispute resolution process. In this regard, the member's complaint is lodged with a fund for consideration by the board of the fund, by the OPFA – on behalf of the member. If the complaint remains unresolved to the satisfaction of the member after 30 days, the OPFA will then process the complaint via its usual processes.

So, what is the RTF process? It is an opportunity for funds to connect with their members, to alleviate its complaint case load, and to create a better experience for the member overall. This can only be achieved, off course, if the process is given the respect it deserves and if the RTF referrals are responded to meaningfully.

Recent decisions on section 37C

By Naheem Essop

The SCA decision in Fundsatwork Umbrella Pension Fund v Guarnieri and others meant that many funds had to relook at their death benefit distribution process. The matter concerned the issue of what happens when a beneficiary dies after allocation of portion of a benefit to them but before payment of the allocated portion is effected. In interpreting section 37C(1) and the definition of "dependant", the court held that a dependant should enjoy that status at the time that the decision to distribute is made by the board and also at the time when payment is made. That is the only way, the Court said, in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect. This effectively means that if an identified beneficiary dies before payment of their allocated benefit is made, that benefit cannot be paid into their estate. The board should then reconsider how it will distribute that portion of the benefit in terms of section 37C.

Interestingly, the Court also held:

"That the board made a payment pursuant to this decision did not alter the position. That payment was made without any lawful obligation to do so and the Fund was entitled to invoke whichever of the condictiones would be applicable to recover that payment. As against the other dependants its position was that it had made a lawful allocation of 58% of the death benefit and was obliged to make a distribution of the balance. The argument proceeded as if Mr Guarnieri's death benefit existed as a pot of money distinct from the assets of the Fund, all of which had been disbursed and none of which remained. That was incorrect. The death benefit was not a distinct and separate sum of money, but a claim against the assets of the Fund. Distributions made to lawful beneficiaries resulted in that claim being pro tanto discharged by payment to those beneficiaries. When an amount was distributed in favour of Mrs Guarnieri Snr that did not discharge any portion of the claim constituted by the death benefit. The balance of the benefit remaining after the distribution to the widow and children remained as a lawful claim against the Fund."

We are often asked about the circumstances under which the Adjudicator, if not satisfied with a decision of a fund, may substitute the board's decision for her own. The Adjudicator has often held that she will not lightly interfere with the discretion of the fund and it is only under exceptional circumstances that she will substitute the board's decision with her own – even when she is not satisfied with the board's original decision. This was also an issue that the Court had to decide in the matter of Swart N.O. and Others v Lukhaimane N.O. and Others.

The Court held that it can only replace the board's decision with its own decision when two factors are present, viz:

- The Adjudicator is in as good a position as the fund to make the decision i.e. it has all the information available to it to make a decision; and
- The decision is a foregone conclusion.

Thereafter, other considerations come into play, such as:

- The effect of any delay in finalising the dispute;
- Any bias or incompetence shown on the part of the fund;
- Whether the fund revealed an unjustifiable determination to adhere to a wrong decision i.e. if the facts reveal that the fund is unlikely to apply a fresh and open mind to the decision.

Ultimately, a substitution order should be just and equitable, although it is difficult to contemplate a situation where a section 37C distribution is a foregone conclusion.

If the two main factors are not present but the Adjudicator has reason to believe that the fund will not apply a fresh and open mind to the decision, the Adjudicator should direct the fund to what is necessary to conduct a proper investigation and make an equitable decision. This may include directing the fund to investigate the actual maintenance requirements of a beneficiary taking into account any inheritances received, or directing the fund to include someone as a dependant for consideration of an equitable distribution, or any other factor that may be relevant to a particular matter where the fund is found to have failed in its investigations or consideration.

The Court also held that the wishes of the deceased expressed in a nomination form or a will is not to be lightly ignored. It is one of the factors to be considered but it is a 'substantial factor'. There must be compelling reasons not to follow the nomination form i.e. it should only be deviated from if following the nomination form would result in an injustice or inequity.

Another interesting finding made in the Swart judgment was that a trust can be nominated as a beneficiary by the deceased member and that the beneficiaries of the trust become the dependants (nominees?) and payment to the trust constitutes payment to the dependants (nominees?).

The Financial Services Tribunal has in a few of its decisions summarily dismissed applications for reconsideration where all of the beneficiaries were not included as parties in the application. Having considered the Tribunal's stance, the Adjudicator too has adopted the stance that all beneficiaries will be joined as parties to the complaint in terms of section 30G(d) of the Act, and be given an opportunity to respond to the complaint in terms of section 30F.

Speaking of the Tribunal, it has also made itself very clear on the position of a fund in relation to an application for reconsideration dealing with a section 37C distribution. In Momentum Retirement Annuity v LH Botha and 5 Others, it said this (after criticising the Adjudicator's determination):

"The problem though is that the Fund is not a person aggrieved as required by sec 230 of the Financial Sector Regulation Act 9 of 2017. The misunderstanding is not only that of the Fund but shared by the PFA and the first respondent and not appreciated in some Tribunal decisions. The decision affects the Fund in the sense that it must reconsider the matter and exercise its discretion again, but it has no legal interest in the allocation. Reference is made to the cases of Hollenbach, Aon, and Fundsatwork. It is unnecessary to restate the legal principles."

The Tribunal's predecessor, the Financial Services Appeal board also spoke about the concept of an "aggrieved person" and in 2017 it said in the matter of SALA Pension Fund v Registrar of Pension Fund:

"It suffices to say that, ultimately, a "person aggrieved" must be someone against whom a decision has been pronounced which wrongfully deprived that person of something, or wrongfully affected his/her title to something. It does not refer to every person who feels annoyed or hurt at a decision. It must be someone wrongfully deprived of a legal right, someone with a legal grievance."

So, funds are best advised to motivate fully why they would fall within the definition of an "aggrieved person" in its applications for reconsideration.

Some confusion appears to have arisen pertaining to when a person may approach the Financial Services Tribunal after the board's decision has been set aside and remitted by the Adjudicator for reconsideration by the board. If a complainant has previously approached the Adjudicator and the Adjudicator set aside the decision of the board and the board reconsiders the matter and makes a new decision which may or may not be the same as the old decision, the complainant is entitled to approach the Adjudicator to lodge a new complaint if they are aggrieved by the second decision of the fund.

The Adjudicator is not functus officio in respect of the new decision of the board, even if it is a mirror image of the first decision. The Adjudicator is obliged to investigate the complaint afresh. A fund is not a "decision-maker" for the purposes of section 218 of the Financial Sector Regulation Act therefore a complainant may not directly approach the Tribunal if they are dissatisfied with a decision by the fund. It is only a decision of the Adjudicator that may be subjected to a reconsideration application at the Tribunal. The view appears to be supported by the Tribunal as well – see PP Cloete v Pension Funds Adjudicator and Others – PFA42/2021 at paragraph 20.

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