

## PFA dismisses 11 complaints after six-year probe

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By Laura du Preez



Illustration: Colin Daniel

The new deputy Pension Funds Adjudicator (PFA) has dismissed 11 complaints laid by one fund member against his fund and its service providers. The first complaints were laid more than six years ago.

Finding that some of the complaints were time-barred and dismissing others, Muvhango Lukhaimane, the newly appointed deputy PFA, says the considerable time the adjudicator's office devoted to this case highlights the need for retirement funds, administrators and employers to educate members about benefits, retirement funds and how they are administered, and how funds invest your savings.

Eric Venn, a former member of the Nedgroup Pension Fund and later a member of the Nedgroup Defined Contribution Provident Fund, first lodged a number of complaints with the PFA's office in 2005, a year after he retired.

The file on Venn's case filled 15 volumes, the adjudicator's office says. Much time had been spent pondering the complaints and the relief sought, and going back and forth between the various respondents, the PFA says.

One of Venn's complaints related to the fund value that was transferred, in March 1998, when he moved from the Nedgroup Pension Fund – a defined benefit fund that guaranteed a pension based on final salary – to the Nedgroup Defined Contribution Provident Fund – a defined contribution fund where your benefit is based on contributions and the investment growth.

According to the deputy adjudicator's ruling, any scheme in terms of which members are transferred from one retirement fund to another must, in terms of the Pension Funds Act, be approved by the Registrar of Pension Funds at the Financial Services Board (FSB). The registrar must be satisfied that the scheme is reasonable and equitable, and that it recognises the rights and reasonable benefit expectations of the transferring members.

Anyone who is aggrieved by the registrar's decision may appeal against it to the FSB's Appeal Board.

Lukhaimane says in her ruling that the PFA's office is not empowered to review any decisions taken by the registrar.

Furthermore, she says, even if it could be argued that the PFA's office had the jurisdiction to review the calculation of the benefit that the registrar had approved for transfer, the complaint was time-barred.

The adjudicator's office is precluded from considering complaints that stem from acts or omissions that are more than three years old, unless there are good reasons for the delay in lodging the complaint.

Lukhaimane says Venn did not provide any reasons for the delay in bringing this complaint.

Venn originally complained that gross misrepresentations were made to members of the Nedgroup Pension Fund about the benefits of switching to the Nedgroup Defined Contribution Provident Fund. However, according to the ruling, this complaint was not listed as outstanding after the matter went through a conciliation process in 2010. The ruling says that, because no relief was sought, the complaint was dismissed.

Venn denies that the issue was resolved by the conciliation process and says the parties signed an agreement that all but one issue, which related to the distribution of a surplus in one of the funds, were unresolved after conciliation.

Another complaint that Venn lodged with the PFA was that he did not receive any proceeds from the shares to which his fund became entitled after Old Mutual demutualised and listed on the JSE in 1999.

He quantified his loss as R204 806 in 1998, plus interest since then. He estimates the loss would now amount to some R800 000.

Venn claimed the provident fund, as a policyholder when Old Mutual demutualised, received shares in the company, and he had a letter from the fund to a colleague stating that the colleague would receive his portion of the shares (or proceeds) when he retired or left the fund.

Lukhaimane says Venn did not submit proof that he was an Old Mutual policyholder.

If the fund had been a policyholder, it would have been issued with shares, and these would have formed part of its assets, she says.

"It was then up to the trustees to decide who would and who would not qualify for an additional windfall," she says.

Lukhaimane also says the issue is time-barred and cannot be investigated further.

Venn alleged that both the pension fund and the provident fund held substantial Old Mutual policies and that the funds chose a date earlier than the qualifying date Old Mutual published to determine which members would qualify for demutualisation shares or proceeds from the shares.

"This confidential decision immediately disqualified thousands of Nedbank pensioners and former staff members from qualifying for the demutualisation shares or the proceeds thereof," Venn says.

On the date the trustees chose, Venn was a member of the Nedgroup Pension Fund, but he was informed that, because he had subsequently transferred to the Nedgroup Defined Contribution Provident Fund, he no longer qualified for shares or proceeds.

Venn says he was also denied shares in the provident fund, despite belonging to the fund on the date on which Old Mutual demutualised, because he was not a member of the fund on the qualifying date chosen by the fund.

Venn says he intends to pursue this complaint further by suing the trustees of the fund, as he believes thousands of Nedbank pensioners and former employees were affected.

### ALLEGATIONS ABOUT CHURNING, ADMIN FEES AND BULKING REJECTED

In addition to his two main complaints, Eric Venn lodged a number of other complaints against the Nedgroup Defined Contribution Provident Fund and the Nedgroup Pension Fund.

One of these complaints related to the smoothed bonus portfolio into which Venn's savings were invested after he moved to the defined contribution provident fund.

He alleged that the fund performed erratically and that the trustees had not understood how the portfolio worked when they proposed it as an investment choice. He claimed damages of R287 176 plus interest as the fund did not perform as promised at the time of the offer to switch.

However, deputy Pension Funds Adjudicator (PFA) Muvhango Lukhaimane found that no wrongful act had been shown, and it could not be said that the provident fund or its administrator, Old Mutual Life Assurance Company, was the direct cause of any financial loss for Venn.

Lukhaimane says it cannot be said that, in providing information and applying smoothed bonuses in certain investment portfolios, either the information provided or the smoothed bonuses applied by the fund or Old Mutual caused any loss to Venn.

Five months after members of the defined benefit fund were transferred to the defined contribution fund, the trustees moved members in the smoothed bonus portfolio into a new fund, known as the Genesis fund, without, according to Venn, giving them the option of staying in the smoothed bonus guaranteed fund.

Venn says the trustees admitted they were not aware the Genesis fund performed worse than the previous portfolio and had not monitored it as closely as they should have.

Lukhaimane's ruling says Venn sought payment of R16 271 plus interest as the difference between what his investment was worth when he retired in 2004 and what it would have been worth on retirement had he remained in the smoothed bonus fund.

Lukhaimane says "it is not clear on what basis he seeks to hold [Old Mutual] liable for an investment decision which he made", and dismissed the complaint.

Venn also asked the adjudicator's office for R103 699 in compensation for commission that, he claims, Old Mutual advisers earned on: the amount that was transferred from the pension fund to the provident fund; the premiums he paid into the provident fund; and the switch between the one fund and the other. Venn alleged the switch to a new policy so soon after the fund issued its first one constituted churning.

Lukhaimane says churning is an illegal practice whereby a sales agent persuades you to switch one policy for another, thereby earning commission on the new policy.

Commission is unlikely to be paid when the benefits held by one employer-sponsored pension fund are switched to another or when the investment portfolios in a defined contribution fund are switched, she says. If commission is paid, it is part of the administration costs agreed on between the trustees of the fund and the administrator, and it is not an additional cost that is debited against a member's savings.

Lukhaimane says no proof was submitted of unnecessary buying and selling of policies or switching of investments, and she dismissed the complaint.

Another complaint Venn made was that if he had switched out of the smoothed bonus portfolios, the amount switched could be lower than the accumulated value and lower than the vested portion of his accumulated value. This was apparently a result of market value adjustments applied by the life assurer to protect members who remain in the fund when other members leave. Venn says the trustees never told members they could be subject to these adjustments.

Life assurers argue that these market value adjustments ensure that members do not benefit by joining a fund when the smoothing reserves are healthy and prejudice other members by leaving the fund when the smoothing reserves are low.

Lukhaimane says in her ruling there is nothing untoward about funds that offer member-level choice charging members administration fees for switching from one investment portfolio to another, as long as these fees are properly disclosed and are reasonable.

Another complaint related to alleged bulking by the fund. Venn claimed there was a deliberate delay in crediting monthly contributions to generate unlawful profits for the administrator.

Lukhaimane says nothing in Venn's documents indicates that unlawful bulking actually took place.

#### **'OUTCOME IS VERY DISAPPOINTING'**

Eric Venn says he is very disappointed by the outcome after putting so much time and research into his complaints.

In 2008 the office of the Pension Funds Adjudicator (PFA) lost his complaint, Venn says, and he had then at his own cost compiled five files for the office, containing not only his complaint but also the responses to it, as well as important documents, such as the rules of the retirement funds, their financial statements and the policies held by them.

Venn says it appears to him that the adjudicator's office did not consider all of his submissions.

Regarding one complaint that was dismissed as one on which the adjudicator's office could not make a ruling, Venn says he should have been told as much many years ago.

Venn says he is also annoyed that one of his complaints was dismissed for being time-barred. The complaint arose only once he had retired, and his complaint to the PFA was lodged within the next year.

The PFA's office says the date of the act or omission determines whether or not it is time-barred.

#### **CONTACT**

The **deputy Pension Funds Adjudicator** is Muvhango Lukhaimane.

Telephone: 087 942 2700

Fax: 087 942 2644

Post: PO Box 651826, Benmore, 2010

Email: [enquiries-jhb@pfa.org.za](mailto:enquiries-jhb@pfa.org.za)

Website: [www.pfa.org.za](http://www.pfa.org.za)

