

# Legal Report October 2019

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## 1. 2018/2019 Annual report of the Pension Funds Adjudicator (PFA)

The 2018/2019 annual report of the PFA was issued during October 2019. In the foreword, Finance Minister Mboweni said that “from the complaints disposed of by the OPFA [Office of the PFA], it is clear that market conduct remains a burning issue as funds and administrators continue to grapple with such issues as non-payment of contributions, late payment, non-payment of benefits etc.”. The Minister added that it is hoped that data collected from these complaints will be used by the FSCA to ensure that the conduct of all role-players improves to embrace compliance and good governance.

The Minister welcomed the fact that, with effect from 1 April 2018, persons aggrieved with the decisions of the PFA, are able to apply to the Financial Services Tribunal (FST) for a reconsideration of such a decision. The powers of the FST are limited to setting aside a decision of the PFA and remitting the matter for a fresh decision or dismissing the application. The Minister said, “It is envisaged that this measure will allow for a level playing field for persons that would otherwise have wanted to appeal a decision of the Pension Funds Adjudicator, but for the prohibitive costs of High Court processes”.

The annual report also contains a message from Mr Abel Sithole, FSCA Commissioner, wherein he said that “the OPFA has for the first time breached the 10 000 mark of complaints finalised within a financial year which is directly linked to the access of the office to pension fund members and efficiency of its processes”. In the year under review the OPFA finalised 10 289 complaints, which is 17% higher than the previous year.

Mr Sithole however cautioned that, despite the OPFA's performance, “the unprecedented increase in the number of complaints received is of concern and requires our undivided attention”. He said that there has been an increased engagement with funds, fund administrators and the regulator to find ways of collaborating to address existing challenges, sometimes in the form of early warnings, whilst in some instances the OPFA reports on trends that must be monitored.

Mr Sithole stated further: “Some of these challenges have been persistently prevalent in the past few years; namely, non-compliance with section 13A of the Pension Funds Act on payment of contributions and section 37C on death benefit lump sum payments, delays in the payments of benefits to beneficiaries, lack of adequate documentation and records management and poor quality/delayed responses by funds to the OPFA. All these challenges, especially in the current economic conditions, have a direct impact on pension fund members' welfare, and at times, right to human dignity.”

On a more positive note Mr Sithole added: “A welcome development is that there has been an increase in the number of settlements, especially in those matters where there were no outstanding contributions. Some funds were able to pay the benefit complained of to the complainant even before the finalisation of the complaint. This level of initiation and cooperation by funds motivates the OPFA and fuels it to continue engaging the industry at large and tell the good stories.”

In her report the PFA, Ms Muvhango Lukhaimane, said, “It is unfortunate that with an office 20 years old, complaints continue to increase. Perhaps most disturbing, is the fact that the bulk of the complaints have to do with non-compliance with section 13A of the Act and delay in payment of benefits. These are regulatory and compliance matters that should best be tackled by the FSCA. For an industry that prides itself as world class, with relative maturity, this is a grave indictment on our commitment to act in the best interest of members and acting in the spirit of Treating Customers Fairly”.

Ms Lukhaimane stated further: “In many respects, non-compliance was concentrated in the large funds, i.e. umbrella funds, sectoral determination funds and industry funds. The noncompliance had to do with failure to collect the necessary contributions in terms of section 13A of the Act and failure to attempt to implement any enforcement measures in terms of section 13A of the Act against a non-compliant employer or responsible persons. Along with the failure to provide basic information to members e.g. benefit statements, the levels of non-compliance in these large funds put to question the policy considerations to consolidate funds as it is apparent that the more removed a fund and its administrators are from the ordinary member and employer, the less compliance there is to basic regulatory requirements.”

According to Ms Lukhaimane, non-compliance with section 13A of the Act, i.e. non-payment of contributions, is especially prevalent in the municipal sector.

Withdrawal benefits were again the category in respect of which the most complaints were dealt with by the OPFA and such complaints were mostly about delays in the payment of benefits. According to the report, “What is of concern is that funds and administrators complained of would still not effect payment or make any effort to liaise with the complainants even upon receiving the complaint. Only a few funds, notably the large insurer underwritten umbrella funds and the Contract Cleaning National Provident Fund would endeavour to pay the benefit complained of even before the finalisation of the complaint. This is a welcome development that has led to the increase in settlements in those matters where there were no outstanding contributions.”

Like Mr Sithole, Ms Lukhaimane also welcomed the introduction of the Financial Services Tribunal as according to her “it would go some way towards developing pension funds law and granting parties a second bite at the cherry on a somewhat equal footing”.

## **2. Recent death benefit decisions**

### **2.1 Factual dependency**

The issue of factual dependency was considered by the Financial Services Tribunal in *Gunpath v Momentum (FundsAtWork) Umbrella Provident Fund and PFA*.

The deceased member did not leave any legal dependants (i.e. persons in respect of whom he was legally liable for maintenance) and he also did not complete a nomination form. The board of trustees of the Fund found that he was also not survived by any factual

dependants (as contemplated in the definition of “dependant” in the Pension Funds Act) and therefore decided to allocate the death benefit to the deceased’s estate.

The Pension Funds Adjudicator (PFA) reversed the board’s decision and ordered them to re-investigate the allocation of the death benefit – the PFA among others relied on deposits made by the deceased into the bank account of the applicant (complainant), the sister of the deceased. The applicant referred the PFA’s decision to the Financial Services Tribunal, apparently because she was of the view that she should be regarded as a dependant of the deceased as a result of the payments made to her by the deceased.

The Tribunal considered whether the applicant was a factual dependant (i.e. factually dependent on the deceased for maintenance as contemplated in the definition of “dependant” in the Pension Funds Act). It was established that the applicant was employed and owned a motor vehicle and immovable property. The deceased made 9 payments into the applicant’s bank account over the course of about 22 months. In this regard, the Tribunal found that the amount deposited by the deceased into the account of the applicant do not indicate a factual basis to conclude that the applicant was in fact dependent on the deceased for maintenance. According to the Tribunal “the amounts vary greatly in value, the deposits are very few, irregular and are spaced far apart from each other to provide a pattern indicative of factual maintenance of the Applicant by the deceased”.

In paragraphs 28 and 29 of the Tribunal’s decision the following important findings were made:

- “28           What is obvious is that the deceased was generous in giving some money to the Applicant on an ad hoc basis in order to assist her as and when needed. Our view is that this does not create an obligation entitling the Applicant to acquire a right to be maintained by the deceased.
- “29           In our view, for a person, such as the Applicant, to qualify as being factually dependant (sic) on the deceased for maintenance, there should be a need for such maintenance and secondly the maintenance should be contributed on some regular basis and should ideally be in the form of amounts which do not differ in value drastically as appears in the amounts contributed by the deceased to the Applicant. The irregular, and widely different payments of amounts paid into the Applicant’s account do not, in our view, establish a pattern that the Applicant was being factually maintained by the deceased. At best the deposits made by the Applicant indicate generosity on the part of the deceased towards the Applicant.”

As a result, the Tribunal concluded that the applicant was neither factually nor legally a dependant of the deceased and that the board of the Fund’s decision to allocate the benefit to the deceased’s estate was correct. The PFA’s determination was therefore set aside and the matter was remitted back to the PFA for reconsideration.

## **2.2 Must dependants be determined as at date of death or date of distribution?**

In the case of *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* the Supreme Court of Appeal had to determine when dependants of a deceased member are to be identified for the purpose of making a distribution in terms of section 37C. The court found that the applicable date is the date of distribution of the benefit and not the date of death of

the member. Accordingly, the court found that no benefit may be paid in respect of a person who died before a section 37C distribution was made.

In paragraph 23 of the judgment the court stated as follows:

“The purpose of s 37C is to provide some protection for dependants, both existing and potential. The obvious time at which decisions should be taken in that regard is when the determination is made. At that stage the board should have completed its enquiries and be in a position to assess the relative present and future needs of the members of the class of dependants it has identified. Those such as the posthumously born child, or the person who has fallen on hard times, can then be assisted and those whose fortunes have improved, so that they no longer need to be maintained, can drop out of the picture.”

The court came to the following conclusion in paragraph 25 of the judgment:

“Given all these considerations of language, purpose and practicality, in my view, the proper construction of s 37C (1) (a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.”

*Retirement funds or other clients requiring more information should not hesitate to contact their consultant.*