

# A Perspective From the Adjudicator

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PENSION LAWYERS  
ASSOCIATION

# First time entry to a fund (20s)



Ignorance of rights and benefits as members

## ***Rathelele v The Contract Cleaning National Provident Fund***

- Dissatisfaction with the benefit paid
- Never issued with benefit statements throughout membership
- **Fund Response**
  - Even though complainant was employed from April 2005, she was only registered as a member from May 2008
- **Held:**
  - The employer failed to register the complainant timeously in line with the Sectoral Determination and pay full contributions on her behalf
  - The fund failed to issue the complainant with benefit statements
  - Employer ordered to pay arrear contributions and fund ordered to issue the complainant with her latest benefit statement



# Trends and Risks



- Complainants not aware that they are not registered as members or that the employer is in default with contributions payments on their behalf, esp. in industry and umbrella funds
- Complaints relating to benefit statements should be resolved at fund level
- Some funds issue benefit statements to employers, but employers fail to forward to members, yet the same funds seek to limit the role of employers in the fund
- Employers change hands / liquidated
- Boards not pursuing arrear contributions
- No legal steps



# Withholding of benefits (20s)



- Funds instructed by employers to withhold benefits in bad faith
- Reasons for withholding not falling within the ambit of section 37D(1)(b)(ii) of the Act  
***Thovhakale v RFS Umbrella Pension Fund and Another PFA/GP/00003344/2013***
- **Employer reasons:**
  - The benefit has been withheld pending the outcome of a Labour Court case against the complainant in terms of which it claims money owed to it by the complainant for a retention bonus
- **Held:**
  - For a benefit to be withheld in terms of section 37D(1)(b)(ii), damages must have been caused to the employer by reason of theft, fraud, dishonesty or misconduct
  - The retention bonus is a contractual debt and the recovery thereof is a labour matter that does not fall within the ambit of section 37D of the Act
  - Fund ordered to release payment of the benefit to the complainant



# Trends and Risks



- Employers request funds to withhold merely to frustrate members
- Boards of management do not properly apply their minds to the employer's requests
- Administrators withhold benefits without the required resolution from the board in terms of the fund's own rules



# Delay with S14 transfers (30s)



- Funds/Administrators delaying in submitting section 14 transfer documents to the detriment of members

## ***Mathonsi v Natal Hospitality Provident Fund and Another PFA/KN/00001787/2013***

- Delay in completion of S14 Transfer
- Complainant sought an investigation in this regard and an order that the transfer value be paid to her new fund together with interest thereon
- **Fund Response**
  - Delay occasioned by outstanding valuation report and financial statements that had not yet been signed off
- **Held:**
  - Rules required the Fund to report on its financial condition at intervals not exceeding three years
  - Fund ordered to complete and sign off its outstanding financial statements and valuation report within a period of eight weeks and submit same to the Registrar in order for the transfer to be completed



# Trends



- Inordinate delays in transferring benefits in terms of section 14 sometimes caused by funds and/or administrators delaying to submit relevant documentation to the Registrar
- Funds trying to usurp the Registrar's powers in relation to the protection of a member's benefit expectation (***Engen Petroleum Limited v Chemical Industries National Provident Fund & Another PFA/WC/00001561/2013***)
- OPFA wrote to the Registrar of Pension Funds, apprising her of this trend and urging her to take appropriate action



# Divorce benefits (30s)



- Funds enforcing settlement agreements which do not comply with section 7(7) and 7(8) of the Divorce Act

## ***Phago v Sentinel Mining Industry Retirement Fund***

- The divorce settlement agreement provided for payment of a divorce benefit to the non-member spouse calculated from date of marriage to date of divorce
  - The fund paid the non-member spouse the divorce benefit calculated from date of membership to date of divorce
- **Fund Response**
    - The complainant was a member of the Mining Employees' Pension Fund until 31 January 2008 when he was transferred to Sentinel with effect from 1 February 2008
    - As the transfer took place after the date of marriage i.e. 11 November 2004, it forms part of the member spouse's fund credit as at 1 February 2008 when he joined Sentinel



# Divorce benefits (30s)



- **Held:**

- A pension fund will only be obliged to effect the payment to the non-member spouse if the court order complies with section 37D(4)(a) of the Act
- The fund correctly calculated the non-member's pension interest as at the date of divorce, which is correct in terms of the definition of pension interest in the Divorce Act, however this was not in accordance with the settlement agreement
- The fund's decision to pay the divorce benefit was set aside



# Trends and Risks



- Some funds implement settlement agreements that are not enforceable
- Funds allow parties to vary/remedy a settlement agreement by reaching an agreement that is not subsequently made an order of Court



# Death benefits (40s)



- Inequitable distribution of a death benefit.
- Failure to conduct proper investigation in terms of section 37C of the Act  
***Mafologela v Masakhane Provident Fund and Another PFA/MP/5545/2011***
  - Deceased survived by his girlfriend, her two children and his mother
  - Board of management resolved to allocate the benefit to the deceased's girlfriend and her children, to the exclusion of his mother
  - The deceased's mother complained that he was not married to his girlfriend and had no children with her
- **Fund Response**
  - The deceased and his girlfriend were customarily married



# Death benefit (40s)



- **Held:**

- Children owe parents a legal duty of support provided they are indigent (see *Smith v Mutual and Federal Insurance Co Ltd* 1998 (4) SA 626 (C) and *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA)). The complainant found to have been a legal dependant and entitled to be considered
- Respondent provided no reasons for excluding the complainant and not considering her in the distribution of the benefit
- Board's decision set aside and fund ordered to reinvestigate and reallocate the benefit



# Trends and Risks



- Board of management relying on affidavits or information from the employer instead of conducting proper investigation or corroborating such submissions
- Boards of management not explaining the reasons for their decision nor providing the investigation report and the trustees' resolution
- Lack of education to fund members (expecting division of estates)
- Application of the law of succession
- Arbitrary exclusion of major children



# Disability benefits (40s)



- Disability benefits being repudiated due to late notification
- Employer liable to compensate the loss suffered as a result of late notification

## ***Kepler v Bidcorp Group Provident Fund and Others PFA/KZN/10391/2012***

- The fund's Rules provided that on disablement a member shall become entitled to a lump sum disability benefit equivalent to his fund value plus the insured portion
- The complainant's application for a disability benefit repudiated by insurer on the grounds that it was belatedly lodged by the employer
- Fund confirmed that disability claim documents were not received in time from the employer
- Employer stated that the documents were received out of time due to it having pursued a claim for the complainant with the Workman's Compensation Fund



# Disability benefits (40s)

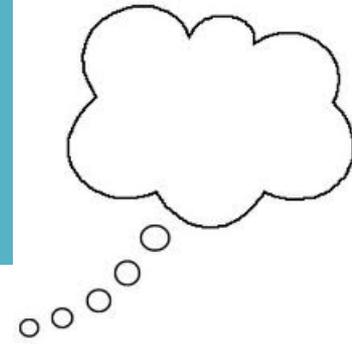


- **Held:**

- At the very least, an employer owes a duty of good faith to its employees in relation to a fund
- The employer's duty of good faith also includes the duty to ensure that it fulfils all obligations imposed upon it by the rules, agreements, policy, legislation and case law in relation to the fund
- The duty of good faith borne by the employer required it to timeously notify the first respondent of the complainant's disablement and by failing to do so, breached its duty of good faith
- Employer must be held liable to pay any disability benefit that would have become payable had the claim been timeously lodged



# Trends and Risks



- Employers failing to notify funds of potential disability claims
- Employers not aware of their roles and responsibilities in instances of disability *vis a vis* the fund



# Causal event charges (40s)



- Complainants unaware of potential imposition of causal event charges in the event that a retirement annuity policy is prematurely terminated

## ***Graef v Momentum Retirement Annuity Fund and Another PFA/WC/00002840/2013***

- Complainant quoted a causal event charge of R89 000.00 should he transfer to another RA fund
- Objected on the grounds that he was not informed at inception that it could be imposed upon premature termination of policy
- Argued that it is too high and should be waived by Fund
- **Fund Response**
  - In signing application form, the complainant declared that he had received full disclosure of fees applicable and causal event charge cannot be waived



# Causal event charges (40s)



- **Held:**

- Causal event charges must be calculated in accordance with generally accepted actuarial principles
- Causal event charges must be actuarially sound and comply with limitations in the Regulations of the Long-term Insurance Act, 1998
- Causal event charges found to have been below the maximum permissible in terms of the Regulations
- Fund complied with generally accepted actuarial principles and the causal event charge imposed was lawful



# Trends



- Members not properly informed of causal event charges and when they would be deductible
- In some cases, the charges have been disclosed but members do not understand them
- Members sometimes want funds to provide them with a breakdown showing how the charges were calculated
- Some insurers still deduct more than the permissible causal event charges, although rare (see *Esterhuyze PFA/GA/11848/2012*)



# Retirement benefits (60s)



Members misunderstanding options upon retirement i.e. difference between a provident fund and a pension fund

## ***Nkambule v Eskom Pension and Provident Fund***

- The complainant retired from the fund and opted to have his full retirement benefit utilized to provide him with a monthly pension
- Complainant alleged that he indicated on his retirement form that he wanted one-third cash lump sum and the remaining two-thirds to provide him a monthly pension
- **Fund Response**
  - Implemented the complainant's instruction as it appeared on his retirement claim form and utilized his full retirement benefit to purchase a monthly pension for him
  - Willing to recalculate the complainant's retirement benefit in order to pay him the one-third lump sum



# Retirement benefits (60s)



- The complainant will owe the fund some money in overpaid pension and his monthly pension will reduce
- **Held:**
  - The fund to recalculate the complainant's retirement benefit with an option of one-third lump sum payment



# Trends and Risks

- Members signing their retirement forms without the requisite understanding of the attendant implications



*YOU DIDNT SAVE ANYTHING  
FOR RETIREMENT DID YOU??*



# Retirement benefits (60s) - Quantum



- Members prematurely cash their benefits due to job losses
- At retirement, they are paid less than what they expected and they claim the benefit is too small considering the number of years in employment

## ***Qwabe v Metal Industries Provident Fund and Others PFA/GP/00002138/2013***

- Employed in the Metal industries for over twenty years and the benefit of R91 350.00 paid to him not representative of the length of his service in the industry
- Fund submitted that it previously paid the complainant a benefit of R172 000.00 in May 2000 when he withdrew due to termination of his employment
- **Held:**
  - Benefit was correctly calculated



# Trends and Risks



- Industry funds
- Due to job losses, members cash their benefits instead of preserving



# Office update

- Office has been in Pretoria for a year
- Still receive a considerable amount of walk-ins daily
- Location seems convenient for staff, stakeholders and complainants
- Close proximity to the FSB makes referrals, consultations and interaction convenient
- Staff continues to settle with focus on organisational development



# Thank you



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