



Noteworthy Financial Services Tribunal Rulings

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ESTABLISHMENT OF THE FINANCIAL SERVICES TRIBUNAL

- The Financial Sector Regulation Act 9 of 2017 (“FSR Act) commenced on 1 April 2018
- Chapter 15 of the FSR Act deals with the establishment & powers of Financial Services Tribunal
- Section 219 of the FSR Act (read with Preamble) establishes the Financial Services Tribunal as **an independent tribunal to reconsider decisions** of statutory ombuds who include the **Adjudicator**
- Is the decision the entire determination or the order?
- My view is that it is the order, meaning that the Tribunal can differ with Adjudicator’s reasoning and still uphold the order made by Adjudicator

HOW DOES THE TRIBUNAL OPERATE?

- Applications are initiated by way of application i.t.o section 230
- Once the record and written arguments are filed, a hearing date is determined
- On date of hearing a panel of three (3) Tribunal members hears the application
- Where parties have waived a right to a hearing, the Deputy Chair of Tribunal makes a decision/ ruling on the papers
- Issues that have arisen include?
 - Does stare decisis apply to Tribunal decisions?
 - Is one panel bound by interpretations adopted by previous panels?
 - Does the ruling of Deputy Chair where he decided matter on paper bind a panel of 3 when it hears a similar matter in future?

PARTIES TO TRIBUNAL PROCEEDINGS

- Applicant must be aggrieved by Adjudicator's decision
- Definition of party in s1 of FSR Act includes "Adjudicator" / "decisionmaker"
- This often results in confusion as to role of Adjudicator in Tribunal proceedings
- Issues that have arisen include:
 - Can Adjudicator oppose application?
 - Can Adjudicator file heads?
 - Can Adjudicator expand on reasons for the determination?

RULES OF THE TRIBUNAL

- S227 of the FSR Act empowers chairperson to publish Rules for how Tribunal will operate
- Last available Rules on FSCA website are dated 1 August 2019
- The Roll (Hearing Schedule) of upcoming cases is also published on FSCA website
- Rules deal with *inter alia*:
 - Dies for filing documents (e.g, day means ordinary calendar day)
 - Filing of record and further reasons by Adjudicator
 - Applications for hearing further evidence
 - Applications for suspending operation of Adjudicator's determination

ORDERS OF TRIBUNAL

- In relation to applications for reconsideration of Adjudicator's determinations, Tribunal can:
 - Dismiss the application;
 - Uphold the application and set aside Adjudicator's determination and remit the matter to Adjudicator for reconsideration.
- My view is that FSR Act should be Amended to allow Tribunal, where Tribunal has all the facts, to finalise the dispute and not remit the matter to Adjudicator.

20 SELECTED RULINGS OF THE TRIBUNAL

- First Ruling is dated 28 May 2018
- There are currently Tribunal 381 Rulings on FSCA website as at 5 May 2021
- Not all of them are pension law related (probably a third to half are pension law related)

(1) Bryan Dhludlhu v Municipal Councillors Pension Fund and Others

- Decision date – 5 October 2020
- Concerned municipal councillor who wished to change pension funds as he was unhappy with management of his fund
- Councillor instructed Municipality to pay his contributions to new fund
- Fund lodged a complaint with Adjudicator
- Adjudicator ordered Council ordered to pay contributions to old
- Councillor applied for reconsideration to tribunal
- Councillor wanted Adjudicator to exercise equitable jurisdiction and allow him to choose own fund

- Tribunal said principle of equity cannot override clear provisions in Rules and Statute
- Application was dismissed

(2) Prime Serve Group v ND Tshabalala and others

- Decision date 26 November 2020
- Employee employed since 2012, not registered with fund
- Employee took case to CCMA, CCMA case settled on basis that contributions will be paid from 2018
- Employer started paying contributions from 2018
- Employee complained to Adjudicator, Adjudicator ordered payment of contributions from 2012
- Employer took case to the Tribunal
- Tribunal said although it appears that Employee waived rights to 2012 – 2017 contributions, he was unsophisticated and unaware
- Tribunal said Adjudicator exercising equitable jurisdiction in this case was consistent with the Act and the Rules
- Employer's application dismissed

(3) Municipality Gratuity Fund v West Rand District Municipality and others

- Decision date 18 May 2020
- Concerns employer contributions, interest and equity jurisdiction
- Employer failed to pay LPI (Municipality placed under administration)
- Fund complained to Adjudicator
- Adjudicator used equitable jurisdiction to order Fund to conclude settlement on lower interest with Employer
- Fund approached Tribunal for reconsideration
- Tribunal set aside determination and remitted for consideration
- Tribunal said Adjudicator must always have regard to provisions of the Act and equitable jurisdiction cannot be exercised to override provisions of the Act

(4) Murray & Dickson Construction (Pty) Ltd v Mokoena and others

- Decision date 2 October 2020
- Concerns ensuring that the correct employer is cited in the complaint and determination
- Complaint by widow about withdrawal benefit of husband who had received only R 15 000 after 35 years service
- Employer cited did not respond to complaint before Adjudicator
- Adjudicator made determination against employer
- Employer referred case to Tribunal
- Tribunal said although determination may be correct, it may be against wrong party

- Tribunal set determination aside and remitted matter to Adjudicator

- Tribunal emphasised the need to ensure proper employer is cited

(5) Transport Sector Retirement Fund v Pension Funds Adjudicator and others

- Decision date 9 March 2020
- Concerned employer's failure to pay contribution
- Fund lodged complaint with adjudicator
- Order sought by Fund was provision of schedules and payment based on schedules
- Adjudicator concerned that employer may no longer be in business
- Adjudicator ordered Fund to apply to FSCA to deregister employer
- Tribunal decided two issues:
 - Its improper for Adjudicator to file explanatory notes after determination;
 - Adjudicator cannot reformulate complaint and grant order that bears no relation to complaint

(6) Michael v Pension Funds Adjudicator and others

- Decision date 19 August 2019
- Dispute concerned maturity value of a vested policy (RA issue)
- Complaint had been dismissed with Adjudicator upholding OM's (administering insurer) calculation
- On reconsideration, Tribunal found that neither complainant nor OM could satisfactorily explain basis for their respective calculations
- Tribunal set aside determination and remitted the matter back
- Take away : tribunal does not perform investigation where facts disputed

(7) Sanders v Momentum and Pension Funds Adjudicator

- Decision dated 15 February 2021
- RA policy made paid-up allegedly due to late payment of premiums
- Member wanted policy reinstated
- Complaint initially with Insurance Ombud but referred by that Ombud to Adjudicator
- Adjudicator dismissed complaint – agreed that policy paid-up based on policy wording
- On reconsideration by tribunal, it set aside determination
- Tribunal found that Adjudicator relied on incorrect clause in policy and rules of Fund
- Matter remitted for reconsideration

(8) Beatrice Wirz v Lifestyle Retirement Annuity Fund

- Decision dated 15 December 2020
- Early retirement penalty had been levied resulting in lower benefit
- Member complained to Adjudicator
- Adjudicator dismissed the complaint
- On reconsideration, tribunal found that benefit statement and other communication to member and broker was arguably incomplete, vague and could lead to misunderstanding
- Tribunal said this was a case for exercise of equitable jurisdiction
- Determination set aside
- Take away: policy wording and benefit statements must not be vague

(9) Lifestyle retirement Annuity Fund v Simelane and others

- Decision dated 23 September 2020
- Initial complaint to Adjudicator concerned dispute about refund of additional charges levied when member made additional voluntary contributions
- It appears that this was the dispute referred to Adjudicator
- Another dispute arose about charges attracted by policy when member wanted to reduce his premiums
- Determination made on both issues in favour of member
- On reconsideration, tribunal set determination aside
- Tribunal said Adjudicator must consider only the complaint before it and must not deal with issues where respondents not given opportunity to respond

(10) Mnisi v Stanlib and Pension Funds Adjudicator

- Decision date 27 November 2020
- Complaint raised many issues but concerned primarily a s37C distribution from 2010
- Complainant alleged nomination form was forged or induced by fraud
- Complaint dismissed based on res judicata principle and time bar provisions
- On reconsideration, Tribunal dismissed application
- Tribunal confirmed res judicata and time bar applies
- Tribunal said paid beneficiaries had to be joined
- Tribunal confirmed that Adjudicator has no jurisdiction over s15B surplus schemes
- Tribunal confirmed that Adjudicator cannot scrap or ignore s30I provisions

(11) Affordable adventures v Former Trustees of inter alia IF Umbrella Pension and Provident Funds

- Decision dated 9 April 2021
- Employers brought a complaint in which they wanted order that former trustees pay back money used for rebuild of records some 10 years prior
- Adjudicator dismissed complaint on basis that previous determination on same issue was set aside by High Court i.t.o s30P
- Employers took the matter to the tribunal
- On reconsideration, tribunal said previous and present complaint are the same
- Tribunal said in any event, since rebuild happened in 2010, the complaint was time-barred in terms of s30I
- Employers were ordered to pay costs – case considered as exceptional

(12) De Lange v Pension Funds Adjudicator

- Decision date 8 November 2020
- Complaint was dismissed by Adjudicator
- Member applied to tribunal for reconsideration
- Case concerned sale of shares transaction involving ACA to Sanlam
- Member contended that the transaction resulting in termination of employment by previous employer and therefore he was entitled to withdrawal benefit
- On reconsideration, Tribunal considered the nature of transaction and correspondence with inter alia SARS
- Tribunal concluded that there was no termination of employment and therefore no benefit accrued
- Application dismissed

(13) Mineworkers Provident Fund v FSCA

- Decision date 4 September 2020
- Fund applies for reconsideration of FSCA directive directing it to reinstate removed trustee
- Allegations of impropriety against CEO of Fund. Trustee insisted that CEO be suspended
- Trustee reported matter to FSCA. Board removed him for breach of code of conduct
- Fund asked Tribunal for a declarator and advisory award
- On reconsideration, Tribunal does not issue advisory awards and declarators
- Tribunal confirmed whistleblowing duties of trustees and their protection in terms of s7A(4) and s9B of PFA

(14) National Fund for Municipal Workers v Tswaing Local Municipality

- Decision dated 19 Aug 2020
- Matter concerned non-payment of contributions by municipality
- Fund lodged a complaint against Municipality
- Adjudicator dismissed the complaint
- Adjudicator said fund should sue Municipality and only come to Adjudicator as measure of last resort
- On reconsideration, Adjudicator's determination dismissed
- Tribunal said the fact that board did not sue employer does not mean Adjudicator cannot entertain complaint
- Tribunal also said Adjudicator cannot declare sections of the PFA unconstitutional

(15) City of Tshwane Metropolitan Municipality v Pension Funds Adjudicator

- Decision date 3 March 2020
- Member suffered a stroke and was on sick leave without pay (2016)
- Member only declared medically unfit to resume a year later (2017)
- Employer submitted disability claim 3 months after declaration
- Fund repudiated claim, saying notification should have happened within 6 months of member suffering stroke
- Adjudicator agreed with Fund, found employer at fault and ordered employer to pay half of the benefit
- Reconsideration application by employer
- Matter turned on interpretation of rules
- Tribunal said rules requires confirmation of permanent disability by medical experts and this only happened in 2017
- Determination set aside and remitted to Adjudicator

(17) Fakazile Anna Kwela v Toyota SA Provident Fund

- Decision date 26 February 2021
- Complaint against a section 37C allocation of death benefit
- Complaint dismissed by the adjudicator
- Application by complainant for reconsideration
- Tribunal restated all well-known principles
- Tribunal confirmed that provided the board has considered all relevant factors in arriving at its distribution decision, there is no basis for interfering with the board's discretion
- Tribunal dismissed the application

(18) Nandos employees Umbrella Provident fund v FSCA

- Decision date 4 February 2021
- FSCA had imposed an administrative penalty against the fund for late submission of statutory returns
- Fund applied to Tribunal for reconsideration
- Cited among other reasons temporary absence of the PO
- Tribunal dismissed application for reconsideration
- Tribunal said it could not interfere with FSCA's decision where returns were indeed late and there was no reasonable explanation for lateness
- Tribunal found that FSCA applied its mind to the law and facts and penalty imposed was appropriate.

(19) Okpugo v South African Local Authority Pension Fund

- Decision date 27 February 2021
- Complaint apparently alleging underpayment of benefits
- Complaint dismissed by the Adjudicator
- Claim had prescribed
- On application for reconsideration to the Tribunal
- Tribunal said is a claim has prescribed, that is the end of the matter
- Neither the Tribunal nor the adjudicator can override the statutory provisions in the Prescription Act
- Take away: It would appear that equity jurisdiction cannot be invoked where a claim has prescribed

(20) Startec Trading v S V Ngcobo

- Decision date 20 April 2021
- Notice of complaint had been given to employer by post during the lockdown
- Employer did not receive the notice
- Determination made without employer's response
- On reconsideration by the Tribunal
- Tribunal criticised use of unreliable postal service, especially during lockdown
- Tribunal was not happy that email or telephone was not used
- Determination set aside due to lack of notice of complaint to employer
- This ruling is interesting because in this ruling, Tribunal
 - Makes suggestions about how Adjudicator complaints could be simplified
 - Tribunal suggest Adjudicator use "member", "employer", "fund" and "administrator" instead of "first respondent", "second respondent" and "third respondent"

CONCLUSION

- The Tribunal is not bound by previous Adjudicator decisions on interpretation
- Tribunal adopts its own new interpretation
- This means that there will be a lot of new jurisprudence coming out of the Tribunal
- A wonderful opportunity for academic papers to be written on the tribunal's jurisprudence

THANK YOU

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