



Pension Lawyers Association Conference 2021: OPFA determinations

10 May 2022

***Bwanya v Master of the High Court, Cape Town and
Others [2021] ZACC 51***

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

37C. Disposition of pension benefits upon death of member.— (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

- Couple involved in a permanent life partnership.
- Upon death of Mr Ruch, Ms Bwanya claimed a share of the deceased's late estate and/or maintenance from the estate in terms of the Intestate Succession Act, 1987 (IS Act) and Maintenance of Surviving Spouses Act, 1990 (MSS Act) respectively.
- Her claims were rejected by the executor on the basis that they were not recognised nor provided for under those Acts. Ms Bwanya then approached the High Court for orders declaring those Acts constitutionally invalid in so far as it prohibited her claims.

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

- The High Court declared that Ms Bwanya and the deceased were partners in a permanent opposite-sex life partnership, with the same or similar characteristics of a marriage, in which they had undertaken reciprocal duties of support.
- It declared certain provisions of the IS Act as unconstitutional and invalid and that the Act should be read as though the following words appear after the word spouse wherever it appears in section 1(1) of the Act – “*or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support*”.

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

- The High Court application partially succeeded only in respect of the IS Act. In respect of the MSS Act, the Court decided that it was bound by the principle of stare decisis and, in this regard, referred to the 2004 Constitutional Court decision in *Richard Gordon Volks NO v Ethel Robinson and Others* 2004 (6) BCLR 671 (CC).
- The Volks judgment held that that the different treatment of married and permanent life-partners was not unjustified for purposes of the MSS Act and that couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage, including obligations that extend beyond the termination of marriage and even after death.

***Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51**

- The Court in *Volks* said that to the extent that any obligations arise between co-habitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement.
- It was held that the Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation.

***Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51**

- In *Maritz v ABSA Groep Pensioenfonds* [2005] 5 PFLR 421 (PFA), the then Adjudicator relied on *Volks* and held that it was “a natural corollary” to *Volks* that a differentiation could be made between spouses and partners for maintenance claims and that it was justifiable to differentiate between spouses in a marriage and partners in a permanent life relationship for purposes of identifying recipients of spouses’ pensions.
- In justifying the finding, the Adjudicator reasoned that the rules of a pension fund provide, through cross-subsidisation by other members of the fund, for the payment of a spouse’s pension. Funding of such benefits is based on actuarial calculations which uses assumptions regarding the number of members likely to be married at the time of death in service. A finding that all such co-habitees in permanent life partnerships are eligible for spouses’ pensions could have a devastating effect on the financial soundness of the fund and burden the administrative resources of a fund.

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

- Any declaration of invalidity by a lower court must be sent to the Constitutional Court for verification. And so too, the Bwanya matter came before the Constitutional Court which held that the fact that she had been paid a settlement amount of R3 million did not render the matter moot.
- The majority judgment penned by Madlanga J held that certain sections of both the MSS Act and IS Act were unconstitutional and invalid.
- The majority held that the term “*spouse*” for the purposes of the MSS Act shall include a person in a permanent life partnership in which the partners undertook reciprocal duties of support. The term “*marriage*” for the purposes of the MSS Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

Bwanya v Master of the High Court, Cape Town and Others [2021] ZACC 51

- The majority further held that the omission in section 1(1) of the IS Act after the word “*spouse*”, wherever it appears in the section, of the words “*or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support*” was unconstitutional and invalid.
- Insofar as the MSS Act and the *Volks* judgment was concerned, Madlanga J states that he is convinced that *Volks* had been wrongly decided.

***Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51**

- It will be necessary for funds to assess their rules and determine whether it accords with the Constitutional Court judgment in *Bwanya*.
- It can no longer be held that a differentiation in the rules between spouses in a marriage and partners in a permanent life partnership is justifiable.
- As set out by the Adjudicator in *Maritz*, these are issues which affect funding of benefits based on actuarial calculations and assumptions and funds would be well advised to draw this recent judgment to the attention of their actuaries.

***Municipal Employees Pension Fund and Another v
Mongwaketse [2022] ZACC 9***

***Municipal Employees Pension Fund and Another v Mongwaketse* [2022] ZACC 9**

- Ms Dineo Innolentia Mongwaketse lodged a complaint with the OPFA regarding her purported membership of the MEPF. The Adjudicator found in favour of Ms Mongwaketse, ordering the MEPF to repay to her all contributions made in respect of her purported membership.
- The Constitutional Court had to decide whether Ms Mongwaketse’s grievance was a “*complaint*” and whether she was a “*complainant*” as these terms are defined in section 1 of the Pension Funds Act. Following from that whether Ms Mongwaketse was entitled to the relief which the Adjudicator awarded her.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- Ms M was employed as a chief audit executive at a municipality for a renewable fixed term of five years, which renewal could not be withheld unreasonably and was subject to satisfactory work performance.
- She signed a membership form which specified that the contributions payable by her and the Municipality would be 7.5% and 22% respectively of her monthly pensionable emoluments.
- The form did not state that she was a fixed-term employee and did not provide for recording the new member's employment status.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- Ms M's remuneration package was inclusive of all benefits. If she wanted to belong to a pension fund, she had to make all contributions. She understood that she was entitled to join the MEPF. The Municipality would deduct from her monthly remuneration and pay to the MEPF contributions equating to 7.5% and 22%, the whole of which would be contributions made by her.
- In November 2014, however, she received a benefit statement indicating that upon withdrawal from the MEPF her benefit would be calculated only with reference to the 7.5% contributions. She queried this. It was at this time, she says, that she learnt that the MEPF's rules did not entitle fixed-term employees to be members.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- Ms M asked the Municipality to stop deducting pension fund contributions from her remuneration. In September 2015 the Municipality notified the MEPF that all contributions in respect of Ms Mongwaketse’s purported membership had been made by her alone and that her joining the MEPF had been an error.
- The Municipality asked that she be withdrawn from the MEPF and that all contributions be refunded to her with interest. The last contributions in respect of her purported membership were paid in September 2015.
- The MEPF refused and held that Ms M had become a member.
- Ms M’s employment with the Municipality terminated at the end of January 2017 and was not renewed. In February, the Municipality submitted a termination of service form to the MEPF.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- A complaint was lodged with the OPFA and the Adjudicator was informed by the Municipality that the total of all contributions made in respect of Ms M's purported membership was R856 489.94.
- On 8 June 2017, and before responding to the grievance, the MEPF paid Ms M R237 422.67, supposedly as her net withdrawal benefit in terms of the rules, after deducting R133 606.51 for income tax. The gross amount of R371 129.18 was calculated in terms of clause 37(1)(b) as applied only to the 7.5% contributions.
- The MEPF informed the Adjudicator that Ms M had been what she was entitled to in terms of the rules.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- The Adjudicator found:
 - Ms Mongwaketse had not met the criteria for membership of the MEPF, had not become a member, and was not bound by the Fund's rules.
 - Factually, all contributions in respect of her purported membership had been met out of her salary.
 - The MEPF should thus refund to her the total amount of all contributions, including those deemed to have been made by the Municipality, because the MEPF had not been entitled to receive the contributions.
 - The total amount of the contributions was R856 489.94. However, to avoid undue enrichment to Ms Mongwaketse, the MEPF should deduct the amount already paid to her.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- MEPF approached the High Court and sought relief by way of judicial review and by way of appeal in terms of section 30P. The review relief was advanced in terms of the Promotion of Administrative Justice Act (PAJA), alternatively on the principle of legality.
- The MEPF opposed the refund claim on the basis that it had not been enriched, that Ms M had not been impoverished, and that any impoverishment she had suffered was because of her own inexcusable error and the Municipality's conduct.
- MEPF also relied on prescription.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- The MEPF’s contention of non-enrichment and non-impoverishment was based on the allegation that the 22% contributions made by employers were applied by the MEPF to meet expenses of the Fund, such as premiums for risk benefits (death, disability and funeral cover), shortfalls in withdrawal benefits, and overheads. The MEPF had applied the 22% contributions in respect of Ms M’s purported membership in this way, and she had enjoyed the benefits procured by such expenditure.
- The High Court agreed with the Adjudicator and said that MEPF’s defence of non-enrichment was misconceived because the MEPF was never “on risk” in relation to Ms M, given that she was not in truth a member.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

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- The High Court agreed with the Adjudicator and said that MEPF’s defence of non-enrichment was misconceived because the MEPF was never “on risk” in relation to Ms M, given that she was not in truth a member.
- The prescription defence was also rejected.
- MEPF’s application was dismissed by the High Court, with costs.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- The High Court granted the MEPF leave to appeal to the SCA. The majority in the SCA dismissed the appeal and held that Ms M qualified as a “*complainant*” in terms of both paragraphs (a) and (d) of the definition, and that her grievance fitted the statutory definition of a “*complaint*”. She was not “*a stranger to the Fund bringing a civil law claim against it*”, because as a fact she had been accepted as a member of the MEPF and the latter was seeking to enforce its rules against her.
- The majority held that there were two legal routes to the conclusion that Ms M never became a member of the MEPF:
 - The first was by the simple application of the *ultra vires* doctrine – a pension fund only has such powers as are conferred on it by its rules.
 - The second was to invoke the principles of contract law on common mistake – Ms M had been unaware that the rules did not entitle her to become a member, while the MEPF had been unaware that she was on a fixed-term contract and thus ineligible for membership.
 - Estoppel could not be invoked because it would create an unlawful situation, and there was no relevant right which Ms Mongwaketse could have waived.

***Municipal Employees Pension Fund and Another v Mongwaketse* [2022] ZACC 9**

- All the elements for the *condictio indebiti* were satisfied.
- The MEPF's contention that Ms M had not been impoverished was rejected, given that she never acquired the right to any benefits under the MEPF's rules.
- The MEPF had been enriched: to the extent that Ms M's 22% contributions had become part of the MEPF's general funds and used to pay expenses, the MEPF had used Ms M's money to meet ordinary expenses that would otherwise have had to be met from other contributions. The MEPF was enriched by not having to use its "*legitimate funds*" to meet these expenses.
- Like the High Court, the majority also rejected the prescription defence.

***Municipal Employees Pension Fund and Another v Mongwaketse* [2022] ZACC 9**

- Dissatisfied with the SCA judgment, the MEPF approached the Constitutional Court for relief to appeal the SCA's order.
- The Centre for Applied Legal Studies (CALS) applied and was granted leave to make written and oral submissions as an *amicus curiae*. CALS argued that the interpretation of the Act should be undertaken with due regard to the constitutional rights at stake, including the right to social security and appropriate social assistance (section 27(1)(c) of the Bill of Rights) and the right to have legal disputes decided in a fair public hearing (section 34 of the Bill of Rights).
- CALS pointed out that if the Adjudicator could not entertain complaints from persons wrongly admitted to membership, their only recourse would be to the High Court, which they might not be able to afford or where they would run the risk of an adverse costs order.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- CALS accepted that Ms M did not fall within paragraphs (a) to (c) of the definition of “*complainant*” but argued that she fell within paragraph (d), giving the words of that paragraph their ordinary meaning.
- The Constitutional Court, in confirming its jurisdiction, said that the proper interpretation of the definitions is a matter of general public importance, since on this depends the Adjudicator’s jurisdiction in all cases where a pension fund has purported to admit to membership a person who did not qualify for membership in terms of the fund’s rules.
- The CC examined the MEPF’s rules and found that there were no fewer than nine circumstances under which a person could become a member of the MEPF and that the board did not have uncircumscribed power to admit unspecified classes of people to membership.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

- The CC said that a pension fund such as the MEPF is unlikely to be a suitable vehicle for persons employed for a limited period, and it is entirely understandable that they would be excluded from membership.
- Ms M was employed for a fixed term of five years. This is a “limited period”.
- Since Ms M was not eligible for membership of the MEPF, the latter did not have the power to admit her as a member and her purported membership was a nullity.
- The application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality. Section 13 of the Act decrees that a pension fund’s rules shall be binding *inter alia* on the pension fund.
- Section 5(1)(a) states that the effect of the registration of a pension fund such as the MEPF is that it becomes a body corporate capable of suing and being sued in its corporate name and of doing all such things “as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules”. The admission to membership of a person who is by virtue of the rules ineligible for membership is not an act “*necessary for or incidental to*” the exercise by the pension fund of its powers or the performance of its functions in terms of the rules.

Municipal Employees Pension Fund and Another v Mongwaketse [2022] ZACC 9

‘complainant’ means—

- (a) any person who is, or claims to be—
 - (i) a member or former member, of a fund;
 - (ii) a beneficiary or former beneficiary of a fund;
 - (iii) an employer who participates in a fund;
 - (iv) a spouse or a former spouse of a member or former member, of a fund;
- (b) any group of persons referred to in paragraph (a)(i), (ii), (iii) or (iv);
- (c) a board of a fund or member thereof; or
- (d) **any person who has an interest in a complaint;**

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‘complaint’ means a complaint of a complainant relating to the administration of the fund, the investment of its funds or the interpretation and application of its rules, and alleging—

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.”

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- Ms M was never in law a member and did not claim in her grievance to have been one. On the contrary, she alleged that she was precluded by the rules from being a member. Ms M could be accommodated in paragraph (a)(i) of the definition.
- After considering arguments from MEPF and CALS, both lines of argument have their merits, but on balance concluded that the wide interpretation of paragraph (d) of the “*complainant*” definition is to be preferred.
- The “*complaint*” definition requires, as a first component, that the grievance should relate to “*the administration of a fund*”, “*the investment of its funds*” or “*the interpretation and application of its rules*”. As a second component, the grievance must make allegations of the kind described in one or more of paragraphs (a) to (d) of the “*complaint*” definition.

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- The question is whether the grievance concerned the “*administration*” of the MEPF.
- Admitting people to membership and receiving contributions in respect of their membership with a view to providing them with retirement benefits is the core activity of a pension fund. Doing these things is at the heart of pension fund “*administration*”.
- The admission of Ms M to membership and the receipt of her contributions were acts of administration of the MEPF which were ultra vires. It is their *de facto* character, not their legality, which brings them within the scope of “*administration*”.
- It is unnecessary, for purposes of this judgment, to decide where the line is to be drawn in relation to “*administration*” of a fund for purposes of the “complaint” definition. That expression would certainly be capable of limitation so as to exclude the ordinary contractual and delictual disputes.

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- The MEPF's contention was that the Adjudicator acted in a procedurally unfair way by finding, of her own accord, that Ms M never became a member of the MEPF and that she was entitled to a refund on the basis of unjustified enrichment. The MEPF complains that the Adjudicator did not put these propositions to the MEPF for comment before issuing her determination.
- This criticism must be rejected. The terms of Ms M's complaint as lodged with the Adjudicator were clear. In her complaint, Ms M referred to and attached the Municipality's letter to the MEPF in which the Municipality stated that she should not have joined the MEPF and asked for a refund of all contributions. She also referred to a meeting where the MEPF's legal adviser informed her that she should never have become a member and that all the contributions were hers.

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- Satisfied that the requirements of *condictio indebitii* were met and that the MEPF had been enriched.
- The Adjudicator’s order against the MEPF for repayment of all contributions withstands the attack made on it by way of judicial review.
- Section 30P is a rehearing on the merits in which additional evidence can be adduced.
- *“If the MEPF had not instituted review proceedings, and had simply challenged the Adjudicator’s determination on the merits by way of section 30P, it would by now have failed on the merits in the two courts below. A further appeal to this Court on the merits is aimed at reversing factual findings made by the courts below, in particular the finding that the MEPF was enriched...A contention that a lower court’s factual findings were wrong does not engage this Court’s constitutional or general jurisdiction, nor does a contention that a lower court misapplied an established test to the facts of the case.”*
- Leave to appeal was granted, but the appeal was dismissed.

GH FORBES (“complainant”) v OLD MUTUAL SUPERFUND PENSION FUND (“first respondent”), OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED (“second respondent”) AND NEDBANK LIMITED (“third respondent”)

PFA/WC/00069120/2020/MM

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- Mr Forbes was employed by Nedbank on a contractual basis for two consecutive periods during June 2016 to December 2016 and was remunerated at a rate of R500 per hour.
- He became a full-time employee from 1 February 2017 and his remuneration changed to R414 per hour capped at 158 hours per month / R785,644 per annum.
- After being appointed on a permanent basis, Mr F received remuneration in terms of his permanent employment contract. In addition thereto, Nedbank erroneously continued to pay him remuneration in terms of the contractual basis. In effect, Mr F received two salaries.
- Mr F conceded that he had noted discrepancies in his salary after becoming a permanent employee. He submitted that he initially assumed that this was because of the transition from fixed term employee to permanent and that these discrepancies would resolve over time. When the discrepancies persisted, he assumed that Nedbank “*had in fact not prejudiced him, by reducing his pay scale so drastically*”.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- Mr F submitted that his IRP5 documents agreed to his payslip and that his failure to notify his employer about the additional payments does not stem from dishonesty but rather from misconceptions.
- Mr F was suspended from employment on 24 April 2019 and that the third respondent informed him that it may lay criminal charges against him for theft and dishonesty, which he denied.
- During Nedbank's investigation, Mr F signed a statement wherein he conceded that he was not entitled to a second salary and expressed his surprise regarding same. In the same statement, he expressed his willingness to refund the third respondent all undue amounts owing to the third respondent.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- On 13 September 2019, a disciplinary enquiry was held and Mr F was dismissed for "*misconduct: dishonesty*". He referred his matter to the CCMA and after conciliation failed, he abandoned the CCMA proceedings. He submitted that this was due to a lack of funds to cover his legal fees.
- Mr F submitted a claim for a withdrawal benefit to the fund on 25 September 2019. He made an enquiry to the fund regarding his withdrawal benefit on 20 March 2020, and according to him this "*set forth a collusive effort by the third respondent and the first respondent to willfully subvert the process of the withholding and deduction of benefits in terms of S37D(1)(b)(ii) of the Act*".
- Mr F submitted that his conduct amounted to negligence, instead of misconduct which was the requirement in terms of section 37D(1)(b)(ii). He further submitted that the fund made the withholding decision without complying with the principles of natural justice and without the board exercising its discretion with care and in the process balancing the competing interests with due regards to the third respondent's claim and affording the complainant an opportunity to be heard.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- The Adjudicator identified the issue to be determined as whether the fund is entitled to act in terms of section 37D(1)(b)(ii) of the Act to withhold or deduct from Mr F's benefit, compensation that is due to Nedbank.
- The Adjudicator has in several recent determinations set out the requirements that must be met in order to justify the withholding of a benefit in terms of section 37D(1)(b)(ii) of the Act. It will suffice to say that one of the main requirements for withholding a benefit is applying the principles of natural justice.
- However, it is important to appreciate that there is a distinction to be drawn between the 'withholding' of a benefit and the 'deduction' of compensation due to an employer on the grounds set out in section 37D(1)(b)(ii) of the Act.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- There was no dispute about the second salary and that Mr F was entitled to it. Mr F had been loaded onto the third Nedbank's payroll system as a permanent employee however he was erroneously not removed from the payroll system as a temporary employee. This resulted in automatic payments being generated to him for both his permanent and his temporary employee status until the error was discovered by Nedbank approximately two years later.
- It is common cause that Mr F noticed the discrepancy in the payment of his salary but failed to bring the double salary payments to the attention of Nedbank.
- In order for a deduction to be lawful, the Act provides that there must either be a written admission of liability by the member to the employer, or a judgment obtained against the member by the employer. Both of the aforesaid must relate to theft, dishonesty, fraud or misconduct by the member.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- Mr F made a statement in terms of which he admitted liability to the employer, acknowledged the facts from which such liability arose, and further acknowledged the period over which his liability must be calculated from.
- It is common cause that the same set of facts led to Mr F being dismissed by the Nedbank for misconduct relating to dishonesty. The said dismissal was not challenged at the CCMA and the Adjudicator must accept the findings of the disciplinary enquiry as it stands.
- Legal representation in arbitration proceedings pertaining to an unfair dismissal is only permitted when the commissioner allows it. It is not an automatic right. The CCMA proceedings are designed to be accommodating towards lay persons. Accordingly, it is not clear why the complainant could not have pursued his dispute at the CCMA in person and the excuse that he did not have funds for legal representation was not accepted.

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- Furthermore, the complainant had the option of approaching the Legal Aid Board for assistance if he desired legal representation. He did not do this. A finding of misconduct relating to dishonesty is serious and can have a negative impact on a person's future employment prospects. One would have expected the complainant to challenge it if he disputed the outcome even if he had to do so in person.
- The Adjudicator cannot perform the function of the CCMA and overturn the finding of the disciplinary enquiry and must accept the finding that the complainant was guilty of misconduct relating to dishonesty.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- The payments persisted for a long time and the Mr F had sufficient opportunity to query same with the Nedbank. He failed to do so. As an employee and in terms of the employment contract entered with Nedbank, Mr F stood in a position of confidence which involved a duty to protect the interests of his employer. Accordingly, Mr F owed a fiduciary duty towards Nedbank which he failed to fulfil (See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD at 177-180 cited with approval in *Phillips v Fieldstone Africa (Pty) Ltd and another* [2004] 1 All SA 150 (SCA) at paragraph [30]).
- Mr F's expectation at the time of entering into permanent employment with Nedbank would have been a reduction in his monthly income. This reduction was a trade-off for securing permanent employment. Payments of almost double his expected salary should have raised alarm bells and he ought to have queried same. Instead, he chose to stay silent. His failure to speak constituted dishonesty.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- In the circumstances of this case, Nedbank is entitled to a deduction. Nedbank's claim for compensation is based on misconduct relating to dishonesty, as per the unchallenged finding of the disciplinary enquiry. It was also common cause, that Mr F admitted liability in writing to Nedbank.
- There is simply no point in the fund continuing to withhold the Mr F's benefit pending the outcome of the civil or criminal proceedings instituted by Nedbank against Mr F. The provisions of section 37D(1)(b)(ii)(aa) of the Act have been met and Nedbank is well within its rights to claim a deduction from Mr F's benefit. The fund would be acting lawfully in acceding to such a claim.

GH Forbes v Old Mutual Superfund Pension Fund and 2 Others

- The purpose for the withholding of a benefit in terms of section 37D(1)(b)(ii) is to protect an employer's claim pending the finalisation of legal proceedings against the member which may eventually lead to a deduction. In circumstances where the member has already admitted liability in writing and such liability arises from dishonest conduct, a deduction can be made without awaiting the outcome of civil or criminal proceedings.
- Nedbank is entitled to the statutory relief provided under section 37D(1)(b)(ii)(aa) of the Act and it follows that the complaint cannot succeed as this would deprive Nedbank of the relief that it is lawfully entitled to.
- The complaint was dismissed.
- FST found the Adjudicator's dismissal of the complaint to be reasonable in law (PFA17/2021).

KAREN VAN SCHALKWYK v PFA AND OTHERS (11 MARCH 2022, FST – PFA36/2021)

Karen van Schalkwyk v PFA and Others (PFA36/2021)

- The deceased was married to Mrs M on 17 December 1966. They had 3 children all of whom were self-supporting adults at the time of his death.
- The deceased was residing in the UK with Mrs M. However, 4 months prior to his death he came to South Africa without Mrs M. There is a dispute about whether this move was intended to be permanent. It also appeared that the deceased and Mrs M had discussed getting divorced.
- Mrs M was still financially dependent on the deceased at the time of his death. The children claimed a portion of the deceased's death benefit.
- The fund decided to award 100% of the death benefit to Mrs M. One of the children lodged a complaint with the Adjudicator which was dismissed.
- The issue that the FST had to decide was whether the 4-month period of separation disentitled Mrs M to a portion of the death benefit.

Karen van Schalkwyk v PFA and Others (PFA36/2021)

- The FST considered that the deceased and Mrs M were married for 53 years until his death and as such Mrs M was a legal dependant.
- They shared living expenses and therefore Mrs M could be considered as a factual dependant.
- The board of the fund is empowered to exercise a discretion taking into account relevant factors. In this regard, the fund considered that Mrs M was:
 - (i) a legal dependant;
 - (ii) married for 53 years to the deceased; and
 - (iii) was financially dependent on the deceased at the time of his death;which were all relevant factors.

Karen van Schalkwyk v PFA and Others (PFA36/2021)

- The separation did not disqualify Mrs M from being a legal dependant.
- For the purposes of a spouse's pension, the fund was entitled in terms of its rules to condone the non-cohabitation of a pensioner and his spouse.
- Section 37C's purpose was not to reimburse persons for medical bills and funeral expenses. It serves a social purpose to protect people who were dependent on the deceased.
- There was no irrationality or unreasonableness on the part of the fund and no fault in the Adjudicator's determination.
- The application for reconsideration was dismissed.

SUMMARY OF OTHER CASES

CASE SUMMARIES

- The Adjudicator does not have jurisdiction to order an employer to register and participate in a fund even when there is a collective agreement or sectoral determination requiring the employer to participate. Such a dispute does not fall within the definition of “complaint” and must be dealt with by other competent bodies such as bargaining councils, industry regulators or labour courts – See ***ES Hlongwane v Pension Funds Adjudicator and Others*** (PFA 85/2021) and ***SB Bulose v Pension Funds Adjudicator and Others*** (PFA75/2021).
- The Financial Services Tribunal is not an enforcement agency empowered to enforce Adjudicator determinations – See ***GW Truebody v The Unclaimed Benefits Preservation Fund and Others*** (PFA80/2021).

CASE SUMMARIES

- An employer can be held liable to pay the risk portion of a death benefit if it fails to make timeous contributions resulting in a lapse of cover – See ***Quad Racks Cables CC v Pension Funds Adjudicator and Others*** (PFA38/2021) and ***Gauteng Coaches (Pty) Ltd t/a Gauteng Coaches Stabus Tours (Pty) Ltd v MMM Ramike and Others*** (PFA14/2021).
- The rules of a fund are binding and the Adjudicator is not entitled to overrule them or find them to be unfair – See ***MA Mfusi v Pension Funds Adjudicator and Others*** (PFA59/2021).

END – THANK YOU 😊