

**JUNE 2021: EDITION 5 of 2021**

*In case you missed it...*

4. [May 2021: Section 37C: When does dependency commence? And Is a death benefit decision subject to PAJA?](#)
3. [March 2021: Section 37D and withholding of benefits](#)
2. [February 2021: Smoothed Bonus Policies](#)
1. [January 2021: Conduct Of Financial Institutions Bill 2nd Draft](#)

## Financial Services Tribunal – some recent decisions

### 1. What is the Financial Services Tribunal and what are its powers?

1.1 The Financial Services Tribunal (“the Tribunal”) hears appeals against decisions by the Financial Sector Conduct Authority (“the FSCA”) and the Office of the Pension Funds Adjudicator (“the PFA”), which are perceived by the complainant to be unfair or unjust.

1.2 The Tribunal operates in terms of a fairly complex set of rules and procedures which can be read in full on the FSCA Website. The following issues are worth highlighting:

1.2.1 Only an aggrieved person may approach the Tribunal with a complaint. An “aggrieved person” has a very specific meaning – *such a person must be someone who has been “wrongfully deprived of something” or where a decision by the fund or other organisation has ‘affected such person’s right or title to something’.*

It is therefore likely that normally the retirement fund itself would not have the right to approach the Tribunal in the capacity of a complainant, particularly in cases related to deductions in terms of Section 37D of the Pension Funds Act, where the employer and/or the member are the parties who have suffered loss.

1.2.2 The Tribunal does not have the power to overturn a decision made by the PFA or by the FSCA. It may only refer the matter back to the organisation concerned for re-consideration.

### 2. Case 1 – Peter Bedford Nortier versus the Denel Retirement Fund and the Pension Funds Adjudicator

#### 2.1 Mr Nortier’s complaint was based on the following:

2.1.1 Mr Nortier was employed by a company in the Denel group and therefore was a member of the Denel Retirement Fund. He retired with effect from 1 March 2015.

2.1.2 Upon retirement he elected that a portion of his retirement benefit should be paid to him in cash and that the balance be applied to secure a pension, which was to be paid to him partly as a life annuity and partly as a living annuity by the Denel Retirement Fund.

2.1.3 Mr Nortier became dissatisfied with the manner in which the portion of his pension payable as a living annuity was invested and at first sought to instruct the Denel Retirement Fund with regard to how the living annuity portion should be invested. When this failed, he asked the fund to transfer the living annuity portion of his pension to another fund (Glacier) where he considered that he would have more control over the investment portfolio.

2.1.4 Mr Nortier also complained that he had not been properly advised by the Denel Retirement Fund when he retired in 2015 of the options available to him and the implications for his future retirement planning.

#### 2.2 Response from the Denel Retirement Fund and the PFA:

2.2.1 The board of the Denel Retirement Fund refused to agree to Mr Nortier’s request, citing GN 18, issued by the South African Revenue Service (“SARS”) which stipulated that funds may provide an annuity to a retiring member either by paying it to him directly, or by purchasing the annuity in the name of the fund or by purchasing the annuity in the name of the member. However, GN 18 prohibited a combination of these methods and therefore a member could not receive part of his retirement benefit as an annuity from the fund and use the balance to purchase an annuity in his own name from another service provider.

2.2.2 In May 2020, Mr Nortier complained to the PFA, who issued a determination in November 2020 in which she agreed with the decision of the board of the Denel Retirement Fund for the same reason i.e that the provisions of GN18 prohibited the board from acceding to Mr Nortier’s request.

2.2.3 It is important to note that retirement funds are both registered under the Pension Funds Act and approved by SARS for tax purposes. The SARS Commissioner approves a fund in any particular year of assessment "subject to such limitations and conditions as the Commissioner may prescribe". A GN Note issued by SARS therefore carries more weight than a similar note issued by the FSCA, and had the board acceded to Mr Nortier's request, the fund would have been placing its tax approval in jeopardy.

**2.3 The decision of the Tribunal:**

2.3.1 The Tribunal upheld the decision of the board of the Denel Retirement Fund and the PFA on the grounds that their interpretation of GN18 was correct when Mr Nortier lodged his complaint with the PFA. At the time, GN18 did not allow for the retirement capital held by the fund on the date of retirement to be split between two providers. The decision of the PFA in this instance was correct and there was no need to refer the matter back to her for reconsideration.

2.3.2 However, what the Tribunal referred to as a 'complication' arose on 26 February 2021. On that date, GN18 was repealed. Nevertheless, the Tribunal believed this did not affect the correctness of the decision by the PFA in November 2020 and did not believe the repeal of GN18 was a reason to set aside her determination.

2.3.3 The Tribunal advised the Denel Retirement Fund that going forwards they would now have to take into account that SARS' requirements in terms of GN18 were no longer applicable when structuring the fund's annuity strategy policy. Once this had been done, Mr Nortier could approach the board again with his request.

(d) *Payment of a living annuity from a retirement fund is likely to be problematic, since the investment of such an annuity has to comply with Regulation 28 of the Pension Funds Act. This is likely to be frustrating for many recipients of living annuities paid by retirement funds, such as Mr Nortier, since the pensioner's control over the investment of the annuity is limited by legislation – for example the annuity could not be totally invested in offshore assets. From the perspective of the trustees, the inclusion of a living annuity in their default investment strategy is particularly onerous, as not only do they have to adhere to the requirements of Regulation 39, but also to those contained in the draft FSCA Conduct Standard on the Criteria for Living Annuities as part of a Default Annuity Strategy.*

**3. Case 2 - The Anax Logistics Case**

3.1 In this case, the Tribunal received two applications for reconsideration of a determination made by the PFA. One application was made by the employer, Anax Logistics, and the second application was made by the NBC Umbrella Fund and Anax Logistics. It is clear from the language used by the presiding judge, Judge Harms, that he was irritated by receiving two applications on the same matter "I begin with an attempt to make sense of the two applications for reconsideration of a decision by the Pension Funds Adjudicator".

The determination of the PFA was in relation to the decision of the trustees of the NBC Umbrella Fund to withhold payment of a benefit due to the complainant, who had been accused of theft by his employer. Both applications failed and the Tribunal upheld the determination by the PFA that the NBC Umbrella Fund must pay the benefit to the member. Judge Harms gave two reasons for his decision.

3.2 The application was dismissed because the NBC Umbrella Fund had failed to comply with the *audi alterem partem* rule. It did not inform the complainant of the application to freeze his pension benefit pending the finalisation of legal proceedings against him and it did not provide him with an opportunity to refute the employer's case against him.

3.3 The second reason for dismissing the applications was that in the view of the Tribunal, the NBC Umbrella Fund had no legal interest in withholding payment of a benefit and no legal standing to apply for reconsideration. The Tribunal's view was that a retirement fund was not an aggrieved person as contemplated in the rules of the Tribunal. In this regard, refer to clause 1.2.1 of this publication. The retirement fund is required to act completely independently of the employer.

**4. Case 3 – Letrush Steel and Engineering Supplies versus the Pension Funds Adjudicator**

4.1 In this case, the complainant had complained to the administrator regarding the quantum of his termination benefit. It transpired that during the period of his employment between 1 August 2015 until 30 June 2018,

**COMMENTARY**

(a) *The importance of proper counselling at retirement. Had Mr Nortier received appropriate counselling regarding the effect of the choices he made with regard to the investment of his retirement capital he might have made a different decision. His retirement in 2015 was well before the introduction of Regulations to the Pension Funds Act which made retirement benefits counselling mandatory, but his case illustrates the need for that particular change to legislation.*

(b) *Since GN18 has been repealed, it may now be possible for the trustees to allow in their annuity strategy for annuities to be paid partly from the fund and partly from an insurer*

(c) *A subsequent change to legislation does not affect the correctness of a determination by the PFA; provided that the legislation is not explicitly retrospective and that the determination was correct in law at the time when the PFA made the determination.*

the employer had not paid contributions to the retirement fund in respect of him. The reason for this was that during that period the member did not fall under the scope of the bargaining council.

4.2 The PFA however, decided to broaden the enquiry by considering whether the employer was nevertheless obliged to pay its contributions in respect of the member and eventually made a determination in favour of the member on that basis.

4.3 The Tribunal ruled against the PFA, firstly on the grounds that the employer could not make contributions in respect of someone who was not eligible for membership of the fund. However, the Tribunal laid particular emphasis on the second reason for its ruling in favour of the employer. The Tribunal stated that the PFA was an administrator in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"). As such, the PFA was required to provide a person with adequate notice of the nature and purpose of the proposed administrative action, with a reasonable opportunity to make representations and with a clear statement of the administrative action. In short, the PFA is required to adhere to the *audi alterem partem* rule. The Tribunal referred the determination back to the PFA for reconsideration on the grounds that in this case, the office of the PFA had failed to comply with any of these requirements.

#### COMMENTARY

*Given the PFA's insistence on funds and employers observing the audi alterem partem rule in relation to cases where funds have withheld benefit payments without giving the member accused of wrongdoing an opportunity to state his or her case, it is ironic that the Tribunal felt it necessary to comment on the PFA's own failure to observe the rule in the Letrush Steel case.*

### 5. Case 4 – Rose Thukane versus the CSIR Pension Fund and the Pension Funds Adjudicator

5.1 The case concerned a decision by the board of trustees made in terms of Section 37C of the Pension Funds Act. Ms Rose Thukane was the wife of the deceased and challenged the decision of the CSIR Pension Fund to allocate 5% of the death benefit to the mother of the deceased, Ms B Thukane. She based her complaint on the grounds that the deceased had not supported his mother financially and had not nominated her as a beneficiary. Further, she stated that the mother was dishonest and had lied to the CSIR Pension Fund regarding her dependency. She also accused the Principal Officer of the CSIR Pension Fund of dishonesty and bias.

5.2 The CSIR Pension Fund submitted that it had conducted a thorough investigation and had interviewed various persons with a view to establishing beneficiaries who were dependent on the deceased. The interviews had been recorded in the minutes of board meetings.

One such interview had been with Ms Rose Thukane in which she herself had confirmed that the deceased had assisted his mother with buying groceries. Ms Thukane senior had also confirmed that she was financially dependent on the deceased as she had received money from him to purchase groceries on a monthly basis.

5.3 The PFA had made her determination in favour of the CSIR Pension Fund and against Ms Rose Thukane on the grounds that the board had sufficient evidence that the deceased had provided his mother with groceries and that this was aligned to the duty to support one's parents. The PFA also took into consideration the nomination form, which named Ms Rose Thukane as the only beneficiary, but this had been completed 18 years before the death of the deceased and had never been updated. Furthermore, the PFA took into account that a nomination form is merely an expression of the wishes of the deceased and is not binding. The task of the board is to investigate and identify dependants and then distribute the death benefit on an equitable basis, taking into account factors which are relevant and rational.

5.4 The Tribunal identified the following six principles the board is required to consider where making a death benefit decision:

- The age of the dependants;
- The relationship with the deceased;
- The extent of the dependency;
- The wishes of the deceased;
- The future earning capacity of the beneficiary;
- The amount available for distribution.

The Tribunal agreed with the PFA that the nomination form is only one of the principles the trustees need to consider. The Tribunal supported the determination made by the PFA in favour of the CSIR Pension Fund on the grounds that the board of trustees in making its decision had done so on the basis of factors relevant to the six principles stated above and had not taken irrelevant, improper and irrational factors into consideration.

#### COMMENTARY

*Two main points of interest arise from the case:*

- (a) The principle that a decision with regard to the distribution of death benefits made by the trustees must be made on rational grounds. This is aligned with the requirement in terms of the Promotion of Administrative Justice Act ("PAJA") that an administrative action must be reasonable (refer the May edition of Seshego Insights for discussion on whether a death benefit decision in terms of Section 37C is subject to PAJA).*
- (b) The above decision by the Tribunal strengthens the case for the trustees making death benefit decisions on the basis of principles established in existing case law, which would leave the board less vulnerable to litigation and minimise unnecessary discussion and debate at trustee meetings.*

*Should you have any questions regarding the above, please contact your consultant to assist you. The information in this document belongs to Seshego and may not be copied, distributed or modified without the express written permission of Seshego.*