

NOVEMBER 2022: EDITION 9 of 2022

In case you missed it...

8. [October 2022: Section 22 of POPIA Notification of Security Compromises](#)
7. [September 2022: Update on industry issues – FSCA requests to attend trustee Board meetings](#)
6. [July 2022: Revised Regulation 28 of the Pension Funds Act - Finalised](#)
5. [May 2022: Case Law – Decisions affecting Retirement Funds](#)
4. [April 2022: FSCA Conduct Standard](#)
3. [March 2022: FSCA Draft Strategy for Transformation](#)
2. [February 2022: Budget summary 2022/23 Tax Year](#)
1. [January 2022: Recent Papers issued by National Treasury](#)

FEEDBACK FROM THE OFFICE OF THE PENSION FUNDS ADJUDICATOR

At a webinar recently hosted by the Institute for Retirement Funds Africa, Advocate Tshepo Dooka from the office of the Adjudicator dealt with recent determinations by the OPFA dealing with contraventions of Section 13A of the Pension Funds Act (“the PF Act”) and the manner of making payment to beneficiaries.

1. Contraventions of Section 13A

Advocate Dooka said that the Financial Sector Conduct Authority (“FSCA”) had acknowledged that it was extremely difficult for them to impose penalties on employers who contravened Section 13A of the PF Act and recognised that even the process contained in Conduct Standard 1 of 2022 which required the Principal Officer to report contraventions to the South African Police Service after 90 days might not be effective.

The OPFA offers alternative relief to members whose benefits have been negatively affected by an employer failing to pay contributions. The OPFA is able to make an order “sounding in money” which is enforceable against the delinquent employer. Two cases discussed by Advocate Dooka were the following:

Case 1 – employer’s failure to pay contributions - Van Wyk versus Metal Industries Provident Fund

The facts of the case were as follows:

- The member was still in service when he lodged his complaint with the OPFA in 2021. Although he was a registered member of the fund, the employer had failed to pay contributions in respect of him since September 2018, despite the deductions reflecting on his payslip;
- The fund sent letters to the employer notifying the employer of the contravention;
- The fund did not notify the FSCA or the National Prosecuting Authority of the contravention.

The OPFA said the fund needed to take further action by notifying all the defaulting employer’s employees of the contravention and also by taking legal action against the employer. This is part of the trustees’ statutory duty in terms of Section 7C (1) (f) and Section 7D (d) of the Pension Funds Act.

The Adjudicator ordered the employer to pay the total outstanding contributions of R192,305.13 for the period July 2018 to August 2018 and October 2018 to March 2022.

Case 2 – effect on risk benefits of the employer’s failure to pay contributions.

If a fund provides an insured risk death benefit and a capital disability benefit, the premiums to maintain these benefits are included in the employer’s contributions. Therefore if the employer fails to pay contributions, cover for these benefits will lapse and members employed by a defaulting employer, as well as their beneficiaries will be prejudiced.

This happened in the case of **SA Xaba and another versus Metal Industries Provident Fund**. The facts of the case were as follows:



- The member was not paid a disability benefit due to non-payment of contributions by the employer, who was in contravention of both the PF Act and the fund rules;
- The member then died and the insurer refused to pay the risk portion of the death benefit because of the non-payment of contributions;
- The value of the fund credit was also diminished because of the non-payment of contributions;
- The fund did not report the non-compliance;
- The OPFA said the employer was legally responsible for non-payment of the insured portion of the death benefit and for the diminished value of the fund credit and ordered the employer to pay the full value of the insured portion of the death benefit together with the outstanding contributions plus interest.

Advocate Dooka also made several important points in relation to Section 13A contraventions:

- It often happens that the late payment interest payable by the employer is higher than the original debt. In such cases, the OPFA applies the *in duplum* rule which means that the amount of interest payable on the outstanding amount of the contributions cannot be more than the debt to the fund and its members owed by the defaulting employer.
- It is a critical statutory duty of the trustees that they make sure that the fund notifies members in the employment of the defaulting employer, as well as the relevant authorities. The notification requirements were discussed in Seshego [Insights Edition 4, April 2022](#).
- If the trustees, despite all efforts and having complied with all the requirements of Conduct Standard 1 of 2022 are unable to compel a defaulting employer to pay contributions, the fund itself can complain to the OPFA to take action against the employer.

2. Mode of payment to beneficiaries when the Trustees have made a decision regarding distribution of a death benefit in terms of Section 37C of the PF Act.

Advocate Dooka reminded attendees at the Webinar that a board of trustees should not apply a blanket approach when deciding whether to pay a death benefit due to minor children to the guardian or to a beneficiary fund.

In Ms Moremi versus Metal Industries Provident Fund the board of trustees decided to pay the benefits for the minor children into a beneficiary fund rather than to the guardian of the minor children on the grounds that the guardian was not living with the deceased and the children at the time of death and that she was unemployed.

The OPFA held that these were not cogent reasons for not making direct payment to the guardian. Advocate Dooka reiterated the principles established in the case of ***Ramanyelo v Mine Workers Provident Fund***, which the board should take into consideration when deciding whether to pay a death benefit in respect of minor children directly to the guardian or into a beneficiary fund:

- The amount of the benefit;
- The ability of the guardian to administer the monies;
- The qualification (or lack thereof) of the guardian to administer the monies; and
- The benefit should be utilised in such a manner that it can provide for the minor until she attains majority.

Should you have any questions regarding the above, please contact your consultant to assist you.

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