



be informed

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Complaints: the Pension Funds Act and the Promotion of Administrative Justice Act

The Pension Funds Act

The Pension Funds Act provides for the hearing and settling of complaints.

Complaints and the Pension Funds Adjudicator

Section 30B of the Pension Funds Act provides for the setting up of the Office of the Pension Funds Adjudicator. The Pension Funds Adjudicator can assist a person to settle a complaint that they might have against a pension fund (including a provident fund, retirement annuity and preservation fund). This office can investigate complaints and make decisions on complaints that have been lodged under the Pension Funds Act. The Pension Funds Adjudicator adjudicates complaints about the administration of a pension fund, the investment of its assets, or the application of its rules.

The complainant must claim:

- that the fund has made a decision outside its powers;
- that the complainant has been prejudiced as a result of maladministration by the fund;
- that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- that an employer who participates in the fund has not fulfilled its duties in terms of the rules of the fund.

Who can complain?

A complainant must be a member or former member of a pension fund, a beneficiary or former beneficiary of a fund, or an employer who participates in a fund. In addition, the board of management of a fund, or a member of the board, can also lodge a complaint.

How to lodge a complaint

It is possible to resolve a dispute amicably without involving the Pension Funds Adjudicator. In fact, the Pension Funds Act gives a complainant the opportunity to first lodge a written complaint to the fund for consideration by the board of the fund.

In terms of section 30A of the Pension Funds Act a complainant should first attempt the following:

1. Lodge a written complaint with the fund.
2. Give the fund 30 days to respond in writing.
3. If the fund or the employer who participates in the fund does not respond or the complainant is not satisfied with the response, the complainant may lodge a complaint, in writing, with the Pension Funds Adjudicator.

The above procedure provided for in section 30A of the Pension Funds Act is a comprehensive internal remedy, as the fund then has an opportunity to consider the matter and reply to it. If the complainant is then still not satisfied with the answer they may refer the matter to the Pension Funds Adjudicator.

Powers of the Pension Funds Adjudicator

The Pension Funds Adjudicator is appointed in terms of section 30C of the Pension Funds Act. Section 30D in turn then allows the Adjudicator to dispose of complaints in a procedurally fair, economical and expeditious manner. Section 30E empowers the Adjudicator to make an order that a court of law may make.

Application of the Promotion of Administrative Justice Act (PAJA)

In *Babalwa Ruth Titi v FundsAtWork Umbrella Provident Fund*, Ms Titi's (the applicant) brother was a member of the FundsAtWork Umbrella Provident Fund in which his employer, Fort Gale Motors, participated. Before his death he had completed a beneficiary nomination form and listed his two children as well as his sister, Babalwa Ruth Titi, as his beneficiaries. On the member's death the Fund exercised its discretion in terms of section 37C of the Pension Funds Act and decided to divide the benefit between the deceased's two children and in that way excluded Ms Titi from the distribution.

Ms Titi argued that the decision of the board of trustees was subject to judicial scrutiny and should be reviewed in terms of the requirements of PAJA as the decision was unilateral and without giving her notice or offering her a hearing.

Ms Titi's legal representative argued that the decision of the trustees fell within "administrative action". PAJA defines administrative action inter alia as follows –

Any decision taken or failure to take a decision by –

- (b) a natural person or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect.*

Ms Titi's legal representative claimed that the board of trustees got their powers from the provision of section 37C of the Pension Funds Act and because the board of trustees is an entity established in terms of the Act, it is performing a public function when administering the funds of its members. They argued that, in terms of PAJA, Ms Titi is entitled to fair administrative action, and more particularly in terms of section 3(2)(b) entitled to –

- (i) adequate notice of the nature and purpose of the proposed administrative action; and*
- (ii) a reasonable opportunity to make representations.*

The court felt that if PAJA is to be relied upon, then the whole Act must apply. This includes section 7(2)(a) and (b) which provides –

- (a) subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted;*

(b) subject to paragraph (c) a court or tribunal must, if it is satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

The High Court found that the Pension Funds Act makes sufficient provision for internal remedies for someone who feels wronged. The court found that Ms Titi did not give the court any special reasons that may have prevented her from finding an internal remedy before applying for legal review in terms of PAJA.

The court then ruled that Ms Titi should first make use of all internal remedies provided for by the Pension Funds Act before applying for legal review in terms of PAJA. This means that she should follow the procedure provided for in terms of section 30A of the Pension Funds Act.

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