



THE OMBUD COUNCIL, A DEATH BENEFITS CASE AND A POPIA UPDATE

THE OMBUD COUNCIL

The Minister of Finance, Mr Tito Mboweni, has appointed the first Ombud Council Board and a Chief Ombud for the Council, giving effect to the new financial Ombud system under the Financial Sector Regulation Act (FSRA).

The Minister has appointed Ms Eileen Meyer as a Chief Ombud for the Ombud Council, as a transitional measure, until a full-time Chief Ombud is appointed.

OBJECTIVE

The objective of the Ombud Council is to assist in ensuring that financial customers have access to effective, independent, fair and affordable alternative dispute resolution processes for complaints when interacting with financial institutions.

The Council will recognise industry schemes, set governance procedures, enhance accountability requirements, and align the standards of practice for each Ombud scheme through rule-making and enforcement powers. It will also ensure there is a uniform framework of external dispute resolution mechanisms that can be applied with consistency across the financial services sector.

The Council is essentially the 'Regulator' of all ombud and will standardise best practice as well as promote and coordinate cooperation amongst ombud. One of the goals is to have a single point of entry for complaints and then allocate these complaints to the relevant Ombud.

OVERSIGHT POWERS

The Ombud Council will have oversight powers over both the statutory and industry Ombud, that is:

- Office of the Pension Funds Adjudicator
- Office of the Ombud for Financial Services Providers (FAIS Ombud)
- Office of the Credit Ombud
- Ombudsman for Long - Term Insurance
- Ombudsman for Short - Term Insurance
- Ombudsman for Banking Services
- Johannesburg Stock Exchange Ombud

STARTED WORK

The Ombud Council has commenced its work to fulfil its statutory mandate, with the Ombud Council Board holding its first meeting on 26 May 2021. The Ombud Council is now giving effect to its legal establishment and developing an operational plan to establish its office and fulfil its functions. Communication with existing financial sector ombud schemes will take place in due course.

All financial sector industry ombud schemes already recognised under the Financial Services Ombud Schemes Act before that Act was repealed will be recognised for a period of 12 months, up to 1 November 2021, after which a renewal process will be instituted. The Council has stated that it will try to start the recognition process of new financial sector industry schemes on 1 November 2021.

BOARD OF DIRECTORS

The Council's Board of Directors include:

Deanne Wood – Chairperson

Adv Dikeledi Chabedi – Vice Chairperson

Emmanuel Lekgau

Silindile Kubheka

Adam Horowitz

Charmaine Soobramoney

Katherine Gibson will be replaced by Unathi Kamlana, who is the newly appointed FSCA Commissioner.

A DEATH BENEFITS CASE

In the recent matter of *Swart N.O and Others v Lukhaimane N.O and Others* (54157/2019) [2021] ZAGPPHC 124 (12 February 2021), the High Court considered aspects of section 37C of the Pension Funds Act.

THE FACTS OF THE CASE

- The member died leaving a wife and two major children in their late twenties. The children (legal dependants) alleged financial dependency. The children were beneficiaries of a family trust.
- After the member's death, the wife remarried. She was employed and 39 years of age. She claimed maintenance from the member's estate.
- The fund allocated 100% of the benefit to the wife.
- The Pension Funds Adjudicator ordered the fund to reconsider its decision. The fund did so and made the same decision again, that is, to allocate 100% of the benefit to the wife. The fund was of the view that the children would be taken care of by the trust and that the children were not factual dependants.
- The children alleged that the fund had just accepted, without evidence, that the trust would be able to take care of them.
- The fund did not take into account the member's beneficiary nomination form in its first decision. The member had nominated his wife for 50% and the trust for 50% of the death benefit.
- The matter was taken to the High Court.

CERTAIN SUBMISSIONS TO THE HIGH COURT AND REASONING OF THE HIGH COURT

Solvency of the estate

The fund submitted that it was not required to take into account the solvency of the estate when making a decision.

The Judge disagreed and stated that:

“this submission is strange considering the Fund's own stance that section 37 C is intended to “protect dependency”, and that it fulfils the social function of ensuring that dependants are protected, even against the

wishes of the deceased, if necessary. If the estate (or the trust) is not solvent, it cannot maintain the sixth and seventh applicants [children], a factor that must surely be considered.”

Solvency of the trust

The fund also submitted that it was not required to take into account the solvency of the trust when making a decision.

Again the Judge disagreed with this assertion, and stated that:

It [the fund] accepted that the trust was possessed of assets and that it could therefore provide for sixth and seventh applicants' [children] needs. This argument does not take account of the fact that the trust had a substantial cash shortfall. Simply because the trust is possessed of assets does not make it solvent.”

Circumstances not investigated thoroughly enough

The court was of the view that the fund had not investigated the wife's and children's circumstances sufficiently to conclude that the wife was in need of maintenance and the children were not:

“I find it striking that there is such a dearth of information regarding the financial affairs of the fourth respondent [wife] on the one hand, and the sixth and seventh respondents [children] on the other. One would have expected the Fund to have obtained financial statements, bank statements, proof of income, proof of expenses, and suchlike from all the parties. ... Instead, all I have is an unsubstantiated statement that the Fund believes that fourth respondent [wife] is in need of maintenance.”

In addition, the Judge stated that the fund had unreasonably and irrationally ignored the fact that the wife had remarried and not considered the impact of the wife's remarriage on her financial position and maintenance requirements.

The court went on to say that the fact that the wife had filed a maintenance claim of R10 million against the estate did not mean that her claim against the estate was well founded or that she was dependent on the deceased (as submitted by the fund).

The nomination of beneficiary form

When considering how the fund had dealt with the nomination form, the Judge made the following points:

- The fund is not bound by the wishes of the deceased;
- The “wish” expressed in a nomination form or will should not to be lightly ignored;
- A nomination form is one of a number of factors to be taken into account, but it is a “substantial factor”;

- The fund needs “compelling reasons” to ignore the nomination. For example, if it would result in an injustice or be inequitable should the member's wishes be given effect to, then the fund would be “justified in deviating from the member's wishes”; and
- There was no evidence that the fund placed any weight at all on the nomination form.

The nomination of the trust in the nomination form

The court seems to accept the nomination of the trust. The Judge referred to section 37C(2)(a) and stated that:

“It is consequently not the trust that is the dependant, but the person who receives a benefit by way of payment to the trust. Payment to the trust is regarded as a payment to the dependant”. (Own emphasis.)

THE COURT'S FINDINGS

The fund argued that it merely had to show that it took the decision “honestly”. The Judge disagreed and said that this was not the test. The fund was required to act reasonably and rationally. The court found the fund's decision to be irrational and not rationally connected to the section 37C purpose to look after dependants. The court set aside the fund's decision and ordered the fund to remake its decision within 90 days. It also ordered the fund to fully investigate specific questions when reconsidering the matter and to pay the costs of the court application.

PROTECTION OF PERSONAL INFORMATION ACT (“POPIA”) UPDATE

- Most of the provisions of POPIA are now effective and enforceable (as of 1 July 2021).
- Funds exemption from having to draft a Promotion of Access to Information Act Manual has been extended again until the end of 2021.
- There is currently no deadline to register an Information Officer and the Information Regulator's registration portal is being upgraded. Funds, and their Information Officers, will not be penalised if they have not yet registered their Information Officers. Once the portal is up-and-running again, it will be possible for a person to register as the Information Officer for more than one entity.
- The Information Regulator has recently issued guidance on compulsory prior authorisation applications, applications for processing of special personal information or children's personal information and application for exemptions from conditions under sections 36 to 38 of POPIA. This guidance can be found on the Information Regulator's website, <https://www.justice.gov.za/inforeg>
- The deadline for ensuring that a responsible party has the compulsory prior authorisation it requires from the Information Regulator has been extended until 1 February 2022.