

# OPERATIONAL REPORT continued

## ICT Governance

There are governance structures in place that oversee the OPFA ICT function. The Risk and Audit Committees of the FSCA assist the OPFA by ensuring that ICT risks are reviewed and managed. The ICT Steering Committee verifies ICT strategic compliance in achieving the strategic ICT objectives. The following policies and procedure documents were reviewed and approved: ICT Security Policy and Acceptable Usage Policy, Incident Management, Problem Management, Change Management, Patch Management, The Firewall procedure and Disaster Recovery Plan.

## Training and Awareness

Two case management system application training sessions for the new employees and refresher training for the experienced users took place during the year. ICT Security Policy, Acceptable Usage Policy and user security awareness training sessions also took place.

## Human resources

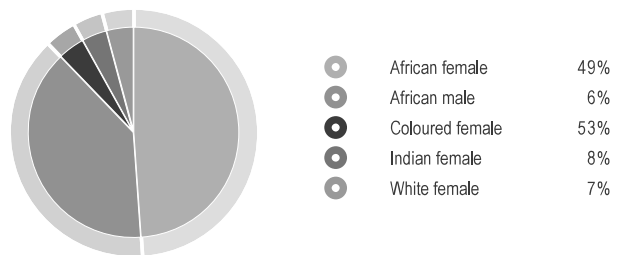
The OPFA is wholly dependent on people to achieve its strategic objectives. The fact that we are able to achieve the results that we have done thus far is mostly testament to the hard work of employees. No doubt, the OPFA would have been able to achieve a lot more if we had a reliable, and proactive human resources

management to iron out any potential issues of conflict, thus making staff feel safe, confident and more loyal.

One of our greatest challenges has been the inability to store and arrange our human resources data in such a way that line managers are provided with critical information to take timeous management decisions. The OPFA was sometimes unable to forecast future HR events for risk mitigation and effective planning e.g. identifying problem areas, managing information, monitoring the performance of the HR function, effective planning, predictive forecasting and most importantly enhanced communication.

As at 31 March 2019, the OPFA employee headcount was 53. The employment equity statistics were as follows:

### Population Group



**From left to right (back):** Nontokozi Manana, Sandile Mthethwa, Lesley Ratsebe, Darshana Maharaj  
**Seated:** Muvhango Lukhaimane

Population Group	Female		Male	
African	26	49%	21	39%
Coloured	2	4%	0	0%
Indian	2	4%	0	0%
White	2	4%	0	0%
Foreign	0	0%	0	0%
<b>Total</b>	<b>32</b>	<b>61%</b>	<b>21</b>	<b>39%</b>

Representation at management levels		
Levels	Executive management	Senior and middle management
	Female	Male
African	2	3
Coloured	0	0
Indian	1	0
White	0	0
Foreign	0	0
<b>Total</b>	<b>3</b>	<b>3</b>

Whilst the OPFA aimed to reduce its turnover rate, this was not possible. The turnover rate remained the same as the previous year, with terminations resulting from poor work performance and resignations – some of which are understandable given the flat structure of the organisation that offers only so much internal movement.

A lot of work also took place to achieve internal pay parity. Internal promotions increased, which is testament to the rigorous performance management system and the ability of line managers to continuously guide for improved performance. It often fell to line managers to help encourage and optimize employee performance on a continuous basis.

Employee productivity significantly improved – both in quantity and quality of product delivered. Internal mobility remains a priority that the OPFA will continue with in the new year given the amount of time and financial resources that it takes to train and develop our human resources.



**From left to right:** Zodwa Bill, Tintswalo Shibambu, Muvhango Lukhaimane, Lucas Flink, Carmen Kotshoba

## SUMMARY OF IMPORTANT DETERMINATIONS

*“One of the advantages of a specialist tribunal such as the Office of the Pension Funds Adjudicator (OPFA) is that parties can rest assured that there is a repository of specialist pensions law knowledge that understands the nuances of the retirement funds industry. It is this knowledge that enables the tribunal to resolve disputes in an expeditious and economical manner, whilst at the same time adhering to the rule of law. Below follows a selection of determinations by Pension Funds Adjudicator, Muvhango Lukhaimane, which settled important areas of the law around pension funds administration during the year under review.”*

### Death benefit

#### Pension fund ordered to relook death benefit payment

A pension fund should have exercised better discretion when allocating a more than R1-million death benefit to the deceased's 75-year old mother who already received a State grant, to the total exclusion of his former life partner, the Pension Funds Adjudicator has ruled.

Muvhango Lukhaimane ordered Absa Pension Fund (first respondent) to re-exercise its discretion in terms of section 37C of the Pension Funds Act and consider the request of the complainant, JT Damoense, to be allocated a share of the death benefit.

The complainant was the former life partner of LB Mantjiu who passed away on 4 March 2017. The deceased was a member of the first respondent, administered by Absa Consultants and Actuaries (Pty) Ltd (second respondent).

Following the deceased's demise, a death benefit in the amount of R1 065 480.00 became available for distribution to his beneficiaries and dependants. The board resolved to allocate the entire benefit to the deceased's mother, RD Mantjiu (“MS Mantjiu”), to the exclusion of the complainant.

The complainant submitted that she is a nominee in the deceased's beneficiary nomination form and as such, she should have been considered by the fund.

The deceased passed away in a car accident together with their minor son.

The complainant said that despite the fund's submission that it considered all the relevant factors in deciding to exclude her, it failed to consider the fact that Ms Mantjiu was 75 years of age and received an old age grant from the State which satisfied all her maintenance needs.

She submitted that the board failed to consider Ms Mantjiu's needs, her extent of dependency on the deceased, whether or not only the deceased provided her with financial support and if she received income from other sources.

She added that the board failed to consider other sources from whence Ms Mantjiu could have received some funds and what impact those funds had on her needs. She asked what socio-economic difficulty would have befallen Ms Mantjiu if she was allocated 50% of the death benefit as set out in the beneficiary nomination form.

She further asserted that the board failed to consider her personal circumstances and the fact that the complainant was a nominee entitled to 50% of the death benefit.



The second respondent submitted that during its investigation, the board established that Ms Mantjiu was a pensioner and financially dependent on the deceased for maintenance prior to his demise.

She was also nominated to receive 50% of the death benefit in the deceased's beneficiary nomination form. Due to the fact that the deceased had to maintain his mother, she was accordingly identified as his factual dependant.

It stated that the deceased was involved in a life partnership with the complainant when he signed the beneficiary nomination form on 5 March 2010. The relationship between the deceased and the complainant was non-existent at the time of his demise.

During their period of break-up, the deceased maintained his son with the complainant. Thus, the extent of financial dependency of the complainant on the deceased was the contributions towards his son's general maintenance and not directly towards the complainant's financial needs.

In this regard, it referred to an affidavit signed by the complainant wherein she stated that the deceased provided her with money in respect of their son's maintenance.

The board's investigation revealed that the complainant was gainfully employed and earned R21 000 per month, was 37 years of age and fully able to generate income through her employment.

It submitted that even though the complainant was a nominee, the board identified her as not being financially dependent on the deceased. The level of financial dependency to maintain their son did not exist anymore as their son passed away with the deceased.

In her determination, Ms Lukhaimane said in principle a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of factual dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person.

She said having conducted its investigation, the board resolved to allocate the entire death benefit to Ms Mantjiu, to the exclusion of the complainant.

However, she said where there are dependants and nominees, the Act provided for the board to make an equitable distribution.

"In the present matter, the amount of the death benefit is R1 065 480.

"Ms Mantjiu was proven to have been financially dependent on the deceased, received an old age pension from the State and was allocated the entire amount of the death benefit.

"Ms Mantjiu also received a payment in respect of a group life assurance benefit. On the other hand, the complainant who is 37 years of age was excluded and is earning a monthly salary of R21 000."

Ms Lukhaimane said one of the critical sore points was that the deceased completed a beneficiary nomination form assigning 50% of the death benefit to the complainant and another half to his mother. However, the board failed to follow the deceased's wishes.

"The board should have considered the complainant on the basis that she was a nominee. The complainant did not have to prove that she was financially dependent on the deceased for her to be considered.

"The mere status of being a nominee compelled the fund to consider her situation together with the totality of other relevant factors."

Ms Lukhaimane set aside the decision of the board of the first respondent to allocate the entire amount of the death benefit to Ms Mantjiu, to the exclusion of the complainant, without considering relevant factors.

The board of the first respondent was ordered to re-exercise its discretion in terms of section 37C of the Act, considering the issues raised in this determination," said Ms Lukhaimane.

## SUMMARY OF IMPORTANT DETERMINATIONS continued

### **PFA rules that death benefits were paid fairly**

The Pension Funds Adjudicator has ruled that a death benefit was distributed fairly although one of the beneficiaries was not financially dependent on the deceased.

Muvhango Lukhaimane said a nominee was not entitled to be considered as a beneficiary because he or she was financially dependent on the deceased.

“The entitlement stems from the fact that the person concerned was nominated by the deceased and nothing more is required,” said Ms Lukhaimane in her ruling.

I Dekker and her two brothers, L Dekker and R Dekker, complained about the distribution of a death benefit by the Lifestyle Retirement Annuity Fund (first respondent) following the death of their father, A Dekker.

They were unhappy that M de Kock who was the former wife of the deceased had been allocated a portion of the death benefit.

The death benefit from three policies amounted to R1 293 367.87. The first respondent allocated and distributed the death benefit to the deceased’s beneficiaries as follows:

Policy number 0011733218 and 0011733183: I Dekker, L Dekker, R Dekker and M de Kock 25% each; and Policy number 0025959744: I Dekker, L Dekker and R Dekker 33.33% each.

The complainants submitted that M de Kock was not financially dependent on the deceased. They requested that the first respondent be ordered to allocate the death benefit equally to them.

The first respondent submitted that the deceased was survived by three dependants (I Dekker, L Dekker and R Dekker) and one nominated beneficiary (M de Kock).

M de Kock was the ex-wife of the deceased. She was divorced from the deceased in 2007 and not financially dependent on the deceased.

### **Case Management Team**



**From left to right (back):** Nomlindo Mpongo, Tshepo Dooka-Rampedi, Mandy Dikotla, Thomas Maponya, Yolande van Tonder, Khutso Mafokwane, Tsumbedzo Mboweni, Lerato Mokoena, Khuliso Gavhi  
**From left to right (front):** Mashudu Matovheke, Jerry Buthane, Fortunate Ratlhagane

M de Kock was the sole beneficiary on policies 0011733183 and 0011733218 and the board allocated her an equal share along with the complainants. It stated that the deceased's estate was named as a beneficiary under policy 0025959744. It submitted that there was no proof of financial dependency from any of the dependants mentioned above. It stated that the board in its discretion allocated the benefit under policy 0025959744 equally to the complainants.

In her determination, Ms Lukhaimane said the law recognised three categories of dependants based on the deceased member's liability to maintain such a person, namely, legal dependants, non-legal dependants and future dependants.

In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of non-legal dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person.

She said investigations by the first respondent revealed that the deceased nominated M de Kock as a nominee to his death benefit under policies 0011733183 and 0011733218.

"Where the deceased member is survived by a dependant and the deceased has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable.

"This Tribunal would also like to highlight that a nominee is not entitled to be considered as a beneficiary because she was financially dependent on the deceased.

"The entitlement stems from the fact that the person concerned was nominated by the deceased and nothing more is required. A nominee does not have to prove that she was financially dependent on the deceased at the time of death," said Ms Lukhaimane.

She added that the board relied on the latest nomination form signed by the deceased as guidance in distributing the death benefit.

"The deceased failed to strengthen his wish by changing the nomination form. Had the deceased wished M de Kock not to benefit from his death benefit, he could have signed another nomination form excluding her from benefiting which seems not to be case in this complaint.

"It is also important to note that any decision which favours dependants over nominees in the distribution of the death benefit would be unreasonable and unjustifiable.

"This Tribunal is satisfied that the death benefit was allocated properly to the dependants of the deceased and there is no reason to set aside the board's decision," Ms Lukhaimane ruled and dismissed the complaint.

### **Pension fund members must complete their own beneficiary forms**

Members of pension funds who have legal dependants must complete a beneficiary nomination form themselves, said the Pension Funds Adjudicator.

Muvhango Lukhaimane said members cannot entrust the welfare of their legal dependants to the whims of their siblings and other family members who are often "less than honourable where money is concerned".

Ms Lukhaimane's comments came in the wake of a determination involving a complaint by LR Roems against Metal Industries Provident Fund (first respondent) and Metal Industries Benefit Funds Administrators (second respondent) concerning the delay in the payment of a death benefit following the death of her brother C Roems.

She found that the complainant had been dishonourable and had deliberately failed to disclose important information.

The deceased was survived by the complainant and a son, Christopher Pietersen.

Following the deceased's death, a total death benefit of R892 829.16 became payable to the deceased's beneficiaries. The board of the first respondent resolved to allocate 40% (R357 131.66) of the death benefit to the complainant based on her nomination as a nominee and retained the remaining 60% (R536 697.49) for Christopher.

## SUMMARY OF IMPORTANT DETERMINATIONS continued

The complainant stated that she was nominated by the deceased as his sole beneficiary of his estate and provident fund benefits.

The second respondent said the first respondent received death benefit application documentation from the complainant on 8 December 2016. The complainant provided two beneficiary nomination forms with her application.

The first nomination form was completed by the deceased on 31 October 2007 in terms of which he nominated the complainant and his other sister, Regina Roems, who predeceased the deceased on 21 November 2013. The second nomination form was completed on 1 May 2016 with the complainant as the sole nominee.

On 12 January 2017, the first respondent contacted the complainant to obtain information regarding the deceased's dependants and the child mentioned on her affidavit. However, the complainant stated that she had no idea of the whereabouts of the child, did not know his name and had never met him.

The second respondent indicated that the complainant confirmed that she was not dependent on the deceased and was employed. On 17 January 2017, the first respondent requested the employer to provide any information that may assist in locating the child. The employer stated that it had no further information regarding the deceased.

The second respondent submitted that further investigations revealed that a warrant of execution was issued on 10 March 1998 for arrear maintenance against the deceased. A garnishee order was also issued against him on 27 March 1998 for payment of maintenance in a matter between one Ms Sarah Pietersen and the deceased.

The deceased's nephew Gerald Roems subsequently confirmed that the deceased had a son named Christopher and the complainant was aware of him. He confirmed that Christopher would visit the deceased and after the deceased's death, he enquired about the deceased's benefits and belongings, which the complainant was aware of.

The nephew indicated that the deceased occasionally gave Christopher money to assist him as he was unemployed and resided with a family that was known to the deceased's family.

A visit to the home where Christopher resided revealed that he lived in an environment that was not stable. Christopher's mother, Sarah, passed away approximately 10 years ago, which was subsequently confirmed to be on 1 April 2004. On 4 April 2018, Christopher was assisted with an application for an identity document as he had only a birth certificate.

The second respondent indicated that it would assist Christopher with his application process and will pay his share of the death benefit upon receipt of his documentation.

In her determination, Ms Lukhaimane said it was the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.

The facts indicated that the complainant was dissatisfied with the allocation of a portion of the death benefit to Christopher as she stated that she was the sole beneficiary of the deceased in terms of his last nomination form.

However, the complainant should note that the board was not bound by a nomination form and it only served as a guide in the distribution of a death benefit.

Thus, the board was not bound to allocate the entire amount of the death benefit to the complainant based on her nomination as the sole beneficiary. The board had to take into account the existence of other beneficiaries and the extent of their dependency on the deceased in order to make an equitable allocation of the death benefit.

The deceased was survived by a son, Christopher, who qualified to be a legal dependant of the deceased.

"It follows that the board exercised its discretion equitably in allocating 60% of the death benefit to him.

"The complainant has been extremely dishonest in terms of providing information to the first respondent regarding the existence of Christopher as the deceased's son.

"There is an uncontested submission that the complainant denied ever knowing Christopher, which is contrary to the information gathered during the investigation by the board.

“It is dishonourable for the complainant to hide information from the board for her own benefit.

“Members must know that where they have legal dependants, they must complete a beneficiary nomination form as they cannot entrust the welfare of their legal dependants to the whims of their siblings and other family members who are often less than honourable where money is concerned.”

Ms Lukhaimane ordered the first respondent to pay Christopher Pietersen the remaining 60% of the death benefit that was allocated to him.

## Withdrawal benefit

### Pension fund rapped for ignoring treating customers fairly rules

Members of pension funds must be kept appropriately informed before, during and after entering into contracts, the Pension Funds Adjudicator has warned.

Muvhango Lukhaimane said the National Treasury had introduced principles of Treating Customers Fairly (“TCF”) to guide the relationship between the financial industry and consumers.

“TCF requires entities to measure themselves as to whether or not in doing their business they are dealing fairly with the consumer by, inter alia, providing them with sufficient and clear information that will enable them to make informed choices when acquiring financial products,” she said in a recent determination.

Ms Lukhaimane said the Municipal Employees Pension Fund (first respondent) had not acted in keeping with the spirit of the TCF in a matter that came before her for adjudication.

The complainant, CJ Modiba, was unhappy with the quantum of the withdrawal benefit paid to him following his exit from service at the Greater Sekhukhune District Municipality (second respondent).

The complainant was employed with the second respondent from 1 October 2007 to 29 February 2016. Following his exit from service, the complainant was paid a net withdrawal benefit of R276 150.64.

The complainant stated that he initially contributed to the Government Employees Pension Fund (“GEPF”) for 26 years and 9 months before his fund value of

R800 000 was transferred to the first respondent. He averred that he contributed to the first respondent for nine years before he resigned from the second respondent. He indicated that his gross resignation benefit amounted to R478 000 and a net amount of R276 000 was paid to him.

The first respondent said the complainant had a transfer value from GEPF in the amount of R860 527.64 which was received by the fund on 31 August 2013. The transfer value bought 17 years and 3 months of service for the complainant and at the time of his resignation, the complainant had 20 years and 3 months total service in the fund.

The first respondent further submitted that the complainant had a total gross resignation benefit of R468 259.57. An amount of R106 319.63 was deducted in respect of a loan and income tax in the amount of R79 786.72 was also deducted and paid to the South African Revenue Services. A further amount of R5 902.58 was deducted in respect of arrear tax and a net benefit of R276 150.64 was paid to the complainant.

The first respondent provided an actuarial computation for the purchase of the complainant’s past service and a computation of the withdrawal benefit paid which reflects the complainant’s pensionable service and final pensionable salary.

Ms Lukhaimane agreed with the first respondent’s explanation for the reduced amount that was paid to the complainant.

However, she was critical that the first respondent had failed to inform the complainant that the transfer value was used to purchase the additional pensionable service from the GEPF.

This issue should have been disclosed to the complainant when he joined the first respondent so that he understands that at the point of exit it won’t simply be added to his withdrawal benefit.

This result has been ruinous to say the least, in the complainant’s case. The first respondent has a duty to provide the complainant with relevant information relating to his benefits.

Further, the first respondent contravened the principles of Treating Customers Fairly by failing to disclose relevant information that affect a member’s fund value.



## SUMMARY OF IMPORTANT DETERMINATIONS continued

“However, the first respondent subsequently explained the pensionable service purchased with the transfer value and provided a computation thereof,” said Ms Lukhaimane and dismissed the complaint.

### Causal event charges

#### Pension funds profiteer at expense of members’ benefits, says PFA

“It is rather unfortunate that while a pension benefit is meant to provide for retirement, pension funds see nothing wrong in making excessive profits whilst eroding any value on the members’ part,” said the Pension Funds Adjudicator.

Handing down a determination relating to causal event charges, Muvhango Lukhaimane said funds should embrace the principles of the Retail Distribution Review (“RDR”) which aim to do away with commission payments which are prohibitive to consumers when they want to exercise their right and terminate their policies or effect changes thereto.

AG Rubin complained that Sanlam Life Insurance Limited (second respondent) had quoted an excessive causal event charge if he transferred from the Sanlam Linked Retirement Annuity Fund to another retirement annuity fund.

The complainant said the penalty charges levied on his policy had resulted in the estimated investment amount of R2 854 132 invested since 1996 only being worth R2 974 195.00 as a termination value in September 2017, which was a marginal return in nominal terms.

He asserted that the fees and charges that he was locked into for more than two decades had devastated his investment as a retirement product.

He submitted that the first respondent and its actuaries should have known all along that the product he was sold could not produce a financial return consistent with a product designed to be a retirement product.

The complainant was also unhappy that the second respondent wanted to charge a termination penalty in the region of R307 851.

He said the levying of termination charges was inconsistent with Treating Customers Fairly (“TCF”) principles and constituted “an unreasonable post sale barrier”. He said the first respondent must allow

members to exit without penalties as its product did not deliver what was promised.

The second respondent indicated that the complainant had not terminated the plan yet and as such no termination charge had been levied.

It explained that it received a request for the transfer of the complainant’s benefit to another retirement annuity fund. As a result, an early-termination charge came into play and had to be calculated in terms of the applicable legislation. The termination charge of R330 701.60 as at 24 January 2018 was equal to 9.27% of the fund value.

Ms Lukhaimane said the second respondent provided a breakdown of the complainant’s fund value and the amount to be imposed as a causal event charge if the complainant transferred to another retirement annuity fund.

She was satisfied that the causal event to be levied for early termination of the policy was lawful and, hence, dismissed the complaint.

However, she was critical of the fact that while the complainant had been informed at the time of contracting that early termination charges would be imposed; he had no way of knowing how much those charges would be.

“The TCF principles are intended as a tool for self-regulation by the industry to measure themselves as to whether or not in doing their business, they are dealing fairly with the consumer.

“They must provide sufficient and clear information that will enable customers to make informed choices when acquiring financial products.

“This Tribunal notes that although lawful, the actions of the respondents in this instance can hardly be described as being anywhere near the spirit of the principles.

“The fact that the complainant was not initially provided with the causal event charges on his fund value is an indication that the charges are obscure and excessive; and cannot be translated into value for members of retirement annuity funds.

“The imposition of causal event charges in instances where such information is not made apparent to members is nothing short of legalised theft.

“The fact that a settlement was reached in terms of the Statement of Intent does not in any way address the unfairness and absence of value that often accompanies the levying of causal event charges,” Ms Lukhaimane said.

## **Fund under curatorship**

### **PFA says transfer of benefits to unclaimed benefit fund will be unjust**

A request by a retirement fund for the membership of all the beneficiaries in a beneficiary fund under curatorship be terminated and the assets of the beneficiaries be transferred to an Unclaimed Benefits Fund, has been dismissed by the Pension Funds Adjudicator.

Muvhango Lukhaimane said the object of a beneficiary fund is to receive, administer, invest and pay benefits that become payable to beneficiaries on the death of a member. An Unclaimed Benefit Fund cannot perform these objectives, she said.

The Transport Sector Retirement Fund (complainant) requested the Tribunal to order the termination of membership of all its beneficiaries who are members of the Bophelo Beneficiary Fund (respondent) and the transfer of those members to the complainant’s Unclaimed Benefit Preservation Fund.

The complainant submitted that its board resolved that when distributing death benefits involving minor children for whom payments could not be made to guardians or caregivers, such benefits must be transferred to the respondent. It stated that this was done after due diligence as an appropriate method of payment of these benefits.

The complainant stated that the respondent was placed under curatorship by the Financial Services Conduct Authority (“FSCA”). It indicated that in order to ensure that benefits of the beneficiaries whose benefits were transferred to the respondent remain protected, its board resolved to transfer all current benefits of its beneficiaries to its Unclaimed Benefits Preservation Fund (Unclaimed Benefits Fund) and to have all beneficiaries in the respondent transferred to its Unclaimed Benefits Fund.

It stated that although there may be no evidence of loss or mismanagement, a mere allegation and subsequent appointment of a curator is sufficient reason for concern

and sufficient reason for it to ensure the protection of the beneficiaries’ benefits.

The complainant also submitted that by forcing the respondent to make the calculations, it will become evident whether there has been any mismanagement of benefits and it is only then that any further action against the respondent and its former board can be considered.

It indicated that it is important to institute any action now instead of waiting until a beneficiary turns 18 years as by then all assets would possibly have been depleted.

The complainant further stated that it would be unjust for the beneficiaries to remain in the respondent where there are concerns regarding its management. Furthermore, the affected beneficiaries are minors and in order to protect the interest of the minors, it had no option but to approach this Tribunal.

On 2 May 2017, the respondent advised that an amount of R55 133 144.00 due to the complainant’s beneficiaries was fully accounted for.

The complainant requested the Tribunal to make a determination that the membership of all the beneficiaries that were transferred to the respondent be terminated and the assets of the affected beneficiaries be transferred to the Unclaimed Benefits Fund.

The respondent said it was placed under curatorship by the FSCA. The curator submitted that he could not consent to the request by the complainant as the respondent’s rules did not permit this.

In her determination, Ms Lukhaimane said although the rules of the respondent made provision for the Office of the Pension Funds Adjudicator (“OPFA”) to terminate membership of beneficiaries in the respondent, the same could not be done in isolation.

“There must be sound legal reasons for this Tribunal to order the termination of membership of the beneficiaries in the respondent. The complainant has failed to set out a legal basis for its prayer. There are no allegations that the respondent breached any of its rules.

“Furthermore, the complainant in its own admission indicated that there is no evidence of loss or mismanagement of funds and that the respondent has confirmed that an amount of R55 133 144.00 transferred to it on behalf of the complainant’s beneficiaries is fully accounted for.

## SUMMARY OF IMPORTANT DETERMINATIONS continued

“The fact that the respondent was placed under curatorship is not sufficient to warrant the termination of membership of the complainant’s beneficiaries who are members of the respondent.

“The FSCA appointed the curator in order to safeguard the interests of the members of the respondent. It is also noted that the complainant, prior to lodging this complaint, referred its request to the FSCA. The latter declined the request to terminate the complainant’s participation in the respondent as the latter was under curatorship.

“Had the complainant been dissatisfied with the decision of the FSCA, it could have referred the matter to the FSCA Appeals Board instead of lodging it with this Tribunal and hoping for a different outcome.

“This Tribunal discourages forum shopping where a complainant approaches different role players with the

same complaint hoping for a different outcome. The complainant is a large fund and should know better,” said Ms Lukhaimane.

She said the object of a beneficiary fund is to receive, administer, invest and pay benefits that become payable to beneficiaries on the death of a member.

“An unclaimed benefit fund is established solely for the receipt of unclaimed benefits. It is, therefore, evident that the intention of the complainant to transfer the benefits from the respondent to an Unclaimed Benefit Fund is unjust as the latter’s object is not to administer, invest and pay benefits to beneficiaries of death benefits.

“Therefore, the complaint against the respondent cannot succeed and must be dismissed,” said Ms Lukhaimane.

### Case Management Team



**From left to right (back):** Busisiwe Dhlamini, Caswell Ritshuri, Lalita Jadoonandan, Siphokazi Cetyana, Phakiso Chuene, Neo Mashigo, Joseph Makama, Sibongile Jamekwane

**From left to right (front):** Atlegang Tshidi, Silas Mothupi, Gift Mudau, Keletso Selomo, Urisha Maharaj

## **Failure to pay contributions to fund**

### **Some municipalities putting pension benefits at risk**

It is unacceptable that some municipalities fail to pay contributions to pension funds in respect of employees, despite the amount being deducted from the salary, said the Pension Funds Adjudicator.

Muvhango Lukhaimane said the issue of non-compliance by municipalities with regard to payment of contributions affected members in terms of their pension or provident fund investments and risk benefits.

She said such benefits may not be paid due to outstanding contributions.

Ms Lukhaimane was commenting in a determination concerning a municipality that had failed to pay contributions on behalf of its employees to the pension fund in good time.

The complainant TP Hlongwane claimed that Maluti-A-Phofung Local Municipality (fourth respondent) had failed to pay all contributions on his behalf to Phuthaditjhaba Municipality Pension Fund (first respondent) and National Fund for Municipal Workers (third respondent), which affected the quantum of his fund credits.

The complainant further stated that the first respondent had not provided him with annual benefit statements and did not explain the issue to members or take any action.

The second respondent submitted that the first respondent had experienced serious challenges in obtaining arrear contributions from the fourth respondent.

On 31 October 2017, it wrote to the chairperson of the board to state that contributions were in arrears and requested the chairperson to address the matter with the fourth respondent.

After the fourth respondent failed to remedy the matter, the Principal Officer of the first respondent opened a case with the South African Police Service.

On 6 February 2018, a formal member communication detailing the situation was drafted for distribution to members. The matter was also reported to the

Financial Services Conduct Authority ("FSCA") on 14 February 2018.

The second respondent indicated that on 6 June 2018 and 23 July 2018, it drafted a letter of demand informing the fourth respondent that if contributions were not paid, it would take legal action.

Letters were also drafted to update members of the situation whereby the fourth respondent was in arrears with contributions for the period November 2017 to January 2018 and March 2018 to June 2018.

A settlement agreement dated 27 March 2018 was the only response received from the fourth respondent in which it undertook to pay the arrear contributions in relation to members who were dismissed, resigned or passed away by June 2018 and the balance would be rectified thereafter.

The second respondent confirmed that the fourth respondent paid all contributions up to June 2018 on 24 July 2018. However, it averred that late payment interest on the arrear contributions was outstanding. It concluded that benefit statements would be finalised once the reconciliation of contributions received was completed by no later than 30 September 2018.

The third respondent confirmed that the fourth respondent had not been compliant with section 13A of the Act as it did not pay contributions timeously or not at all.

The third respondent submitted that annual benefit statements were sent to members at the end of August every year and it was in the process of finalising same. The benefit reflected on a benefit statement would only be for contributions actually received.

In her determination, Ms Lukhaimane said while the complainant had stated that the first respondent failed to take legal steps against the fourth respondent for its non-compliance with regard to the payment of contributions, the first respondent had in fact engaged the fourth respondent on several occasions regarding the arrear contributions and also reported the matter to the FSCA on 14 February 2018.

As a result of the steps the first respondent took, the fourth respondent subsequently paid the arrear contributions up to December 2018. The first respondent continued to engage the fourth respondent regarding the outstanding late payment interest.

## SUMMARY OF IMPORTANT DETERMINATIONS continued

“This Tribunal would like to indicate that it is unacceptable that municipalities, like the fourth respondent, can continue to operate without paying salaries or contributions in respect of employees.

“The issue of non-compliance by municipalities with regard to payment of contributions affects members in terms of their pension or provident fund investments and risk benefits that may not be paid due to outstanding contributions,” she said.

The first respondent was ordered to provide the complainant with his latest benefit statement – and a benefit statement annually thereafter as long as his membership subsists.

The fourth respondent was ordered to pay the first respondent the complainant’s outstanding late payment interest in the amount of R2 520.38. The fourth respondent was also ordered to pay the third respondent the complainant’s outstanding late payment interest.

### **Pension fund owed an estimated R58-m by municipality**

The Kopanong Local Municipality in the Free State failed to pay an estimated R58 million in contributions on behalf of its members to a pension fund.

This emerged during an investigation by the Office of the Pension Funds Adjudicator following complaints by several employees of the municipality.

The complainants said the third respondent, Kopanong Local Municipality, deducted pension fund contributions from their salaries but did not pay this to the first respondent, South African Local Authorities Pension Fund.

In its response, the second respondent, Fairsure Administration (Pty) Ltd submitted that the third respondent had not paid contributions since March 2013 in contravention of the first respondent’s rules. This was despite monthly communication that was sent to the third respondent regarding the status of the unpaid contributions.

The second respondent also said complainants had been informed that the third respondent was in arrears

with contributions and added that the first respondent was in discussion with its legal representatives for assistance in the collection of the outstanding contributions.

The second respondent said while it was unable to confirm arrear contributions in respect of each individual member of the fund, the third respondent was in arrears for an estimated amount of R58 347 794.69.

The third respondent was afforded the opportunity to respond to the complaint. However, it failed to file a response.

In her determination, the Pension Funds Adjudicator, Muvhango Lukhaimane, said the third respondent had contravened the Pension Funds Act by failing to pay all contributions in respect of the complainants.

She also said while the second respondent had indicated that the first respondent was in discussion with its legal representative to assist in the collection of the outstanding contributions, it did not appear that any legal steps had been instituted against the third respondent.

She also noted with concern the failure of the first respondent to take action against the third respondent for non-payment of pension fund contributions.

“The board of the first respondent ought to have advised the Financial Services Conduct Authority (“FSCA”) of the third respondent’s failure to pay contributions and taken action to remedy such.

“Other than sending letters to the third respondent, this Tribunal is not aware of any legal action taken by the fund to remedy the situation since it became aware of the default by the third respondent in 2012,” said Ms Lukhaimane.

Ms Lukhaimane was critical of the first respondent for failing to get the third respondent to provide the name of the person who could be held personally liable for the non-payment of contributions and have their assets attached, if necessary.

“Therefore, the first respondent must be proactive in order to ensure accountability and better protection of the interests of members.”