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Pension Funds Adjudicator



**NON
COMPLIANCE**

Retirement funds must improve on their responsibilities to members in order to avoid prescription of outstanding contributions

With case law having settled the issue of the application of time-barring to outstanding retirement fund contributions, it is critical for role players to ensure that members' interests are always protected.

Most members are unaware of an employer's non-compliance with the payment of contributions until claims time. This is mostly due to funds not communicating vital information to members timeously.

The cross reference to the Prescription Act contained in section 30I(2) of the Pension Funds Act ("Act") means that the 3 year time-barring period must be calculated with reference to *inter alia* section 12(1) to (3) of the Prescription Act. Therefore, the date upon which the complainant gained knowledge of the complaint or could have acquired it by exercising reasonable care is the date from which the 3-year time bar should be calculated, all else being equal.

If we consider the financial literacy levels of the bulk of retirement fund members and the vulnerable position that most employees stand in relation to their employers, it is not surprising that members are unaware of the employer's non-compliance of the payment of contributions and even when they are aware they may be reluctant to act. In other instances, employers do not even bother to register employees as members of funds when they are supposed to do so, whilst in even other instances employees are registered later than the fund rules require.

It is incumbent upon the board of a fund to ensure that participating employers comply with all the rules of the fund, in that:

- All eligible employees are registered with the fund timeously,
- Contributions are paid timeously, and
- Contributions are remitted at the applicable rate.

Where the employer fails to comply with the rules of the fund, it is again incumbent on the board of the fund to implement measures provided for in the rules, the Pension Funds Act, 1956 and FSCA Conduct Standard 1 of 2022 (RF) to hold the employer accountable. These measures will include:

- Notifying the employer of its non-compliance within 30, 60 and 90 days of such non-compliance,
- Notifying all affected members of the employer's non-compliance with its obligation to pay contributions, and
- Taking steps (including legal action) mandated in the Conduct Standard to recover such outstanding contributions.

Whilst the Financial Sector Conduct Authority and retirement funds may keep data indicating the amount of outstanding contributions, it is now clear that not all of those contributions are legally recoverable owing to time-barring or prescription. If boards of funds do not take sufficient, timeous steps to actively manage and monitor the timely recovery of outstanding retirement fund contributions, more members will be left significantly out of pocket as far as their retirement fund benefits are concerned.

The need to ensure that, at the earliest signs of non-compliance, action is taken cannot be overemphasized. Retirement funds should start with something as small as issuing and delivering member benefit statements directly to all members. It cannot reasonably be expected of a non-compliant employer to distribute benefit statements to its employees if that would expose its non-compliance. In addition, the Pension Funds Act places a duty, not on the employer, but on the fund to provide such information to its members.

In *R.S. Gurney N.O. and Others v Z Mkhize and Others* (PFA53/2022, Financial Services Tribunal), the Tribunal held that the complainant could have reasonably gained knowledge of the non-payment of contributions if he had looked at his payslips for the relevant period at the relevant time. Therefore, any claim for contributions not made three years prior to the date on which the complaint was lodged was time-barred and had to be excluded from the OPFA's jurisdiction. It is important to note that the mere fact that payslips are produced reflecting that there was no indication of a deduction for pension benefits does not immediately mean that a complainant would have or could reasonably have obtained knowledge. The facts alleged by the parties must also be evaluated, as was done in the *Gurney* matter.

Other sources of knowledge from which a complainant could reasonably be held to have gained knowledge include, but are not limited to:

1. Any communication by the fund;
2. Annual benefit statements;
3. Contribution statements (in the case of a fund being the complainant);
4. Report by monitoring person to the board in terms of regulation 33(3) or section 4(2) of the FSCA Conduct Standard 1 of 2022 (RF);
5. Notification to affected members by the fund in terms of regulation 33(4)(a) or section 4(3) of the FSCA Conduct Standard 1 of 2022 (RF).

The PFA must decide *a priori* whether a complaint is time-barred. The standard OPFA complaint forms have accordingly been amended to extract information from the complainant that would assist the PFA making such a decision.

The possibility that a complaint can become time-barred based on the aforesaid, makes it incumbent upon boards of funds, who owe a fiduciary duty to members, to act timeously against defaulting employers as the fund is best placed to be the first to have knowledge of the default. As previously highlighted in the OPFA's previous annual reports, non-compliance with the payment of contributions makes up in excess of 60% of the complaints to the office. Failure to do so within the prescribed time periods is not only a contravention of the relevant legislation but would also constitute a breach of fiduciary duties.

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