



## AMPLATS GROUP PROVIDENT FUND TRIBUNAL DECISION – THE SAGA CONTINUES

### REMEMBER...

You will no doubt remember the decision from the Office of the Pension Funds Adjudicator last year (2018) where she ordered the previous actuary (Mr Vivian Cohen) to the Amplats Group Provident Fund (**“the Fund”**) to pay R40 501 000 plus interest for an error related to the calculation of unit prices which lead to the overpayment of fund benefits.

An independent actuary, appointed by the Adjudicator, stated that the conduct of the actuary as an expert advisor did not appear to have been reasonable. The Adjudicator then found that he was negligent and should be held liable for the Fund's loss.

### SUMMARY OF THE TRIBUNAL

- The Adjudicator's decisions are subject to the Promotion of Administrative Justice Act (PAJA), as are the Tribunal's.
- Persons must first apply to the Tribunal for a reconsideration of the Adjudicator's decision before applying to court.
- Adjudicator decisions may either be set aside by the Tribunal and sent back to the Adjudicator for decision or dismissed. The Tribunal may not substitute its own decision.

- The actuary was performing duties in terms of a contract and not in terms of his statutory appointment.
- In order for the Adjudicator to have jurisdiction the Pension Funds Act requires that a complainant must lodge his complaint in writing with the Fund, the Fund must reply within 30 days and then the complainant can lodge a complaint with the Adjudicator.
- The Adjudicator did not have the jurisdiction to make a determination against Mr Cohen.
- The Adjudicator's process had to be procedurally fair which includes *audi alteram partem* (hear the other side) requirements. The parties to the complaint should have been made aware of the expert's conclusions, reasoning and the facts the expert relied upon. The parties should have been given the opportunity to refute or correct the facts and cite evidence of a contrary expert.
- The Tribunal set aside the Adjudicator's decision and sent it back to that Office for further consideration.

### TRIBUNAL RECONSIDERS THE ADJUDICATOR'S DECISION

The Adjudicator is a statutory ombud and, thus, in terms of the Financial Sector Regulation Act (**“FSRA”**), its decision may be taken for “reconsideration” to the Financial Services Tribunal (**“Tribunal”**).

In summary, on 25 April 2019, the Tribunal (in an order signed by the Chair - Mr Harms) set aside the Adjudicator's decision and referred it back to the Adjudicator's Office for decision. The Tribunal reconsidered only the decision made by the Adjudicator against Mr Cohen and not the other parties to the original complaint. The Tribunal made a number of important and interesting points and we discuss these below.

### AN IMPORTANT PIECE OF LEGISLATION

Much of what was said by the Tribunal relates to legislation called the Promotion of Administrative Justice Act (“PAJA”). The decisions of the Adjudicator (and other administrative entities taking administrative actions, such as the Financial Sector Conduct Authority (“FSCA”)) must comply with the provisions of PAJA. It has also been argued that PAJA applies to certain administrative decisions or actions by retirement fund boards, for example section 37C death benefit decisions (but this is a subject for a different time).

### THE TRIBUNAL IS AN “INTERNAL REMEDY” AND WHY THIS IS IMPORTANT

In terms of PAJA, an administrative decision (like that of the Adjudicator or the FSCA) can only be taken to the High Court once all “internal remedies” have been exhausted. The Tribunal views a reconsideration of a decision by itself as an internal remedy (as stipulated in the FSRA). *This means that persons must first apply to the Tribunal for a reconsideration of the Adjudicator's decision before applying to court.*

The Tribunal referred to the review proceedings of its own decisions in the High Court (in terms of PAJA or any other law) and notes that “how in the light of this mix of provisions the process may unfold hereafter is a mystery to us”.

### WHAT MAY THE TRIBUNAL ORDER?

With respect to decisions by the Adjudicator, the Tribunal recognised that in terms of the FSRA it may either:

- set aside the decision and remit it back to the Adjudicator for decision; or
- dismiss the application for reconsideration.

The Tribunal may not substitute its own decision for that of the Adjudicator.

There are times that the Tribunal may replace the decision of the administrative body, which it is reconsidering, with its own decision. For example, if the FSCA makes an enforcement order, the Tribunal has the option of replacing the FSCA's decision with its own.

### TIME PERIOD FOR APPLYING TO THE TRIBUNAL FOR THE RECONSIDERATION OF A DECISION

The FSRA set out the time periods that a person must comply with when applying to the Tribunal for a reconsideration of a decision. This period is:

- 30 days from the reasons being provided, if the person asked for reasons under the FSRA; or
- otherwise, 60 days from being notified of the decision or a later date if good cause is shown.

In this case, the Adjudicator had not notified Mr Cohen of his right to apply to the Tribunal for reconsideration of its decision. Therefore, the Tribunal found that Mr Cohen's 60 days ran from the date he was notified that he had this right, as the FSRA requires that he be notified of this right. Thus, he had applied to the Tribunal in time. The Tribunal covered its bases by then saying that it condoned the late application.

It is going to be very interesting to see if and how the Adjudicator applies this principle in practice, as many complaints are referred to the Adjudicator in circumstances where the complainant has not written to the Fund first.

### STATUTORY APPOINTMENT VERSUS CONTRACT – THE ADJUDICATOR'S JURISDICTION

The Tribunal made the point that Mr Cohen was appointed as the Fund's valuator and had to perform valuator's duties under the Pension Funds Act. However, the Fund also entered into an agreement with him to perform calculations for the Fund. It was this latter contractual requirement to perform calculations that may have been breached. The Adjudicator based the case on delict – negligence – and failure to perform statutory duties, instead of contract.

The importance of the contractual basis of the case is that if the case against Mr Cohen is not based on a breach of statutory duty (Pension Funds Act) then this raises the question of whether the complaint falls within the jurisdiction of the Adjudicator to determine. The Adjudicator is not a court and derives its powers from the Pension Funds Act.

In order for the Adjudicator to have jurisdiction the Pension Funds Act requires that a complainant must lodge his complaint in writing with the Fund, the Fund must reply within 30 days and then the complainant can lodge a complaint with the Adjudicator. This had not happened in this case. In addition, the actuary's actions did not relate to the administration of the Fund, the investment of its assets, duties under the Pension Funds Act or the rules.

Taking into account the above, the Tribunal concluded that the Adjudicator did not have jurisdiction to make a determination.

### THE TRIBUNAL WENT ON TO MAKE FURTHER COMMENTS

This is the end of the matter against Mr Cohen, that is, the Adjudicator did not have jurisdiction to make the determination. However, the Tribunal went on to say that because it did not know what other twists and turns this case may take it was going to make a few more broad comments on material issues.

### THE ADJUDICATOR DID NOT FOLLOW A FAIR PROCESS

The Adjudicator's Office has a wide discretion as to what procedure to follow but it must be *fair*. The Tribunal said that the Adjudicator's Office made a determination on the papers but clearly the essential disputes were beyond its capabilities to determine. The Adjudicator did not have the expertise to understand the hardcoding of the data issue or whether the actuary was negligent. In addition, not even the High Court would make a decision on a damages claim without a full blown trial.

The Tribunal stated that the Adjudicator could have held an oral hearing or devised a proper procedure but instead, without notice to the parties, appointed an independent actuary (expert) for advice and opinion and based her determination on that. The Tribunal did not know what information was provided to the actuary and Mr Cohen was able to show that the assumptions were incorrect.

The root of the problem was that the process had to be procedurally fair which includes *audi alteram partem* (hear the other side) requirements. The parties to the complaint should have been made aware of the expert's conclusions, reasoning and the facts he relied upon. The parties should have been given the opportunity, by the Adjudicator, to refute or correct the facts, provide new facts and adduce evidence of a contrary expert. These were fatal flaws in the process and the Tribunal did not feel it needed to point to other facts regarding the process.

Again, it is going to be interesting to see if and how the Adjudicator changes her processes and whether she will hold more oral hearings. We already know that that Office will ensure that their processes are changed for

complaints involving the application of principles of equity to allow parties to respond further. It is certainly necessary, in our view, that any expert evidence or findings are provided to the parties and that they are permitted time to respond, including adducing their own expert evidence.

### CALCULATION OF THE LOSS

The Tribunal was of the opinion that the loss was calculated incorrectly given that certain of the loss had been recovered and the Fund did not stop the loss once it was aware of the error.

### DECISION BY THE TRIBUNAL

The Tribunal set aside the Adjudicator's order against Mr Cohen and sent it back to the Adjudicator for further consideration. We wait with bated breath to see what the next step in the saga is. For example, will the Adjudicator make a different decision or will the Tribunal's decision be taken on review.