



Legal Services

FINANCIAL SERVICES



ON THE SCALES 8 OF 2019

Tribunal sets aside an Adjudicator determination for personal liability against an actuary

In On the Scales 19 of 2018, we dealt with the Pension Funds Adjudicator ('Adjudicator') case of Amplats Group Provident ('the Fund') and others v Vivian Cohen ('Mr Cohen'). The finding in that matter was that Mr Cohen was held personally liable for financial loss suffered by the Fund.

Mr Cohen challenged that decision at the Financial Services Tribunal ('the Tribunal') and the Tribunal set aside the Adjudicator determination.

Executive summary

- A person who is dissatisfied with the Adjudicator's decision must first approach the Tribunal for relief before approaching the High Court.
- In this case Mr Cohen was performing his contractual duties, and not his statutory duties under the Pension Funds Act, ("the Act"). Therefore the Adjudicator did not have jurisdiction to deal with the matter.
- Where the Adjudicator relies on expert evidence, the party against whom such expert evidence is given must be informed and be given an opportunity to challenge the expert evidence.
- The Tribunal set aside the Adjudicator's decision to hold an actuary personally liable for financial loss suffered by the Fund.

Facts of the case

The Fund lodged a complaint with the office of the Adjudicator against Mr Cohen, Sanlam (the Fund administrator), and former board members to claim compensation for financial loss suffered by the Fund.

Mr Cohen was appointed as a Fund's actuary. In addition, he was also contracted by the Fund to calculate monthly unit prices. An error occurred in the calculation of the unit prices from September 2012 to December 2012, as a result of which beneficiaries were overpaid. The Fund's complaint against Mr Cohen was that he was in breach of his obligation under the contract to perform his duties with due care and skill required of an actuary in his position. The complaint against the former board members and Sanlam was that they failed to maintain proper controls over the operations of the Fund.

In her determination, the Adjudicator dismissed the complaint against the former board members and Sanlam. The Adjudicator found Mr Cohen liable and ordered him to pay an amount of R40 501 000, plus interest at a rate of 10% per annum from the date of determination, as compensation for the financial loss suffered by the Fund.

The reconsideration of the matter before the Tribunal

Mr Cohen was dissatisfied with the Adjudicator's decision and brought the matter to the Tribunal for reconsideration. He brought the application to the Tribunal in accordance with the Financial Sector Regulation Act ("the FSRA"). The FSRA provides that a person who is dissatisfied by a decision of a statutory ombud, which includes the Adjudicator's office, may approach the Tribunal for reconsideration of the matter.

The Tribunal held that reconsideration by the Tribunal is considered an internal remedy in terms of the Promotion of Administrative Justice Act. This means that a person who is dissatisfied with the Adjudicator's decision cannot approach a High Court for relief until they have approached the Tribunal.

In reconsidering the matter brought before it, the Tribunal can either:

- set aside the decision and refer it back to the Adjudicator for reconsideration, or
- may simply dismiss the case.

However, the Tribunal does not have authority to set aside the decision of the Adjudicator's office and substitute it with its own decision.

Condonation for late filling of the application

The Tribunal said that a dissatisfied party must lodge an application for reconsideration with the Tribunal within 60 days of the determination. The Adjudicator in this case advised Mr Cohen to approach the High Court but did not advise him of his right to approach the Tribunal. Therefore, even though the application was lodged on the 71st day from the date that the determination was issued, the Tribunal nevertheless condoned (excused) the late filling of the application because Mr Cohen was not informed of his right and that he lodged his application with the Tribunal within one week of becoming aware of his right to do so.

The nature of the complaint

In her determination, the Adjudicator had said that the complaint was based on delict or failure to comply with statutory duties. The Tribunal pointed out that failure to execute a mandate with the necessary diligence, skill and care required of a reasonable professional must be resolved under principles of contract law and not the law of delict. When the error occurred, Mr Cohen was performing his contractual duty, which was to calculate monthly unit prices and not statutory duties as an actuary appointed under the Act. This then raised a question of whether the Adjudicator had the jurisdiction to deal with this matter.

The Tribunal stated that the Adjudicator does not have inherent jurisdiction. Even though it can make an order which has the same effect to a court order as provided by the Act, it is not a court of law. This means that the Adjudicator's jurisdiction is limited to the issues that are within the limits of the Act.

Furthermore, the Act defines a complaint as a complaint relating to the administration of a fund, investment of its funds or interpretation and application of its rules. The definition of complaint as it relates to maladministration of a fund, indicates that it must be against a person administering the fund or performing functions in terms of the Act or rules of the fund. Such person could, for example, be an actuary appointed by the fund. Mr Cohen was neither administering nor performing a function under the Act or rules, and the complaint did not relate to the investment of the fund or the interpretation or application of the fund rules.

The Tribunal held that the Adjudicator did not have jurisdiction to make a determination against Mr Cohen.

Lack of due process

The Tribunal further held that due to the complex nature of the complaint, the Adjudicator should not have heard the matter on paper. The matter required a full-blown hearing. The Adjudicator had an option to hear the matter orally. The Adjudicator, without notice to any of the parties, obtained services of an actuary and based her decision solely on the report from the independent actuary. The Tribunal held that to obtain evidence without notice is irregular.

The Tribunal found that it was not known whether the information given to the independent actuary was correct or complete. Mr Cohen showed that the conclusions of the independent actuary were based on incorrect assumptions. The proceedings were therefore not procedurally fair in that they did not comply with the doctrine of *audi alteram partem* (hear the other side of the story). In terms of this rule, the decision maker is required to make the parties aware of the reasoning and the relevant fact provided or assumptions made by the expert. Furthermore, the doctrine requires the decision maker to provide the parties with the opportunity to refute or correct the relevant facts, put forward other facts and obtain a contrary expert opinion. The proceedings were therefore procedurally unfair.

Calculation of loss

The Adjudicator, in determining the loss failed to consider undisputed facts that show that the loss was less than what was set out in the actuarial report.

This is based on the fact that part of the loss was recovered by the Fund and that the Fund failed to prevent further losses by stopping payments after the error was discovered. This indicates a lack of a connection between Mr Cohen's conduct and the loss.

The Tribunal set the Adjudicator's determination and referred the matter to the Adjudicator for further consideration.

Comments: *a party who is dissatisfied with the Adjudicator's determination must first approach the Tribunal before approaching a High Court. This route is more cost effective than approaching a High Court. Should a party dissatisfied with an Adjudicator determination approach the High Court for a review before approaching the Tribunal, the High Court might dismiss the matter on the basis that such party has not exhausted internal remedies by approaching the High Court without having approached the Tribunal first. This decision does not seem to take away a person's right to an appeal in terms of section 30P of the Act, but it only applies to reviews and not appeals.*

If you need more information, please contact your consultant.
