



Draft for discussion purposes

GUIDELINES ON THE EXERCISE OF POWERS BY THE PENSION FUNDS ADJUDICATOR UNDER SECTION 30J(3) OF THE PENSION FUNDS ACT, 1956

Section 30J(1) of the Pension Funds Act, 1956 empowers the Pension Funds Adjudicator to follow any procedure that the Adjudicator considers appropriate when conducting an investigation, including procedures of an inquisitorial nature. Section 30J(3) further provides that sections 1, 2, 3, 4 and 6 of the Commissions Act, 1947 apply, with the necessary changes, to the Adjudicator.

These Guidelines are issued to provide guidance on the manner in which the Adjudicator may exercise the powers contemplated in section 30J(3) of the Pension Funds Act, 1956, including the issuing of summonses, the conduct of proceedings for obtaining evidence and information relevant to an investigation, and related procedural matters.

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1. Definitions

In these Guidelines, unless the context indicates otherwise, the following terms have the meanings assigned to them below, and cognate expressions have corresponding meanings:

“Act” means the Pension Funds Act, 1956 (Act No. 24 of 1956);

“Adjudicator” means the Pension Funds Adjudicator appointed under section 30C(1)(a) of the Act and includes a Deputy Pension Funds Adjudicator appointed under section 30C(1)(b) of the Act;

“Authorised Person” means a person appointed by the Adjudicator as part of a panel of persons authorised to assist with administrative, logistical, technical or questioning functions in connection with Proceedings, including a person appointed in terms of section 30Q(e) of the Act, subject to any limits imposed by the Adjudicator and applicable law;

“Business Day” means any day other than a Saturday, Sunday or public holiday officially recognised in terms of the Public Holidays Act, 1994 (Act no. 36 of 1994);

“Commissions Act” means the Commissions Act, 1947 (Act No. 8 of 1947);

“Proceedings” means a process convened by the Adjudicator in which the powers contemplated under section 30J(3) of the Act are exercised for the purpose of obtaining evidence, information, Material or explanations relevant to an Investigation;

“Complaint” means a complaint as defined in section 1 of the Act;

“Document” includes any book, written, printed, recorded, electronic, digital, audio or visual record, correspondence, data, statement, register, minute, policy, rule, file, report, calculation, account, spreadsheet or other item capable of recording, containing or evidencing information relevant to an Investigation;

“Investigation” means an investigation conducted by the Adjudicator into a Complaint under the Act;

“Material” means any Document or Object;

“Object” means any physical item, article, product, sample, equipment, device, or thing relevant to an Investigation;

“Secretary” means a person designated by the Adjudicator to assist with the administration of Proceedings and to perform the functions contemplated in section 3(2) of the Commissions Act, as applied by section 30J(3) of the Act, including signing and issuing a Summons;

“Summons” means a written notice, signed and issued by the Secretary substantially in the form set out in Schedule A to these Guidelines, requiring a person to appear before the Adjudicator at Proceedings to give evidence as a witness and/or to produce Material relevant to an Investigation;

“Guidelines” means these Guidelines which provide guidance regarding the procedure and management of Proceedings before the Adjudicator when exercising the powers contemplated in section 30J(3) of the Act; and

“Witness Fees” means the fees payable in accordance with section 3(4) of the Commissions Act to a person summonsed to attend Proceedings as a witness, or who gives evidence at Proceedings.

2. Purpose

2.1 These Guidelines provide guidance regarding the procedure and management of Proceedings convened by the Adjudicator in the exercise of the powers contemplated in section 30J(3) of the Act for the purpose of obtaining evidence, information, Material or explanations relevant to the Investigation and determination of a Complaint.

2.2 The purpose of these Guidelines is to promote a fair, efficient, economical and transparent process for the exercise of the Adjudicator’s procedural discretion under section 30J(1) of the Act, and the powers contemplated in section 30J(3) of the Act, while ensuring procedural fairness.

2.3 These Guidelines do not limit, amend or replace any power, duty, discretion or obligation arising under the Act, the Commissions Act or any other applicable law.

- 2.4 Nothing in these Guidelines limits the Adjudicator's discretion in terms of section 30J(1) of the Act to adopt any procedure that the Adjudicator considers appropriate when conducting an Investigation, including procedures of an inquisitorial nature.
- 2.5 These Guidelines must be read together with the Act, the Commissions Act and other applicable law.

3. Powers of the Adjudicator in the Proceedings

- 3.1 The Adjudicator is responsible for the conduct of the Proceedings and may issue any procedural directions as are reasonably necessary for the fair, economical and expeditious conduct of an Investigation and determination of a Complaint.
- 3.2 The Adjudicator may determine the date, time, venue, format, scope and sequence of the Proceedings, including whether the Proceedings will be conducted in person, virtually, in writing, or by any combination of such methods.
- 3.3 In exercising the powers contemplated in section 30J(3) of the Act, the Adjudicator may summon a person to appear before the Adjudicator, to give evidence, answer questions, and produce any Material relevant to an Investigation.
- 3.4 The Secretary or any other official of the Office of the Pension Funds Adjudicator may be designated by the Adjudicator to perform administrative functions necessary for the effective conduct of the Proceedings.

4 Issue and service of Summonses

- 4.1. A template form of Summons appears in **Schedule A** to these Guidelines.
- 4.2. The Adjudicator may amend, adapt, supplement or vary the form set out in **Schedule A** where appropriate in the circumstances of a particular Investigation, provided that the requirements of the Act, the Commissions Act and procedural fairness are observed.
- 4.3. A Summons may be issued by the Adjudicator where the Adjudicator reasonably considers it necessary for the effective Investigation and determination of a Complaint. The issuing of a Summons is an investigative step to assist the Adjudicator in the

exercise of the powers contemplated under section 30J(3) of the Act and does not constitute a finding against any person.

4.4. Without limiting paragraph 4.1, a Summons may be issued where:

4.4.1. a person has failed to respond to a Complaint or has provided an inadequate or incomplete response to a Complaint;

4.4.2. a person has failed to provide information, explanations or Material requested by the Adjudicator and relevant to the Investigation;

4.4.3. there is reason to believe that a person may be able to provide evidence, information, explanations or Material relevant to the Investigation;

4.4.4. a person has repeatedly requested extension of time without adequate justification and, despite being afforded a reasonable opportunity to do so, has failed to provide the required information or evidence, or has otherwise delayed or impeded the Investigation; and/or

4.4.5. the Adjudicator reasonably considers the exercise of powers under section 30J(3) of the Act necessary for the fair, economical and expeditious determination of the Complaint.

4.5. The grounds listed under paragraph 4.4 above must not be interpreted as exhaustive and do not limit the Adjudicator's powers under section 30J(3).

4.6. A Summons must, as far as reasonably practicable:

4.6.1. identify the Complaint or matter to which it relates;

4.6.2. state the name or description of the summoned person;

4.6.3. specify whether the summoned person is required to appear, produce Material or information, or to do both;

- 4.6.4. state the date, time, place of appearance, or the virtual platform at which the summoned person is required to appear;
- 4.6.5. identify any Material or information required to be produced;
- 4.6.6. indicate the purpose for which the attendance, evidence or production is required; and
- 4.6.7. notify the summoned person of the consequences of failing to comply with the Summons.
- 4.7. A Summons may be served:
 - 4.7.1. personally;
 - 4.7.2. through the sheriff;
 - 4.7.3. by an Authorised Person;
 - 4.7.4. by electronic mail; or
 - 4.7.5. by any other method reasonably likely to bring the Summons to the attention of the person concerned.
- 4.8. Proof of service may be established by affidavit, a sheriff's return of service, a delivery receipt, an electronic transmission record, an acknowledgment of receipt, or any other evidence demonstrating that the Summons was delivered to or came to the attention of the person concerned.

5. Process followed during the Proceedings

At the commencement of the Proceedings, the Secretary must identify the Complaint or matter concerned and confirm the identity and capacity of each person appearing before the Adjudicator.

- 5.2. The Adjudicator will ordinarily explain, or cause to be explained, the purpose and scope of the Proceedings and the nature of the information, evidence or Material sought.

- 5.3. Any preliminary issue that is known, or ought reasonably to be known, including an issue relating to privilege, self-incrimination, confidentiality, service, authority to act, legal representation or postponement, should be raised at the earliest reasonable opportunity. The Adjudicator may determine the manner in which any preliminary issue will be dealt with.
- 5.4. Where oral evidence is required, a person giving evidence must first take an oath or make an affirmation in accordance with section 3(3) of the Commissions Act before giving evidence.
- 5.5. After taking the required oath or making the affirmation, the summoned person may be questioned by the Adjudicator or an Authorised Person.
- 5.6. Where the Adjudicator considers it necessary in the interest of procedural fairness, any party to the Complaint, or any person whose interests may be materially affected by the evidence, may be afforded an opportunity to put questions to the summoned person in a manner determined by the Adjudicator.
- 5.7. The Adjudicator may determine the scope, sequence, duration and manner of any questioning and may disallow questions that are irrelevant, repetitive, oppressive, misleading or otherwise inappropriate.
- 5.8. Where a Summons requires the production of Material or information, the summoned person must produce the material in the manner and within the time specified in the Summons or as otherwise directed by the Adjudicator.
- 5.9. Where any Material or information is not produced, the Adjudicator may require the summoned person to explain, under oath or affirmation, if necessary, the reasons for its non-production and the steps taken to locate or obtain it. The provision of a notification under paragraph 9.4 of the Guidelines does not relieve the summoned person of the obligation to provide such an explanation if required by the Adjudicator during the Proceedings.

- 5.10. Once the Adjudicator is satisfied that the required evidence, information or Material have been obtained or adequately accounted for, the Adjudicator may excuse the summoned person.
- 5.11. The Adjudicator may require the production of further information or Material, require a person to remain available, adjourn or reconvene the Proceedings, invite further submissions from affected parties, or issue any other procedural direction necessary for the proper conduct of the Investigation.
- 5.12. Following the Proceedings, the Adjudicator may continue the Investigation and may thereafter determine the Complaint or take any other steps authorised by the Act or any other applicable law.

6. Obligations of Summoned Persons

- 6.1. A person who is served with a Summons must comply with it in accordance with its terms unless excused by the Adjudicator or otherwise relieved of the obligation by a competent court.
- 6.2. Where appearance is required, the summoned person must attend at the date, time and place, or virtual platform specified in the Summons, and remain available until excused by the Adjudicator.
- 6.3. A summoned person must answer all lawful questions put by the Adjudicator or by any Authorised Person.
- 6.4. A refusal to answer a lawful question or produce Material or information is permissible only where recognised in terms of applicable law.
- 6.5. A summoned person who is unable to appear before the Adjudicator on the date, at the time at the place or on the virtual platform specified in the Summons, must apply in writing to the Secretary for a postponement as soon as reasonably practicable and in any event at least 5 (five) Business Days before the scheduled appearance, unless this is not reasonably possible in the circumstances.
- 6.6. A summoned person who is unable to produce any Material or information required by a Summons must comply with the notification requirements set out in paragraphs 9.4

to 9.6 of these Guidelines.

- 6.7. The application must set out the reasons for the postponement and be accompanied by any supporting information or documentation on which the person relies.
- 6.8. The Adjudicator may grant or refuse the application or grant the application subject to conditions.
- 6.9. The lodging of an application under paragraph 6.5 does not suspend the obligation to comply with the Summons unless the Adjudicator directs otherwise.
- 6.10. The unavailability of a legal representative does not, by itself, constitute sufficient grounds for postponement.
- 6.11. Proceedings are conducted in English. Any person who requires the assistance of an interpreter must request such assistance in writing at least 7 (seven) Business Days before the scheduled proceedings, indicating the language for which interpretation is required, and an interpreter will be provided where such request is made.

7. Manner of Submission of Notifications, Applications and Communications

- 7.1. Any notification, application, written explanation, claim or other communication required or permitted to be submitted by a person to the Secretary or to the Adjudicator under these Guidelines must be submitted:
 - 7.1.1. by hand delivery to the address of the Office of the Pension Funds Adjudicator specified in the Summons; or
 - 7.1.2. by electronic mail to the email address of the Secretary or the Office of the Pension Funds Adjudicator specified in the Summons or as otherwise communicated by the Secretary.
- 7.2. The person submitting the notification, application, written explanation, claim or other communication must retain proof of dispatch and delivery.
- 7.3. A notification, application, written explanation, claim or other communication submitted

by electronic mail is deemed to have been received on the Business Day on which it was sent, provided it was sent before 16h00 on that day. If sent after 16h00 or on a day that is not a Business Day, it is deemed to have been received on the next Business Day.

8. Witness Fees

- 8.1. A person who is summoned to attend Proceedings as a witness, or who gives evidence at Proceedings, is entitled to Witness Fees.
- 8.2. Witness Fees are payable in accordance with section 3(4) of the Commissions Act.
- 8.3. A person claiming Witness Fees must provide such information and supporting documentation as may reasonably be required by the Adjudicator to verify the claim.
- 8.4. The payment of Witness Fees is subject to the Commissions Act and any other applicable law governing the payment of witness fees from public funds.

9. Production of Material and Information

- 9.1. A Summons may require the production of any Material or information in the person's possession, custody or control that may be relevant to an Investigation.
- 9.2. Material required in terms of a Summons must be produced in the format specified by the Adjudicator or, where no format is specified, in the form in which it is ordinarily kept.
- 9.3. A person who contends that any Material or information is unavailable, lost, destroyed, privileged, confidential, commercially sensitive, or not within the person's possession, custody or control must notify the Secretary in accordance with paragraphs 9.4 to 9.6 of these Guidelines.
- 9.4. A person who is unable to produce, in whole or in part, any Material or information required by a Summons must notify the Secretary in writing as soon as reasonably practicable after becoming aware of the inability, and in any event not later than 5 (five) Business Days before the date on which the Material or information is required to be produced in terms of the Summons, unless compliance with this time period is not

reasonably possible in the circumstances.

9.5. The notification referred to in paragraph 9.4 must:

9.5.1. be addressed to the Secretary;

9.5.2. identify the Summons and the specific Material or information that cannot be produced;

9.5.3. set out the reasons why the Material or information cannot be produced;

9.5.4. describe the steps, if any, taken to locate, obtain, reconstruct or preserve the Material or information;

9.5.5. where only some of the required Material or information cannot be produced, identify the Material or information that can be produced and confirm that such Material or information will be produced in accordance with the Summons; and

9.5.6. be accompanied by any available supporting documentation, including an affidavit or sworn statement where reasonably practicable, substantiating the reasons for non-production.

9.6. The notification must be delivered in accordance with paragraph 7 of these Guidelines.

9.7. Upon receipt of a notification under paragraph 9.4, the Adjudicator may:

9.7.1. accept the reasons for non-production and excuse the person from the obligation to produce the Material or information concerned;

9.7.2. require the person to provide further information, supporting documentation or an explanation under oath or affirmation regarding the non-production;

9.7.3. direct the person to take further steps to locate, obtain or reconstruct the Material or information and to report on such steps within a specified period;

9.7.4. grant an extension of the time within which the Material or information must be produced;

- 9.7.5. determine that the reasons provided do not constitute sufficient cause for non-production and direct the person to produce the Material or information by a specified date; or
- 9.7.6. take any other step authorised by the Act, the Commissions Act or any other applicable law, including referring the matter for investigation or prosecution under paragraph 16.3.
- 9.8. A person claiming legal professional privilege over any Material must identify the Material, or category of Material concerned, and provide sufficient information to enable the Adjudicator to assess the claim without disclosing the privileged content.
- 9.9. A claim of confidentiality, commercial sensitivity or protection of personal information does not, on its own, relieve a person of an obligation to comply with the Summons.
- 9.10. The Adjudicator may, where appropriate, direct that any Material be produced subject to confidentiality safeguards, redaction, restricted access, anonymisation, in camera consideration or any other protective measure recognised by law.
- 9.11. Where reasonably necessary for the effective conduct of the Investigation, the Adjudicator may require Material produced in response to a Summons to be indexed, paginated, certified, verified by affidavit, or accompanied by explanatory information as the Adjudicator considers necessary.

10. Legal Representation

- 10.1. Section 30K of the Act applies to these proceedings. A person appearing before the Adjudicator is not entitled, as of right, to legal representation, but may apply to the Adjudicator for permission to be legally represented. Such application must be made in writing at least 7 days before the day of appearance.
- 10.2. In deciding whether to permit legal representation, the Adjudicator will consider whether allowing such representation is necessary to give effect to procedural fairness, having regard to, among other relevant considerations, the following:

- 10.2.1. whether the matter raises legal issues requiring substantive interpretation, legal analysis or formal legal submissions;
- 10.2.2. the factual, technical or procedural complexity of the complaint;
- 10.2.3. the public interest;
- 10.2.4. the respective ability of the parties, or any persons assisting them, to understand the issues, present their position and participate meaningfully in the proceedings.
- 10.3. A legal representative may not obstruct the proceedings, answer questions on behalf of a person where personal knowledge is required, or interfere with the Adjudicator's questioning.
- 10.4. The factors listed above are not exhaustive, and the Adjudicator may consider any other factor or circumstance relevant to procedural fairness in the particular matter.

11. Oath, Affirmation and Evidence

- 11.1. The Adjudicator, or a person lawfully authorised to do so, may administer an oath to, or accept an affirmation from, any person giving evidence.
- 11.2. Evidence may be received orally, by affidavit, through Material, by electronic means, or in any other manner the Adjudicator considers appropriate.
- 11.3. The Adjudicator or an Authorised Person may ask any question relevant to the Investigation.
- 11.4. Questioning during the Proceedings must be directed towards obtaining information and evidence relevant to the Investigation and determination of the Complaint.
- 11.5. A person may raise any claim relating to self-incrimination before answering a question or producing Material, and the Adjudicator must deal with that claim in accordance with section 4 of the Commissions Act, the Constitution and any other applicable law.

12. Proceedings and Manner of Appearance

- 12.1. Proceedings before the Adjudicator are investigative and inquisitorial in nature and are not ordinary adversarial hearings.
- 12.2. The Adjudicator may conduct Proceedings in person, in camera, virtually, by written process, or by any combination of such methods.
- 12.3. In determining the manner in which the Proceedings will be conducted, the Adjudicator may have regard to fairness, efficiency, accessibility, proportionality, confidentiality, privilege, the protection of personal information and the interests of affected persons.
- 12.4. A person appearing virtually must comply with any reasonable direction relating to the identification, authentication, recording, confidentiality or the orderly conduct of the Proceedings.
- 12.5. The Adjudicator may postpone, adjourn, reconvene or continue Proceedings where reasonably necessary for the effective conduct of the Investigation.
- 12.6. The Adjudicator may consolidate Complaints where the Complaints raise substantially the same factual or legal issues, and the consolidation would promote the fair, efficient, economical and expeditious conduct of the Proceedings, provided that the consolidation does not materially prejudice any party or affected person.

13. Persons Materially Affected

- 13.1. Where information obtained during an Investigation may materially and adversely affect the rights or interests of another person, the Adjudicator may, where required by procedural fairness, afford that person an opportunity to respond.
- 13.2. The opportunity to respond may be afforded by written submission, an affidavit, an appearance before the Adjudicator, the production of Material, or any other procedure determined by the Adjudicator.
- 13.3. The nature and extent of any opportunity afforded under this section will be determined by the Adjudicator having regard to the requirements of procedural fairness and the

circumstances of the Investigation.

14. Confidentiality

- 14.1. Subject to applicable law and any direction issued by the Adjudicator, persons participating in the Proceedings must treat information obtained through those Proceedings as confidential, and may use it only for purposes connected with the Proceedings, the Investigation, the protection or exercise of legal rights, or compliance with law
- 14.2. Personal information must be processed in accordance with applicable data protection legislation and only for purposes connected with the Investigation and determination of the Complaint.
- 14.3. The Adjudicator may restrict access to information where reasonably necessary to protect confidentiality, privilege, personal information or other legally protected interests.
- 14.4. The Adjudicator may direct that information be redacted, anonymised, withheld from wider disclosure, considered in camera or otherwise protected.
- 14.5. No person may disclose, publish or use any information obtained through the Proceedings except as required by law, necessary for the exercise or protection of a legal right, or otherwise permitted by applicable law.

15. Record of Proceedings

- 15.1. A record of Proceedings must be kept by the Adjudicator in accordance with section 30L of the Act.
- 15.2. The record forms part of the Investigation record and may be considered by the Adjudicator when determining the Complaint or deciding any procedural or enforcement step.

15.3. Access to a copy of the record is subject to section 30L of the Act and, where applicable, the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

16. Offences and Enforcement

16.1. A person who has been duly summoned and who, without sufficient cause:

16.1.1. fails to attend at the time and place specified in the Summons;

16.1.2. fails to remain in attendance until the conclusion of the Proceedings or until excused by the Adjudicator;

16.1.3. refuses to take an oath or make an affirmation when lawfully required to do so;

16.1.4. refuses or fails to answer fully and satisfactorily any question lawfully put to that person;

16.1.5. fails or refuses to produce any Material required by Summons and within that person's possession, custody or control; or

16.1.6. after taking an oath or making an affirmation, gives false evidence on any matter, knowing such evidence to be false or not knowing or believing it to be true,

may be guilty of an offence in terms of section 6 of the Commissions Act, as incorporated by section 30J(3) of the Act.

16.2. A person who, in connection with the Proceedings before the Adjudicator:

16.2.1. insults the Adjudicator;

16.2.2. seeks to improperly influence the outcome of the Proceedings;

16.2.3. interrupts, obstructs or otherwise interferes with the Proceedings; or

16.2.4. engages in conduct which, if committed before a court of law, would constitute contempt of court,

may be guilty of an offence in terms of section 30V of the Act.

16.3. Where a person fails to comply with a Summons, the Adjudicator may:

16.3.1. continue with the Investigation on the basis of the information available, provided that doing so is fair in the circumstances;

16.3.2. refer the matter to the appropriate authority for investigation or prosecution in terms of the Act, the Commissions Act or any other applicable law;

16.3.3. seek appropriate relief from a competent court; or

16.3.4. take any other lawful step available under the Act, the Commissions Act or any other applicable law.

16.4. In assessing whether a person has failed to comply with a Summons “without sufficient cause” for the purposes of section 6 of the Commissions Act, regard may be had to whether the person has complied with the notification requirements in paragraphs 9.4 to 9.6 of these Guidelines., including the timeliness, completeness and good faith of any notification given.

17. Directions

17.1. The Adjudicator may issue procedural directions to facilitate the implementation of these Guidelines.

17.2. The Adjudicator may condone non-compliance with these Guidelines, extend or shorten any time period, vary any procedural requirement contained in these Guidelines, or issue any direction reasonably necessary to achieve fairness and the effective conduct of an Investigation.

17.3. Where these Guidelines do not expressly provide for a procedural matter, the Adjudicator may determine the appropriate procedure having regard to the Act, the Commissions Act, the requirements of procedural fairness and the inquisitorial nature of the Investigation.

18. Publication and Amendment of the Guidelines

- 18.1. The Adjudicator may amend, replace or withdraw these Guidelines from time to time.
- 18.2. The Guidelines, and any amendment, replacement or withdrawal thereof, may be published and made available on the Office of the Pension Funds Adjudicator's website.
- 18.3. Unless otherwise stated, any amendment or replacement takes effect on the date of publication on the Office of the Pension Funds Adjudicator's official website.

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