

## Legal update

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### Case law update

This legal update discusses several recent judgements and Pension Funds Adjudicator (PFA) determinations that have an impact on pension funds and where appropriate, sets out the position adopted by the MMI sponsor funds, which include the FundsAtWork Umbrella Pension and Provident Funds and the Momentum Corporate Pension and Provident Preservation Funds (FundsAtWork), the Momentum Pension and Provident Preservation Funds, Momentum Retirement Annuity and Self-Financed Retirement Annuity Fund (Momentum Retail) and Metropolitan Preservation Pension and Provident Funds, Protea Life Preservation Pension and Provident Funds, Metropolitan Retirement Annuity Fund, Moorgate Retirement Annuity Fund and Prosure Retirement Annuity Fund (Metropolitan Retail). Unless indicated otherwise, the cases discussed below are unreported judgements.

#### 1. **Distinctive Choice v Pension Funds Adjudicator & Gladile (2015) – High Court: late submission of insurance benefit claim**

Distinctive Choice, an employer in the security sector, made an application to the High Court to set aside a determination of the Pension Funds Adjudicator (PFA).

The initial complaint was brought to the PFA by Mrs. Gladile. She was aggrieved by the fact that the fund had failed to pay her the insured portion of her late husband's death benefit.

The reason for the non-payment of the insured portion of the death benefit was that the employer, Distinctive Choice, only became aware of the member's death 3 years after it had occurred. The claim was lodged with the insurer at this time but was repudiated on the basis that it had not been lodged timeously.

The PFA held that the employer had a duty to submit the claim to the insurer within a specified time period. The employer failed in its duty and was therefore liable to the complainant for the damages that she had suffered.

#### High Court Ruling

The High Court overturned the PFA's determination. In doing so the court held that:

- in this case, the fund rules did not create an obligation on the employer to submit the death claim to the insurer;
- there was no obligation in law for the employer to submit the claim and if there is no duty on the employer to submit the claim, then there can be no breach; and
- furthermore, the employer had no knowledge of the member's death, so it would have been impossible for it to lodge the claim until it actually became aware of his death.

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#### Position adopted by FundsAtWork

The rules of the FundsAtWork Umbrella Funds specify that the insured portion of a death benefit will be paid in accordance with the reinsurance policy. This policy, unlike the facts of this case, in turn places an obligation on the employer to submit all relevant documents relating to a death claim to the insurer within 6 months of the date of the member's death.

Momentum Retail and Metropolitan Retail policies do not have similar provisions.

## **2. Rose v Rose (2015) – High Court: Islamic marriages**

The issue for the court to decide was whether a woman married in terms of Islamic law could claim maintenance from her former husband as well as a share of his pension benefit.

Faiza Rose married Faizel Rose in terms of Islamic law, while he was still legally married to his first wife.

The first marriage ended after a few months while the marriage between Faiza and Faizel was annulled by the Muslim Judicial Council in 2009.

Faiza Rose then attempted to claim spousal maintenance and a portion of his pension benefit from Faizel Rose by virtue of her marriage to him.

#### High Court Ruling

The court held that:

- the pre-existing civil marriage did not preclude the spouse of a subsequent Islamic marriage from claiming maintenance or a share of the other spouse's pension benefit upon divorce;
- the Constitutional Court has extended the word "spouse" to include spouses of an Islamic marriage for purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act. It would be inconsistent to recognise the parties to an Islamic marriage as "spouses" so that they qualify for the protection and benefits under certain laws but then to withhold this recognition in the context of the Divorce Act.

#### Position adopted by all MMI sponsor funds

For the purposes of division of pension interest on divorce, the sponsor funds will treat an Islamic divorce in the same way as a civil divorce.

## **3. Mantsho v Municipal Pension Fund (2015) – High Court: failure to comply with PFA determination**

The applicant, Mantsho, applied to the High Court for an order placing the fund in contempt of court for failing to act in accordance with a determination issued by the Pension Funds Adjudicator (PFA).

Mantsho argued that the fund's failure to comply with the determination meant that it was in contempt of court because section 30O of the Pension Funds Act provides that "any determination of the Adjudicator shall be deemed to be a civil judgement of any court of law had the matter been heard in such court".

#### High Court Ruling

The court held that:

- an order for contempt of court can only be granted for the non-compliance with a *court order*;

- the Constitution recognises the Constitutional Court, High Court, Magistrate's Court and any other court established by Parliament as a court;
- the PFA is a tribunal established in terms of the Pension Funds Act and is therefore not a court as contemplated in the Constitution. For this reason, a determination issued by the PFA is not tantamount to a court order;
- Section 30O does not confer on the PFA the status of a High Court; it simply means that the procedure for the execution of a determination is the same as that for a court order.

#### **4. Sentinel Retirement Fund v Mtambo (2015) – High Court: payment of future maintenance as a lump sum**

The court had to consider whether a fund could pay future maintenance as a lump sum.

The court held that the payment of future maintenance as a lump sum was contrary to sections 37A and 37D of the Pension Funds Act (unless there was mala fides on the part of the debtor).

The court was of the view that future maintenance awards must be deducted and paid to the maintenance creditor as and when it becomes due and payable.

##### Approach adopted by all MMI sponsor funds

The sponsor funds will deal with claims for future maintenance awards on a case by case basis.

#### **5. Rodseth v Dynamique SA Umbrella Provident Fund (2015) – PFA: trustees' obligation with regards to communication**

The complainant lodged a complaint with the PFA based on the fund's lack of communication and failure to provide him with a benefit statement.

The fund had sent the benefit statements to an intermediary who would then distribute these statements to the members.

The PFA held that providing benefit statements to members is one of the duties of the board under section 7D(c) of the Pension Funds Act. By forwarding benefit statements to an intermediary for distribution to members, the board had failed in its duty to ensure that adequate information is communicated to members.

##### Approach adopted by FundsAtWork

FundsAtWork communicates with members directly by way of regular newsletters, benefit statements and infoslips where we have their personal contact details.

##### Approach adopted by Momentum Retail

Momentum Retail sends annual policy statements directly to members.

##### Approach adopted by Metropolitan Retail

Metropolitan Retail sends benefit statements to members directly.

## **6. City of Johannesburg v SALA 2015 ZASCA 4 – SCA: fund litigating on behalf of members**

The SCA considered whether or not a fund can litigate on behalf of its members.

The court held that where the members had a direct and material interest in the matter, they must be given an opportunity to state their preference.

Section 7C of the Pension Funds Act provides that the board of the fund must act in the best interests of the members; it does not appoint the trustees as agents of the members.

This matter has been appealed to the Constitutional Court.

## **7. Sentinel Retirement Fund v Gilbert (2015) – High Court: attachment of fund benefit**

In this matter, the creditor of the member attempted to attach a portion of his pension benefit to satisfy the debt owed to her.

The court held that section 37A of the Pension Funds Act protects a member's benefit for as long as the benefit remains in the fund. This means that the benefit cannot be attached or subject to any type of execution. The only deductions that can be made from a pension benefit are those provided for in section 37D of the Pension Funds Act.

However, once the benefit is paid out to the member or his beneficiaries, it loses this protection and can be attached.

### Approach adopted by all Sponsor funds

All Sponsor funds already follow the principle upheld in this case. We will only allow a deduction from a pension benefit if all the legal requirements have been met.

## **8. Horn v LA Health (2015) – Constitutional Court: payment of pension and redundancy benefits on transfer of business as a going concern**

The appellants were employed by LA Health.

On 1 January 2005, the department in which they were employed was transferred by LA Health to Discovery Health.

On hearing that their department was going to be transferred to Discovery, the appellants approached LA Health and made out a case for retrenchment.

In terms of the fund rules, a member whose service was terminated due to the reduction or reorganisation of staff or by the abolition of his post in order to effect improvement in efficiency or organisation or as a result of his post being declared redundant will be entitled to a redundancy benefit. The appellants argued that in terms of the above rule, they were entitled to a redundancy benefit. The Supreme Court of Appeal had ruled that the appellants were not entitled to such a benefit.

On appeal to the Constitutional Court, the majority judgment held that the court has no jurisdiction to hear the matter as no constitutional issue raised and also relief sought against a party (Discovery) that was not present.

In a separate judgement handed down by Zondo J (Mogoeng CJ and Leeuw AJ concurring) it was held that there was a constitutional issue and any obligation that LA Health had to pay an additional

redundancy benefit fell within section 197(2)(b) of the Labour Relations Act and was consequently taken over by Discovery. Section 197 provides that all rights and obligations between the old employer and the employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee. As a result, this judgement concluded that the action instituted against LA Health should have been brought against Discovery Health.

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