

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 Fund 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.

The University of Pretoria Pension and Provident Fund v Du Preez JSP and the Pension Funds Adjudicator (2015) – High Court: Powers of the Pension Funds Adjudicator

The University of Pretoria Pension and Provident Fund 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 Ms Du Preez. She was aggrieved by the fact that the fund has failed to recognise her as an “eligible spouse” in terms of the rules of the fund.

When the board took its decision in respect of Ms Du Preez’s claim, they considered all the factors that they deemed to be relevant. Ms Du Preez sent in an affidavit on the 4 of June 2012 indicating that at the time of the member’s death, she and the member were not living together. They had separate households. On 17 March 2013, Ms Du Preez submitted a further affidavit saying that she and the deceased shared a household and were living together.

After careful consideration of all the facts, the board was not satisfied that at the time of death, Ms Du Preez qualified as an “eligible spouse” in terms of the rules of the fund.

When the complaint was lodged with the adjudicator, she was required to determine the rationality and lawfulness of the decision. She however decided on the relationship between the deceased and Ms Du Preez and proceeded to reconsider the complaint entirely, usurping the board’s discretionary powers. The adjudicator held that Ms Du Preez did in fact qualify as an “eligible spouse” in terms of the rules of the fund.

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High Court Ruling

The high court overturned the PFA's determination and upheld the appeal. In doing so the court held that:

- A complaint to the adjudicator cannot be about the merits of the board's decision.
- The adjudicator can consider the manner in which the discretion was exercised, but not the correctness of the decision.
- There is no legal basis for the adjudicator to reconsider or rehear the matter, due to its inherent jurisdiction.
- The adjudicator had no power to simply substitute her own decision for that of the board.
- Since the court of law could not substitute its discretion for that of the board, neither could the adjudicator.
- There was a misdirection of the law.

Relevance to the MMI sponsor funds

The trustees of the funds must ensure that they take all relevant factors into account and exercise their powers fairly and equitably.

Ntsoereng v Regent Life Retirement Annuity Fund – PFA: Distribution of a death benefit

The complainant lodged a complaint with the PFA based on the fund's decision to exclude her from a death benefit on the basis that she was not nominated.

The member of the fund had passed away and a death benefit was payable. The benefit amount was under R50 000. The board of this fund had taken a resolution stating that any benefit that is less than R50 000 must be paid in terms of the member's nomination form; no further investigations are required. Due to this, the complainant was not considered to receive a portion of the benefit, as she was not nominated.

The adjudicator held that the resolution taken by the board to not investigate amounts below R50 000, was a violation of section 37C of the Pension Funds Act. Such a resolution was tantamount to a fettering of the trustees' discretion. A nomination form is just one of the factors to be considered in the exercise of the trustees' discretion and section 37C was enacted to protect the dependency needs of certain people over the wishes of the deceased member.

After considering all the facts, the adjudicator accordingly set aside the decision made by the board.

Approach adopted by MMI sponsor funds

The funds investigate all claims, irrespective of the amount involved.

Ndumiso v Auto Workers Provident Fund – PFA: 37D deduction in absence of a compensation order

The complainant lodged a complaint with the PFA based on the fund's decision to withhold his withdrawal benefit and not pay it to him.

The complainant was a member of the fund by virtue of his employment. The complainant's employment came to an end following allegations of theft from his employer. The employer had laid a charge with the South African Police Service and a criminal case was opened against the complainant.

The complainant was found guilty in the court of law for the amount that was stolen from the employer. The judgement handed down by that court indicated that the member had in fact stolen from the employer and as such was given a 3 year suspended sentence coupled with community service.

In light of this judgement, the employer had then instructed the fund to pay the amount that was owed to them from the complainant's withdrawal benefit. The fund asked the employer to send them the judgement that would allow the fund to pay over an amount to the employer. However, there was no such evidence as the judgement that was obtained was not accompanied by a compensation order.

The employer was required to make an application for a compensation order in terms of section 300 of the Criminal Procedure Act. It is only when an employer has such an order, which is deemed to be a civil judgement, that a fund can deduct the amount owed to the employer from the member's benefit and pay it over to the employer in terms of Section 37D of the Pension Funds Act.

The complaint was upheld and the fund was ordered to pay the full withdrawal benefit to the complainant.

Approach adopted by FundsAtWork

The rules of the funds allow them to withhold a portion or the whole of the benefit until the matter has been determined by a court of law and has been settled or if the case is withdrawn. In terms of the guidelines that govern this process, it is made clear that a compensatory order must accompany the court order.

Approach adopted by Metropolitan Retail and Momentum Retail

There is no employer-employee relationship in retail funds, therefore the above does not have any impact on these funds.

DM Rutter OBO GCM Retirement Fund v ABSA Consultants and Actuaries and Herbet Robin Hurd – PFA: Expenses incurred for the finalisation of a section 14 transfer

The complainant lodged the complaint with the PFA due to the excessive costs incurred by Mr Hurd who was appointed to deal with the finalisation of a section 14 transfer from GCM to the Millennium Retirement Fund. GCM was classified as an orphan fund and Mr Hurd was appointed by the FSB as an authorised representative of GCM. He was also an employee of ABSA Consultants and Actuaries.

The complainant alleges that Mr Hurd had incurred excessive costs in the finalisation of the section 14 transfer and also failed to invest the money in the Wealth Creation investment portfolio and instead invested it in a money market account. Mr Hurd's response was that he had invested the cash in the money market account to protect the investment against the volatile financial markets while the section 14 was still pending.

The adjudicator held that the costs incurred by Mr Hurd were necessary in order to submit the surplus apportionment scheme to the FSB. Furthermore, the decision to keep GCM's funds in a money market account to safeguard the members against the volatile financial market pending the finalisation of the section 14 transfer was a reasonable decision.

The appointment of employees of service providers, as representatives, that have an interest in the fund was of concern to the adjudicator. The adjudicator felt that this practice might result in undesirable consequences as far as proper governance is concerned. The adjudicator held that the loss of capital due to poor administration was unavoidable when expenses are incurred as a result of a delay in the finalisation of the section 14 transfer.

The complaint was dismissed.

Approach adopted by MMI sponsor funds

The rules of the funds provide that section 14 transfers must be done within the prescribed periods. This ensures that no unnecessary delays take place and no unnecessary costs are incurred.

Solani v Metal Industries Provident Fund, Metal Industries Fund Administrator and On Par Erection Works CC – PFA: Payment of contributions

The complainant lodged the complaint with the PFA because his employer had failed to pay over his contributions to the retirement fund.

The complainant became a member of the Metal Industries Provident Fund by virtue of his employment with On Par Erection Works CC in October 2007. On Par Erection Works CC deducted contributions from the complainant's salary which were to be paid to the Metal Industries Provident Fund for his retirement funding. The complainant mentioned that from 9 March 2009 to 31 July 2012, the employer had made deductions from his salary for his retirement funding; thereafter no deductions were made from his salary. This was confirmed by the fund administrator. The basis for the complaint was that the complainant wanted the employer to continue making deductions from his salary and paying it over to the Metal Industries Provident Fund.

On Par Erection Works CC stopped all contributions from 2012 due to financial difficulties. They decided to stop contributions to the fund to ensure none of the employees were retrenched. They held discussions with the Bargaining Council involved and informed them that contributions would be placed on hold. They claimed to have informed all employees of this decision.

The adjudicator held that On Par Erection Works CC had a duty in terms of section 13A(1)(a) of the Pension Funds Act and the rules of the Metal Industries Provident Fund to pay the contributions and provide the contribution schedules. The failure by On Par Erection Works CC to pay contributions to the Metal Industries Provident Fund was not a withdrawal from the fund. As long as the employer has not withdrawn from the fund, they had an obligation to pay contributions to the fund. On Par Erection Works CC stated that they intended on resuming the payments once their financial position improved.

The adjudicator further held that in instances of financial stress, it was important that the employer applied to be placed under business rescue, which would stop its financial obligations, including contributions to the fund.

The complaint was upheld and the employer was ordered to pay over all outstanding contributions, as well as late payment interest.

Approach adopted by FundsAtWork

The rules of the FundsAtWork Umbrella Funds allow for an employer to enter into an agreement with the Fund to suspend contributions for 3 months. The Fund and the employer then agree on when the contributions would begin again and when and how the contributions in respect of the suspended period would be paid to the Fund.

Approach adopted by Metropolitan Retail and Momentum Retail

There is no employer-employee relationship in retail funds, therefore the above does not have any impact on these funds.

Msimango v Ekurhuleni Metropolitan Municipality and Municipal Employees Pension Fund – High Court: Withholding of pension benefits

The applicant applied to the court to have her retirement fund benefit paid to her as the respondent was withholding the benefit pending the finalisation of court proceedings that were instituted against her.

The applicant was employed as a cashier by the respondent. She was dismissed on 22 November 2013 due to her misconduct. She had embezzled money that was due to the respondent. A disciplinary hearing by the respondent found her guilty of gross negligence and misconduct which ultimately led to her dismissal.

In terms of section 37D of the Pension Funds Act, an employer is allowed to withhold a member's benefit where the member has admitted liability in writing or where a judgement has been obtained against the member in a court of law. In this case, the respondent had sent an acknowledgement of debt to the respondent for her signature which she refused to sign. The respondent had also instituted proceedings against her in a criminal court for theft and fraud and in the civil court for determination of liability.

The applicant claimed that since the respondent had no admission of liability or a judgement, the respondent had no right to withhold the benefit and that it should be paid out to her. The respondent claimed that the applicant's request for payment was premature due to the pending proceedings in the courts.

The applicant claimed that the respondent had instituted action in the courts and thereafter intentionally delayed proceeding with the action that was instituted against her. She claimed that she was prejudiced by this unreasonable behaviour. The court however mentioned that section 37D of the Pension Funds Act created scope to withhold a member's benefit pending the finalisation of the employer's claim. In most cases, employers only suspected dishonesty once the member has already left employment and the pension benefits usually get paid without the suspected dishonesty being properly investigated. The court further iterated that there were lengthy delays in the justice system when it came to finalising cases. The court stated that the wording of section 37D of the Pension Funds Act must be interpreted to include the power to withhold the member's pension benefit pending the determination of the investigation or the acknowledgment of such member's liability.

Now that it has determined that the fund did in fact have authority to withhold the benefit, the court had to decide if the discretion used by the fund was properly exercised in light of the complaint by the complainant.

The court found that the respondent's actions showed that they were taking this matter seriously and that they were not intentionally delaying the process to disadvantage the member. The court felt that it would be fair to withhold the benefit pending the outcome from the court proceedings.

The complaint was dismissed.

Approach adopted by FundsAtWork

The General Rules of the FundsAtWork Umbrella Funds allow the Funds to withhold the payment of the benefit pending the outcome of the court proceedings.

Approach adopted by Metropolitan Retail and Momentum Retail

There is no employer-employee relationship in retail funds, therefore the above does not have any impact on these funds.

Maswanganye v Baloyi (Executrix of the deceased estate) and the Master of the High Court (2015) – High Court: Customary adoption

The applicant applied to the court to have herself declared as the sole surviving descendant of the late KM Baloyi as well as the executor of the deceased estate as opposed to the first respondent being made the executor. The applicant claimed that she was customarily adopted by the late KM Baloyi.

The deceased and the applicant's mother were sisters who both had the maiden surname Baloyi. The applicant's mother later got married and it was from that marriage that the applicant was born. The applicant alleged that when she was 10 years old, her parents had her customarily adopted by the deceased. The applicant stated that her residing with the deceased and taking her surname was enough proof of the adoption.

The first respondent was the wife of the deceased's son and she was appointed as the executor of the estate. The deceased's son also passed away and had 3 children with the respondent and 2 from a previous marriage. The first respondent opposed the application on the grounds that the applicant was never adopted and that even if she was, she cannot be the sole surviving descendant of the deceased.

In determining the basis of customary adoption, the court referred to the case of *Kewana v Santam Insurance*. In this case the court referred to an article written by an African law expert which outlined the process of customary adoption. The process entailed the following: relatives were called to a meeting where the adoption was to take place. After the meeting, the adoption is reported to a traditional leader of the area or their representative. This was done to indicate that the adopted child has been formally transferred from one family to another. In the case where the adoption was not reported to the traditional leader, it would still be valid if due publicity was given to the process and there was an agreement between the adoptive child and the adoptive parents. The validity of an act of adoption in terms of customary law largely depended upon the agreement between the families.

Based on the above evidence, the court felt that the element of publicity was central to the customary adoption process. In this case, all the applicant could establish was that she resided with the deceased. She could not prove that any ceremony or publicity was given to this significant development. The court felt that the mere fact of residence, on its own, was not sufficient to constitute customary adoption. Furthermore, both the applicant's natural parents were alive during the adoption period and there was no proof or suggestions that the family was unable or unwilling to take care of her. Under those circumstances, the court felt that that was not enough of an indication that the applicant's parents had in fact given her away for adoption. Adoption is a process through which substitute family care is provided for a child whose natural parents are unable or unwilling to provide for the child. When considering a case of alleged adoption outside the framework of the law, a court should not be hasty to conclude, in a given situation, that there has been informal adoption.

The court made reference to the well-known case of *Flynn v Farr*. In this case, the child's parents were divorced and the mother had remarried. The step-father looked after the child as if he were his own. However, the child was never legally adopted by the step-father because his biological father would not grant the consent for the adoption. After the step-father died, the executor of the estate applied to the court to have the child, who was now a major, deemed to have been adopted by the step-father. The court declined to grant such an application.

The court pointed out that the applicant had gotten married and the lobola was actually paid to her biological parents and not to the late KM Baloyi. The court held that this further indicated that adoption never took place.

Statutorily, an order of adoption terminates all rights and responsibilities which may exist between the child and their natural parents. It should not be any different if the child was adopted customarily.

The court felt that the applicant had failed to satisfy the requirements for customary adoption. The application was dismissed.

Relevance to FundsAtWork

The insurance policies were amended to remove all reference to customary adoption; only legal adoption is recognised.

Shameer Chothia

Legal Specialist : Products

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