



Case law update – fund benefits

This update discusses several recent judgements that have an impact on pension funds, in particular fund benefits, and where appropriate, sets out the position adopted by the MMI Sponsor funds.

A. **Mbozi v South African Local Authorities Pension Fund and Others (2016) 2 BPLR 252: PFA – Charging of interest on debts**

Mr Mbozi was a member of the South African Local Authorities Pension Fund (the fund) from 1 April 1989 until 30 November 2014 when his employment was terminated. His retirement benefit at the time was R928 231,72. Mr Mbozi stated that after the termination of his employment, an amount of R80 055,86 was deducted from his retirement benefit for a housing loan which he had with FNB. A further amount of R119 328,78 was also deducted from his retirement benefit, for a home loan that he had with Standard Bank. It was the second deduction that Mr Mbozi had a problem with.

The adjudicator had to determine whether Mr Mbozi had a home loan with Standard Bank for which the fund acted as guarantor and if the fund was justified in deducting the amount from his retirement benefit to settle the home loan debt.

The rules of a fund are supreme and binding on its officials, members, shareholders, beneficiaries and anyone else claiming from the fund. This is confirmed by section 13 of the Pension Funds Act.

It was clear from the rules of the fund that the fund had the right to issue a guarantee on behalf of its members in favour of financial institutions for housing loans.

It was also clear from the rules of the fund that a member's benefit may be reduced by the amount owing to a financial institution for a housing loan guarantee granted by the fund where a member has defaulted or failed to make repayments and where membership in the fund comes to an end. Mr Mbozi had retired on 30 November 2014. The housing loan was however already settled on 31 July 2002 due to the fact that he defaulted on his repayments, which meant that the fund as surety had to step in at that time and settle the debt. The capital amount that Mr Mbozi owed to Standard Bank at the time was R38 820, 03. The fund however deducted an amount of R119 370, 81 from Mr Mbozi's retirement benefit, stating that the amount had grown as a result of interest.

The adjudicator pointed out that the fund had ignored the application of a very important principle, the *in duplum* rule, when calculating Mr Mbozi's debt. This is a common law principle which regulates how much interest can be charged on a debt. The case of *Standard Bank v Oeanate Investments (Pty) Ltd (1997) ZASCA 94* confirmed this principle that interest should stop running when the unpaid interest equals the outstanding capital. When, due to payment, interest drops below the outstanding capital, interest again begins to run until it once again equals the outstanding capital. The effect of the *in duplum*

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rule on Mr Mbozi's debt meant that the interest on the debt should have been capped at R38 820,03, meaning that at no point in time the total of the debt should have exceeded R77 640,06. The actions of the fund to continue charging interest on interest after this amount was reached, was illegal.

The adjudicator found that Mr Mbozi was prejudiced by the manner in which the fund calculated the interest on the debt in total ignorance of the *in duplum* rule. The adjudicator ordered that the fund place Mr Mbozi in the position that he would have been had the *in duplum* rule been correctly applied.

Approach adopted by FundsAtWork Umbrella Funds

These are the only sponsor Funds allowing for housing loans. The Funds apply the *in duplum* rule correctly in relevant matters where a member's debt is to be calculated.

B. Kwacha Pension Fund and Sizwe Medical Fund v Pension Fund Adjudicator and NF Gabela (case number 76484/2013) – Section 37D deduction and the failure to return property of the employer

Ms Gabela was a member of the Kwacha Pension Fund (the fund) by virtue of her employment at Sizwe Medical Fund. Her contract of employment was terminated by agreement in October 2011. Ms Gabela agreed to return the assets of the employer to the employer with immediate effect. The assets involved were a vehicle, a petrol card, credit cards, cell phones and a laptop. Ms Gabela breached the agreement. The employer instituted a *rei vindicatio** in respect of the motor vehicle and was successful in the recovery thereof. Ms Gabela was ordered to pay the costs of the application, which amounted to R383 808.86.

* legal action by which the plaintiff demands that the defendant return a thing that belongs to the plaintiff.

Ms Gabela's attorneys then informed the fund and the employer that she consents to a set-off from her pension fund benefit in the amount of R383 808.86. They further requested that the remainder of the fund benefit be released. The fund deducted the amount of R383 808.86 and paid it to the employer. The balance however was retained in the fund and was not paid to Ms Gabela as requested by her attorneys. The reason for this was because the employer had instituted an action for damages against Ms Gabela, amounting to a lot more than the remainder of her fund benefit. Ms Gabela lodged a complaint with the Pension Funds Adjudicator (PFA).

Pension Funds Adjudicator

The PFA ordered the fund to reimburse Ms Gabela with the amount of R383 808.86 which was deducted from her pension benefit, with interest of 15.5% per annum.

High Court

Section 37D(1) of the Pension Funds Act (the Act) gave the fund the right to withhold the benefit pending the finalisation of the criminal case against Ms Gabela. Section 37D(b)(ii) lists the reasons for which a deduction can be made from a member's benefit, one of which is misconduct. The court was of the view that the actions of Ms Gabela in retaining the vehicle after having agreed to return it to the employer, forcing the employer to institute legal action to recover its asset, fell within the ambit of misconduct. Further, the member also admitted liability in writing for her actions.

In light of this, the court found that the deduction that the fund made from Ms Gabela's pension benefit was lawful and set the determination made by the PFA aside.

Approach adopted by FundsAtWork Umbrella Funds

The General Rules of the FundsAtWork Umbrella Funds allow the Funds to withhold a portion of or a member's entire benefit under section 37D of the Act until the matter has been determined by a court of law and has been settled, or if the case is withdrawn.

Approach adopted by MMI sponsor retail funds

Since there is no employer-employee relationship in a retail fund, the rules of these funds do not allow for a deduction in favour of an employer.

C. TC Khadi v University of Venda, Designated information officer of the University of Venda and Univen Provident Fund (case number 245/2013) – Access to information in order to determine benefits arising from the fund

Ms Khadi was married to Mr Khadi (the deceased) who was a member of the Univen Provident Fund (the fund) by virtue of his employment with the University of Venda (the employer). Ms Khadi had requested certain records regarding the formula that was needed in order to determine the value of the benefit that was to be paid to Ms Khadi from the fund as a death benefit. She also wanted access to the rules of the fund.

The employer had failed to provide the information to Ms Khadi within 30 days of her request. The court found that in terms of the Promotion of Access to Information Act, the employer is a type 3 public body created in terms of legislation. It is not a private body. There is a statutory duty on the employer to render reasonable assistance to Ms Khadi who requested the information, free of charge. The employer may not refuse such request without providing the reasons for it, as explained in the Promotion of Access to Information Act.

The application for costs of litigation was granted as the court was of the view that litigation was reasonably necessary in order to gain access to the information that was requested.

Approach adopted by MMI Sponsor Funds

Whenever a member or a beneficiary wants any information in respect of their benefit or a benefit that becomes payable as a result of the death of the member, the relevant information will always be made available to the parties. With regard to the Rules of the Funds, these are available for inspection at any time as is required by the Pension Funds Act. When members request it, the Rules are sent to them electronically, at no charge.

D. RR McGloughlin v Lifestyle Retirement Annuity Fund and Liberty Group Limited (PFA/GP/00025293/2016/SM):PFA – Mode of payment of a death benefit

Mr McGloughlin was married to Mrs McGloughlin (the deceased) who was a member of the Lifestyle Retirement Annuity Fund (the fund). They got divorced on 23 October 2009. Mrs McGloughlin had two policies with the fund. She died in April 2015 and was survived by Mr McGloughlin and her two minor children from a previous marriage. Mrs McGloughlin had left a will whereby she stated that any benefit that was bequeathed to a beneficiary that was under the age of 18 years should go into a testamentary trust. Mr McGloughlin was nominated as the guardian of the minor children in Mrs McGloughlin's will.

Upon the death of Mrs McGloughlin, a benefit of R1 406 867,72 became payable from the fund under section 37C of the Pension Funds Act (the Act). The board of the fund decided to split the benefit equally between the two minor children. The fund however refused to pay the benefit into a testamentary trust that was to be set up for the minors. Mr McGloughlin wanted it to be paid into the trust as per the wishes of Mrs McGloughlin. He then lodged a complaint with the Pension Funds Adjudicator (PFA).

The trust deed which the fund got from Mr McGloughlin, after several requests, showed that the trust was a discretionary trust. In a discretionary trust, the trustees that manage the trust funds and assets on behalf of the beneficiaries have full decision making authority. The fund stated that the challenge with this type of trust was that there was no guarantee that the benefits would be used solely for the upkeep of the minor children. This was the main concern for the trustees of the fund. The trustees of the fund suggested that a non-discretionary trust should rather be set up instead, which would mean that the trust assets and funds would be distributed according to pre-determined instructions. Alternatively, they recommended that the current trust be changed to a non-discretionary trust.

The adjudicator made it clear that a board of trustees of a fund is not bound by a will or nomination made by the deceased. The contents of the will or nomination are merely to guide the trustees in the exercise of their discretion. Further, the benefit does not form part of the estate and as such cannot be subject to the provisions of the will. Section 37C(3) of the Act gives trustees the discretion to determine the mode of payment of the benefit. The best interests of a minor child are paramount and should prevail over all other considerations.

The adjudicator found that the fund was reasonable and justified in its apprehension in not allowing the benefit to be paid into the discretionary trust. Mr McGloughlin must either get the trust deed amended or establish a non-discretionary trust that guaranteed the interests of the minor children and did not give the trustees of the trust a wide discretion regarding the use of the funds and assets in the trust. If Mr McGloughlin failed to establish a non-discretionary trust, the benefit should be paid into a beneficiary fund.

The complaint was dismissed.

Approach adopted by MMI Sponsor Funds

Whenever there is a request to pay a benefit into a trust, the boards of the funds assess the trust deed to ensure that the benefit will be paid and used for the benefit of the intended beneficiaries and nobody else. In practice this means that they follow the approach adopted in this matter, by not allowing payment into a discretionary trust.

E. AB Potgieter v Pension Funds Adjudicator (case number 45647/2013) – Ill-health disability benefits

Mr Potgieter was a member of the Motor Industry Provident Fund (the fund). In terms of the rules of the fund, a member can apply for a disability benefit as a result of accidental ill-health if he has become continuously and permanently unable to perform his usual work in the motor industry. In November 2004, Mr Potgieter suffered a heart attack. He claimed that this was the start of all his medical problems that followed. In 2005 he suffered from severe back pain which according to Mr Potgieter made it impossible for him to work. He underwent an operation to perform a disc replacement. The doctor was of the opinion that Mr Potgieter could no longer practice his trade and should apply for disability benefits.

The fund sent an occupational therapist to assess Mr Potgieter's condition. She found that Mr Potgieter's condition was partial and that he would be able to overcome the condition by adapting his tasks at work as well as delegating some of the work to his employees. Mr Potgieter challenged her statement that he was assisted by other workers by pointing out that the person that was on the premises at the time that she visited him, did not work for him.

On this basis, the fund repudiated the claim. Several further assessments were conducted by many different medical doctors. Some of the opinions concluded that he had diminished capacity to perform his usual functions, while others found that such diminished capacity would, if he continued to work, result in him becoming permanently disabled.

Mr Potgieter lodged a complaint with the Pension Funds Adjudicator (PFA).

Pension Funds Adjudicator

After considering the medical reports and representations from Mr Potgieter and the fund, the PFA concluded that the fund repudiated the claim correctly and that the claim for disability benefits did not comply with the rules of the fund.

High Court

The court was of the view that if there were factual inaccuracies in the report of the occupational therapist, then that would raise some doubt as to the reliability of her opinion in this regard.

The judge mentioned that neither the board nor the PFA subjected the experts' opinions to oral hearing in order to verify it. As such, it could not find reasons for the rejection of the experts' opinions. The PFA did not provide reasons for rejecting the opinions of certain medical experts that stated that Mr Potgieter should be boarded. The court ruled that Mr Potgieter's condition of ill-health had placed him in a situation where he had become continuously and permanently unable to perform his usual work. The fund has not demonstrated that the conditions mentioned by the medical experts could be removed by surgery. Mr Potgieter therefor qualified for a disability benefit.

The application for review of the determination made by the adjudicator in respect of whether or not Mr Potgieter was entitled to a disability benefit was granted. The determination by the PFA was thus set aside.

Approach adopted by FundsAtWork

The General Rules of the Funds entitles a member to a disability benefit if he meets the requirements set out in the insurance policy under which the insurer is insuring the disability benefit.

Approach adopted by MMI sponsor retail funds

In terms of the rules of the funds, a member can take early retirement from the fund due to ill-health if medical evidence is provided to the trustees of the fund to support such claim. The member will then become entitled to his benefit.

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