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. Motlhakoana v City of Johannesburg Pension Fund and others (2016) JOL 36564: PFA – Commutation of retirement benefits

Mr Motlhakoana was a member of the City of Johannesburg Pension Fund (the fund) as a result of his employment with the City of Johannesburg Metro Police department. Mr Mothlakoana reached his normal retirement age on 10 October 2013. He left employment on 28 February 2015. He was not eligible for a withdrawal benefit as he left employment after his normal retirement date. He sent a notification of retirement form to the administrator, indicating that he wished to commute his entire retirement benefit to a lump sum. The administrator informed him that he could not commute his entire benefit as it is a retirement benefit and that the rules of the fund would not allow for it.

The adjudicator had to determine whether or not the refusal to commute Mr Mothlakoana's retirement benefit was justified.

The rules of a fund are supreme and binding on its officials, members, shareholders, beneficiaries and anyone else claiming from the fund. The rules of the fund provided three options regarding the manner in which Mr Motlhakoana's retirement benefit could be paid. If the benefit was below R75 000, he could take the entire amount as a lump sum payment. If the benefit was above R75 000, he could take one third of the benefit as a lump sum payment; the remainder would then have to be used to purchase an annuity. The third option was to use the entire benefit to purchase an annuity. Mr Mothlakoana's benefit was in excess of R75 000; as such, he could not take the entire benefit as a lump sum.

The complaint was dismissed.

Approach adopted by MMI Sponsor Funds

The rules of the MMI Sponsor Funds make it clear as to what options a member has on retirement. The funds follow income tax legislation, which would only allow payment of the full amount in a lump sum if it is under the *de minimis* amount, currently R247 500.

B. MW Lowers v JMV Textiles (Pty) Ltd Pension and Group Life Scheme; MMI Group Limited and JMV Textiles (Pty) Ltd (PFA/KN/00014894/2015/PGM):PFA – Quantum of a retirement benefit

Mr Lowers was a member of JMV Textiles (Pty) Ltd Pension and Group Life Scheme (the fund) by virtue of his employment at JMV Textiles (Pty) Ltd from March 2003 to April 2015. Mr Lowers retired in April 2015 and became entitled to a retirement benefit in terms of the rules of the fund. MMI Group limited (MMI) was the administrator of the fund. They took over the previous administrator, Sage Life Limited, and the benefits were then transferred to them. Mr Lowers mentioned that he never signed any documents in relation to changing his investment portfolio when the transfer was done.

In January 2015, Mr Lowers requested a benefit statement where he saw that his fund credit was approximately R103 008.43. He was of the view that his benefit should be a lot higher based on the calculations that he had done. He claimed that the administrator had made bad investment choices in administering the fund benefits. The administrator pointed out that the board of the fund was responsible for making the investment choices. The board of the fund in this case had taken a decision to invest the fund assets with Corporate Money Managers (Pty) Ltd (CMM). The fund also appointed Mr John Stewart as its investment consultant and delegated signing authority to him in respect of investment mandates and objectives. In 2008, Mr John Stewart had requested the administrator to switch the assets from the Cadiz portfolio to the CMM portfolio. As the administrator of the fund, MMI had a duty to act on a resolution taken by the board of the fund to avoid breaching its administrative responsibilities.

On 27 November 2008, Mr Lowers' savings that was invested in the Cadiz Money Market Unit Trust Fund amounted to R77 137. After switching it to CMM, his savings had grown to R86 522. In 2009, CMM was placed under curatorship. This meant that the savings of all the members in the fund had to be adjusted to take into consideration the assets that were invested with CMM. As soon as MMI became aware that CMM was being liquidated, they moved members' savings into the Momentum Money Market investment portfolio in order to safeguard members' ongoing investments.

As part of the curator's efforts to recover monies, two separate payments had been made to Mr Lowers. One was to the value of R4 494 and the other was R2 347. MMI stated that although they understood the plight of members, they were not in any way responsible for this plight. The investment decision was and remained a decision that was taken by the board of the fund.

The Pension Funds Adjudicator (PFA) found that the administrator had acted in accordance with the instruction that it had received from the board of the fund. The investment vehicle, CMM, was chosen by the board of the fund and not by the administrator. Further, the PFA found that Mr Lowers suffered financial loss due to the curatorship of CMM. He stood to receive a benefit that was less than the one prescribed in the rules of the fund. The PFA was of the view that the board of the fund had failed to protect the interests of its members. The board had failed to act with due care and diligence and should therefor carry the blame in this matter.

The fund was ordered to pay to Mr Lowers the benefit that they currently hold, plus the remainder of his benefit as and when they received it from the curators.

<u>Approach adopted by MMI Sponsor Funds</u>

The MMI Sponsor Funds have a service level agreement between themselves and the administrator which clearly sets out the duties of the administrator. They also documented the duties of the trustees and the delegation of certain functions of the trustees to different entities. These documents take away any confusion regarding who is responsible for a specific function.

C. CE Greyling v Government Employees Pension Fund and LC Berning (case number 51529/2012): High court - Death benefits and dependency

Mr AB Greyling (the deceased) was a member of the Government Employees Pension Fund (the fund) by virtue of his employment with the South African Police Service. He went missing in 1995. At the time he was married to Ms LC Berning (formerly Greyling). In 1997, Ms Berning obtained a divorce order. In 2011, she obtained an order declaring Mr Greyling as deceased. At the time that the court had declared Mr Greyling deceased, Ms Berning was not married to him anymore. She could therefore not be considered as a widow for purposes of the estate or for purposes of deriving a benefit that was payable to a widow of a member of the fund.

Ms CE Greyling, the deceased's mother, claimed the death benefits by stating that she was the only surviving relative. She was not financially dependent on the deceased at the time of his death.

The court had to determine whether or not Ms CE Greyling was in fact a dependant as defined in section 1 of the Government Employees Pension Law (proclamation 21 of 1996) by virtue of being the mother of the deceased, and whether her financial independence was a relevant factor that disqualified her from receiving the benefit.

The payment of death benefits is regulated by section 22 of the Government Employees Pension Law and the rules of the fund.

The three prerequisites of a legal duty of support are: 1) a relationship; 2) need on the part of the person to be supported; and 3) adequate resources on the part of the person who is called upon to provide the support. The court referred to the case of *Government Employees Pension Fund and Another v Buitendag and Others 2007 (4) SA 2 (SCA)* in coming to the conclusion that the interpretation of dependant as defined in section 1 of the Proclamation should be extended to include a self-supporting or non-dependent parent of a member or pensioner. Accordingly, the court found that Ms Greyling did in fact qualify as a dependant for purposes of payment of death benefits.

The court stated that in cases like this one, payment to the estate should be as an absolute last resort and only where there are no dependants. The court ordered that the death benefits be paid to Ms Greyling.

Approach adopted by MMI Sponsor Funds

The MMI Sponsor Funds follow the provisions of section 37C of the Pension Funds Act in dealing with the distribution of death benefits. The definition of "dependant" in section 1(1) of the Pension Funds Act has certain similarities with the definition of "dependant" in the Government Employees Pension Law. Under that definition, the mere fact that a person is a family member of a member would not suffice to bring that person under the definition of "dependant". The Pension Funds Act also does not require that payment to the deceased member's estate should be the absolute last resort.

The MMI Sponsor Funds conduct thorough investigations to determine who the potential beneficiaries to be considered for the distribution of a member's death benefit are. If they do not find a dependant as defined in the Pension Funds Act, and there are also no nominated non-dependant beneficiaries, the benefit would be paid into the deceased member's estate.

D. Hazel Nhlabathi v Mpumalanga Economic Growth Agency (case number 15315/2013): High court – Prescription in death benefit distributions

Mr Nhlabathi (the deceased) was a member of the Multikor Pension Fund (the fund). He died in 2009. Mrs Nhlabathi claimed payment of an amount of R703 898 relating to the death benefits of the late Mr Nhlabathi. Mpumalanga Economic Growth Agency was responsible for making the payments.

Mrs Nhlabathi became aware of the benefit on 3 August 2009. She had received a partial payment of the benefit and was now laying claim to the rest of the benefit that has become due and payable. However, her court action was instituted more than three years after the date on which the claim arose. Mpumalanga Economic Growth Agency had raised a special plea stating that the claim has prescribed and that Mrs Nhlabathi could not bring such a claim. The question that had to be answered by the court was whether or not her claim has prescribed in terms of the Prescription Act (the Act).

On 2 February 2010, Mrs Nhlabathi and her mother in law were paid an equal share of the benefits from the Group Life Cover that was in place. However, there was still an amount for spouse's cover that was not yet paid to Mrs Nhlabathi. The court was of the view that Mpumalanga Economic Growth Agency was in a position of trust in relation to Mrs Nhlabathi as she was paid out a benefit far less than what she was entitled to. Section 12 of the Act states that prescription commences to run as soon as the debt is due. Prescription will only begin to run once the creditor becomes aware of the existence of the debt. A debt shall not be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises.

A debt becomes due when it is immediately payable by the debtor and immediately claimable by the creditor. A debt can only be claimable if the creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of the debt, a creditor must have a complete cause of action in respect of it. What this means is that every fact which was necessary for Mrs Nhlabathi to prove in order to support her right to judgement of the court would need to be presented. The entire set of facts which gave rise to an enforceable claim and every fact which was material to her claim must have been presented. The cause of action did not arise until the occurrence of the last of such facts and as such Mrs Nhlabathi must have the complete cause of action when summons was served.

Section 14 of the Act states that the running of prescription will be interrupted by the express or tacit acknowledgment of liability by the debtor. Prescription then begins to run afresh from the day on which the interruption takes place. *Agnew v Union and South West Africa Insurance Company Limited 1977(1)SA 617(A)* confirmed this position. In this case it was stated that in order to interrupt prescription, an acknowledgment by the debtor must amount to an admission that the debt is in existence and that he is liable therefore.

On 6 July 2010, Mpumalanga Economic Growth Agency sent a letter to Mrs Nhlabathi, acknowledging that there was some money still due and payable. The court said that Mpumalanga Economic Growth Agency was in a position of trust as they were still in a position whereby they had to pay the remainder of the benefit to Mrs Nhlabathi and that dictates that they should have made a full disclosure of what was due to Mrs Nhlabathi right from the beginning.

The court stated that by making partial payments and withholding other payments, it was clear that Mpumalanga Economic Growth Agency admitted to the debt and as such protected the running of prescription. Prescription could only begin to run again from the date that Mrs Nhlabathi received the letter, which was 6 July 2010. The summons issued in this matter was March 2013.

The court was of the view that the claim had not prescribed and that Mrs Nhlabathi has every right to pursue such claim. The special plea that was raised was dismissed with costs.

E. D v M, M(in her capacity as a mother and guardian of Z, the minor son) and Setshaba Pension Fund (case number 30619/2015): High court - Death benefits and paternity

SD (the deceased) was a member of the Setshaba Pension Fund (the fund). Upon his death, an amount of R2 million had become payable by the fund. The fund identified Z as a dependant in terms of the rules of the fund and that he should be the beneficiary of the death benefit. D had queried the paternity of the minor child Z and asked the fund to conduct a paternity test to get certainty of his paternity. The fund refused this request but did provide D the chance to prove her claim with any such proof that she could provide.

M was the mother of the minor Z. D was the mother of SD and also the executor of the estate. M and SD was in a relationship from 2005 until 2010. Z was born in 2008. There were factual disputes raised by D as to whether the relationship between M and SD was actually a proper relationship as well as whether SD considered himself as Z's father at the time of his death. D also mentioned that SD and M had taken a three month break in their relationship and shortly after reconciling M had informed SD that she was pregnant. D mentioned that SD questioned Z's paternity when Z turned a year old, based on the child's appearance. She also claimed that SD had stopped paying maintenance when he began to doubt that he was the father of Z.

Regarding the paternity testing, an expert in the field of human genetics explained the scientific procedure and the accuracy of such tests in the case where the minor child's father is deceased. She mentioned that a child inherits half its DNA from its mother and the other half from its father. In the case where the father is deceased, the ideal scenario to test for paternity would be to test the mother, the child and both parents of the deceased father. Where it is a male child, additional testing of the Y chromosome, which looks at the relatedness through the male-line, would also be possible, in which case a probability in excess of 98% is possible. It is clear that an acceptable DNA test can be held without having to examine the body of the deceased.

The judge referred to the case of *Botha v Dreyer (2008) JOL 22809 T* which confirmed the jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties require the truthful verification of paternity by scientific methods. The judge also accepted a view that was adopted in the case of *M v R 1989(1) SA 416(O)*, where it was mentioned that it was in a court's power to order an adult to have blood tests because it was in the best interests of the child that reliable information be obtained to gain clarity on the question of paternity. A guardian of a minor child would be compelled to act in the best interests of the minor child even if doing so would be contrary to their own interests. Depending on the circumstances and within reasonable limits, the privacy rights of a non-consenting adult must yield to the demands of discovering the truth in the best interests of the administration of justice.

In this specific case, the main reason why the request for a paternity test should have been granted was because it would resolve the issue of whether the minor child or the estate should be the beneficiary of the death benefit. A further reason was that it was also in the minor child's interests that the issue of his paternity be resolved as the uncertainty of his disputed paternity would follow him for the rest of his life.

The relatively minor infringement of M's and Z's privacy should not trump the discovery of the truth. Failure to seek the truth in circumstances such as these would not be in the best interests of the administration of justice.

The application to compel M to conduct the DNA test was granted. M and Z were ordered to go for DNA tests to determine Z's paternity. The costs for these tests would have to be borne by D.

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