momentum

Legal update

No. 7 of 2016 • May 2016

Case law update

This update discusses several recent judgements that have an impact on pension funds and where appropriate, sets out the position adopted by the MMI Sponsor funds. Unless otherwise indicated, the cases below are unreported judgements.

1. Sasol Limited v Chemical Industries National Provident Fund (2015) ZASCA 113 – interpretation of rules pertaining to a section 14 transfer

The rules of the Chemical Industries National Provident Fund (CINPF) did not allow for members to transfer out of the fund while still in service.

Due to pressure from members, these rules were amended to allow for members to transfer to another approved fund, subject to certain conditions.

A total of 2444 of Sasol's employees indicated that they wished to transfer to another fund. Sasol informed CINPF that these members would be transferred to another approved fund with effect from 1 March 2013.

Despite objections raised by CINPF, Sasol ceased contributions to the fund on 1 March 2013.

CINPF approached the High Court for an order declaring that these members were still members of the fund and that both employer and member contributions were still payable in terms of the CINPF rules.

High Court

The High Court upheld CINPF's application.

The court said that the rules of a fund were its constitution and the general rules of interpretation should apply.

Due consideration must be given to the ordinary meaning of words, the context in which they appear, the purpose and background of a particular provision. Where more than one meaning is possible, all possible interpretations must be weighed against the above considerations and a sensible meaning must be favoured.

In this case the court found that the rules of the fund set out certain conditions for a valid transfer out of the fund, namely, that the fund must be satisfied that the transfer is reasonable and equitable and that the reasonable benefit expectations of the members are protected. The rules further provided that contributions in respect of members transferring out the fund, could cease on the effective date of the section 14 transfer. These conditions were never met as the fund, CINPF, had not taken any decision on the reasonableness of the transfer and no section 14 application had been lodged.

Supreme Court of Appeal (SCA)

Sasol appealed the High Court decision to the SCA.

The SCA followed the reasoning of the High Court, finding that the rules of the fund had not been complied with. The appeal was dismissed.

2. South African Local Authorities Pension (SALA) Fund v Mthembu 20649 / 2015 (2015) ZASCA 205 – entitlement to a child's pension

On the death of Mr. Kanyile, who was a member of the SALA Pension Fund ("the Fund"), the respondent, Ms Mthembu, became entitled to receive a child's pension on behalf of her daughter, Mbali.

In terms of the rules of the Fund, a child would qualify for a pension if she is unmarried, under the age of 18 and dependent on the member at the time of the member's death. The age limit of 18 can be extended to age 23 if the child is a full time student or the child's pension can be paid indefinitely where the child is wholly dependent on the member on medical grounds.

In March 2011, the fund stopped payment of the child's pension for Mbali because it was of the view that she no longer qualified for the benefit as she was now over the age of 18 and was not a full time student.

At this time, Mbali was 21 and was studying toward a Bachelor of Commerce degree through UNISA.

The Fund argued that UNISA was a distance learning institution and as such any student registered with UNISA could in their opinion not be considered a full-time student. Mbali therefore fell short of the requirements set out in the rules.

Pension Funds Adjudicator (PFA) and High Court

The respondent successfully lodged a complaint against the Fund's decision with the PFA. The PFA's determination was upheld on appeal by the High Court and the Fund took this matter on appeal to the SCA.

SCA

The SCA held that the Fund could not rely on UNISA's definition of "full-time student". The Fund had a duty to examine each case on its merits.

In determining whether a student qualified as a full-time student, the Fund ought to have regard to the course of study being pursued and the commitment demanded by that course of study.

The SCA also reiterated that where in doubt as to the meaning of a word, one must follow the ordinary meaning.

The SCA was satisfied that despite being registered at UNISA, Mbali qualified as a full-time student for the purpose of receiving a child's pension. She had intended to complete her degree in 3 years, as would be required by any institution facilitating full-time study, and she had registered for the same number of courses as would be expected of a full-time student.

Approach followed by the FundsAtWork Umbrella Funds

Studying through a distance learning institution (correspondence study) does not automatically mean that a child is not a fulltime student.

In determining whether a child is a full-time student, Momentum FundsAtWork will look at the nature of the child's studies and the commitment that is demanded of them by that course. If the course is of an unusual character, then Momentum FundsAtWork will compare its demands with those institutions where study is undoubtedly full-time. Based on the information that Momentum FundsAtWork receives,

we will then have to make a decision as to whether the student qualifies as a full-time student or not for purposes of the insurance benefits.

3. Mohapi v De Beers Pension Fund (2016) ZASCA 14 – entitlement to retire due to ill-heath

The appellant was dismissed from employment for reasons not relating to ill-health. He contended that he was no longer able to work due to his ill-health and therefore qualified for retirement on the basis of medical infirmity in terms of the fund rules.

The rules provided that retirement on the basis of ill-health was solely at the discretion of the trustees and that the employer must be of the view that the member was no longer capable of working as a result of medical infirmity.

The fund decided that the member did not qualify for retirement based on ill-health. The member lodged a complaint with the PFA and the fund's decision was overturned. The Adjudicator directed that the fund re-exercise its discretion. The fund again re-affirmed its decision that the member did not qualify for ill-health retirement.

High Court

The fund successfully appealed against the Adjudicator's determination. The court held that the member had already been validly dismissed and therefore could not retire on the basis of ill-health.

SCA

The member appealed the High Court decision to the SCA. The SCA dismissed the appeal and followed the reasoning of the High Court. It held that the rules of the fund provided that for a member to qualify for ill-health retirement, the employer must be of the view that the member was unable to continue working due to ill health. In this case the employer had dismissed the member for reasons not relating to his mental attitude. It was clear that the employer was not of the view that the member was incapable of working due to ill-health.

4. Mtyhopo v South African Municipal Workers Union National Provident Fund (2015) ZACC 32 – freedom of expression / defamation

The applicant was a member of the SAMWU National Provident Fund and together with a number of other members, was dissatisfied with the administration and management of the fund and sought to leave the fund. A collective bargaining agreement placed a moratorium on transfers between funds preventing these members from leaving the fund.

The members lodged a complaint with the PFA. The adjudicator held that the rules of the fund allowed for the members to transfer to another fund.

The fund successfully appealed against this determination and the Adjudicator's determination was set aside.

The member was unhappy and still sought to leave the fund. He made certain comments to a journalist expressing his dissatisfaction that despite the PFA's determination, the fund still would not allow him to transfer out. He also stated that the fund was embroiled in a scandal in which R800 000 was allegedly stolen.

The member neglected to mention that the PFA's determination had been overturned by the High Court.

The fund sought an interdict against the member restraining him from communicating his opinions to the media or public. The interdict was granted in the High Court.

Constitutional Court

The member took the High Court decision on appeal to the Constitutional Court on the basis that the interdict amounted to an unconstitutional restraint of speech and that the fund had failed to make a case for defamation.

The Court held that the true question was whether the fact that the member omitted to mention that the PFA determination had been overturned, diminished the Fund in the estimation of reasonable readers. Would it make them think less of the fund? The court held that it was very unlikely.

With regard to the allegations of a scandal, the court found that the fund was indeed involved in a scandal where R800 000 was paid to a trustee of the fund shortly before he resigned.

The court held that if an allegation was true, it could not be said to amount to defamation.

5. Windybrow Centre for the Arts and Sanlam Life Insurance Limited (case number: 50395 /2015) – interdict to prevent fund from paying out benefit

The employer, Windybrow Centre for the Arts, applied for an interdict against Sanlam to prevent Sanlam from paying out the withdrawal benefits of 2 former employees.

The employees in question were charged with overseeing the renovations at the Windybrow Centre. After some disputes on procurement and payments pertaining to these renovations, the employer commissioned a forensic investigation into the renovation project.

The forensic report revealed an alleged misappropriation of R60 million of the employer's funds. Based on this report, the employer filed criminal charges against the employees. The criminal case was still pending at the time of this application.

The employer also dismissed these employees on the strength of the forensic report. However, the CCMA found this dismissal to be unfair and ordered that the employer compensate them accordingly. The employer lodged an appeal against the CCMA's arbitration award. This application was also pending at the time of the hearing of this application.

High Court

The court set out the requirements that must be met for an interdict to be granted, namely:

- The applicant must establish a real right or at least a *prima facie* right.
- There must be a well-grounded apprehension of harm if the interdict is not granted.
- The balance of convenience must favour the granting of the interdict.
- The applicant must show that there is no other satisfactory remedy.

The Court held that in order for a fund to withhold the payment of a benefit in terms of section 37C of the Pension Funds Act, it must be satisfied that the employer suffered damages due to theft, fraud, dishonesty or misconduct on the part of the member whose benefit it seeks to withhold. So the employer's right to request that the benefit be withheld hinges on whether or not the employer is able to satisfy this requirement. If the employer cannot show that the damages suffered were as a result of theft, fraud, dishonesty or misconduct, then no right to withhold the benefit exists.

In this case the employer believed that it had the right to request that the benefit be withheld because the forensic report indicated the alleged misappropriation of funds which the employer attributed to the 2 employees in question. However, the CCMA ruled that the employees' dismissal on the basis of this report amounted to an unfair dismissal. For this reason, the court held that the employer could not rely on the forensic report to satisfy the requirements of section 37D and that consequently the employer had failed to establish a right to have the benefits of these employees withheld by the fund.

The application for an interdict was dismissed.

Approach followed by the FundsAtWork funds

FundsAtWork will allow the employer a reasonable period (in general, this should not be longer than 3 months) within which to institute proceedings to obtain an order against the member, unless there are compelling or exceptional circumstances preventing it from doing so. The period cannot be indefinite, as that would prejudice the member.

If FundsAtWork is satisfied that the employer has instituted legal action against the member or will institute such proceedings within a reasonable period and the employer is not responsible for any undue delays, it will then withhold an amount that is equivalent to the amount that is owed to the employer from the member's benefit during this time, including any legal costs incurred by the employer, as permitted by the Act.

6. Dr. Lubka Ivanova v Department of Health Kwa-Zulu Natal (2015) ZALCD 70 – reinstatement when employee has already reached retirement age

Dr. Ivanova was employed by the Department of Health KZN, and stationed at the GJ Crooks Hospital.

In June 2012 a patient was admitted to the hospital with serious injuries sustained in a motorcycle accident.

Dr. Ivanova was the only doctor on duty and insisted that several tests be performed on the patient; however, the patient succumbed to his injuries.

Dr Ivanova was charged with contravening the code of conduct for public service as it was alleged that her negligence had led to the patient's death.

In an internal disciplinary hearing, she was found guilty and dismissed.

She referred the matter to the relevant bargaining council where she requested retrospective reinstatement.

The bargaining council found that her dismissal has been fair both substantively and procedurally.

Labour Court

The court found that section 193(i)(a) of the Labour Relations Act vests the court and an arbitrator appointed by the court with the jurisdiction to determine the extent of the retrospectivity of the reinstatement. Reinstatement can only be ordered from the date of dismissal, but there is no limit on the end date of that reinstatement. On the merits of the case, the court found that Dr Ivanova had not acted negligently and that her dismissal had in fact been substantively unfair.

Accordingly, the court made an order of retrospective reinstatement from the date of dismissal to the date on which she would have retired but for her unfair dismissal (end of March 2015).

She was entitled to all benefits and remuneration that she would have been entitled to up to the date of her retirement.

Approach followed by the FundsAtWork Umbrella Funds

In a case where it is ordered that a member be reinstated with full benefits until the date of his retirement, the fund will endeavour to put the member in the position he would have been in but for his unfair dismissal, by calculating the benefit that the member would have been entitled to had he not withdrawn from the fund. This amount will then be communicated to the employer to settle with the the member.

In a case where a member is reinstated with full benefits and returns to work, there are 2 possibilities.

Firstly, where the payment of the withdrawal benefit and the reinstatement occur in the same tax year, the fund will request that the member repay the benefit. The member's records will be restored and membership will continue uninterrupted.

Secondly, if the payment of the withdrawal benefit and the reinstatement occur in different years of assessment, the member will not be requested to repay the benefit and will join the fund as a new member from the date of the unfair dismissal.

7. Horn and Others v LA Health Medical Scheme and Another (2015) ZACC 13 – the effect of section 197(2) of the Labour Relations Act on rights and obligations concerning pension and redundancy benefits

The appellants were former employees of LA Health Medical Scheme (LA Health), a medical scheme providing medical aid to local authorities in the Eastern Cape, Western Cape and Northern Cape regions. By virtue of their employment, the appellants belonged to the Cape Joint Municipal Pension Fund (CJMPF) until 31 December 2004. The CJMPF is a defined contribution fund set up to provide benefits to employees of local authorities.

The rules of the CJMPF were amended in 1994 to the effect that only employees of the local authorities were permitted to join the fund. It was decided that employees of LA Health would remain members of the fund even though they were not employed by a local authority.

In 2004 the administration department of LA Health was transferred to Discovery. The affected members could choose to have their benefit transferred to Discovery's pension fund, remain in the fund as deferred members, or transfer their benefits to a preservation fund. The majority chose to transfer to a preservation fund and withdraw the full benefit as their "once-off" withdrawal. They then began employment with Discovery on 1 January 2005.

The appellants instituted legal action against LA Health and the CJMPF for the payment of an additional redundancy / retrenchment benefit provided in the rules of the fund. In terms of the rules, this benefit was to be paid by the *local authority*. LA Health contended that it was not a local authority and therefore the retrenchment benefit contained in the rules did not form part of the terms and conditions of employment.

<u>High Court</u>

The High Court held that the applicants were entitled to the retrenchment benefit because upon termination of their employment they became entitled to certain benefits in terms of the rules of the fund. This position was confirmed by a full court.

<u>SCA</u>

LA Health then took this matter on appeal to the SCA. The SCA held that the rules provided that a redundancy benefit would be payable by the local authority. This could not be extended to parties that were in fact not a local authority. LA Health was not a local authority and therefore this rule could not be extended to apply to its employees.

<u>Constitutional Court</u>

The appellants lodged an appeal in the Constitutional Court. The appeal was dismissed on the grounds that it did not invoke constitutional jurisdiction. In dismissing the appeal, the Constitutional Court found that there was no merit to the attacks on the interpretation of the SCA, which in all respects, was correct.

In a separate judgment, Zondo J held that this matter required the interpretation and application of the Labour Relations Act and that accordingly the Constitutional Court did have jurisdiction in this matter. He took the view that the administrative division in which the employees were employed by LA Health

was transferred as a “going concern” to Discovery. He found that a transfer of business as a going concern neither terminates employment contracts, nor is it a lawful reason for the termination of employment contracts. He held that the LRA creates a statutory dispensation in terms of which, when there is a transfer of business as a going concern, a change of the identity of the employer occurs without the termination of the employment contracts of the employees. In such a case, the employment contracts and all the rights and obligations existing between the business transferor and each employee prior to the transfer are retained.

Accordingly, Discovery took over the obligation that the employees seek to enforce against LA Health, if it ever existed, under the terms of the LRA that govern the transfer of a business as a going concern. Therefore, the employees sued the wrong party and should have joined Discovery to their proceedings.

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