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.

A. Denel SOC Limited t/a Denel Aviation and Denel Aerostructures SOC Limited v Klaas Madimetsa Mafalo and Denel Retirement Fund: High Court – Deduction from a member's retirement savings

Denel Aerostructures rendered administrative services for Denel Aviation, which included the administration of the payroll. Denel Aviation was the former employer of Klaas Mafalo, a member of the Denel Retirement Fund.

The employer brought an application against the member for the repayment of a sum of R716 533.30, including interest thereon, due to an erroneous payment that was made to the member. The employer also applied for an order against the fund for payment of the member's retirement savings of R35 115 as part payment towards the settlement of the debt.

The erroneous payment was a result of the member being paid an amount of R1 910 129.61 instead of his normal salary of R10 175.27 for the month of November. The error was discovered on 8 January 2015. On 12 January 2015, the member agreed that the remaining balance in his account be transferred to the employer. The problem was that he had already used R751 153.35 and was unable to pay that money back.

The employer withheld the member's salary from January 2015 to April 2015, totalling R34 620.05, to settle the debt. The member had agreed to repay the money, but the repayment terms were never agreed upon. After taking this into account, the amount that remained outstanding was R717 533.30. The member was dismissed from employment.

The court had to decide whether the employer was entitled to reclaim the money that was owed to it on the basis of *conditio indebiti* (a civil action to recover payment that was made by mistake) and allow a deduction in favour of the employer under section 37D(b)(ii) of the Pension Funds Act.

The payment was a bona fide error. Once the employer notified the member's bank of the overpayment, the bank froze the member's bank account. The member was asked to return to work as soon as possible, but refused to do so. He also never informed the employer of the overpayment. When he returned to work, he mentioned that he used the funds that were no longer in his account but never mentioned what it was used for. The employer felt that it acted lawfully by withholding the member's salary from January to April. The employer charged and found the member guilty of gross dishonesty,

unauthorised use of company funds and unlawful enrichment in a disciplinary hearing. The member's defence was that the amount reflected on his payslip corresponded with the amount that was paid into his account. He mentioned that had the two amounts not correlated, he would have reported it to the employer.

The member agreed to repay the money on the condition that he remains in employment and that deductions be made from his salary every month. He felt that it was unlawful for the second applicant to withhold his entire salaries from January to April, leaving him with no means of an income.

High Court

In terms of *conditio indebiti,* a person who has paid a sum of money to another person believing in error that it was due to such person when in fact it was not, is entitled to recover the overpayment from that person. The requirements for this remedy to be available are:

- Payment was made by the applicant or his agent;
- Payment was made in *debite* in the wildest sense without obligation; and
- The error must be excusable.

In this specific case the first requirement has quite clearly been met. Regarding the second requirement, the member could validly raise a defence against the claim for repayment of money in *debiti* if he can show that he was not enriched. This was confirmed in the case of *African Diamond Experts v Barclays Bank International*. This case confirmed that the defence of non-enrichment is available to the payee; however, it cannot be if the payee acted mala fides.

According to the member, he was not acting mala fides. He mentioned that he never made any further withdrawals after he was notified of the overpayment. He cooperated in transferring of the remaining amount back to the applicant. He mentioned that he was not enriched as the money is no longer available; he had already used it. The court did not accept this. The member was not forthcoming about how he used the money. His non-withdrawals after being informed of the overpayment could be due to the fact that his bank account was frozen, so no withdrawals were possible in any case. He refused to avail himself for discussions with the employer before his return to work on 12 January 2015. The court also did not accept that the member honestly believed that the money was due to him due to the fact that the payment correlated with his payslip. The member could have and probably should have verified the payment and the amount thereof with the employer the moment he received the payment, as it was considerably more than his normal earnings.

The court found that the employer has satisfied the requirements for a claim founded on *conditio indebiti* and was entitled to an order for repayment. With regard to the order for payment by the fund, it was submitted that the member never admitted liability and the employer did not have a judgement against him as is required under Section 37D of the Pension Fund Act. The court found that the circumstances on which the money was due to be paid fell within the ambit of Section 37D of the Pension Funds Act. The member was found guilty of gross dishonesty, amongst others, in the disciplinary hearing that was held. Accordingly a proper case has been made for the deduction and payment of the retirement savings to the employer in respect of the money that it is owed.

B. Tsele v Bidvest South Africa Retirement Fund and another (2016) 1 BPLR 146: PFA – Distribution of death benefits

Mr T Mokhethi (the deceased) was a member of the Bidvest South Africa Retirement Fund (the fund). Alexander Forbes is the administrator of the fund. He passed away on 7 April 2013. The complainant, TJ Tsele, is the mother of the deceased's child, TZ Tsele. The deceased had a death benefit of R317 736.76 which had to be distributed. The resolution that was taken on 1 August 2014 by the fund's board of trustees (the board) in respect of the distribution of the death benefit was as follows:

Mr SM Buthelezi	Brother of the deceased	15%
Mr TK Mokhethi	Brother of the deceased	15%
Ms TZ Tsele	Daughter of the deceased	70%

The complainant confirmed that the deceased and his mother had passed away in a car accident on 7 April 2013. According to the complainant, the deceased's mother and daughter, TZ Tsele, were the only nominated beneficiaries. The complainant further mentioned that because the mother has also passed away, the daughter should be the only beneficiary. The daughter was dependent on the deceased.

The complainant stated that she had mentioned to the fund and its administrator that both the brothers were not dependent on the deceased as they both had very good jobs and earned a good income. The fund claimed that they received affidavits from the brothers stating that they were unemployed and in fact dependent on the deceased. The complainant felt that the deceased's daughter was being prejudiced by the fund's failure to conduct a proper investigation.

A further point raised by the complainant was that she was not given a choice in respect of the beneficiary fund that was chosen for the money that was to be paid in favour of the daughter.

The fund stated that the board conducted the investigation in terms of section 37C of the Pension Funds Act. They were provided with information that showed that the deceased was never married. The deceased had one child with the complainant and that child was fully dependant on the deceased; he paid R1000 a month towards the child's maintenance. The complainant was not dependent on the deceased. Both the brothers confirmed in affidavits that they were unemployed and financially dependent on the deceased. The board identified the deceased's brothers and his daughter as factual dependants and distributed the benefit accordingly. The fund clarified that there were no objections to the distribution until January 2015.

The fund made it clear that a death benefit is not paid out in accordance with the deceased's wishes. The nomination merely serves as a guide to the board. The discretion is with the board to make the allocation based on the information that they have after conducting all their investigations. The board took into consideration the age of the beneficiaries, the relationship to the deceased, their extent of dependency, the financial affairs of the beneficiaries and the future earning capacity of the beneficiaries. The Pension Funds Act (the Act) does not specify the criteria that should be followed; it just requires that the board make a fair and equitable distribution.

The fund submitted that the complainant never informed them of the deceased's brothers' employment prior to the board allocating and paying the benefit. The complainant only raised the objection to the distribution in January 2015; long after the investigations had taken place and after the benefit had already been paid. The benefit was paid on 6 August 2014.

In terms of section 37C of the Act, the board is granted discretion when distributing death benefits. As part of its discretion, it is required to investigate the most appropriate, cost effective, practical payment solution in respect of benefits payable to minor children. The fund asked the complainant to indicate whether she would prefer the benefit being paid into a beneficiary fund, to which she agreed. The complainant also mentioned that she did not have any knowledge of investments. Based on this information, the board had placed the benefit in the Alexander Forbes beneficiary fund.

Pension Funds Adjudicator (PFA)

The adjudicator was of the view that the board did not have any source to rely on other than the affidavits submitted by the deceased's brothers. The board proceeded with the distribution of the benefit, without knowing the level of dependency of the brothers on the deceased. According to the adjudicator, the first respondent's conduct was derelict to the prejudice of TZ Tsele. The adjudicator pointed out that knowing the level of dependency was important to ensure equity, otherwise the

distribution would be arbitrary as it would not be based on factual information. Accordingly, the fund did not conduct proper investigations as was required by section 37C of the Act.

The adjudicator further mentioned that it was a common law right for a guardian to administer the financial affairs of the minor child. In this case, the complainant was not disputing the fact that the money should be paid into a beneficiary fund, but rather that she should have been allowed to choose the beneficiary fund that was used. The adjudicator agreed and said that the complainant should be allowed to select the beneficiary fund, especially where a beneficiary fund chosen was linked to the administrator. The business interest of the administrator cannot be said to be independent of the decision made. The board cannot force its preferred service provider on the complainant.

The adjudicator set the decision of the board aside and ordered that a new investigation must take place and a new resolution must be passed whereby the benefit is reallocated. Further, the fund should allow the complainant to select a beneficiary fund of her choice for the payment of the child's benefit.

Approach followed by the sponsor funds

Beneficiary fund: The Act does not state that the guardian has the right to elect which beneficiary fund the fund should use. The boards of the sponsor funds choose the beneficiary fund in respect of death benefits that become due to minor children. Like all other service providers, the beneficiary fund is subject to annual review by the board.

Affidavits: The sponsor funds do not accept affidavits on their own as a means of evidence of proving dependency. It is used as a basis for further investigation. In most cases, secondary confirmation from other family members is required to confirm dependency. Bank statements are also asked for as a means of proving any claims of dependency. Each case is dealt with on its own merits.

C. Old Mutual Superfund Defined Benefits Pension Fund, Old Mutual Superfund Defined Benefits Provident Fund. Old Mutual Superfund Pension Fund and Old Mutual Superfund Provident Fund ("Old Mutual Superfunds") v The Registrar of Pension Funds – Appeal board of the FSB: Exemptions granted to Umbrella Funds under the Pension Funds Act

The rules of the Old Mutual Superfunds (the funds) were in conflict with the Pension Funds Act because they ring-fenced sub-funds and gave them legal personality. The funds applied to the Registrar for exemption from sections 15H, 15I, 28, 29 and 30 of the Pension Funds Act (the Act). The Registrar refused the application, whereupon the funds appealed the decision.

The funds are umbrella funds, where more than one employer participates in the fund. The assets and liabilities of members are maintained separately in respect of the members employed by each participating employer. Each participating employer is known as a sub-fund within the bigger umbrella fund. However, unlike the umbrella fund, the sub-funds do not have juristic personality under the Act. The effect of this is that the notional ring-fencing of the different sub-funds is not acknowledged by the Act, particularly not in sections 15H and 15I.

Section 15H states that if a fund (umbrella fund) has credit balances in the member surplus account or the employer surplus account and the fund is found to have a deficit after an actuarial valuation, such credit balances shall be reduced in the same proportion by the amount of the deficit. The effect of section 15H is that the credit balances in the member surplus account or employer surplus account is automatically reduced in order to extinguish the actuarial deficit.

Section 15I states that on liquidation of a fund under section 28 or 29, any credit balances in any reserve accounts, the member surplus account and the employer surplus account shall be applied in the order of priority that has been prescribed.

Despite these provisions, the funds adopted rules to ring-fence the participating sub-funds. These rules stated that each sub-fund is a single juristic person. These rules also ring-fenced benefits and

contributions of each sub-fund from the rest of the umbrella fund. This includes other sub-funds within it, and stated that any surpluses or deficits arising in a sub-fund are to be dealt with separately from the umbrella fund. This was in conflict with the Act.

The funds asked the Registrar to grant them exemption under section 2(5) of the Act in order to bring the rules in alignment with the Act. The approval of the rules and the steps taken by the funds to implement those rules impeded the strict application of the provisions of the Act. Cross-subsidisation between the sub-funds was required in the event of deficits or shortfalls arising during the course of the funds' ongoing operations or in the liquidation of any or all of the sub-funds under the funds. These were the practicalities that impeded compliance with the provisions of the Act.

The Registrar stated that it could not be argued that practicalities impede the strict application of section 15H and I. Simple book keeping entries were all that was needed in making those entries and there was nothing impractical about it. The problem was caused by the fact that the rules were ultra vires the Act. It was not impracticalities that impede the strict application of these provisions but the application of the ultra vires rules would be in conflict with the Act. Ultimately ultra vires rules cannot override legislation.

This case confirmed that the misalignment between the operation of umbrella funds and the provisions of the Act is something for Parliament to rectify. The Registrar cannot use the power of exemption, which is directed at administrative matters and not matters of substance, to regularise the position of umbrella funds. Even if the provisions of the Act were unfair and inequitable if applied to sub-funds administered by an umbrella fund, section 2(5) did not empower the Registrar to grant exemptions on the grounds of unfairness. As such the appeal was dismissed.

D. TP Ramohapi v Mineworkers Provident Fund and Harmony Gold Mining Company: PFA – Allocation and distribution of death benefits

Mr Ramohapi (the deceased) was a member of the Mineworkers Provident Fund (the fund) by virtue of his employment with Harmony Gold Mining Company. He passed away on 18 December 2008. The complainant is the son of the deceased. The deceased had a death benefit of R161 316.34 which had to be distributed. The fund had failed to allocate and distribute the death benefit.

The complainant submitted that, upon the death of the deceased, he did not claim a death benefit as he did not know what processes to follow in order to submit the claim. In 2014 he had received some assistance and lodged a claim for a death benefit. However, the fund had failed to assist him in finalising this claim.

Pension Funds Adjudicator (PFA)

The adjudicator had to determine whether or not the board of the fund had failed to carry out their duties in terms of section 37C of the Act. Section 37C of the Act governs the disposition of death benefits and places a duty on the board of the fund to identify the beneficiaries of the deceased member. Section 37C also grants the board discretionary powers in respect of the distribution of the benefit and places the duty on the trustees to make a fair and equitable distribution after giving proper consideration to all the facts that have been presented. A board cannot fetter its discretion by following policies that do not take into account the personal circumstances of the beneficiaries.

The adjudicator referred to section 37C(1) of the Act where it states that the fund had 12 months to identify the dependants of the deceased and to allocate and pay the death benefit. Although the member had passed away on 18 December 2008 and the complainant only submitted a claim in 2014, the fund had failed to investigate the matter within the prescribed period as set out in the Act. After more than 12 months of the complainant having claimed the death benefit, the fund has still not yet completed their investigations. The fund failed to provide reasons for the unreasonable delay. Due to the delay, the deceased's beneficiaries have suffered prejudice in that they have been denied access to benefits which may have become available to them sooner had the investigation been completed in time.

Having considered all the facts, the adjudicator found that the fund had failed to act in terms of section 37C of the Act. She further ordered the fund to complete its investigations and make an equitable distribution to the beneficiaries without any further delay.

The adjudicator was of the view that her office, like any court of law, has the power to grant compensatory damages in order to mark its displeasure with the conduct of a body if the circumstances fit. She therefore ordered the fund to pay R10 000 compensation to the complainant for the delay in finalising the matter.

E. National Tertiary Retirement Fund v Mokadi (2016) ZASCA 92: SCA – Discretion conferred on the Pension Funds Adjudicator to determine whether interest shall accrue

Mr Mokadi was the rector and vice-chancellor at Vaal University of Technology until his employment ended on 11 July 2006. He was a member of the National Tertiary Retirement Fund (the fund) by virtue of his employment with the Vaal University of Technology. Mr Mokadi was charged with misconduct after a commission of enquiry investigated certain allegations that were made against him. Subsequent to his dismissal, the university had instituted criminal charges of fraud and corruption against him and requested the fund to withhold his pension benefit pending the finalisation of the criminal case.

On 5 August 2007 the university instituted a civil action against Mr Mokadi for damages in the amount of R6 073 215.01 arising from his fraudulent actions during his employment at the university.

In February 2009 the criminal case was concluded and Mr Mokadi was acquitted of the criminal charges that were laid against him. In light of that ruling, the university instructed the fund to continue withholding the pension benefit as there was still a civil action that was pending. The fund agreed to withhold the pension benefit in terms of section 37D(1)(b) of the Act, pending the outcome of the civil action. Mr Mokadi then lodged a complaint with the Pension Funds Adjudicator on 3 January 2010. On 2 March 2010 the adjudicator requested the fund to respond to the complaint by no later than 1 April 2010. The fund only filed a response on 19 April 2010, alleging that Mr Mokadi's complaint was time-barred in terms of section 30I of the Act as it related to a benefit which he should have received in June 2006 when his employment was terminated at the university. The fund further alleged that the university had done everything that they could in order to expedite the proceedings. The fact that a trial date has not been set was beyond their control. The fund was of the view that they have acted within the scope of section 37D of the Act by continuing to withhold the benefit until the civil action has been considered by a court.

Between June 2010 and April 2012 there was no further communication between Mr Mokadi and the fund. On 11 April 2012 Mr Mokadi wrote to the fund stating that the university, by resolution of its Council, had agreed to release the pension benefit that was being withheld all this time. The fund never received the proof of this decision. On 10 July 2012, Mr Mokadi wrote to the adjudicator pointing out that there was no pending civil action against him as was being claimed and that the university has never pursed this action further. In light of this information, the adjudicator sought confirmation from the fund and the university as to whether there was a pending case or not. The university made reference to a bill of costs that was allowed in favour of the university from a matter between Mr Mokadi and the university. They mentioned that a determination by the Taxing Master had the effect of a civil judgement and that the matter would only be finalised once that bill of costs has been paid.

The fund was not satisfied with this response from the university and as such felt that they could no longer withhold Mr Mokadi's pension benefit. The fund then informed the university that they would no longer withhold the benefit and that they have instructed the administrator to calculate the value of the benefit and to effect payment to Mr Mokadi. By September 2012, the fund had still not paid Mr Mokadi his pension benefit.

Pension Funds Adjudicator

The adjudicator found that the complaint had not prescribed because, as indicated in the letter of 20 July 2012, the university had decided not to pursue the civil claim for damages but rather pay the pension benefit to Mr Mokadi. The adjudicator also held that the fund did not have any reason to continue withholding the benefit and ordered the fund to pay Mr Mokadi's withdrawal benefit with interest at the rate of 15,5% from 2 June 2010.

Gauteng Local Division, Johannesburg

The fund appealed the decision of the adjudicator. At the same time, Mr Mokadi made a counter-application where he requested that the court make an order allowing for interest on the pension benefit to be calculated from 27 November 2006, the date on which the tax directive was issued, as opposed to the date of 2 June 2010 as determined by the adjudicator. Both these applications were dismissed by the judge, who reasoned that the Pension Funds Act provided that where there was a determination consisting of an obligation to pay an amount of money, there was a statutory obligation that the debt would bear interest. The interest rate and the date from which the interest would be payable would be determined by the adjudicator. The fund was not satisfied with this decision and decided to take it on appeal.

Supreme Court of Appeal (SCA)

The primary issue for determination in this appeal was whether the adjudicator had the power under the Act to order interest against the fund. The fund claimed that they were not in *mora* and was not liable to pay interest and that they paid the pension benefit, including fund return that was due to Mr Mokadi, and that any payment of interest would result in Mr Mokadi getting double the benefit.

Section 30N of the Pension Funds Act (the Act) grants the adjudicator discretion to order the payment of interest where there is an obligation to pay money and to determine the rate of interest that shall accrue and the date from which it will run. The object of section 30N is thus to compensate a member for the late payment by the fund of a benefit, so as to place the member in the same or similar position that they would have been in had the benefit been paid timeously. Therefore the adjudicator is not obliged to use the prescribed rate as determined in the Prescribed Rate of Interest Act when making a determination under section 30N. Under the common law, where payment of a debt is overdue and no interest has been agreed upon between the parties, *mora* interest may be charged. What this means is that even if the rules of the fund do not provide for late payment interest, the adjudicator may exercise her discretion and order that interest be paid.

Regarding the payment of the benefit, the court mentioned that fund return is fundamental to the rationale of a pension fund. It accrues as part of the objective for which moneys are invested in a pension fund – to yield speculation gains. Interest on the other hand is clearly distinguishable as envisaged in section 30N; its purpose is comparable to *tempore mora* interest, which the judge explained was when a party who has been deprived of the use of their capital for a period of time has suffered a loss. It is apparent that the concept and purpose of interest is distinguishable from fund return as defined in the Act. Therefore there is no merit in the claim that Mr Mokadi will receive double the benefit.

For the reasons mentioned above, this appeal was not successful.

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