Case law update – Fund related matters

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. JEC Sweetland v Corporate Selection Umbrella Retirement Fund, Liberty Group Limited and Rush Trailers CC t/a The Pumpsmith (PFA/KN/00021364/2015/TD): PFA – Deductions from pension benefits

Mr Sweetland was a member of the Corporate Selection Umbrella Retirement Fund (the fund) from 1 March 2012 to 30 September 2015 by virtue of his employment with Rush Trailers CC t/a The Pumpsmith (the employer). The fund is administered by Liberty Group Limited (Liberty). Mr Sweetland's employment came to an end and he became entitled to a withdrawal benefit. He was paid a withdrawal benefit of R18 512.44 on 11 January 2016. All the contributions in respect of Mr Sweetland were not paid over to the fund although the deductions were made from his salary. Mr Sweetland asked the Pension Funds Adjudicator (PFA) to investigate the matter.

Mr Sweetland began employment in March 2011 and should have been registered as a member of the fund then. He was only registered as a member in March 2012.

The PFA had to determine whether or not the employer should be held liable for failing to register Mr Sweetland as a member of the fund and pay over all contributions on his behalf, which resulted in non-payment of the full withdrawal benefit he would have been entitled to had that been done.

Liberty mentioned that an acknowledgment of debt was received with Mr Sweetland's withdrawal forms. In the acknowledgment there is no reference to theft, fraud, dishonesty or misconduct as is required in terms of the Pension Funds Act (the Act). Mr Sweetland's fund value was R49 688.54 at the time that he submitted his withdrawal forms. He was however only paid R18 512.44 when he withdrew from the fund.

Upon investigation it was found that the fund had deducted a loan that Mr Sweetland owed to his employer. The loan that was deducted did not fall within the permissible deductions in terms of section 37D of the Act. By making this deduction, the fund had acted contrary to the provisions of the Act and the rules which governed the fund. The fact that Mr Sweetland had signed the acknowledgement of debt did not bind him to this agreement, as a person cannot consent to an unlawful act. The PFA has the power to set aside the decision of the fund to deduct the loan amount from Mr Sweetland's benefit.

The complaint was successful. The PFA ordered the fund to place Mr Sweetland in the position that he would have been had they registered him as a member of the fund at the time when he began employment. Further, the fund had to pay the R24 362.73, as well as late payment interest, which they

deducted in favour of the employer to the Mr Sweetland. The employer had to recoup its loan like any other creditor of Mr Sweetland.

Approach adopted by FundsAtWork Umbrella Funds (FAW)

All deductions that are made from a member's benefit are done in accordance with section 37D of the Act and in line with the rules of the FAW Umbrella Funds. Neither the Act nor the rules of the funds allow for deductions in favour of an employer in respect of a loan granted to the member by his employer.

B. MV Xaba, NT Xaba, KM Xaba v NPR Xaba, Sanlam Life Insurance Limited, SABC Pension Fund, Master of the High Court Pretoria (appeal number A279/2013): High court – Death benefits

Mr PT Xaba was employed by the SABC and was a member of the SABC Pension Fund (the fund). The SABC took out a group life policy for its employees. This policy was held with Old Mutual Life Insurance Company (Old Mutual). Old Mutual gave the SABC the power to obtain nomination forms from the SABC employees who were insured under the Old Mutual policy.

On 9 March 1993 Mr Xaba completed and signed a nomination form (the Old Mutual form). On the nomination form it stated that the nomination form is for the fund benefits as well as the group life insurance benefits of the SABC. Mr Xaba nominated MV Xaba to receive 50% of the benefit and NT and KM Xaba to receive 25% each. MV Xaba is the deceased's ex-wife, who he divorced in 1998. NT and KM Xaba are both major sons that were born from that marriage.

On 1 July 2004, Sanlam replaced Old Mutual as the insurer of the group life policy. They had separate nomination forms for the fund and the group life policy benefits. Mr Xaba did not complete a Sanlam nomination form for his fund benefits. MV Xaba, NT Xaba and KM Xaba said that the Old Mutual nomination form should transfer to the Sanlam policy because Mr Xaba never withdrew or changed that nomination form. On that basis they felt that they should get the benefit.

NPR Xaba was the wife of Mr Xaba. She was also the executrix of the estate and the sole heir of Mr Xaba's estate. She was of the opinion that the Old Mutual form was not effective and could not be linked to the Sanlam policy. She felt the benefits should go to Mr Xaba's estate.

The court found that the fund and the Sanlam policy were two separate entities and that the benefits payable from the fund was to be distinguished from the benefits payable under the policy. Further, the court stated that the agreement between Old Mutual and the SABC ceased to exist when Old Mutual stopped being the provider of the insurance benefit. A new agreement came into existence between the SABC and Sanlam. This policy only came into existence in 2004. No valid nomination could have been made in 1993 because there was no contract in existence between the SABC and Sanlam at that point in time. A nomination of a beneficiary under an insurance policy is a form of a third-party contract. In such a contract, one party agrees with another to render a performance to a beneficiary. The beneficiary acquires rights under the contract when the beneficiary accepts the benefit.

The Sanlam policy potentially created two categories of third-party contracts; one between the insurer (Sanlam), the employer (SABC) and the insured (PT Xaba), and one between the insurer (Sanlam), the employer (SABC), the insured (PT Xaba) and the beneficiary. With regard to the Sanlam benefit, there was no completed nomination form and no part of the contract to which Sanlam and the deceased became parties to state that nominations made by the deceased under the Old Mutual policy should be transferred to the Sanlam policy. Therefore there were no benefits in favour of any beneficiary in relation to the Sanlam policy and therefore no benefits for any beneficiary to accept. Based on this, MV Xaba, NT Xaba and KM Xaba did not become parties to the contract of insurance between Mr Xaba and Sanlam. They had no rights to claim payment of the death benefits payable.

The appeal was dismissed.

Approach followed by the FAW Umbrella Funds

Momentum has two separate beneficiary nomination forms – one for the FAW Umbrella Funds and another for the separate employer-provided group life policy. We do not accept the nomination of beneficiaries under the separate policy as a nomination for the fund benefits.

C. Masemola v Chemical Industries National Provident Fund and others (2016) JOL 36014: PFA – Interpretation of rules pertaining to a section 14 transfer

Mr Masemola was a member of the Chemical Industries National Provident Fund (the fund) by virtue of his employment with Sasol Synfuels (the employer). The employer ceased to pay contributions to the fund on behalf of Mr Masemola on 1 March 2013. The employer did however pay contributions on behalf of Mr Masemola to the SACWU National Provident Fund from 1 March 2013. Mr Masemola stated that he requested the fund and the employer to have his benefit transferred in terms of section 14 of the Pension Funds Act (the Act) to the SACWU National Provident Fund; however, his benefit remained in the fund and was not transferred to the SACWU National Provident Fund as requested.

Pension Funds Adjudicator (PFA)

The PFA had to determine whether or not the fund was delaying the transfer of Mr Masemola's benefit to the SACWU National Provident Fund.

Section 13 of the Act makes it clear that the rules of a fund are supreme and binding on its officials, members, shareholders, beneficiaries and anyone else who claims from the fund. The rules of the fund in this case provided for members who wish to transfer out of the fund while still in service to make representation to the board of the fund. It was clear from the facts that the complainant had not made any representation to the board as required by the rules. The board then had to ensure that the representations were investigated and confirmed and explicit approval was obtained from the member prior to any application forms being submitted to the Registrar of Pension Funds. The board also had to conduct clear and comprehensive communication with the members concerned. Lastly, the fund had to be satisfied that the transfer was reasonable and equitable. In order for Mr Masemola to be treated fairly, he needed to know beforehand what the board considered as reasonable and equitable in order for the transfer to be approved. The board had to communicate the requirements for the transfer that they deemed to be equitable; this would have empowered the members to make a clear and concise decision before making a transfer request.

The rules of the fund had to be complied with. The PFA came to the conclusion that the board of the fund delayed transfer applications due to the conditions that have been set in the rules. She suggested that Mr Masemola and the employer submit an appeal to the appeal board of the Financial Services Board as the Registrar has registered a rule that was unreasonable, vague and ambiguous and in violation of the Act. The complainant and the employer should request the Registrar to have the rules of the fund amended to provide that upon receipt of a section 14 transfer application, the fund must complete and submit the application to the Registrar without any further delay.

Refer to paragraph 1 of Legal update 7 of 2016 where the case of *Sasol Limited v Chemical Industries National Provident Fund* was discussed, specifically the issue regarding the rules of the Chemical Industries National Provident Fund and section 14 transfers.

Approach followed by the MMI Sponsor funds

The MMI sponsor funds deal with section 14 transfers within the parameters set by the Pension Funds Act.

D. Metropolitan Life Limited and MMI Group Limited v Nura Energy (Pty)Ltd and The Pension Funds Adjudicator (case number 76657/2014): High court – Condonation of late filing for review

In 2005, Metropolitan Life Limited (Metropolitan) and Nura Energy (Pty) Ltd (Nura) entered into an agreement in respect of funeral and life cover as well as retirement annuities for Nura's employees. Between July 2009 and June 2010 certain employees terminated their service with Nura. Nura notified Metropolitan accordingly. Metropolitan was supposed to stop deducting pension and funeral premiums for those members that left. In June 2010, Nura demanded that Metropolitan refund an amount of R326 617, 11 to them for premiums which they unlawfully debited from Nura's account for those members that already resigned.

When Metropolitan did not refund the amount as requested, Nura lodged a complaint with the Pension Funds Adjudicator (PFA) against Metropolitan in October 2013. The complaint related to the deductions made by Metropolitan despite Nura asking them to stop making the deductions for those members that resigned. The PFA stated that they did not have the jurisdiction to deal with the insurance related benefits and that only the contributions in respect of the fund benefits could form part of the determination. The contributions to the fund amounted to R93 477.86. Metropolitan responded to the complaint stating that they needed more information in order to reply properly to the complaint. Nura alleged that they provided the requested information to the PFA. The PFA never sent this information to Metropolitan or to Metropolitan's holding company, MMI Group Limited (MMI).

In March 2014, the PFA issued a determination which only came to the knowledge of Metropolitan and MMI in August 2014. In terms of section 30P of the Pension Funds Act (the Act) a party may apply to a division of the high court within six weeks from the date of the determination to review the decision taken by the PFA. Metropolitan and MMI claimed that they did not have any knowledge of the PFA's determination as it was not brought to their attention timeously in order for them to appeal the determination within the prescribed six weeks.

Section 30P of the Act states that the High Court will consider the merits of a complaint and may make any order that it deems fit. An aggrieved party is entitled to have the legal dispute that was dealt with by the PFA reconsidered by the court. In making their case for a review, Metropolitan and MMI relied on the following grounds to back up their argument.

1. The complaint is not a complaint as defined in the Act. Metropolitan and MMI denied that premiums were incorrectly debited and that Nura failed to notify them within a reasonable time that those members would be terminating their service. The court stated that this cannot be considered to be maladministration on the part of the fund as mentioned in the Act and therefore it was not considered to be a complaint.
2. The PFA made a determination of the complaint without giving Metropolitan and MMI the opportunity to formulate a response to the complaint. The reason that they did not formulate a response to the complaint was because Nura had failed to provide the relevant information that was requested. The court accepted this reasoning.
3. The determination was made against the incorrect party. In terms of the Act, the complaint must be lodged against the fund. Metropolitan and MMI are not pension fund organisations as defined in the Act. The fund is the Metropolitan Retirement Annuity Fund. The court agreed with this reasoning and confirmed that the complaint should have been lodged against the fund.
4. The complaint has prescribed in terms of section 30I(1) of the Act. The court agreed that the complaint had indeed prescribed.
5. Metropolitan and MMI stated that it would not be possible to give effect to the determination as it was not clear what deductions in respect of which period must be recalculated and Nura had not provided any clarity in this regard.

6. The PFA had limited jurisdiction in dealing with the complaint. The PFA does not have jurisdiction to make any finding in respect of funeral and life cover issues. The court agreed that the PFA had limited jurisdiction in this matter in so far as they can only deal with complaints as defined in the Act.

After considering all the facts presented, the court was satisfied that Metropolitan and MMI had shown good cause for the late filing of their application to review the determination made by the PFA and condoned the fact they were late in filing the application. Secondly, the court also set aside the determination made by the PFA.

Approach followed by the FAW Umbrella Funds

Once an employer informs the fund that a member has resigned, the system automatically creates a new workflow for the pending withdrawal claim. Fund contributions and insurance benefit premiums would have been collected up until the exit date and no further contributions and premiums will be collected.

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