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Case law update – Fund related matters

This update discusses several recent determinations / judgements relating to the payment of death benefits that have an impact on pension funds, and where applicable, sets out the position adopted by MMI Sponsor Funds.

A. Masindi v Chemical Industries National Provident Fund and Others (Case number: 16/24267): High Court – Payment of death benefit to a third party

Mrs Masindi was married to Mr Masindi who passed away on 25 November 2013. At the time of his death, Mr Masindi was a member of the Chemical Industries National Provident Fund (the fund). Mrs Masindi applied to the High Court ordering the fund to pay the death benefit, together with interest on the amount with effect from one year after Mr Masindi died, into Mrs Masindi’s attorney’s trust account. The fund acknowledged that Mrs Masindi was entitled to payment of the death benefit, but was opposed to paying the benefit into the attorney’s trust account and paying interest on such benefit.

The court looked at section 37(A)(1) of the Pension Fund Act (the Act) which states that a benefit must be paid to the member or beneficiary concerned and cannot be ceded, pledged or liable to be attached except under circumstances specifically provided for in the Act. Section 37(A)(4) does allow for payment of a benefit to a third party if the member or beneficiary can show that he is unable to open a bank account. The court found that the purpose of the provisions of the Act is to protect a beneficiary from being unduly influenced or tempted to part with the benefit. Furthermore, the benefit is protected from claims of creditors to ensure that the benefit remains in the hands of the beneficiary.

In this case, no evidence had been presented before the court to show that Mrs Masindi was unable to open a bank account. The court also found that it could not make an order that goes against the provisions of the Act, even if the fund was willing to pay the benefit into the attorney’s trust account, as there was no sufficient proof to show that Mrs Masindi was unable to open a bank account.

The court also considered Mrs Masindi’s argument that the fund should pay interest on the benefit, calculated from one year from the date on which Mr Masindi passed away until the date of payment. The court looked at section 37C(1) of the Act, which provides that if a fund becomes aware of or traces dependants within 12 months of the death of a member, the benefit will be paid to such dependant. The court found that a fund cannot comply with the obligations imposed on it in terms of the Act if it is not notified of the death of a member. Mr Masindi’s employer should have notified the fund of his passing, which it did not do. This meant that the 12 month period within which the fund must have traced Mr Masindi’s dependants only started once it was notified that he had passed away, which was on 26 April 2016. The court found that Mrs Masindi was not entitled to interest on payment of the benefit.

In light of the above, the court dismissed the application.

Approach adopted by the FundsAtWork Umbrella Funds

The payment of a death benefit will be made in line with the provisions of section 37C of the Act. The Funds places an obligation on the employer to notify them as soon as possible of a member's death. The Funds will only pay the benefit to a beneficiary once the beneficiary's bank account information has been verified by the specific bank. If the Funds receive sufficient proof that a beneficiary is unable to open a bank account, the beneficiary will be required to complete the *Instruction and Indemnity for Payment to Third Party Bank Account Form*, authorising the Funds to pay the benefit to the third party nominated by the beneficiary. The payment to the third party will be deemed to be a payment to the beneficiary.

B. Nelson v Tiger Brands Provident Fund and NBC Holdings (Pty) Ltd (Case Number: PFA/GA/7422/2006/SM): Pension Fund Adjudicator – Benefits payable to a minor

Mrs Nelson passed away on 23 January 2001. At the time of her death, she was a member of the Tiger Brands Provident Fund (the fund). A death benefit of R316 243.66 became available for distribution to her beneficiaries after R20 000 was allocated to her husband, Mr Nelson.

The board of trustees of the fund placed the benefit in a trust for the benefit of Mrs Nelson's minor children. The trust paid monthly amounts to Mr Nelson in his capacity as the children's guardian. Mr Nelson was unhappy with the board's decision to place the children's share of the benefit in a trust and he lodged a complaint with the Pension Fund Adjudicator (PFA). Mr Nelson was of the view that he should have been consulted before the decision to place the children's share of the benefit in a trust was made.

The PFA looked at section 37C of the Pension Funds Act (the Act) which granted the board discretionary powers on how death benefits are to be distributed, including how payments of a benefit to minor children are to be made. The PFA found that such power had to be exercised after having given proper consideration to any relevant factors. The board could not follow a rigid policy that did not take into account the personal circumstances of each beneficiary.

A benefit payable to a minor child is normally paid to the guardian of such minor child. A parent, as a legal guardian of a minor child, has a duty to administer the property and assets of the minor child. This means that a minor child's benefit should be paid to his legal guardian, unless there are compelling reasons for not allowing a parent to manage his child's financial affairs and to deny him the right to decide how the funds are to be used in the best interest of the minor child.

The PFA referred to *Ramanyelo v Mineworkers Provident Fund (2005) 1 BPLR 67 (PFA)* which set out the following factors that need to be considered when deciding whether or not a guardian should manage money on behalf of his minor children:

- the amount of the benefit;
- the guardian's ability to administer the money;
- the qualifications (if any) of the guardian to administer the money; and
- the benefit should be used in such a way that it can provide for the minor child until he or she becomes a major.

The PFA found that the board did not give any reasons to Mr Nelson for deciding not to allow him to administer the benefit payable to his minor children. The PFA also found that the board did not correctly exercise its discretion by placing the benefit in a trust without investigating whether or not Mr Nelson was able to administer the money on behalf of his minor children.

In light of the above, the PFA ordered that the matter be referred back to the board to exercise its discretion regarding the appropriate way of paying the benefit, taking into account the factors set out by the PFA.

Approach adopted by the MMI Sponsor Funds

The Funds, when exercising their discretion, will investigate all relevant factors when deciding what is the most appropriate way of paying death benefits that are payable to a minor beneficiary.

C. Jacoby v Metal Industries Provident Fund and Metal Industries Benefit Fund Administrators (Case number: PFA/GP/00024477/2016/CMS): Pension Fund Adjudicator – Payment of death benefit into deceased member's estate

Ms Jacoby was in a relationship with Mr West, who at the time of his death on 17 February 2015 was a member of the Metal Industries Provident Fund (the fund). Before his death, Mr West completed a beneficiary form in which he nominated Ms Jacoby to receive 90% of the death benefit and his friend Mr Sanderson, the remaining 10%. Mr West's wife had died before him and he did not have any children. Mr West was an orphan and did not have any surviving siblings. The fund decided to pay the entire benefit to Mr West's estate and not to Ms Jacoby or to Mr Sanderson. Ms Jacoby lodged a complaint with the Pension Funds Adjudicator (PFA), claiming that she was entitled to payment of 90% of the benefit as per Mr West's nomination as she was a factual dependant of Mr West and was also nominated by Mr West to receive payment of a portion of the benefit.

The PFA stated that there are three recognised categories of dependants, namely, legal dependants, factual dependants and future dependants. As Ms Jacoby was not married to Mr West, she was not a legal dependant. She had to show that she was a factual dependant by proving that Mr West contributed to her maintenance and that she was dependent on him at the time of his death. Ms Jacoby could not show that she was financially dependent on Mr West for her reasonable maintenance needs. The PFA found that Ms Jacoby was not a factual dependant of Mr West.

The PFA also looked at section 37C of the Pension Fund Act (the Act) which provides that where a fund is unable to find a dependant of a deceased member within 12 months of the death of the member, the fund must pay the benefit or such portion of the benefit to a nominee as the member specified in writing to the fund. The payment to the nominee can only be made after the fund has established that the deceased member's estate is solvent, that is, the liabilities of the late estate are not more than the assets of the late estate. This could be determined from the Liquidation and Distribution Account of the late member's estate.

The PFA found that the fund incorrectly paid the entire benefit to Mr West's estate. It placed too much emphasis on how long Mr West had been in a relationship with Ms Jacoby, implying that the relationship was too short to be taken into account in deciding how the benefit was to be distributed. The PFA also found that the fund did not take into account that where there are no dependants and there are nominees, the death benefit is not automatically paid into a deceased member's estate. An investigation should first be conducted into whether or not the deceased' member's estate is solvent before deciding to pay the entire death benefit into the estate. The fund could have easily done so as it already had a copy of the Liquidation and Distribution Account of Mr West's estate.

The PFA ordered that the decision to pay the entire benefit into Mr West's estate be set aside. The fund was ordered to investigate whether the liabilities of Mr West's estate were more than the assets and pay an amount that is equal to the difference between the liabilities and the assets into Mr West's estate. The remaining balance (if any) was to be paid to the nominees as specified in the nomination form.

Approach adopted by the MMI Sponsor Funds

If there are no dependants and the deceased member has nominated a beneficiary that is not a dependant (the nominee), the benefit will be paid to the nominee, provided that the late member's estate is solvent. An exclusive distribution to a nominee may only take place if after the 12 month period no dependants could be found. The nominee can only receive the portion of the benefit specified by the member in the nomination form. If a portion of the benefit is not paid to a nominee for whatever reason, it cannot be distributed between the other nominees; it has to be paid to the estate. If there is a shortfall in the estate of the deceased member, the benefit to the nominee must be reduced by the amount needed to cover the shortfall.

D. VB Mahaia v South African Local Authorities Pension Fund; South African Local Authorities Beneficiary Fund and Bophelo Benefit Services (Case number: PFA/EC/00020869/2015/MD): Pension Funds Adjudicator – Distribution of death benefits

Mrs Mahaia was the surviving spouse of Mr Mahaia who passed away on 30 October 2010. Mr Mahaia was a member of the South African Local Authorities Pension Fund (the fund) at the time of his passing. A net death benefit of R784 983.80 was paid in various proportions to his beneficiaries, who included his children with Mrs Mahaia, children born out of wedlock and two former partners who were the guardians of the children and who were financially dependent on Mr Mahaia. Mrs Mahaia was paid 20% of the benefit and 5% was paid to her major son. Fifteen percent was also allocated to her minor son who passed away after Mr Mahaia had passed away. This allocation was paid into the South African Local Authorities Beneficiary Fund (the Beneficiary Fund).

Mrs Mahaia lodged a complaint with the Pension Fund Adjudicator (PFA). One of the grounds of her complaint was that she felt that the amounts paid to her and her children were inadequate. She requested that the PFA investigate whether the benefit had been paid correctly.

The PFA found that section 37C of the Pension Funds Act (the Act), which regulates the payment of death benefits of a member, imposes three duties on a fund when distributing a death benefit. The fund must –

(1) identify and trace all the dependants and nominated beneficiaries of the deceased;

(2) make a fair distribution of the benefit; and

(3) determine an appropriate mode of payment.

The Act gives a fund discretionary powers which must be exercised reasonably and fairly in the distribution of a death benefit.

The PFA found that the fund made the distributions to the beneficiaries on the basis that the beneficiaries were legal and factual dependants of Mr Mahaia. Mr Mahaia's children were legally dependent on him because he was their father and he owed them a duty of support. The fund also allocated a portion of the benefit to his former partners as they were guardians of his other children and were also financially dependent on Mr Mahaia at the time of his passing.

The PFA emphasized that it was not for it to decide what the fairest or most generous distribution was. It could only decide on whether or not the fund had acted rationally and had made a proper and lawful decision. The PFA could only examine the matter before it and decide whether or not the fund had considered all relevant factors when it made its decision. The PFA found that it could not order that the benefit be distributed in a manner that Mrs Mahaia felt would have been fair.

The PFA declined to make an order on the distribution that was made by the fund.

Approach adopted by the MMI Sponsor Funds

The distribution and payment of death benefits is made in line with the requirements set out in section 37C of the Pension Funds Act. In exercising the discretion granted by the Act, all relevant factors will be taken into account, such as the extent of dependency of the member's dependants, the age of any minor dependants and the life expectancy of the beneficiaries. This discretion is always exercised with the utmost of skill, care and diligence.

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