



Case law update – Procedural matters

This update discusses several recent determinations / judgements relating to procedural matters that have an impact on retirement funds and, where applicable, sets out the position adopted by the MMI Sponsor Funds.

A. Executive Summary

1. **Jili v NBC Holdings (Pty) Ltd (Case number: 63168/2012)**

- The applicants' attorneys had acted in bad faith by proceeding with the application when there was no basis for it. The court ordered the attorneys to pay the costs of the application.

2. **Masindi v Chemical Industries National Provident Fund and Others (Case number: 16/24267)**

- The delay in paying a death benefit to the claimant resulted from the conduct of her attorneys, who continued with an application against the fund even though the fund had offered to pay the death benefit. The court ordered the claimant's attorneys to pay the costs of the application.

3. **Municipal Employees' Pension Fund and Another Mudau and Another (Case number: 61555/14)**

- A rule amendment which reduced the withdrawal benefit of the fund could not be applied to the member, as he was no longer a member of the fund by the time the rule amendment was applied for and registered.
- Where a member becomes entitled to a withdrawal benefit, such benefit will be paid according to the Rules of the MMI Sponsor Funds that apply at the time of the withdrawal.

B. Case law

1. **Jili v NBC Holdings (Pty) Ltd (Case number: 63168/2012): High Court - *Costs de bonis propriis***

Mr Jili brought an application on behalf of a number of applicants against several retirement funds, the trustees and administrators of the funds, and various other persons (the respondents) for an order compelling them to provide information relating to R21 billion that was alleged to have been invested offshore in 1989. The respondents stated that no such investment existed and provided evidence which showed that the funds never had an asset value of that amount or had that amount of money to invest. This was proven by the financial statements that covered the period 1988 to 1991. The applicants did not present any evidence before the court to prove that the R21 billion existed. The applicants' claim was based on rumours and no real evidence.

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The respondents asked for the application to be dismissed, with costs to be awarded on a *de bonis propriis* basis against the applicants' attorneys. This kind of costs order is granted when the conduct of the legal representative is negligent or is considered to have been taken in bad faith. Such an order is a way for the court to show its displeasure at the conduct of the attorney.

The court looked at the conduct of the applicants' attorneys. It found that despite being informed that there was no case against the respondents, they continued with the application against the respondents. The court found that the attorneys knowingly and recklessly proceeded with the application without any basis for it. They continued despite not having a credible basis to believe that they could make out a case on behalf of the applicants.

The court dismissed the application and ordered the applicants' attorneys to pay the respondents' legal costs.

2. Masindi v Chemical Industries National Provident Fund and Others (Case number: 16/24267): High Court – Costs *de bonis propriis*

This case was discussed in Legal Update 10 of 2017. In this case, the court also discussed when an order for costs can be made against a legal representative. The court found that while legal representatives should not be deterred from pursuing a matter on behalf of their clients even when the chances of success are slim, this did not mean that cases should be pursued carelessly in circumstances where this creates unnecessary and avoidable costs for the parties to the matter.

On the facts, the fund did not unnecessarily delay payment of the death benefit to Mrs Masindi. The fund had in fact made an offer to pay the death benefit approximately six months after it started investigations into determining the member's beneficiaries. Mrs Masindi's attorneys caused the delays simply to ensure that the benefit was paid into their trust account. In so doing, Mrs Masindi's attorneys had acted recklessly and did not show care for her interests and caused her to incur unnecessary costs.

The court ordered that Mrs Masindi's attorneys pay the costs incurred by the fund in the matter.

3. Municipal Employees Pension Fund and Another Mudau and Another (Case number: 61555/14) – High Court: Retrospective Rule amendment.

During 2013, the Municipal Employees Pension Fund was advised to change its withdrawal benefits structure. The rules of the fund provided for withdrawal benefits to be paid at a rate of 3 times the value of the contributions made. This meant that withdrawal benefits were more than the accumulated contributions received by the fund and this put the fund at risk. On 1 July 2013, the fund informed its members of the change of the withdrawal benefit and that the rule would be amended from 1 April 2013. On 22 July 2013, the fund applied to the Registrar of Pension Funds to register the rule amendment. It was registered on 1 April 2014, but from 1 April 2013. Mr Mudau resigned from his employment and withdrew from the fund on 31 May 2013. His withdrawal benefit was calculated and paid according to the amended rule. He was unhappy with the withdrawal benefit paid and successfully lodged a complaint with the Pension Fund Adjudicator (PFA). The PFA found that the fund should have paid Mr Mudau his withdrawal benefit based on the rules applying at the time of his withdrawal, i.e. before they were amended, as the benefit had already accrued to him before the rule had been amended.

The fund applied to the High Court to have the PFA's decision reviewed and set aside. The court found that Mr Mudau had resigned and stopped being a member of the fund before the rule amendment was applied for. The fund notified its members of the rule amendment when Mr Mudau was no longer a member of the fund, and after the fund had already been notified of his withdrawal. The court agreed with the PFA's finding that the amended rule could not apply retrospectively, as Mr Mudau's benefit had already accrued to him by the time the rule amendment had been applied for and later on registered. Once that benefit had accrued to him, it could not be taken away.

The court dismissed the application.

Approach adopted by the MMI Sponsor Funds

Where a member becomes entitled to a withdrawal benefit, such benefit will be paid according to the rules of the MMI Sponsor Funds that apply at the time of the withdrawal.

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