



Case law update – Procedural matters

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

A. Executive Summary

1. **TJ Phiri v Sanlam Umbrella Pension Fund, Sanlam Life Insurance Limited and National Bargaining Council for the Road Freight and Logistics Industry (Case number: PFA/NW/00030488/2017/UM)**

- A fund cannot withhold a member's benefit for loss suffered by an employer if the employer is compensated for the loss by its insurer, as there is no longer a payment due to the employer.
- The General Rules of the FundsAtWork Umbrella Funds make provision for the Funds to withhold a member's withdrawal benefit in line with section 37D(1)(b)(ii) of the Pension Funds Act where the employee's dishonest conduct has caused loss to the employer. In the case where the employer's loss has been settled by its insurer, the continued withholding of the member's benefit is contrary to the Act.

2. **RFS Administrators and Another v National Fund for Municipal Workers (NFMW) and Others (Case number: 27742/2016)**

- A pension fund administrator can claim the whistle-blowing protection when it suffers harm or detriment for making a disclosure as required by the Pension Funds Act.
- The MMI Sponsor Funds will ensure that they act in the best interests of their members when appointing or replacing the Funds' administrator or any other service provider and will ensure that there are sound reasons for such appointment or replacement.

3. **Maphothoma v Pension Fund Adjudicator, Telkom Retirement Fund, Momentum Retirement Fund, and Monyemangane (Case number: 16327/15)**

- The court granted a costs order against the applicant's attorneys for citing the administrator of the retirement fund when the applicant did not seek substantial relief against the administrator.
- If the MMI Sponsor Funds or MMI, in its capacity as administrator, are cited or joined in court proceedings where substantial relief is not sought against them, they will request the attorneys acting on behalf of the party citing them to remove them as a party to the matter. If such request is unreasonably refused, they may request a costs order against the attorneys.

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B. Case law

1. **TJ Phiri v Sanlam Umbrella Pension Fund, Sanlam Life Insurance Limited and National Bargaining Council for the Road Freight and Logistics Industry – Pension Fund Adjudicator (Case number: PFA/NW/00030488/2017/UM): Withholding of benefit.**

Ms Phiri was employed by the National Bargaining Council for the Road Freight and Logistics Industry between May 2003 and December 2015, after which her services were terminated. The employer alleged that Ms Phiri had committed fraud which caused financial loss to the employer. Ms Phiri was a member of the Sanlam Umbrella Pension Fund through her employment and the employer had requested the fund to withhold her withdrawal benefit in terms of section 37D(1)(b)(ii) of the Pension Funds Act.

The employer was later compensated by its insurer for the loss it had suffered and the insurer was considering whether to pursue a civil claim against Ms Phiri to recover the amount it paid to the employer. The claim would be instituted in the name of the employer under the common law principle of subrogation. Subrogation is where the insurer steps in the shoes of the insured party to recover the loss suffered by the insured party. Ms Phiri was unhappy with the decision to withhold her benefit and lodged a complaint with the Pension Fund Adjudicator (PFA).

The PFA found that section 37D(1)(b)(ii) of the Act makes provision for a deduction that can be made for an amount that is due by the member to an employer. Since the employer's insurer had settled the loss suffered by the employer, there was no payment due to the employer for the loss it suffered. The PFA went on to state that the common law principle of subrogation did not override the authority of the Act. The insurer did not have legal standing to request the fund to withhold Ms Phiri's benefit. However, this did not prevent the insurer from pursuing a civil claim against Ms Phiri. The PFA found that there were no proper, lawful and reasonable grounds to withhold Ms Phiri's benefit.

In light of the above, the PFA ordered the fund to pay Ms Phiri's withdrawal benefit, together with interest at a rate of 10.5% from January 2016 until date of payment.

Approach adopted by the FundsAtWork Umbrella Funds

The General Rules of the Funds make provision for the Funds to withhold a member's withdrawal benefit in line with section 37D(1)(b)(ii) of the Act where the employee's dishonest conduct has caused loss to the employer. If upon termination of the employment contract the employer has or will within a short period institute civil or criminal proceedings against the member, the employer can request the Funds, in writing and as soon as possible, to withhold the benefit.

The Funds will not withhold or continue to withhold a member's benefit if the employer's loss has been settled by the employer's insurer. In such case, withholding of the member's benefit will be contrary to the Act.

2. **RFS Administrators and Another v National Fund for Municipal Workers (NFMW) and Others – High Court: (Case number: 27742/2016): Protected disclosures by fund administrator.**

RFS Administrators (Pty) Ltd (RFS) was the administrator for the National Fund for Municipal Workers and the National Pension Fund for Municipal Workers. RFS had instituted action in the High Court after the funds cancelled their contracts for administration services with RFS. RFS alleged that the contracts were cancelled because it submitted reports to the board of trustees of the funds and the Registrar of Pension Funds on alleged misconduct by the funds, the chairman of the board of trustees and the principal officer. RFS claimed that the reports qualified as a protected disclosure in terms of section 9B of the Pension Funds Act (the Act). The funds applied to have RFS' case dismissed on the basis that RFS had not adequately set out the grounds for its claim. The court had to decide whether an administrator can claim protection when it suffers harm or detriment for making a disclosure as required by the Act.

The court found that section 9B of the Act protects a disclosure if it is made to the Registrar by a broad category of persons who are likely to come across impropriety or misconduct and have a duty to report same. The protection given to such disclosures is regardless of the content of the disclosure, whether the disclosure is made in good faith, the reasonableness of the disclosure and the circumstances under which the disclosure is made.

The court went on to say that the provisions of section 9B are in place to promote the effectiveness of the regulator. The purpose is to make sure that disclosures are made with as much freedom as possible. To achieve this, the victimization of personnel, which includes administrators, is prohibited even when such communication is unreasonable or made in bad faith.

The court rejected the funds' argument that the reason for the cancellation of the administration contracts was irrelevant. It found that the reason for implementing or enforcing a term in a contract can cause such conduct to be illegal and render it void or of no effect if it resulted in wrongful termination of a contract which would be against public policy.

Section 13B of the Act imposes duties on an administrator to protect investors and ensure careful and strict regulation. The Act requires administrators to play an oversight role over the correctness of the funds' dealings. When there is proof that a fund has exercised its right to cancel an administration contract to obstruct or make the role of an administrator useless, then the exercise of that right is contrary to public policy. While the contract or termination clause in the contract may be valid, if it is implemented in a manner which is illegal or immoral, the court will refuse to give effect to it. The motive for cancelling the administration contracts will be relevant in determining whether the administration contracts were cancelled contrary to public policy.

The court dismissed the funds' application.

Approach adopted by MMI Sponsor Funds (the Funds)

The Funds will ensure that they act in the best interests of their members when appointing or replacing the Funds' administrator or any other service provider and will ensure that there are sound reasons for such appointment or replacement.

3. Maphothoma v Pension Fund Adjudicator, Telkom Retirement Fund, Momentum Retirement Fund and Monyemangane – High Court (Case number: 16327/15): Joinder of administrator

Ms Maphothoma applied to the High Court to set aside the Pension Fund Adjudicator's (PFA) decision to exclude her from the distribution of a death benefit of the late Mr Maphothoma, arising from his membership of the Telkom Retirement Fund. Momentum Retirement Fund (the administrator)¹ sought a cost order against Ms Maphothoma's attorneys on the basis that it should not have been cited as a party to the application. The administrator argued that as an administrator of a pension fund it had no obligation or right to determine, distribute or make payment of death benefits. Additionally, the administrator had on several occasions requested the applicant's attorneys to amend the notice of motion to not request any substantial relief or remedy against it. The applicant's attorneys had refused to do so and the administrator was of the view that the attorney's conduct in this regard was grossly negligent and/or unreasonable.

The court found that the applicant had not made a case against the administrator, but the relief requested in the notice of motion sought substantial relief against the administrator. This left the administrator with no option but to oppose the application. The administrator requested the applicant's attorney on three separate occasions to amend the applicant's claim to show that no substantial relief was sought against the administrator, but this was not done.

¹ There is no fund called "Momentum Retirement Fund". The party cited should have been Momentum Retirement Administrators, who was the administrator of the Telkom Retirement Fund.

The court dismissed the application and ordered the applicant's attorney and counsel to pay the administrator's costs.

Approach adopted by MMI Sponsor Funds (the Funds)

The Funds or MMI, in its capacity as administrator, are often cited or joined in court proceedings where substantial relief is not sought against them. They will then request the attorneys acting on behalf of the party citing them to remove them as a party to the matter. If such request is unreasonably refused, they may request a costs order against the attorneys.

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