Case law update – Procedural Matters

This update discusses several recent judgements that have an impact on pension funds, in particular matters relating to how matters of the fund are to be handled.

A. PG Mavundla v J Mahlangu, M Thulare, HI Collins, S Makatikela, Registrar of Pension Funds, WM Kgakane and South African Local Authorities Pension Fund (Case number 79364/16): High Court – Appointment of independent trustee

The South African Local Authorities Pension Fund (the fund) held a board meeting from 19 to 21 November 2015. On the agenda of the meeting was a resolution that needed to be taken by the board to appoint Mr Mavundla as an independent trustee with immediate effect. This was done and it was further agreed that an agreement between the fund and Mr Mavundla be signed. The draft agreement stated that the term of an independent trustee will be for a period of 5 years from the date of appointment, which was 21 November 2015.

On 3 August 2016, when the local government elections took place, all the members of the board of the fund stopped being members of the board as their period of appointment had come to an end. Mr Mavundla claimed that this should not apply to him, as he was only recently appointed as per the agreement that was signed. The fund's attorneys pointed out that there was never an agreement signed between Mr Mavundla and the fund. Mr Mavundla claimed that there was a signed agreement; however, he has misplaced the signed copy and had no evidence of this. The other members of the board were of the opinion that Mr Mavundla was never appointed as an independent trustee in the board meeting that was held. Mr Mavundla applied to the High Court to be allowed to continue as an independent trustee on the fund.

The first thing that the court had to determine was whether Mr Mavundla was in fact appointed as per the resolution that was taken in the meeting held on 21 November 2015. In coming to its decision, the court looked at the rules of the fund, as well as any resolutions that were taken in the board meeting with regard to the appointment of Mr Mavundla. In the resolution taken on 21 November 2015, it was resolved that Mr Mavundla be appointed as an independent trustee with immediate effect.

The court found that in light of the resolution that was taken, Mr Mavundla was duly appointed with immediate effect. A resolution is a decision of the body or organisation that adopts it. Its operation still depends on the decision of the body or organisation. It may be effective immediately or it can be made subject to certain conditions. Where the wording is clear it must be accepted that it expresses the intention of the maker. The resolution taken by the board expressly stated that the appointment be made with immediate effect. As such Mr Mavundla became a member of the board once the resolution was

taken. If the intention was for his appointment to only take effect once the agreement was signed, then the resolution should not have stated *"with immediate effect".*

The court further stated that the appointment was in terms of the rules of the fund. Nowhere in the rules does it state that an agreement must be entered into before an independent trustee is appointed. The signing of the agreement was something else that had nothing to do with the appointment.

The next thing that the court had to determine was whether Mr Mavundla's term of office came to an end at the same time as the remainder of the board members. On 3 August 2016, the term of the board came to an end. Mr Mavundla's term also came to an end. Mr Mavundla was not happy with this and stated that the term of office of an independent trustee is different from the term of office for an ordinary member of the board. He stated that in terms of the agreement that he signed, he should be a member of the board for a period of 5 years. Since there is no proof of an agreement entered into between Mr Mavundla and the fund, the court stated that the rules of the fund must be the document that governs the relationship between the fund and Mr Mavundla.

The application was dismissed as the court found that Mr Mavundla's term expired on 3 August 2016, just like the other board members, in terms of the rules of the fund.

B. ME Mmileng v Government Employees Pension Fund, South African National Defence Force and Minister of Defence and Military Veterans (Case number 7397/16): High Court – Retirement and Pension Interest

Ms Mmileng was a member of the Government Employees Pension Fund (the fund) by virtue of her employment. She began employment with the Auditor General in 1978. In 1984 she was transferred to the Department of Defence. In 1995 she was moved to the South African National Defence Force (SANDF). She retired in October 2014 when she reached the age of 60. When Ms Mmileng contacted the fund to claim her pension benefits she was told that her pensionable service had only started in 1995. The fund then refused to pay her any benefits in respect of the period before 1995. The fund later accepted proof of old payslips from 1989 to show that she was employed before 1995. The fund then based the pension on the period from 1989 to 1995.

The issue was whether the period from 1978 to 1989 should be considered for the purposes of determining Ms Mmileng's pensionable service. According to the fund, Ms Mmileng did not prove that she was a contributing member during that time and in terms of the rules of the fund, they were allowed to decline her application for that period. In 1996, Ms Mmileng's employer submitted a letter confirming that her pensionable service started in 1978 and that the records of the fund were incorrect. The court accepted this document as proof that her pensionable service began in 1978.

The fund mentioned that the decision not to pay constituted an administrative action as per the definition in the Promotion of Administration Justice Act (PAJA). They further mentioned that Ms Mmileng never asked for a review of the decision in her application and therefore the court did not have jurisdiction as it had not been asked to review and set aside a decision. In looking at this defence raised by the fund, the court considered certain principles regarding the nature of the claim and found that if Ms Mmileng had a contractual right to payment; her right remained intact regardless of whether the fund decided to recognise that right or not. The contractual right arose from the rules of the fund which binds the fund, the member and the employer.

The fund relied on a principle from the case of *Government Employees Pension Fund v Buitendag (2007) 1 All SA 445.* In this case two major children were excluded from receiving a benefit upon the death of the member. In terms of the rules of the fund they had no right to a payment. A right would only have arisen if the board, while exercising it discretion, allocated a benefit in favour of them. They did however have the right to be considered when the benefit was being distributed as they qualified as dependents. In terms of PAJA, the fund's decision to distribute the benefit without taking the children into account, infringed their right to be considered.

In this specific case, Ms Mmileng claim was not dependent on the exercise of any discretion, or making of any award, by the fund. Her claim came about from the fact that she was a member whose pensionable service commenced in 1978. The court was of the view that the decisions in this case were not administrative actions for purposes of PAJA, as they did not adversely affect Ms Mmileng's rights. Even though the fund is an organ of state, not every decision that it takes can be constituted as administrative action. A decision taken would only be considered to be administrative action if it entails the exercise of public power or the performance of a public function.

The relationship between Ms Mmileng and the fund was no different to the relationship between any other fund and its members. The decision by the fund not to pay Ms Mmileng only affected her. The rules made it clear how the decision should be made. The decision by the fund not to pay Ms Mmileng was not a decision of an administrative nature; it was a decision not to comply with a contractual obligation that arose from the rules of the fund.

The application was successful. The fund was ordered to pay Ms Mmileng the balance of her pension benefit based on the pensionable service during the period 1978-1989.

C. Security Employees National Provident Fund v Registrar of Pension Funds and Private Security Sector Provident Fund (Case number A11/2016): FSB Appeal Board – Rule amendments

The Security Employees National Provident Fund (SENPF) was a defined contribution fund. All the participating employers and their employees operated in the private security sector. During the period 2013-2016, the SENPF submitted 31 applications for rule amendments to the Financial Services Board (the registrar). The amendments involved creating new special rules relating to participation in the SENPF for new employers and their employees and also to revise existing special rules that already provided for compulsory membership.

In 2002, the sectoral determination for the private security sector was amended to bring about the Private Security Sector Provident Fund (PSSPF). Membership to the PSSPF was made a condition of employment for private security sector workers. Employers and their employees were obliged to participate in the PSSPF. If an employer chose to participate in the SENPF, then they would have to pay contributions to the SENPF as well as to the PSSPF, unless the PSSPF granted the employer exemption from having to participate in the PSSPF.

The registrar requested proof that the employers in the SENPF were granted exemption from participating in the PSSPF. The registrar further stated that they were not able to make a decision as they never received the information that they had requested and due to this, did not register the rule amendments that were submitted. The SENPF wanted to know if the registrar had the right to refuse to register special rules if such information was not given to them. The registrar confirmed that they cannot register rules that are non-compliant with the law. In this specific case, they could not allow for an employer to participate in the SENPF without first getting the exemption from the PSSPF as per the sectoral determination.

The SENPF was of the view that there could not be a conflict between the amended rules and the sectoral determination because there was nothing that prevented an employer and employee from belonging to more than one fund. The registrar pointed out that without an exemption, employees are allowed to participate in another fund, but the contributions to the other fund cannot be deducted from the employees' wages unless they have given written consent. The registrar said that the rule amendments submitted by the SENPF obliged a participating employer to deduct a member's contribution without the member's consent, and that is not allowed in terms of the sectoral determination, and as such would be a contravention of the law. The SENPF argued that the rules might be inconsistent with the sectoral determination, but it was not inconsistent with the Pension Funds Act (the Act). The SENPF relied on the case of *National Tertiary Retirement Fund v Registrar of Pension Funds 2009 (5) SA 366 (SCA)* which confirmed that the registrar is bound to register any rule provided it is not inconsistent with the Act. The

court in this specific case also raised a more important point, stating that the terms of the Act must be properly interpreted and when that is done, one must not only give regard to the words used by the legislature, but also to its object and policy.

The question that is then raised is: should the registrar register a rule that is on the face of it illegal? The answer is: definitely not. The object of section 12(4) of the Act was to deny the registrar a general discretion, and not to require the registrar to register something that is unlawful in the broader sense of the term. The Act does not operate on its own; it is part of a wider legal landscape.

To have allowed for the amendment to go ahead, the wrong would have continued. As such, the appeal was dismissed.

Shameer Chothia

Legal Specialist: Products
Retirement Fund Governance
MMI Investments and Savings: Retirement Solutions