



Case law update – PFA jurisdiction

This update discusses several recent determinations / judgements that have an impact on pension funds in respect of determining where the PFA has jurisdiction and where not.

A. Sentinel Retirement Fund v CV Bold MA Lukhaimane N.O and Harmony Gold Mining Company Ltd (Case number 80105/2015) – High Court: Discretionary powers of the board

Mr Bold was employed by Harmony Gold Mining Company Ltd (the employer) as a diesel mechanic from 1990 until his employment came to an end in August 2014 due to medical reasons. Mr Bold was a member of the Sentinel Retirement Fund (the fund) by virtue of his employment.

In 1995, Mr Bold was involved in a motor vehicle accident and suffered injuries that made him unable to cope with the heavy physical duties that his job required of him. The employer accommodated Mr Bold by giving him an administrative position. Mr Bold performed his administrative duties for 11 years after the accident. Mr Bold's functions had changed but he was still employed as a diesel mechanic and got the same salary as he always had, and paid the same contributions to the fund as he always had.

In 2014, Mr Bold's foreman decided that Mr Bold should perform the heavy duties that were expected of a diesel mechanic, since that was the position that he was employed for. Mr Bold was unable to cope with those duties and was dismissed. Mr Bold was then made to apply for a permanent disability benefit. In his medical incapacitation forms, the medical practitioner found that he was permanently unfit for his normal duties. There was no explanation from the employer as to why they required Mr Bold to perform the duties of a diesel mechanic again after allowing him to do an administrative job for almost 11 years.

The medical reports were submitted to the fund for a decision as to whether Mr Bold should be allowed to receive a permanent disability benefit. The board of the fund found that Mr Bold was not permanently disabled to perform his own or a similar occupation in terms of the rules of the fund. The board stated that Mr Bold had performed an administrative job for 11 years and was therefore not permanently disabled to perform those administrative functions. Mr Bold was not happy with the decision of the board and applied to the Pension Funds Adjudicator (the PFA) for a review.

The Pension Funds Adjudicator

Mr Bold complained that he should have qualified for a disability benefit from the fund. In response to that, the fund submitted a report from an occupational therapist who found that Mr Bold was totally and permanently disabled to perform the functions of a diesel mechanic, but was not totally and permanently disabled to perform administrative duties.

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Mr Bold received a retrenchment package from the employer, based on an agreement with the fund that if a member was unsuccessful in an application for disability benefits, they would qualify for a retrenchment package. The fund pointed out that Mr Bold had already received a retrenchment package and if the disability benefit was to be paid to him, he will have benefited dually. The fund requested that if Mr Bold persists in receiving the disability benefit, then he should return the retrenchment package that he got from the employer. The PFA found in favour of Mr Bold and stated that he should qualify for the disability benefit.

The High Court

In coming to its decision, the court started off proceedings by looking at the reasons that the board of the fund had given for the repudiation of the claim. In the letter that was submitted to the employer, the board made it clear that Mr Bold's occupation was an administrative one and not that of a diesel mechanic. He performed that job for a period of 11 years and due to the fact that he would have been able to continue with the occupational functions of that job, Mr Bold cannot be seen to be totally and permanently disabled.

The court had to determine whether the determination by the PFA was correct and whether the board had exercised its discretion properly.

In terms of the rules of the fund, the board has the sole discretion to determine whether or not to allow a permanent disability benefit to be paid to the member. The court cannot look into the correctness of the decision. The jurisdiction of the court is limited to the question of whether the board of the fund had acted rationally and arrived at a proper and lawful decision.

The court made it clear that in determining Mr Bold's complaint to the PFA, the PFA had no power to substitute her decision for that of the board. In terms of section 30E of the Pension Funds Act (the Act), the PFA shall investigate any complaint and 'may make an order which any court of law may make'. Since a court of law cannot substitute its discretion for that of the board, neither could the PFA. The court and the PFA are in the same position. The board's decision can only be interfered with where it can be shown that the board had taken irrelevant, improper and irrational factors into consideration or where it can be shown that no reasonable board properly directing themselves could have reached such a decision.

The court looked at principles which a board of trustees must comply with, touching on matters such as: asking the correct questions, acting in accordance with the law and arriving at a decision that a reasonable board would have arrived at. In terms of the rules of the fund, it is clearly stated that it is within the board's sole discretion whether or not to allow for a permanent disability benefit. Where a discretionary power has been conferred on the board of the fund, the court and the adjudicator cannot substitute their decision for that of the trustees. The court found that the board had exercised its discretion after considering the medical reports as well as all the facts of the case. Mr Bold had been unable to perform the duties of a diesel mechanic for 11 years and was accommodated in an administrative capacity. There was no indication that the board acted irrationally or took into consideration any irrelevant facts. The court was of the view that the board had exercised their discretion properly and came to a proper and lawful decision.

The appeal was successful. The court found that the PFA had acted incorrectly by substituting her decision for that of the board. As such the court set aside the determination by the PFA as she had acted beyond her powers.

B. Mthembu and others v Municipal Employees Pension Fund and others (2016) JOL 36565 (PFA) – PFA: Unapproved insurance benefits and court proceedings

Mr Mthembu was a member of the Municipal Employees Pension Fund (the fund) by virtue of his employment. He and a group of employees were not happy about certain rule changes that were made

with regard to the funeral benefits and the withdrawal benefits. They lodged a complaint with the Pension Funds Adjudicator (the PFA).

The group of employees stated that before the recent rule amendment, the funeral benefits that became payable were paid directly to the deceased's family. After the rule amendment, the benefit is payable to the employer, and before payment can be made, the deceased's family have to submit a quote in respect of the benefit. They also complained that the benefits were decreasing instead of increasing. A further complaint was about a withdrawal benefit that becomes payable upon resignation. The rules were amended to state that if a member resigns before they reach the age of 55 years, they would become entitled to only the member contributions and not the employer contributions.

The PFA looked at this matter and found that the rules of the fund clearly stated that the funeral benefits were insured under a separate policy and that the funeral benefit was administered by an assurance company as an unapproved benefit and was not dealt with in terms of the rules of the fund. Because the funeral benefits were not payable in terms of the rules of the fund, the PFA did not have the jurisdiction to adjudicate on the complaint. The complaint should be referred to the ombudsman for Long Term Insurance.

The issue with regard to the withdrawal benefits decreasing was being addressed by the High Court. Section 30H(2) of the Pension Funds Act (the Act) states that the PFA cannot investigate a complaint if, before the complaint is lodged, proceedings have already been instituted in a civil court. The matter before the court would have a direct bearing on the present complaint and as such the PFA was not allowed to investigate this aspect of the complaint.

Both complaints were therefore dismissed as a result of the PFA not having the jurisdiction to adjudicate on them.

C. RM Nakeng and others v Corporate Selection Umbrella Retirement Fund and others (2016) JOL 36566 (PFA) – PFA: Transfer already approved by the Registrar

RM Nakeng and 16 other employees were all former employees of Ground Crew (Pty) Ltd. They were also members of the Corporate Selection Umbrella Retirement Fund by virtue of their employment. They were members of the fund until December 2013, at which point they were transferred to the FundsAtWork Umbrella Provident Fund (the Fund) in terms of section 14 of the Pension Funds Act (the Act). The reason for the transfer was because Ground Crew (Pty) Ltd and Wings Inflight Services (Pty) Ltd had merged and formed a company called Dnata Newsrest (Pty) Ltd (the employer). Following the merger, this group of employees became members of the Fund with effect from 1 January 2014 after the registrar had approved the section 14 transfer.

RM Nakeng and the 16 other employees were not happy with regard to the contributions being made by the employer. The employer was not contributing at the rate that was agreed upon. The employer also deducted the contributions from their salaries but only paid the employer contributions to the Fund and not the member contributions. They lodged a complaint with the Pension Funds Adjudicator (the PFA) requesting that the employer should pay all the outstanding contributions that were owed.

In looking at this complaint, the PFA firstly had to determine whether she had jurisdiction to investigate the issue as the Registrar had already approved the section 14 transfer. Where the Registrar has already issued a certificate of approval confirming that the transfer was reasonable and equitable and gave full recognition to the members' rights and reasonable benefit expectations in terms of the rules, any disagreement with that approval must be taken up with the Registrar (*Mdluli and others v Anglo American Corporation Retirement Fund and others [2004] 11 BPLR 6236 (PFA)*). Based on this, it was clear that the complaint relating to the transfer values was beyond the jurisdiction of the PFA.

The PFA did investigate the complaint about the employer not paying the contributions to the Fund. In terms of section 13A of the Act, the employer has a duty to pay the contributions directly to the Fund not

later than 7 days after the end of the month for which the contributions became payable. The PFA also looked at the special rules that were registered for the employer which sets out the contribution rates that were applicable to the employees. In terms of the special rules, the complainants were all category 2 members. Category 2 members do not contribute to the Fund. There is only an employer contribution that is made to the Fund and no member contribution. The PFA found that the allegations made by the complainants were not correct and that the employer had acted in terms of the special rules.

The complaint was dismissed as it was found that the employer had paid all contributions to the Fund and that there were no outstanding contributions as was alleged by the complainants.

D. TWP Projects (Pty) Ltd v Pension Funds Adjudicator, CH Van Coller, Corporate Selection Retirement Fund and Liberty Group Limited (Case number 67153/2015) High court: Principles of law

Mr Van Coller was a member of the Corporate Selection Retirement Fund (the fund) by virtue of his employment with TWP Projects (Pty) Ltd (the employer). In April 2014, Mr Van Coller passed away. Mrs Van Coller complained to the Pension Funds Adjudicator (the PFA) that she never received a death benefit. She stated that the employer had offered Mr Van Coller an opportunity to take early retirement in March 2014. Mr Van Coller accepted the offer. On 31 March 2014, Mr Van Coller signed the withdrawal forms where it indicated that the date of withdrawal was 31 March 2014. Mrs Van Coller further stated that Mr Van Coller was in his notice period at the time of his death and as such she should receive a death benefit pay-out. The tax directive that was received from SARS showed that the date of accrual was 30 April 2014, which confirmed that Mr Van Coller's last month of employment was in fact April 2014.

In her complaint to the PFA, Mrs Van Coller requested that the fund / administrator be ordered to provide her and the PFA with the reinsurance policy for purposes of establishing her rights and benefit entitlement. She also requested that the fund be ordered to exercise its discretion in terms of section 37C of the Pension Funds Act (the Act) and pay the death benefit. Lastly, she requested in the alternative that if it was found that the employer erroneously communicated the incorrect information to the fund / administrator, then the employer should be held liable for the payment of the death benefit. In terms of this complaint, the only relief applicable to the employer was the alternative relief that was requested. The other two primary aspects of the complaint related to the fund / administrator.

The complaint that Mrs Van Coller lodged was not that the employer erroneously informed the fund of the date on which Mr Van Coller left employment. There were also no allegations that the erroneous information that was provided to the fund caused the non-payment of the death benefit and that the employer had breached their duties in terms of the rules of the fund.

Pension Funds Adjudicator

The PFA ordered that the fund calculate the amount of the death benefit that should have been paid, with interest of 9%. The fund was also ordered to do the section 37C investigations to identify who the beneficiaries should be. The employer was ordered to pay the benefit to the beneficiaries.

High Court

In examining the determination by the PFA, the court stated that the determination made by the PFA was in contradiction to the relief that was requested by Mrs Van Coller. The primary complaint was against Liberty Group Limited (the administrator) and not against the employer. The basis of the complaint was the issue of the reinsurance policy not being given to Mrs Van Coller to enable her to determine her rights. In terms of section 30E(1) of the Act, the PFA is not limited to the relief sought by a complainant. However, this is not something that can just be abused. The principles of law must still apply. The employer should have been granted a right of reply in terms of the *audi alteram partem* rule. This did not happen in this case.

There was no indication from the complaint that was lodged that the employer was to blame for the repudiation of the claim by the administrator, nor was there any indication as to why the employer should be blamed for the repudiation. In the case of *Southern Staff Pension Fund v Murphy NO and Another (2000) 9 BPLR 963 (PFA)*, it was mentioned that failure to observe the requirements of the *audi alteram partem* rule was material and sufficient to render the procedure by which a finding was reached as unlawful. The court was of the view that such a principle must be applied to this specific case. There was no right of reply given to the employer and therefore the procedure was unlawful and the decision should be set aside.

It was clear that the PFA made a finding on facts not before her and not supported by the evidence in the complaint. The employer was not granted an opportunity to contest those findings that were made against them. The PFA is confined to making a finding on the complaint that is made by a complainant; in this case she acted beyond her jurisdiction. Further to this point, the PFA had also acted contrary to section 30D of the Act as she did not dispose of the matter in a procedurally fair manner as was required of her.

The case was successful as the PFA had exceeded her powers by adjudicating on a point that was not the issue in the complaint. The determination issued by the PFA was set aside.

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