



Case law update – Benefit related matters

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

A. **Kitshoff v Fedsure Staff Pension Fund and Others (Case number: 597/2016) – Supreme Court of Appeal: Right to claim enhanced pension benefits**

Mr Kitshoff was employed by the Building Industrial Bargaining Council (BIBC). Fedsure Staff Pension Fund (the Fedsure Fund) was the pension fund that BIBC contributed to. In March 2002 Investec Employee Benefits acquired Fedsure Holdings Limited, which was the employer of the Fedsure Fund. Investec informed BIBC that it would no longer accept contributions from BIBC from 1 July 2002. BIBC made arrangements to join Wizard Universal Pension Fund (WUPF) in terms of section 14 of the Pension Funds Act from 1 July 2002. The transfer was approved on 9 July 2004 and would be effective going back to 1 July 2002.

Mr Kitshoff was retrenched on 30 June 2003 and WUPF paid him R2 120 153 in pension benefits. He was unhappy as he felt he was entitled to enhanced pension benefits provided for in the Fedsure Fund's rules and he should have received an additional R529 307. Mr Kitshoff applied to the High Court for an order that the Fedsure Fund and/or BIBC pay the enhanced pension benefits to him.

The High Court

The High Court found that when BIBC stopped paying contributions to the Fedsure Fund, it no longer participated in that fund; this meant that Mr Kitshoff was no longer a member of the Fedsure Fund. Since he qualified for the enhanced pension benefits based on BIBC's participation in the Fedsure Fund, he no longer qualified when BIBC stopped making contributions. The court dismissed the application.

Supreme Court of Appeal

On appeal, the Supreme Court of Appeal found that Investec was entitled to cancel the agreement with BIBC. It gave notice to BIBC and BIBC accepted the cancellation. Once BIBC accepted the cancellation of the agreement, the ties that existed between the Fedsure Fund and BIBC were broken. In turn, the ties between the Fedsure Fund and Mr Kitshoff were also broken. In the absence of the ties between BIBC and the Fedsure Fund, Mr Kitshoff did not have any right to claim enhanced pension benefits from the Fedsure Fund.

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The transfer from the Fedsure Fund to WUPF was approved on 9 July 2004, but was effective going back to 1 July 2002. This meant that when Mr Kitshoff was retrenched on 30 June 2003, he was a member of WUPF and as such received payment of his pension benefit from WUPF.

The court dismissed the appeal.

Approach adopted by the FundsAtWork Umbrella Funds

A member who is retrenched by his employer, will become entitled to a benefit from the FundsAtWork Umbrella Fund (the Fund) in which his employer participated at the time of his retrenchment. If there are additional benefits payable by the Fund as a result of the retrenchment, it will also be paid by the Fund in which his employer participated at the time of his retrenchment. If a section 14 transfer takes place before the member is retrenched, the transferring fund will not be responsible to pay any enhanced benefit due to the member's retrenchment.

B. Dingake v National Treasury Republic of South Africa and Others (Case number: 53351/2012)- High Court: Right to a special pension

Mr Dingake was awarded a special pension in terms of section 1 of the Special Pensions Act (the Act) for the 15 years in prison that he served on Robben Island during the Apartheid struggle. The Act awards a special pension to South African citizens or persons who are entitled to be citizens that were involved with the Apartheid struggle and were as a result not able to provide for a pension. Certain criteria need to be met before a person can qualify for the special pension, which include that a person must have been in full time service of a political organisation.

Mr Dingake appealed the award to the Special Pensions Appeal Board on the basis that the award did not take into account his other periods of service with the African National Congress (ANC) and the uMkhonto we Sizwe (MK). The board confirmed the award and dismissed the appeal. Mr Dingake applied to the High Court for review of the decision of the board.

The court found that the requirement in the Act for full time service meant that a person must have dedicated his life to the cause. This was supported by the requirement in the Act that the person applying for the special pension must have been prevented from providing for a pension. This meant that if a person had normal employment in addition to serving the cause, that person would have not been prevented from providing for a pension.

Mr Dingake needed to show that he was in full time service for the periods in question, which he didn't do. Even though he had listed the positions he held with the ANC and MK that required full time involvement, this was not enough to prove his claim. While the ANC and the MK provided information regarding Mr Dingake's involvement, this only confirmed his membership. However, it did not support or prove his claim. The court also rejected Mr Dingake's argument that the board should have investigated what the true position was. The court found that the board had in fact requested additional information from Mr Dingake and it was his responsibility to provide the relevant information, which he didn't do.

The court dismissed the application.

Approach adopted by the FundsAtWork Umbrella Funds

Any benefit a member may be entitled to will be paid according to the General Rules of the Fund. If a member is unhappy with any decision regarding the payment of such benefits, he may register a written complaint with the Fund, which the Fund will consider and reply to within 30 days after it has received the complaint.

C. NEHAWU obo Ndweni v Member of the Executive Council, Department of Social Development and Another (Case number: JR1488/15) – Labour Court: Absconding from work

NEHAWU, on behalf of its member, Mr Ndweni, approached the Labour Court for an order to set aside and / or substitute the decision of the Member of the Executive Council, Department of Social Development (MEC) not to reinstate Mr Ndweni to his position.

Mr Ndweni was dismissed from service in terms of Section 17 of the Public Service Act (the Act). The Act stipulates that if a public service employee does not report for duty for more than a calendar month without the permission of his head of department, he is deemed to have been dismissed on the basis of misconduct with immediate effect from the day after the last day he reported for duty. The Act also provides if the employee later reports for duty, he may be reinstated on good cause shown and the period of absence will be deemed to be unpaid leave or leave on such other conditions as the MEC may determine.

Mr Ndweni was employed as a messenger / driver by the Department of Social Development. Mr Ndweni said that he reported for duty on 13 February 2014 but left after he became ill. He also said that he was declared unfit for duty by a doctor on the same day until 12 March 2014. Mr Ndweni said he arranged to have a copy of the medical certificate delivered to his manager on 25 March 2014. On 26 March 2014, Mr Ndweni reported for duty but was told that he would not be allowed to continue with his duties until a decision on his failure to report for duty had been made. On 9 April 2014, Mr Ndweni was told that he had been dismissed from service in terms of the Act. Mr Ndweni made representations to the MEC for his reinstatement, but was unsuccessful. He then lodged a dispute with the bargaining council, which found that it did not have jurisdiction over the matter.

The court found that based on the wording of the Act, dismissal takes place automatically. There is no disciplinary hearing before the dismissal. It also found that such a dismissal is not regarded as a dismissal in the ordinary sense. This makes it very important that a decision maker, when deciding whether or not to reinstate an employee who has been dismissed, is able to show that the representations made by the employee were carefully considered and responded to in such a way that justifies why the dismissal should not be reversed.

The court found that there were enough grounds to dismiss Mr Ndweni. He had not provided good enough reasons or proof to justify his absence from work. Mr Ndweni said that he was seen by a doctor on 13 February 2014, but the medical certificate he provided was dated 12 March 2014. He only returned to work on 26 March 2014 and did not have any proof to show that he was still not fit for duty from 12 March 2014 until his return to work. The court said that it is not enough for an employee to simply get a medical certificate long after the first day on which he misses work and expect an employer to accept the medical certificate with no questions asked.

The court found that the MEC's response as to why Mr Ndweni would not be reinstated was not sufficient as it did not state in enough detail on what basis the decision was reached. There was no basis for the court to conclude that the MEC had applied her mind to the representations that Mr Ndweni had made for his reinstatement. The MEC could have approved Mr Ndweni's reinstatement and deemed his periods of absence as unpaid leave or reinstated him on such other conditions she could have decided. The court concluded that while the dismissal requirements of the Act had been met, the MEC's response as to why Mr Ndweni would not be reinstated did not set out the basis for her decision in sufficient detail and this made Mr Ndweni's dismissal unfair.

The court set aside the MEC's decision and ordered that Mr Ndweni be reinstated.

Approach adopted by the FundsAtWork Umbrella Funds

If the Fund does not receive any contributions or payment of any of the Fund's expenses, fees and costs for a specific member for 90 consecutive days, that member will be considered to have absconded. During this 90 day period, the Fund will continue debiting the fund expenses from the

member's retirement savings account. If the Fund receives confirmation that the member has indeed absconded or if after 90 days the Fund has not received any confirmation that the member has absconded and the member has not returned to work, the Fund will preserve the member's benefit and the member will become an inactive member.

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