Legal update

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Case law update – Fund related matters

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

A. Summary

1. Naidoo v Discovery Ltd and Others (2018) ZASCA 88 (31 May 2018) – Risk only policy not an asset in the estate of the policyholder

- On a risk only life policy, the proceeds are only paid on the death of the insured. They can never be paid out to the policyholder or the beneficiary during the lifetime of the insured. The only rights a policyholder has, flows from the policy itself. These are the rights to nominate a beneficiary, to change the beneficiary nomination, to cede and to terminate the policy. A policy on which the policyholder does not have a claim during his lifetime can never be an asset in his estate and for that reason cannot be taken into account in determining the value of a joint estate.
- On the FundsAtWork lump sum death benefits, the Fund or the employer is the policyholder. Where the employer is the policyholder, the member can nominate his spouse, child or dependant, or in the absence of all these beneficiaries, another person, as the beneficiary of the lump sum death, or change that beneficiary nomination. Neither the member nor any beneficiary has the right to payment of the benefit during the member's lifetime. The policy is not an asset in the joint estate if the member is married in community of property.

2. Bouttell v Road Accident Fund (2018) ZASCA 90 (31 May 2018) – Voluntary contributions to a retirement annuity fund cannot be claimed as loss of future earnings

- Contributions to an employer pension fund make up part of the employee's employment benefits, while contributions to a retirement annuity don't. If a claimant becomes a member of and contributes to a retirement annuity fund, he does so voluntarily and the membership is unconnected to an employment contract. His contributions to the retirement annuity fund cannot be recovered from the Road Accident Fund.

B. Case law

1. Naidoo v Discovery Ltd and Others (2018) ZASCA 88 (31 May 2018) – Risk policy not an asset in the estate of the policyholder

M Naidoo and V Naidoo were married in community of property. In 2002, Mr Naidoo took out a joint life assurance policy with Discovery, which was a risk only policy. He was the principal life insured and the owner of the policy. He nominated his wife as the beneficiary of the pay-out on his passing. The policy provided that he could change the beneficiary nomination at any time and the nominated beneficiary was not entitled to any benefits during his lifetime.

In 2011, Mr Naidoo changed the beneficiary nomination and nominated his parents, his brother and his sister. His wife did not know about the change. When Mr Naidoo passed away, Discovery paid the proceeds of the policy to the nominees. His wife approached the High Court to set aside the payment to the nominees on the basis that the rights and obligations under the policy formed part of the joint estate, which included the right to nominate a beneficiary, to receive payment of the sum insured and to revoke or cancel a nomination. She argued that as they were married in community of property, her husband could not nominate third parties as beneficiaries without her consent. The High Court did not agree and dismissed the application.

On appeal to the Supreme Court of Appeal (SCA), the SCA found that the right to nominate a beneficiary on a policy is widely used because the policy proceeds are then immediately paid to the beneficiary when the policyholder passes away, without the beneficiary having to wait for the estate to be wound up. The policy proceeds also do not form part of the deceased's estate for calculating the executor's fee. The purpose of these two advantages is to bypass the deceased's estate.

When a policy is a risk only policy, the proceeds are paid on the death of the insured. The proceeds can never be paid out to the policyholder or the beneficiary during the lifetime of the insured. The only rights a policyholder has, flows from the policy itself. These are the rights to nominate a beneficiary, to change the beneficiary nomination, to cede the policy and to terminate the policy. The policy can never be an asset in the estate of the policyholder where he has paid the premium but has no corresponding claim during his lifetime. So the policy could never be an asset in the joint estate.

The SCA looked at section 15(1) of the Matrimonial Property Act (the Act), which reinforced the general rule that a spouse in a marriage in community of property may perform legal acts that are binding on the joint estate without the consent of the other spouse. Section 15(2)(c) creates an exception to the general rule by prohibiting a spouse married in community of property from disposing of an asset in the joint estate without the written consent of the other spouse. This includes shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds and so on.

The SCA pointed out that when interpreting the specific sub-section, insurance policies must be looked at in the context of the types of assets listed in the sub-section. In this context they clearly include policies that have a current value, such as endowment policies or retirement annuities that can be surrendered or made paid up. The SCA concluded that the rights of a policyholder in a risk only policy before death are not assets. Furthermore, the right to nominate a beneficiary is not a transfer of a right that is an asset in the joint estate. It is simply the exercise of a contractual right created by the policy.

The appeal was dismissed.

Approach adopted by the FundsAtWork Umbrella Funds

For the FundsAtWork lump sum death benefits, the Fund or the employer is the policyholder and the member only has the right to nominate a beneficiary or change the beneficiary nomination. The member does not have the right to cede the policy and the policy is not an asset in the estate of the member.

2. Bouttell v Road Accident Fund (2018) ZASCA 90 (31 May 2018) – Voluntary contributions to a retirement annuity fund cannot be claimed as loss of future earnings

Mr Bouttell was an electrical engineer who ran two businesses as owner and general manager. He contributed approximately 15% of his gross earnings to a retirement annuity fund.

In 2012 he was involved in a motor vehicle accident in which he was injured. He lodged a claim against the Road Accident Fund (the RAF) for compensation for his injuries. The RAF admitted that it was liable for his claim. The only issue the High Court had to determine was how much the RAF was liable to pay Mr Bouttell. The parties agreed on all the amounts claimed, except for loss of future earnings and more specifically whether the contributions to the retirement annuity fund could be included as loss of future earnings. The High Court found that there is a distinction between contributions to an employer pension fund and the voluntary contributions to a retirement annuity fund when calculating loss of earnings. It found that contributions to a retirement annuity fund should not be taken into account in a claim for loss of earnings.

On appeal to the SCA, Mr Bouttell argued that he and others like him who voluntarily contribute to a retirement annuity fund were discriminated against and were prejudiced by not being able to include their contributions in a claim for loss of earnings. By not including the contributions, the RAF was not fulfilling its duty to compensate a claimant in full because the retirement annuity fund contributions are not taken into account while pension fund contributions are. He argued that he was being discriminated against and his rights under the Constitution of the Republic of South Africa were being violated.

The SCA found that a retirement annuity fund is not a pension fund, but rather a form of investment. Contributions to an employer pension fund are part of an employee's employment benefits while contributions to a retirement annuity are not. The SCA further found that if a claimant purchases a benefit, such as a retirement annuity, he does so voluntarily and the membership is unconnected to an employment contract. His contributions or payments to such investment or purchase of a benefit cannot be recovered from the RAF. A negligent third party can't be responsible to compensate a claimant who voluntarily obtains a benefit regardless of whether or not the third party was negligent. The voluntary purchase of the benefit does not cancel the benefit when the delict or wrongdoing is committed.

Regarding Mr Bouttell's argument of discrimination, the SCA found that while the concept of equity and discrimination are linked, discrimination relates to treating one person or group of people differently to another on the basis of a person's characteristics such as race, gender, or any of the other prohibited grounds in the Constitution. What Mr Bouttell was referring to was a differentiation or distinction in treatment that is unrelated to any characteristic that has the potential to impair the dignity of a person.

The SCA further stated that it could not be said that a person like Mr Bouttell whose employer does not contribute to a pension fund for the employee as part of his remuneration is in a similar position to an employee whose employer does contribute to a pension fund for the employee as part of his remuneration. All employees are treated equally in the sense that in order to determine their future loss of earnings, a court will consider the employment contract as a whole. It could not be said that there was discrimination.

The appeal was dismissed.

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