



Case law update – Fund related matters

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

A. Summary

1. Municipal Workers Retirement Fund v M.S. Cekama and M.A. Lukhaimane N.O. (case number 95639/2016) – Pension Funds Adjudicator cannot award compensatory damages

- The PFA did not have the power to award compensatory damages, as this was not a benefit the member was entitled to in terms of the rules of the fund. By ordering the fund to pay, the PFA acted outside the rules of the fund and as such had acted beyond the powers derived from the rules.

2. Sentinel Retirement Fund and Another v Masoanganye (2018) ZASCA 126 – Payment of pension benefit to a curator bonis

- A restraint order prevents a person from dealing in any way with any property to which the order relates. It also requires disclosure and surrender of the property to the curator bonis who is appointed to administer the assets in terms of the order. When the order is executed, the curator bonis takes possession of the property and this makes it a form of attachment and execution.
- Once a benefit is paid to a member, it is no longer protected by section 37A of the Pension Funds Act (the Act) and forms part of the member's estate. The curator bonis steps into the shoes of the member and administers his property in line with the restraint order. So the payment of a member's benefit to a curator bonis is the same as paying to the member himself.
- The MMI sponsor funds will comply with a valid and binding restraint order that is issued by a court.

3. Mosetlha v Ampath Trust Provident Fund and others (2018)2 BPLR 459 (PFA) – Fund must provide benefit statements directly to members

- Section 7D(1) of the Act sets out the duties of the board of a fund and places a duty on the trustees to provide adequate and appropriate information to its members, informing them of their rights, benefits and duties in terms of the rules. A fund must have the personal information of its members; the benefit statements must be sent to the members directly. Section 7D(1)(c) of the Act specifically provides that adequate and appropriate information must be communicated to the members. Benefit statements should be sent to the members directly and not to the participating employer to forward to the members.

- The Funds send benefit statements directly to their members. Members are also able to access their benefit statements at any time on the Funds' online portal system.

4. Amplats Group Provident Fund and others v Implicated Board Members of the Complainants and Vivien Cohen and Sanlam Life Insurance Limited (PFA/GP/00019725/2015/YVT) – Duties of a service provider

- Fund advisers are bound by the duties that are prescribed by their professional code of conduct, statutes, common law and contracts with their clients. When a fund suffers a loss, a breach of any of the duties can be used in court to show a breach of contract or prove a claim for damages.
- Before appointing a service provider, the funds must perform a due diligence exercise to ensure that these providers meet their requirements and can perform according to the standards expected on them. The funds must also regularly review the performance of these providers.

B. Case law

1. Municipal Workers Retirement Fund v M.S. Cekama and M.A. Lukhaimane N.O. (case number 95639/2016) – Pension Funds Adjudicator cannot award compensatory damages

Mr Cekama lodged a complaint with the Pension Funds Adjudicator (PFA) regarding an incorrect benefit statement that was given to him by the fund. The PFA found that Mr Cekama was not entitled to the incorrect amount that was stated in the benefit. Even though the member had not suffered any loss or damages, the PFA ordered that the fund pay him R10 000 in compensatory damages for the inconvenience he experienced due to the incorrect benefit statement given to him.

The fund appealed the determination to the High Court. The Court found that the main purpose of the fund is to provide retirement and death benefits for members. The payment of the benefit must be done in terms of the rules of the fund.

After reviewing Rule 9.2 of the fund's rules, the Court found that the R10 000 the PFA ordered the fund to pay to Mr Cekama could not be seen as a benefit he was entitled to in terms of the rules of the fund or related to any costs Mr Cekama was entitled to.

By ordering the fund to pay, the PFA acted outside the rules of the fund and as such had acted beyond the powers derived from the rules. The Court further found the PFA did not have any legal or factual basis to reformulate the member's request to investigate and order the compensatory damages.

The Court set aside the PFA's determination and dismissed Mr Cekama's complaint.

2. Sentinel Retirement Fund and Another v Masoanganye (2018) ZASCA 126 – Payment of a pension benefit to a curator bonis

Mr Ndebele was a member of the fund. He resigned from his employer in 2014 and became entitled to a withdrawal benefit. In 2011, he was convicted of racketeering (a type of organised crime) which is an offence under the Prevention of Organised Crime Act (POCA). He appealed the conviction. Just after his conviction, the National Director of Public Prosecutions (NDPP) got a restraint order which required Mr Ndebele to disclose and hand over his assets that could be realised (sold, claimed etc.) and he was prevented from dealing with those assets. Mr Masoanganye was appointed as a curator bonis to take control of Mr Ndebele's assets. A curator bonis is a legal representative appointed by the High Court to manage a person's financial affairs in certain circumstances.

In 2015 the curator advised the fund that Mr Ndebele's withdrawal benefit was a realisable asset once he was no longer a member of the fund and requested Mr Ndebele's banking details. The fund took the view that Mr Ndebele's benefit was protected by section 37A of the Pension Funds Act and his bank account

details were confidential. Section 37A provides that a benefit cannot be reduced, transferred or otherwise ceded, or of being pledged, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. The fund approached the High Court to decide whether the curator's authority extended to collecting Mr Ndebele's withdrawal benefit since he had made his election to receive his benefit as a lump sum.

The Court found that a restraint order prevents a person from dealing in any way with any property to which the order relates. It also requires disclosure and surrender of the property to a curator bonis under the supervision order. When the order is executed, the curator bonis takes possession of the property and this makes it a form of attachment and execution. The Court found that the restraint order allows for property to be attached and realised in terms of POCA.

Once a benefit is paid to a member, it is no longer protected by section 37A of the Pension Funds Act (the Act) and forms part of the member's estate. The curator bonis steps into the shoes of the member and administers his property in line with the restraint order. So the payment of a member's benefit to a curator bonis is the same as paying to the member himself.

The Court ordered the fund pay Mr Ndebele's benefit into a special bank account controlled by the curator.

Approach adopted by the MMI Sponsor Funds

The MMI sponsor funds will comply with a valid and binding restraint order that is issued by a court.

3. Moseitlha v Ampath Trust Provident Fund and others (2018)2 BPLR 459 (PFA) – Fund must provide benefit statements directly to members

Mr Moseitlha was a member of the fund through his employment. He lodged a complaint with the PFA consisting of various claims, one of which was that even though he was a member of the fund for seven years, he was never given information relating to his fund membership, fund credit, annual reports, list of trustees and rules of the fund. He also said that there was no transparency regarding his contribution rate or the date on which the contributions are debited from his salary.

In its response, the fund stated that the members' benefit statements were sent to the employer to forward to the members. So the members, and specifically Mr Moseitlha, did receive their benefit statements. The fund also provided evidence which showed that Mr Moseitlha had received a newsletter in 2016 which set out the increase in contribution rates categories and advised that if a member would like to increase his contribution rate, he may do so once a year. Furthermore, Mr Moseitlha had attended two induction sessions which explained how the fund functions.

The PFA found that the grounds of Mr Moseitlha's complaints were labour related and the PFA did not have the power to decide on such complaints. The PFA noted with concern that in practice benefit statements are not sent directly to the members but are sent to the employer to distribute to the members. The PFA looked at section 7D(1) of the Act which sets out the duties of the board of management of a fund and found that the Act places a duty on the trustees to provide adequate and appropriate information to its members, informing them of their rights, benefits and duties in terms of the rules. A fund must have the personal information of its members; the benefit statements must be sent to the members directly. Section 7D(1)(c) of the Act specifically provides that adequate and appropriate information must be communicated to the members. Benefit statements should be sent to the members directly and not to the participating employer to forward to the members.

The PFA dismissed Mr Moseitlha's complaint but stated that the fund should stop sending benefit statements to the employer to forward to its members.

Approach adopted by the FundsAtWork Umbrella Funds

The Funds send benefit statements directly to their members. Members are also able to access their benefit statements at any time on the Funds' online portal system.

4. Amplats Group Provident Fund and others v Implicated Board Members of the Complainants and Vivian Cohen and Sanlam Life Insurance Limited (PFA/GP/00019725/2015/YVT) - Duties of a service provider

The fund, the board of the fund and the principal officer (the Complainants) lodged a complaint with the PFA against certain of the fund's board members, Vivian Cohen who was the fund's actuary and the fund's administrator (the Respondents) for payment of R40 501 000 with interest, for losses the Complainants claimed the fund suffered.

The Complainants said that between September 2012 and December 2012 there was a unit pricing error which was made by Mr Cohen regarding the opening balance of one of the fund's portfolio. The error was that a cell on the spreadsheet of one of the investment portfolios was hard-coded with the value as at 31 July 2012 when it should have referred back to the previous month's balance using a standard excel formula. As a result of the unit price being overstated, members' fund credits were overstated by 4% and members who left the fund since September 2012 received payments that were more than what they should have received. The fund suffered a loss of R40 501 000.

The Complainants further said that Mr Cohen, in conducting the monthly unit price calculations, was performing a task that could be done by any reasonable numerically skilled person. He was accountable because if he had acted reasonably according to his skill and the level of care expected of him, the error would not have happened.

The PFA found that for the Complainants to be successful with a claim for damages they must show that -

- (1) there was an act or failure to act which caused damage or loss;
- (2) the act or failure to act was wrongful;
- (3) there must be fault in the form of intention or negligence;
- (4) the complainant must show that he suffered loss; and
- (5) there is a causal link between the wrongful act or failure to act and the loss or damage suffered.

The PFA appointed an independent actuary to assess whether Mr Cohen had acted reasonably. This actuary found that the affected cell was not independent and relied on the previous closing balance. In this case, the incorrect hard-coding of the affected cell reduced the opening balance by R40 501 000. This was avoidable and had the direct consequence that the fund return for the affected portfolio and for the fund as a whole was incorrectly increased by the same amount. The unit price was overstated, which in turn overstated the members' benefits and possibly affected financial soundness. He further said that the checking of the results did not only have to happen at the overall level of the fund but also at the individual portfolio level. The process is bottom up, so if there are errors in the individual portfolios, the top overall results would be wrong. It would be obvious to any actuary or financial expert that there is an error with the opening value. Checking or reviewing at individual portfolio level was a very important and necessary part of the overall process, which did not happen in this matter.

The PFA found that fund advisers are bound by certain duties that are prescribed by their professional code of conduct, statutes, common law and contracts with their clients. When a fund suffers a loss, a breach of any of the duties can be used in court to show a breach of contract or prove a claim for damages. Based on the evidence provided, it was clear that Mr Cohen, as an expert adviser, was negligent and should be held responsible for the fund's loss.

The PFA added that the administrator could not be held responsible as it was the responsibility of the board, principal officer, valuator of the fund, fund auditors and risk consultants to consider the quality of

the quarterly report provided to the board. Due to the nature of the calculation error, the board and the administrator would not have been able to detect the error as it could only be detected by an expert advisor.

The PFA ordered Mr Cohen to compensate the fund the R40 501 000 it lost, as well as interest on that amount at a rate of 10% per annum from the date of the determination.

Approach adopted by the MMI Sponsor Funds

Before appointing a service provider, the Funds perform a due diligence exercise to ensure that these providers meet their requirements and can perform according to the standards expected on them. The Funds also regularly review the performance of these providers.

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