



Case law update – Benefit related matters

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

A. Summary

1. Case 27 of 2017 – Funeral policy – definition of wider family member: Ombudsman for Long-Term Insurance

- The insurer could reject the claim for payment of a funeral benefit because the insured did not fall within the definition of “cousin”. In certain cultures the definition of “cousin” also included second cousins. Based on equity, the Ombud ordered the insurer to pay the complainant the amount claimed.
- The Family Protector Funeral Benefit provides FundsAtWork members with cover for funeral benefits for the member’s spouse, children, parents and parents-in-law. The cover does not extend to cousins.

2. Mampe v Amplats Retirement Fund and Others (2017) ZAGPPHC 687 (30 October 2017)

- The wording of section 37C of the Pension Funds Act is clear; a member’s death benefit must be dealt with by the Board of Trustees of the fund under this provision and the rules of the fund. The Court found that section 1(1)(c) of the Intestate Succession Act did not apply.
- The MMI sponsor funds deal with the allocation and distribution of death benefits that become payable on the death of a member strictly in line with the provisions of section 37C of the Pension Funds Act and the relevant rules of the Funds.

3. Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018)

- The Court found that Eskom’s decision to accept Mr Molefe’s early retirement and the pension payouts made to him in terms of the early retirement agreement were unlawful. When Mr Molefe’s contract was changed from an opened ended to a fixed term, he became a temporary employee. Based on the rules of the Eskom Pension and Provident Fund he no longer met the eligibility criteria to remain a member of that fund. He also didn’t meet the requirements for early retirement and was not entitled to receive an early retirement benefit.
- The General Rules of the FundsAtWork Umbrella Pension and Provident Funds define an eligible employee as an employee of a participating employer who meets the membership criteria as set out in

the Special Rules of that participating employer. The participating employer determines what the eligibility criteria are. The General Rules allow for a member to retire before his normal retirement age when the member reaches 55 years or on the grounds of ill-health. Early retirement from the Umbrella Pension Fund before the age of 55 may be allowed if the member does not have an outstanding housing loan for which the Fund bound itself as guarantor and if the Commissioner of the South African Revenue Services approves. Early retirement from the Umbrella Provident Fund before the age of 55 may be allowed if the Commissioner of the South African Revenue Services approves.

B. Case law

1. Case 27 of 2017 – Funeral policy – definition of wider family member: Ombudsman for Long-Term Insurance

The complainant took out a funeral policy with Sanlam from 1 December 2011. The complainant submitted a claim for an extended family member who passed away on 17 April 2015. At the time of the family member's passing, the cover amount was R17 500.

At claims stage it was determined that the deceased was in fact the complainant's second cousin. The complainant and the deceased's grandmothers were sisters. Sanlam rejected the claim and refunded the premiums paid for the deceased because in the policy, the word "cousin" was defined as "cousin who is the child of the Policyholder's aunt and uncle". The complainant alleged that at application stage the broker knew that the deceased was the complainant's cousin and he told the complainant that the deceased would be covered as a cousin.

Sanlam argued that the application form was designed to include the terms and conditions of the policy. The terms and conditions clearly stated who Sanlam considered to be a cousin. Sanlam acknowledged that in certain cultures, a second cousin may be a cousin, which is why the definition of "cousin" in the policy had been defined.

The Ombudsman for Long-Term Insurance (the Ombud) found that contractually Sanlam could reject the claim. It was noted that in certain cultures the term "cousin" included second cousins. Policyholders would not necessarily check a definition for a commonly used term such as "cousin" before insuring a life.

The Ombud further found that it was in the interests of fairness and equity that Sanlam pay the claim. It added that a common mistake that insurers make is treating every policyholder exactly the same, which will result in the insurer acting unfairly. Equity must take into account the individual circumstances of a particular policyholder or complainant.

The Ombud upheld the complaint and Sanlam paid the claim, less the premiums that were already refunded to the complainant.

Approach adopted by FundsAtWork Umbrella Funds

The Family Protector funeral benefit provides FundsAtWork members with cover for funeral benefits for their spouse, children, parents and parents-in-law. The cover does not extend to cousins.

2. **Mampe v Amplats Retirement Fund and Others (2017) ZAGPPHC 687 (30 October 2017)**

Mr Motate David Mampe (“the Deceased”) passed away on 2 November 2013. At the time of his death, he was a member of the Amplats Retirement Fund. He was in a civil marriage in community of property with Mrs Makaleka Mampe (“the Applicant”) and had a son, Tshiamo Tshepo Ditibane, who was born before his marriage to the Applicant. On 27 January 2015 the Applicant approached the High Court for an order:

- to set aside the decision of the Board of Trustees of the fund to exclude her, as the executrix and surviving spouse of the Deceased, and his son as beneficiaries; and
- that a portion of the benefits be paid to the Applicant and the Deceased’s son according to section 1(1)(c) of the Intestate Succession Act 81 of 1987. Section 1(1)(c) provides that where a person dies intestate, i.e. without leaving a valid will, and is survived by a spouse and a descendant, the spouse will inherit a child’s share in the estate, or an amount determined by the Minister of Justice (currently R250 000), whichever is greater. The descendant will inherit the remainder of the estate.

The Applicant contended that only she and the Deceased’s son were the Deceased’s heirs. The fund challenged the Applicant’s reliance on section 1(1)(c) of the Intestate Succession Act on the basis that the Deceased was a member of the fund and his benefits had to be dealt with in terms of section 37C of the Pension Funds Act. The Board of Trustees had traced all of the Deceased’s beneficiaries and allocated payments to certain beneficiaries. The Applicant, by her own account, was separated from the Deceased and was not supported by him.

The Court looked at section 37C, which sets out how a member’s pension benefit should be distributed upon his death and specifically provides that the benefit does not form part of the assets in the estate of that member. The Court found that the wording of section 37C is clear and regardless of anything contrary in any other law, the benefit of the member must be dealt with by the Board of Trustees of the fund in terms of the Pension Funds Act and the rules of the fund. The Court found that section 1(1)(c) of the Intestate Succession Act did not apply.

The Court dismissed the application.

Approach adopted by the MMI Sponsor Funds

The allocation and distribution of death benefits that become payable on the death of a member are done strictly in line with the provisions of section 37C of the Pension Funds Act and the relevant rules of the Funds.

3. **Democratic Alliance v Minister of Public Enterprise and Others; Economic Freedom Fighters v Eskom Holdings Limited and Others; Solidarity Trade Union v Molefe and Others (33051/2017; 34568/2017; 34042/2017) [2018] ZAGPPHC 1 (25 January 2018)**

In November 2015, Mr Brian Molefe entered into an open ended employment contract with Eskom for the position of Group Chief Executive Officer. In March 2016, Mr Molefe’s contract was changed from an open ended to a five year fixed term which was to run from October 2015 until 30 September 2020.

In November 2016, the Public Protector issued the State of Capture report which, amongst others, contained claims against Mr Molefe of abusing his position at Eskom to benefit the Gupta family by the improper and possibly corrupt awarding of state contracts to Gupta family businesses. Mr Molefe then announced in a press conference that he would be leaving his employment at Eskom. He stated that he was leaving voluntarily and in the interests of good governance at Eskom. Later that day he submitted a request for early retirement to the Eskom Pension and Provident Fund (“EPPF”), which was granted on 24 November 2016. His request was granted in terms of an early retirement agreement which allowed Mr Molefe to retire from age 50, with Eskom making up the shortfall for the ten year service requirement

based on the rules of the EPPF. The EPPF is a defined benefit fund, which pays a defined benefit to a member, calculated by using a formula which uses certain factors, such as the member's number of years of service.

Following from his alleged early retirement, Mr Molefe chose to receive one-third of his retirement benefits as a lump sum pay-out. EPPF paid a total of R10 327 074.53. After the Sunday Times reported that Mr Molefe received a R30.1 million pension pay-out, a media outcry followed and the Minister of Public Enterprises ("the Minister"), together with the Eskom board of directors, resolved to withdraw the early retirement agreement and entered into a reinstatement agreement with Mr Molefe. The reinstatement agreement "revived" Mr Molefe's contract with the period that he had left to be considered as unpaid leave and Mr Molefe would repay the money the EPPF paid to him.

Mr Molefe returned to his employment duties in May 2016. The Minister then wrote to the Eskom Board instructing them to withdraw the decision to reinstate Mr Molefe as the appropriate process had not been followed. Eskom informed Mr Molefe in June 2016 that the reinstatement agreement had been withdrawn. Three separate applications were brought to the High Court by the Democratic Alliance, Solidarity Trade Union and the Economic Freedom Fighters. These were all in essence a request to review and set aside the decision of the Minister to appoint and/or reinstate Mr Molefe to the position of Group Chief Executive after having left Eskom in terms of the early retirement agreement. These applications were heard as one application before the High Court.

The Court looked at Mr Molefe's fixed term employment contract, which had replaced the open ended contract. In terms of that contract Mr Molefe would have continued to have been a member of the EPPF subject to the rules of that fund. Furthermore, the contract provided that on the termination date he would have been deemed to have resigned. The Court found that Mr Molefe could not rely on the original open ended contract, as it had been replaced with the fixed term contract. By amending Mr Molefe's term of employment, he had become a temporary employee. This meant that in terms of the rules of the EPPF he was not an eligible employee, defined in the rules as an employee under the pensionable age who is not a temporary employee. The Court found the decision by Eskom to waive penalties and buy Mr Molefe the extra years of service after only 15 months of service and at the age of 50 to be unlawful, as it didn't comply with the rules of the EPPF. The Court emphasised "*how disturbed it was by the total lack of dignity and shame people in leadership positions who abuse public funds with naked greed for their own benefit without a moment's consideration of the circumstances of fellow citizens who live in absolute squalor throughout the country with no basic services.*"

The Court further looked at Rules 21.4 and 28 of the EPPF rules which were supposedly relied on to approve and process Mr Molefe's early retirement. The Court found that Rule 28 dealt with retrenchment and not early retirement and could not have applied to Mr Molefe. The Court looked at Rule 24 which deals with early retirement and sets out when an employee would be entitled to early retirement benefits. In terms of this Rule, for an employee to qualify for such benefits he would have had, among others, to be employed by Eskom for at least 10 years and be 55 years old.

Mr Molefe did not meet the criteria set out on Rule 28. He had not reached the age of 55 years and was not a permanent employee. The Court also found that the EPPF failed to independently assess whether Mr Molefe's application for early retirement fell within Rule 28. The EPPF failed to comply with the Pension Funds Act and with its own rules.

The Court set aside the decision by the Eskom Board to accept Mr Molefe's early retirement. It also declared any payment or sum of money paid to Mr Molefe under a supposed pension agreement between him and Eskom was invalid and ordered Mr Molefe to repay these amounts within ten days of the order.

Approach adopted by the FundsAtWork Umbrella Funds

The General Rules of the FundsAtWork Umbrella Pension and Provident Funds define an eligible employee as an employee of a participating employer who meets the membership criteria as set out in the Special Rules of that participating employer. The participating employer determines the eligibility criteria.

The General Rules allow for a member to retire before his normal retirement age when the member reaches 55 years or on the grounds of ill-health. Early retirement from the Umbrella Pension Fund before the age of 55 may be allowed if the member does not have an outstanding housing loan for which the Fund bound itself as guarantor and subject if the Commissioner of the South African Revenue Services approves it. Early retirement from the Umbrella Provident Fund before the age of 55 may be allowed if the Commissioner of the South African Revenue Services approves it.

The member will be entitled to his retirement savings account. All applications for early retirement are processed according to the rules of the Fund.

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