Legal update

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Case law - Fund 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. The Municipal Workers Retirement Fund v Ndlambe Local Municipality (2018) ZAECGHC 139 – Duty of employer to pay contributions

- An employer always has a duty to pay contributions in full, even when they short pay them and mistakenly believe that they paid the correct ones. They also have the duty to pay interest on the outstanding contributions as set out in the Pension Funds Act.
- If a participating employer does not pay contributions or short pays them, the FundsAtWork Umbrella Funds will notify them of the short payments and will take steps to ensure that the outstanding balance is paid, together with the prescribed interest.

2. B v Hollard Life Insurance Company Limited (2018) ZAGPJHC 460 – Failure to disclose material information on life policy application

- An insurer has the right to not pay a claim under a contract of insurance not only if the insured misrepresented a material fact but also if he failed to disclose one. The non-disclosure or misrepresentation must be material to be legally relevant. It will be material if a reasonable person considers that the information should have been correctly disclosed so that the insurer could form their own view on what the effect of that information would have been when assessing the risk.
- Lump sum death benefits are paid when receiving a valid claim and all the documents required to substantiate it. As the benefits on the FundsAtWork Umbrella Funds are provided on a group level, members are not required to undergo medical underwriting at the time that cover starts unless the level of cover is above the free cover limit. The free cover limit is the maximum level of cover a member has without having to undergo medical underwriting.

3. Moor v Tongaat-Hulett Pension Fund (2018) ZASCA 83 – Rule amendment to effect a surplus allocation is not contrary to section 15C of the Pension Funds Act

- Section 15C of the Pension Funds Act leaves the apportionment of future surplus to the applicable rules of a particular fund and, if there aren't any rules on the subject, to the board of that fund. Consequently a board has the power to decide on the apportionment of future surpluses and their

implementation. Apportionment can be done either by a rule amendment or ad hoc, at the discretion of a board.

- The MMI Sponsor Funds are defined contribution funds, where there is no likelihood of future surpluses, and as such they are valuation exempt.

4. Solidarity and Another v Armaments Corporation of South Africa (Sco) Ltd and Others (2018) ZALAC 39 – A dismissal for incapacity must be based on a material reason and must follow a fair process

- If a person is dismissed because he no longer meets the job requirements, it is a dismissal based on incapacity. Such a dismissal must be based on a fair reason and must follow a fair process.
- When a member of the FundsAtWork Umbrella Funds is dismissed from employment, he becomes entitled to a withdrawal benefit.

B. Case law

1. The Municipal Workers Retirement Fund v Ndlambe Local Municipality (2018) ZAECGHC 139 – Duty of participating employer to pay contributions

Between July 2007 and February 2013, the Ndlambe Local Municipality (the employer) did not pay the full amount for both the members' and employer's contributions to the Municipal Workers Retirement Fund (the fund). The fund approached the High Court for an order compelling the employer to pay the outstanding contributions plus interest. The total shortfall was R13 649 186.21 which included the interest.

The employer raised several defences to the fund's claim. It argued that the claim for the short paid contributions had prescribed (lapsed). The court rejected this, saying that by short paying the contributions, the employer had acknowledged their liability to pay the contributions; that was enough to interrupt or stop the running of prescription.

The court also did not agree with the employer's point that it should not be held responsible for amounts that were not deducted from the employees' remuneration. The court stated that the employer had an obligation in terms of section 13A(1) of the Pension Funds Act (the Act) to pay the fund the amounts set out in the contribution schedule. If they did not deduct the full amount from the employees' remuneration, the employees received a higher remuneration than what they were supposed to receive. This should be dealt with by entering into an in-house arrangement with the current employees.

The employer further argued that they mistakenly believed that they were paying the correct amounts for the employees and their own contributions. The court found that the fact that the employer mistakenly believed that they were paying the correct amounts does not mean they can avoid their obligation to pay the contributions. The employer has an obligation to pay the contributions. If they were able to rely on the mistake it would have a negative impact on the employees who are entitled to their full benefits. The employer had a duty to ensure that they were making the right payments. This is the same reason why the employer remains responsible for paying interest on the shortfall. Paying interest is as much a part of the contributions as the contributions themselves.

The employer further argued that the fund had an obligation to notify them of the short payments. The court agreed with this and referred to regulation 33(2) of the regulations to the Act. The regulation provides that the person responsible for checking the electronic fund transfer or any other way that the contributions are received, must report within a certain time frame when section 13A is not complied with. The court stated that while this obligation did exist, it did not take away the employer's legal obligation to pay the contributions.

The court ordered the employer to pay R13 649 186.21, together with interest calculated at the repo rate

plus 1/3 of the amount plus 8%, which is capped at 20% per annum, from 28 September 2018 to the date of payment.

Approach adopted by the FundsAtWork Umbrella Funds

If a participating employer does not pay contributions or short pays contributions, the FundsAtWork Umbrella Funds will notify them of the short payments and will take steps to ensure that the outstanding balance is paid, together with the prescribed interest.

2. B v Hollard Life Insurance Company Limited (2018) ZAGPJHC 460 – Failure to disclose material information on life policy application

Mrs B sued Hollard Life Insurance Company Limited (Hollard) for not paying the proceeds of a life insurance policy when her husband passed away. Hollard had rejected the claim because they alleged that Mr B had made misrepresentations and did not disclose material information at the time that he applied for the life policy.

At claim stage Hollard discovered that Mr B suffered from chronic obstructive pulmonary disease, had previously suffered from depression and had cardiac failure. Although he did disclose that a spot had been discovered on his lung, he had said that the spot was benign (not cancerous). He also did not disclose that two other insurers had declined to give him cover.

Hollard argued that had Mr B disclosed the cardiac failure, they would have requested additional tests and asked for more information. Hollard would have also declined to provide cover to Mr B if they had known of the other conditions. Mrs B on the other hand said that while Mr B failed to disclose certain facts, the manner in which some of the underwriting questions were phrased were confusing and Mr B had acted in the honest belief that he was answering correctly; so Mr B's representations were not misrepresentations.

The court said that an insurer has the right not to pay a claim under a contract of insurance not only if the insured misrepresented a material fact but also if he failed to disclose one. The non-disclosure or misrepresentation must be material to be legally relevant. It is material if a reasonable person considers that the information should have been correctly disclosed, so that the insurer could form their own view on what the effect of that information would have been when assessing the risk.

The court found that the application and proposal form was clearly worded. Mr B used the Afrikaans language form, Afrikaans being his first language. There is no question of him having misunderstood the form. Mr B failed to disclose or disclosed information which he said was true and correct when it was not. The representations and non-disclosures were likely to have materially affected the risk assessment by Hollard under the policy. Hollard was entitled and justified in not paying the benefit.

The court dismissed Mrs B's claim

Approach by FundsAtWork

Lump sum death benefits are paid when receiving a valid claim and all the documents required to substantiate it. As the benefits on the FundsAtWork Umbrella Funds are provided on a group level, members are not required to undergo medical underwriting at the time that cover starts unless the level of cover the member had is above the free cover limit. The free cover limit is the maximum level of cover a member has without having to undergo medical underwriting.

3. **Moor v Tongaat-Hulett Pension Fund (2018) ZASCA 83 – Rule amendment to effect a surplus allocation is not contrary to section 15C of the Pension Funds Act**

Mr Moor and Mr Hazewindus (the appellants) were former members and trustees of the Tongaat-Hulett Pension Fund (the fund). The fund was established on 1 November 2010 after the unbundling of Tongaat-Hulett Limited and Hulamin Limited. The fund's rules were amended to implement the restructure and conversion scheme as a result of the unbundling. The main features of the scheme were:

(a) members, pensioners and deferred pensioners had their benefits enhanced through the members' and pensioners' actuarial reserve values; and

(b) the fund allocated a portion of its assets for the benefit of the employer, Tongaat-Hulett Limited, and credited those assets to the employer surplus account (ESA). The amount transferred to the ESA was R363.2 million.

The appellants, who were pensioner members of the fund, were transferred to Old Mutual and their membership of the fund came to an end.

The appellants were unhappy that R363.2 million was paid to the ESA. They argued that this payment was not allowed by section 15C of the Pension Funds Act (the Act). They lodged a complaint with the Pension Funds Adjudicator who found that when this surplus was allocated exclusively to the ESA, the interests of all stakeholders were taken into account in line with section 15C of the Act. The appellants approached the High Court, which dismissed the appeal.

On appeal to the Supreme Court of Appeal (the SCA), the SCA found that section 15C leaves the apportionment of future surplus to the rules of the particular fund and, if there aren't any rules on the subject, to the board of that fund. A board has the power to decide on the apportionment of future surpluses and their implementation. Apportionment can be done either by a rule amendment or ad hoc in the discretion of a board.

The SCA further found that section 15C imposes strict requirements for the payment of actuarial surpluses. Its scope and objectives must be understood in the light of the historical disputes around surpluses in pension funds. In this case, the fund, after considering the recommendation of the task team that was appointed to investigate the surplus apportionment, took a conscious decision to amend the fund's rules to implement the surplus apportionment. The board decided to allocate the surplus to the ESA of the fund, through Rule 11.5 which was specifically included for that purpose. Rule 11.5 was intended to be in line with section 15C.

The SCA further pointed out that the Registrar of Pension Funds approved the rule amendment, which showed that they were satisfied that the rule amendment would achieve its purpose. The rule approval was part of the approval of the entire scheme, a large part of which was the apportionment of the surplus.

The appeal was dismissed.

Approach by the MMI Sponsor Funds

The MMI Sponsor Funds are defined contribution funds, where there is no likelihood of future surpluses, and as such they are valuation exempt.

4. **Solidarity and Another v Armaments Corporation of South Africa (Sco) Ltd and Others (2018) ZALAC 39 – A dismissal for incapacity must be based on a material reason and must follow a fair process**

Mr J worked for Armscor for more than thirty years since 1981. For his position in the Intelligence Division of the South African National Defence Force, he needed to have security clearance certificates. He had to apply each year to renew his security clearance certificates. In November 2012, his application to renew his security clearance certificate was refused.

Armscor's conditions of employment require itstheir staff to obtain and maintain the necessary and applicable security clearance. Any person who fails to qualify for any grade of security clearance because of a negative vetting will be dismissed or their contract of employment terminated. More specifically, the Defence Act of 2002 says that an employee may not be enrolled, appointed or promoted, receive a commission or be retained as member or employee unless he has been issued with the appropriate grade of security clearance.

In December 2012, Mr J's manager wrote a termination letter to Mr J, telling him that his employment had been terminated because he had been refused all grades of security clearance. The letter did not say why he had been refused security clearance and he was never told what the reasons were. Solidarity, the trade union Mr J belonged to, wrote to Armscor saying that Mr J had not been given reasons why his security clearance had been refused or given a chance to respond to the refusal and that Armscor had not followed pre-dismissal procedures. It requested that Mr J be given reasons so he could reply to the negative vetting. When they did not get a reply, Mr J lodged an urgent revision of his security clearance. When he still did not receive a reply, he lodged an unfair dismissal dispute with the CCMA. The CCMA Commissioner found that the reasons for Mr J's dismissal and the process that was followed were unfair. The Commissioner ordered that he be reinstated to his former position.

Armscor appealed to the Labour Court (LC) that found that the reason for Mr J's dismissal was fair as he was dismissed based on incapacity. Without the security clearance, he was no longer able to do his job and for that reason his dismissal was fair. The LC did find that the process that was followed to dismiss Mr J was not fair, as Armscor did not follow a pre-dismissal process. Mr J appealed to the Labour Appeal Court (LAC).

The LAC found that it is a condition of employment that an employee must have the necessary security clearance. If a person is dismissed because he no longer meets the job requirements, it is a dismissal based on incapacity. Such a dismissal must be based on a fair reason and must follow a fair process. As Mr J did not have the required security clearance, this became a case of dismissal based on incapacity. The Defence Act also provides that a person whose security clearance was withdrawn or downgraded must be given a chance to present information regarding the matter. The LAC said that Armscor should not have dismissed Mr J without giving him a chance to have the decision to withdraw his security clearance reviewed and waiting for the outcome of that review. For these reasons, his dismissal was unfair. The LAC went on to say that as Mr J did not have the necessary security clearance, he could not be reinstated to his job. The LAC ordered that Armscor pay Mr J compensation equal to 12 months' salary.

Approach by FundsAtWork Umbrella Funds

When a member of the FundsAtWork Umbrella Funds is dismissed from employment he becomes entitled to a withdrawal benefit.

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