



QUANTIFYING RISK, ENABLING OPPORTUNITY

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Case Law Update

Themes

- *Prescription*
- *Divorce Orders*
- *DB/DC Conversion*
- *Union Fund Issues*
- *Withdrawal Benefits*
- *Administrator Issues*
- *Pension Increases*
- *Surplus Distributions*
- *Tellumat Pension Fund*

Prescription

FW Mathebula v SA Post Office, PO Retirement Fund

Facts – Managed a PO, did not follow procedures so that a credit card sent by post given to wrong person, resulting in liability by PO for unlawful use.

Deduction made per s. 37D, balance of benefit paid 10 March 2010; only sued for balance on 10 October 2013.

Prescription Act – “debt only due when creditor has knowledge of debtor and of facts from which debt arises;

Provided that creditor deemed to have knowledge if could have acquired it by exercising reasonable care”

Divorce Orders

1. LI Mpete v Fundsatwork Umbrella Pension Fund
PFA/MP/14678/2015 (PFA)
 - *Parties divorced whilst husband a member of Risicare Fund; then transferred to AF Retirement Fund; and again to Fundsatwork Fund*
 - *Divorce order varied to reflect AF Fund, then again to reflect Fundsatwork*
 - *Latest order did not reflect Risicare*
 - *PFA held that divorce order deficient, notwithstanding that the latest order reflected, per s37D(4)(a)(i)(aa)*
“the pension fund named in the decree [of divorce]”

Divorce Orders (cont)

2. Z. Paulse v Sanlam Staff Umbrella Pension Fund PFA/WC/11266/2014 (PFA)

- *Islamic marriage, settlement agreement made an order of court in High Court*
- *Wording of settlement agreement corresponded with wording in Divorce Act*
- *Fund argued that not a divorce in terms of Divorce Act so unenforceable in terms of s 37D(4)(a)*
- *PFA held that it was s37D(3)(d)(i) applied: may deduct from benefit “any amount assigned from such benefit to a non member spouse ito decree under s7(8)(a) of Divorce Act or in terms of any order made by a court in respect of the division of marriage under Islamic law”.*

Divorce Orders (cont)

3. MS Phago v Sentinel Mining Fund High Court, Pretoria, case no 65372/2013

- *Both spouses members of same fund on divorce (H: 2nd marriage)*
- *Divorce order said that:*
 - *50% husband's interest from date of marriage (existing divorce order for 1st wife)*
 - *50% wife's interest from inception of membership*
- *Fund calculated husband's pension interest over whole membership*
- *PFA reformulated complaint and divorce order, said divorce order unenforceable and husband must be refunded*
- *Court held wrong in law, determination set aside*

DB/DC Conversion

IC Yiatzes v Cape Joint Retirement Fund PFA/WC/12610/2014 (PFA)

- *Fund underwent voluntary DB/DC conversion, planned for 1.5.2014*
- *Member elected DC conversion, retired 30.6.2014*
- *Conversion delayed to 1.8.2014 (rule amendment only registered 25.7.2014), so member retired on DB basis with no DC enhancement*
- *Member said did not know of delay, would not have retired then*
- *PFA found*
 - *Rules at time of retirement applied*
 - *Communication was extensive, not denied by member, knew RA had to be registered*
- *Complaint dismissed*

Union Funds

1. *T Lefatsa & CINPF v PPWAWU Nat Prov Fund, MPACT PFA/WC/10243/2014 (PFA)*
 - *Members signed petition to be transferred from PPWAWU to CINPF*
 - *Employment contract allowed members to belong to one of three funds, did not include CINPF*
 - *Rules of PPWAWU allowed transfer to provident fund if an indication “by members within a plant”*
 - *PFA held had to interpret rules in context of employment contract, thus members can only transfer to one of three funds, not CINPF*
 - *CINPF censured*

Union Funds (cont)

2. SAMWU Nat Prov Fund v City of Cape Town PFA/GP/10205/2014 (PFA)

- *Retrospective rule amendment (registered 28.7.2009) increasing employer contributions wef 1.11.2007*
- *Claimed arrear contributions since 2007 + interest at prescribed rate + fund return*
- *City said-*
 - *Rule amendment required agreement of City and Union, which did not exist*
 - *Claim prescribed prior to 8.7.2011*
 - *Can't have prescribed interest and fund return, only prescribed interest*
 - *Only liable iro members still in service*
 - *Needed more information to see if in duplum rule applied*

Union Funds (cont)

2. SAMWU Nat Prov Fund v City of Cape Town PFA/GP/10205/2014 (PFA) (cont)

- *PFA found that*
 - *Prescription did not apply because members did not know contributions were not paid*
 - *Per JMPF v Grobler (SCA) a rule amendment reducing benefits was not a complaint; therefore the validity of rule amendment could not be a defence*
 - *Fund can't get both interest and fund return; interest to compensate for no fund return*
 - *No ruling on in duplum rule issue*

Determination on appeal to High Court

Union Funds (cont)

3. City of Johannesburg v SALA Pension Fund, IMATU, SAMWU and POPCRU Case No. 20045/2014 (SCA)

- *City of Johannesburg decided to cease to participate in SALA Pension Fund and to commence participation in eJoburg Retirement Fund.*
- *SALA Pension Fund claimed to represent its members in opposing the decision of the City of Johannesburg; City of Johannesburg said that trustees do not represent the members but the Fund.*
- *SCA held that section 7C(2) of PF Act, which sets out what the board must do to protect the interests of members and that the board has a fiduciary duty to the members, **does not mean** that the board is appointed :*

“as the agent or representative of members to conduct litigation on their behalf, even against the wishes of individual members”.

Union Funds (cont)

3. City of Johannesburg v SALA Pension Fund, IMATU, SAMWU and POPCRU Case No. 20045/2014 (SCA) (cont)

- *The point is that the interests of the Fund and the interests of the members do not always coincide; and this is so even if the majority of the members may support what the trustees intend to do in an issue such as this.*

Withdrawal Benefits

MA Hobe v Municipal Employees Pension Fund
PFA/NW/11087/2014(PFA)

- *Employed from 1.4.2006 – 22 August 2013*
- *Benefit statements said withdrawal benefit was (contributions + fund return) x 3;*
- *Rules amended retrospectively to 1.4.2013 to say factor was 1.5; approved by FSB on 1.4.2014*
- *Member said not advised of rule amendment, would not have resigned if he knew*
- *PFA held rules in operation applied at time of resignation applied*
- *Required recalculation of benefit, to be paid plus 15,5% from 27.2.14*

Administrators

1. *DI Rodseth v Dynamique Umbrella Provident Fund*
PFA/GP/12135/2014 (PFA)
 - *Complaint about lack of communication*
 - *Employer ceased participation 31.7.2013, commenced participation in another fund from 1.8.2013.*
 - *S.14 transfer delayed because of data rebuild*
 - *Fund had communicated reasons for delay – per administrator sent to broker, not employer or members*
 - *PFA found that by forwarding benefit statements to broker the board had failed to failed in their duties in terms of s.7D(c)*

Administrators (cont)

2. Price's Candles Provident Fund v Aon PFA/GP/9753/2014 (PFA)

- *Employee of Aon committed fraud in respect of surplus payments – amount of R1 118 976 (part clearly whilst in employment)*
- *Fund's insurer accepted liability for R861 559, repudiated balance*
- *Aon said indemnity in admin agreement only covered losses attributed during employment (ie not for fraud by others), and that liable for balance only*
- *PFA said estoppel applied (not raised by Fund), that Aon liable for full amount plus interest at 15,5%*

Pension Increase Policy

DF Payton v Caltex Pension Plan PFA/WE/7908/2011 (PFA)

- *Complaint about no pension increase, blaming contrib holiday*
- *PIP 75% CPI if affordable*
- *2011 no pension increase because fund underfunded*
- *Employer owed balance of cost obligation, had taken a contribution holiday 1984 – 1993 (over that period fund over 100% funded)*
- *Complaint dismissed*

Surplus Distributions

- *Facts:*
 - *section 15B Apportionment as at 31.3.2002 reflected a surplus of R238 million:*
 - *split as to R118 million to employer and the balance to members, pensioners and former members (including minimum benefit top-ups)*
 - *SAS approved on 26.11.2006.*
 - *Amounts transferred to MSA and ESA.*
- *Interim valuation at 31.10.2006 revealed deficit.*
- *Deficit reduced by employer contributions since SAD, but shortfall of R38 million remained which was to be funded proportionately from MSA and ESA.*

Surplus Distributions (cont)

- *Registrar objected to ESA being debited, saying the surplus awarded to MSA should have been applied immediately for the benefit of the members, pensioners and former members so that it had a nil balance.*
- *Court disagreed saying section 15H was peremptory and did not apply only to future surplus as the Registrar argued.*

Tellumat Pension Fund

- *DB Fund with only pensioners*
 - *PIP 75% CPI if affordable, but some pensioners (PSA) enjoy 3% minimum increase guarantee; but then a clawback for non PSA pensioners*
- *31.12.2006 valuation date*
 - *Surplus, incl solvency res = R242.5 m*
 - *Valuation basis based on above PIP, no additional liability for PSA pensioners*
 - *Same valuation basis as in 2003 (SAD), where nil SAS scheme*
- *Surplus Apportionment (s.15C)*
 - *56% to pensioners, bonus plus enhancement in form of annuity chosen by pensioners –*
 - *32% enhancement with profit,*
 - *26% enhancement with profit plus 3% guarantee,*
 - *guaranteed inflationary increase, living annuity if annuity above limit)*
 - *44% to employer*

Tellumat Pension Fund (cont)

- *Objection to surplus apportionment, resolved by arbitration – complaint dismissed*
- *Rules amended to provide for outsource*
- *Insourcing undertaken per investment powers, pensioners made elections, annuities purchased April 2010 – August 2010*
- *Complaint to PFA that annuities do not correspond with RBE as received 100% pension increases over the previous few years – dismissed (RBE determined by PIP not history)*
- *Insourcing –*
 - *Funded by pensioner assets and MSA*
 - *Pensioners commenced receiving pensions per annuity choice (change of PIP)*

Tellumat Pension Fund (cont)

- *Another complaint to PFA – member who chose option 1 entitled to 3% guarantee and did not get it (PFA dismissed complaint – cannot accept benefit of enhancement without strings)*
- *S. 14 application transferring insourced annuities to pensioners approved; appeal lodged with FSB Appeal Board*
- *Argument before FSB Appeal Board-*
 - *Fund's true liability based not on PIP but history*
 - *Using MSA to fund insource unlawful*
 - *As fund would be liquidated, should have used ESA per s.15I*
 - *Should have had additional liability for 3% guarantee for PSA pensioners*

Tellumat Pension Fund (cont)

- *Decision by FSB Appeal Board*
 - *3% guarantee should had additional liability attributed to it*
 - *Annuity choices could not be foisted on members*
 - *Fund could not base liability on pension increase history*
 - *Not necessary to decide unlawful insource issue*
 - *S.15I applied, so pensioner liability to be met from MSA and ESA proportionately*

Issues

- *3% guarantee-*
 - *how to value if so remote*
 - *rules only to be invoked every alternate year*
 - *what about clawback?*

Tellumat Pension Fund (cont)

Issues (cont)

- *Annuity choices not a proper replication of benefits*
- *S15I*
 - *Only applied if insufficient assets to meet pensioner liability, but insourced policy fully matched this*
 - *There is a discretion to apply (“such accounts [MAS and ESA] **may** be drawn upon”)*
 - *Implies s14 transfer less beneficial for members than liquidation*
 - *How now does Registrar deal with s 14 transfers if a possible liquidation?*
- *Registrar and employer appealed FSB Appeal Board decision to High Court; appeal dismissed*
- *Currently on appeal to SCA*

Thank you
Jonathan Mort

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PENSION FUND ATTORNEYS