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CASE LAW - DECISIONS AFFECTING RETIREMENT FUNDS

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4. April 2022: FSCA Conduct Standard
3. March 2022: FSCA Draft Strategy for Transformation
2. February 2022: Budget summary 2022/23 Tax Year
1. January 2022: Recent Papers issued by National Treasury

1. What is the effect of Case Law?

Case law is based on precedents, that is the judicial decisions from previous cases, rather than law which is based on statutes, regulations or directives from a regulatory authority. Case law uses the detailed facts of a case that have been resolved by courts or similar tribunals. The principle is known as "stare decisis" which is a Latin phrase meaning "let the decision stand" and means that judges are bound by such past decisions.

This publication deals with two recent cases and a decision from 2020 which is important as it addresses the critical question of whether the employer may choose which fund its employees are to join.

2. Is a back dated rule amendment valid and enforceable?

2.1 Until very recently the answer to this question would have been an emphatic "no". The authority was the Supreme Court decision in the case of Mostert versus Tek Provident Fund in which the Court stated that registration of a rule amendment was "an essential prerequisite" for any change in a fund's rules. The Financial Sector Conduct Authority ("FSCA") have usually been reluctant to register a retrospective rule amendment and have required the fund concerned to provide confirmation that no members have been prejudiced as well as evidence that members received communication regarding the retrospective rule amendment. However, in the judgement by the Supreme Court of Appeal in the case of the Municipal Employees' Pension Fund ("the Fund") and Another v Mudau and Another, the judge unequivocally sanctioned an amendment which reduced benefits with effect from 1 April 2013 and was only registered by the FSCA on 1 April 2014.

2.2 The facts of the case are as follows:

- Mr Mudau resigned from the employment of Vhembe Municipality on 31 May 2013;
- At that date, the rules provided for a withdrawal benefit equal to a return of contributions plus interest multiplied by 3;
- The actuary said this generous benefit was financially unsustainable, so in June 2013, the Fund amended its rules, backdated to 1 April 2013 to reduce the withdrawal benefit to a return of contributions plus interest multiplied by 1.5;
- The amendment was registered on 1 April 2014, but in October 2013, Mr Mudau was paid the reduced benefit on the basis of the unregistered rule amendment;
- Mr Mudau complained to the Adjudicator ("PFA") saying his benefit should have been calculated in terms of the original rule;
- The PFA determined in favour of Mr Mudau and against the Fund so the Fund took the case to the High Court;
- The High Court also found against the Fund and the Fund took the matter on appeal to the Supreme Court, which overturned the determination of the PFA and the decision of the High Court by finding that the Fund had the power to reduce benefits retrospectively on the basis of an unregistered rule amendment.

2.3 The judge's reasoning was as follows:

- In our law, there is a strong presumption against retroactive legislation, but if the wording of the statute is unambiguous and the intention of the legislature (or in this case the pension fund) is clearly to interfere with vested rights retroactively, the provisions of the retroactive instrument must be given effect to.
- In the view of the judge, the applicable statutory provision is Section 12 (4) of the Pension Funds Act, which states that the Registrar ***shall*** register the amended rule if he or she is satisfied that the

proposed amendment is not inconsistent with the Pension Funds Act and is financially sound. Section 12 (4) then goes on to state that "The amended rule would then take effect ***from a date determined by the fund concerned***, and if the fund has not determined a date, the rule becomes effective on the date of registration".

Comment:
Senior lawyers in the pension funds industry have described this judgement as "deeply disturbing" as the judge overturned previous judgements which ruled against retrospective rule amendments without giving a reason for ignoring legal precedent. Lawyers have also suggested that the decision may affect members' rights to accrued pension benefits. It is possible that the ruling may be taken to the Constitutional Court who could reach a different decision, but for the time being the ruling stands and funds may back-date amendments to their rules.

3. Does a permanent life partner qualify for payment of a spouse's pension?

The recent Constitutional Court judgment in Bwanya v Master of the High Court, Cape Town suggests that it may no longer be justifiable to differentiate between spouses in a marriage and partners in a permanent life relationship for purposes of identifying recipients of spouses' pensions. The facts were as follows:

- Ms Bwanya and Mr Ruch entered into a relationship. Ms Bwanya moved into Mr Ruch's Camps Bay property and Mr Ruch paid Ms Bwanya's living expenses and otherwise assisted her financially. Further, he sold one of his properties with a view to using the proceeds to pay the lobola necessary for him to marry Ms Bwanya.
- Unfortunately, Mr Ruch died intestate before this could happen and the executor of the deceased estate refused Ms Bwanya's claim for maintenance and a share of the estate.
  Ms Bwanya then approached the High Court. The High Court recognised that Ms Bwanya had been the permanent life partner of Mr Ruch and admitted her claim for a share of the estate. However, her claim for maintenance in terms of the Maintenance of Surviving Spouses Act, 1990 ("the MSS Act") was rejected as the High Court felt it was bound by a previous decision (Richard Gordon Volks NO v Ethel Robinson) which had held that it was justifiable to differentiate between spouses in a marriage and partners in a permanent life relationship.
- Ms Bwanya then took her case to the Constitutional Court which held that the term "marriage" for the purposes of the MSS Act shall include a permanent life partnership in which the partners undertook reciprocal duties of support.

Comment:
Although the ruling of the Constitutional Court applied to the MSS Act, the PFA has indicated that she is likely to apply this principle in her determinations on pension matters going forwards. The definition of "spouse" in the Pension Funds Act already includes a permanent life partner. Funds that pay spouses' pensions should therefore check that the definition of "spouse" in their rules includes a permanent life partner and that the fund's actuary has made provision for payment of the pension. The trustees will now have to exercise their discretion in order to determine what constitutes a "permanent" relationship.

4. Can the employer decide which fund its employees must belong to?

4.1 In the case of Amplats Group Provident Fund ("the Fund") versus Anglo American Platinum Corporation Limited and Rustenburg Platinum Mines Limited, the member trustees, purporting to be acting on behalf of the affected members and the Fund, objected to the employer's decision to transfer certain members to an umbrella fund operated by Old Mutual.

4.2 On 29 November 2018, the Fund took the decision to proceed with the Section 14 transfer. It had been agreed that the members' rights and benefit expectations in the Old Mutual Fund remained the same, and that members would not be prejudiced. The Fund had complied with the requirements of Directive 6 and had undertaken the requisite communication exercise to members on 12 July 2019. The 30-day period for objections had expired on 12 August 2019 and the effective date for the transfer was 1 December 2018. However, the member appointed trustees refused to vote at the board meeting of 18 October 2019 because, "they say that the members did not want to transfer to Old Mutual". Accordingly, the member trustees refused to sign documentation to enable the process to continue.

4.3 The main arguments raised by the member trustees were that the objection process was incomplete and further that members are entitled to freedom of association and must be given the right to choose which fund they belonged to.

4.4 The High Court found that the objections dealt with at the meetings related to the transfer value. It was clear from the minutes of the meetings that all these objections had been discussed and considered.

Where the objections were reasonable, the issues had been resolved. Therefore, the High Court found that the objections had no merit.

4.5 With regard to the claim that members and not the employer have the right to determine which fund they must belong to, the High Court found as follows:

- The wording of Rule 9.2.4 of the rules of the Fund was pre-emptory in that it required that if the employer decided to join another retirement fund, the benefits of members "shall" be transferred to such other fund accordingly.
- On the question of whether the principle of freedom of association gave members the right to decide which fund they should belong to, the High Court cited two precedents for the principle which the court stated at the beginning of the proceedings, i.e. that, as participating employers, it is the sole prerogative of the employers "to determine and vary to which fund ... its employees belong". These precedents were:
  - Mineworkers and Construction Union v Anglo American Platinum Ltd and Others (the "Labour Court judgment") where it was decided that the employer "retains the prerogative in terms of the contracts of employment of each of the union's members to determine the provident fund to which its employees are required to belong"; and
  - SAMWU Provident Fund v Umzimkhulu Local Municipality, where the Supreme Court of Appeal confirmed that the principle set out in the above paragraph is the correct approach for the interpretation of the right to freedom of association.

4.6 The High Court therefore found in favour of the employer and against the Fund as represented by the member trustees, the chairman of the trustees and the principal officer. Further, the High Court directed the principal officer, the Chairman and the member elected trustees to file affidavits directly setting out why they should not be held personally liable for the costs (or a portion thereof) of the application.

Comment:
It occurs quite frequently that employers operating in a unionised environment are put under pressure by the dominant union attempting to persuade members that their interest would be better served if they moved to the fund established by that union. Members may also be reluctant to move into an umbrella fund should an employer decide to move from a free-standing fund into an umbrella fund. The precedent set by this case and by the two cases named in item 4.5 above provides comfort to employers that they have the sole prerogative to decide which fund their employees must belong to.