SIMEKA

member of Sanlam group

In Perspective
2/2023

High Court cases

Payment of contributions

Engineering Industries Pension Fund (EIPF) v Pioneer Mechanical CC (the Close Corporation) [1]

In this case, the Close Corporation was placed under voluntary liquidation and owed the EIPF outstanding contributions in contravention of section 13A of the Pension Funds Act. The High Court found that with the introduction of the Financial Services Laws General Amendment Act of 2013, criminal sanctions were introduced in section 13A(8) of the Pension Funds Act, indicating the persons personally liable for non-compliance with section 13A. These persons are all company directors involved in the management of the company, all persons who control or are involved in the management of a close corporation, and all persons in accordance with whose instructions the governing body or structure of the employer acts. A retirement fund must request the employer to identify and notify it of the names of these persons.

Counsel for the sole member of the Close Corporation argued that the personal liability imposed by section 13A is far-reaching and untenable. It means that even if an employer participating in a fund experiences financial difficulties which led it to fail to make contributions to the retirement fund, the identified person would still be held liable for the non-payment. This places a heavy onus and burden upon such person if non-payment is due to circumstances beyond the person's control.

The High Court found that the EIPF does have the right to enforce the provisions of section 13A(8) by seeking redress against the sole member of the Close Corporation, because of the breach for which the sole member is statutorily liable. It added that there is no need to first exhaust legal proceedings against the employer, before proceeding against the managing members of the employer (in this case the sole member of the Close Corporation). It therefore ordered that the sole member of the Close Corporation, in his personal capacity, must pay to the EIPF the monies admitted and owing, based on contribution schedules already submitted, in the total sum of R5 million, within 60 calendar days.

Directors of companies, or members of a close corporation, or any person involved in the management of an employer can be held personally liable for non-payment of contributions in terms of section 13A of the Pension Funds Act, even if the employer experiences financial difficulties.

Should an employer experience financial difficulty, it should take immediate action and communicate with the fund it participates in. It will be prudent for the board of management to act immediately to mitigate the risk to the fund and to make arrangements, including the necessary rule amendments, for the suspension of contributions for a period, if feasible.

Late payment interest

Private Security Sector Provident Fund (PSSPF) v Isidingo Security Services (employer) [2]

The employer owed the PSSPF contributions for its employees who were fund members for the period 2005 to 2008. The employer signed an acknowledgment of debt on 26 November 2013, wherein it accepted and acknowledged that it was indebted to the PSSPF to an amount of R12 million, which it agreed to pay in instalments.

The final instalment due would be for late payment of contributions with interest and had to be calculated by the administrator of the PSSPF. It was agreed that the employer had to be advised of this final amount due 30 days before conclusion of the acknowledgement of debt, or upon payment of the second last instalment.

The employer proceeded to pay the full amount as agreed. The last payment was on 7 January 2017, so the calculation should have been provided to the respondent on 7 December 2016, but this was not done. The employer contended that the payment will not be made as the PSSPF's claim for interest has prescribed.

[1] Engineering Industries Pension Fund and Another v Pioneer Mechanical CC and Another (13568/2020) [2022] ZAWCHC 215 (3 June 2022)

[2] Private Security Sector Provident Fund v Isidingo Security Services (t/a Unitrade (Pty) (Ltd) (3048/2021P) [2022] ZAKZPHC 69 (14 June 2022)

The High Court found that the Prescription Act [3] states that prescription shall commence as soon as the debt is due, and the prescription period for payment of a debt is three years. The Prescription Act further provides that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor. It would then commence to run again from the day on which the interruption takes place. The court found that the fact that the PSSPF did not institute any action for the interest by January 2020 resulted in the claim for interest to have prescribed.

The PSSPF was therefore precluded from enforcing the claim for late payment interest against the employer.

It is important for funds to interrupt prescription where contributions or late payment interest is owing to the fund by taking action and following due process in terms of section 13A, to collect the outstanding contributions.

Also refer to the Financial Services Tribunal determination in Super Rent and SD Hlungwana, Pension Funds Adjudicator and Transport Sector Retirement Fund – In Perspective 4/2022.

Comment: *Where an employer defaults on payment of contributions, the fund should follow two processes:-*

- *The first process is the section 13A statutory process, which includes opening a case with the South African Policy Service.*
- *The second is the recovery of the debt, which is a civil process. A fund should start a civil legal process to recover the debt as soon as possible, in order to avoid running foul of the 3-year prescription period.*

A case can also be lodged with the Pension Funds Adjudicator to enable the fund to obtain a warrant of execution against the employer, if the determination is in favour of the fund and the employer fails to comply with the order. The warrant of execution will interrupt prescription.

Constitution of the board of management / exemption from section 7B(1)(b) for indefinite period

Financial Sector Conduct Authority (FSCA) v Municipal Worker's Retirement Fund (MWRF) [4]

The case relates to the exemption of the MWRF by the FSCA from the provisions of section 7A(1) of the Pension Funds Act, which states that "Notwithstanding the rules of a fund, every fund shall have a board, consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect".

- **Constitution of the board**

The MWRF, a fund established for the benefit of employees of different employers, had previously applied and was exempted from compliance with section 7A(1) of the Pension Funds Act, for a definite period. On its application for renewal of the exemption, the MWRF was informed by the FSCA that its application was out of time and its board was therefore not properly constituted in accordance with the provisions of section 7A(1), which provides every member with the opportunity to elect members of the board. They were consequently required to appoint a new board.

The FSCA contended that the MWRF's rules contemplate a tier process, where the members in any given participating employer comprising *more than 20 members* have the right to elect one member representative to be sent as a delegate to the Provincial Annual General Meeting of the MWRF, where the elected delegates then elect two trustees from their ranks to the board of the MWRF. In that process, members have no opportunity, let alone a right, to elect trustees but at best have a right to elect a delegate, which is not the same as a right to elect a trustee.

The MWRF argued that the limitation where there are less than 20 members in a participating employer, is necessary to ensure that a small number of members in a participating employer are not given a disproportionate voice in the election of a member representative, where another employer has thousands of members.

The High Court held that the members that fall under a participating employer with less than 20 members are disenfranchised, as they are totally excluded from the process when the purpose of the provision is to give all fund members an equal say. The effect of this is the denial of a voice, that it is discriminatory and inconsistent with constitutional values.

The appeal was therefore upheld – as long as the rules of the MWRF do not provide for the direct participation of the fund members in the election of the trustees and continue to exclude the members whose employer does not employ more than 20 of their members, its board's constitution will not comply with the requirements of section 7A.

- **Duration of exemption**

Section 7B of the Pension Funds Act states that the FSCA may on written application of a fund and subject to such conditions as it may determine-

(1) (a) *authorise a fund to have a board consisting of less than four board members if such number is impractical or unreasonably expensive, provided that the members of the fund shall have the right to elect at least 50% of the board members;*

(b) *exempt a fund from the requirement that the members of the fund have the right to elect members of the board, if the fund has been established for the benefit of employees of different employers referred to in the definition of "pension fund" and "provident fund" as defined in section 1 of the Income Tax Act, 1962.*

(2) *The FSCA may withdraw an exemption granted under subsection (1)(a) and (b) if a fund no longer qualifies for such exemption.*

The MWRF felt that the granting of an exemption for a limited period by the FSCA did not fall within the provisions of the Act and should be reviewed and set aside, and it should be granted an exemption for an indefinite period.

The High Court found that section 7B(1) clearly stipulates what the requirement is for a fund to qualify for an exemption, to remain exempted and the condition for the withdrawal of the exemption, which is when the fund no longer qualifies in

[3] Act 68 of 1969 in sections 11 to 14.
[4] Financial Sector Conduct Authority v Municipal Worker's Retirement Fund (A50/21) [2022] ZAGPPHC 977 (15 December 2022)

terms of the purpose of its formation. There is no mention of a withdrawal of exemption that would be due to a fund's failure to adhere to a condition imposed by the FSCA, or as a result of a coming to an end of a period decided by the FSCA.

As it is clearly stated in section 7B(2) that the FSCA may withdraw an exemption granted if a fund no longer qualifies for such exemption as per the provisions of section 7B(1)(a) and (b), the FSCA has no power to decide contrary to the stipulation in the Act by putting time frames on when the exemption will effectively be withdrawn.

As a result, the FSCA's decision is set aside and the MWRF is granted an indefinite exemption.

Fund rules that provide that participating employers with less than a certain number of members may not participate in elections for member trustees, due to for instance cost limitations, do not comply with **section 7A** of the Act. All members must be offered the opportunity to directly participate in elections. If funds cannot comply with this provision, exemption in terms of section 7B must be obtained.

The court found that **section 7B** clearly stipulates what the requirements are for a fund to qualify for an exemption, to remain exempted and the condition for the withdrawal of the exemption, which is when the fund no longer qualifies in terms of the purpose of its formation. There is no mention of a withdrawal of exemption that would be due to a fund's failure to adhere to a condition imposed by the FSCA, or as a result of a coming to an end of a period decided by the FSCA.

Comment: *Subsequent to this court case, the FSCA has notified the retirement funds industry that it will no longer grant time-bound section 7B exemptions. Funds therefore need to apply for indefinite exemption. The indefinite exemption will be granted subject to the conditions set out in FSCA Guidance Notice 4 of 2018. Such conditions include that at least fifty per cent of the board members must be independent and every independent board member must demonstrate their fit and proper status.*

Divorce – no pension interest after member has left service

C.N.N. (the non-member spouse) v N.N (the member) [5]

The Divorce Act defines pension interest in section 1 as the benefits to which a member would have been entitled in terms of the rules of the fund, if his/her membership of the fund would have been terminated on the date of divorce on account of his/her resignation.

The parties in this High Court case divorced on 14 October 2022 and a signed settlement agreement was incorporated into the divorce order. The member resigned from employment on 7 May 2021, two months after being served with the divorce summons. Since the member had already resigned by the time the divorce order was granted, he therefore did not have a "pension interest" as defined in the Act as his benefit had already accrued to him. However, because the member's pension benefits were still in the fund at the time of divorce, the non-member spouse approached the fund to claim her 50% portion.

The fund informed the non-member spouse that the member's benefit had accrued to him, and the fund could therefore not give effect to the order. However, the fund advised that she needed to provide the fund with a divorce order directing it to pay a "pension benefit" instead of "pension interest" since his pension interest was nil. The non-member spouse approached the High Court for such an order.

The High Court found that neither the court that granted the divorce order, nor the non-member spouse was aware at the time that the divorce order was granted that the member had already exited his fund and the member did not bother to bring this to their attention. The court pointed out that even if an order granted by a court was correct and accurately worded, if there is a valid reason that arose after the order was granted, it can be varied. However, even though the non-member spouse only discovered that the member had resigned after the order was granted, at the time the order was granted the member did not have a pension interest as defined in section 1 of the Divorce Act. This led to the granting of an unenforceable order, which unfortunately cannot be made enforceable even if the order should be varied, since the member no longer had a pension interest.

The court remarked that there is no adequate legal framework that allows non-member spouses to claim portions of retirement benefits directly from retirement funds when member spouses exit their funds before divorce. This has allowed member spouses to resign after being served with divorce summons to ensure that they keep these benefits out of the reach of their non-member spouses. This is a serious concern that the legislature is yet to address. Unfortunately, the non-member spouse did not challenge the constitutionality of sections 7(7) and 7(8) of the Divorce Act read with section 37D(4) of the Pension Funds Act.

The High Court also remarked that the non-member spouse was incorrectly advised by the fund to approach the court to vary the divorce order to allow her to claim the member's "accrued pension benefit". The non-member spouse cannot claim pension benefits that accrued before the divorce was ordered because section 7(8) of the Divorce Act only makes provision for a portion of "pension interest" to be allocated to a non-member spouse. The non-member spouse ought to have rather challenged the current legal framework.

The application was dismissed.

A court cannot order a fund to pay a portion of a member's pension interest to a non-member spouse once the member has left service, even if the member's benefit remains in the fund. This leads to divorcing parties leaving service right before a divorce order is granted, preventing a claim by the non-member spouse on their pension benefits. The constitutionality of this provision in the Divorce Act read with the Pension Funds Act should be challenged.

Pension Funds Adjudicator update

At the Pension Lawyers Association's 27th annual conference held in March 2023, the Pension Funds Adjudicator provided an update to the industry. The number of complaints received by the office of the Adjudicator matches pre-Covid levels. She remarked that it seems that

[5] C.N.N v N.N (2021/11607) [2023] ZAGPJHC 208 (23 February 2023)

the process whereby complaints are referred to funds first, is not working. Settlements have also reduced recently, which is likely a sign of a lack of trust by complainants in their funds.

The Adjudicator requested funds to not wait for a formal determination before they complete an action, and used the example of a complaint regarding the payment of a withdrawal benefit where the fund waits for her office to make a ruling before the benefit is paid. She urged funds to communicate more and better with their members. Members often only find out that their employer did not pay their contributions to the fund when they resign, which means the fund is not communicating as they should and not taking action against non-compliant employers.

The process in respect of the withholding of benefits during a section 37D employer damage claim seems to be improving.

In respect of section 37C death benefit distribution cases, she remarked that all families differ and that funds should refrain from using a checklist, but should rather look at all the facts to determine what allocation will be equitable.

She pointed out that members struggle with service providers providing them with information that is not in writing. She requested that funds and service providers confirm in writing to members if information was given to them via telephone or in person.

The Adjudicator's office has implemented an online process for members to lodge complaints. This web-channel circumvents manual intervention for members to lodge complaints. Funds should communicate this to members. The web-channel will make it possible for members to upload documents to their case.