

## In Perspective

4/2023



### High court case

#### Section 13A – *in duplum* rule

##### *Municipal Workers Retirement Fund v Umzimkhulu Local Municipality*<sup>1</sup>

The Umzimkhulu Municipality (the Municipality) is a participating employer in the Municipal Workers Retirement Fund (the Fund). The Municipality failed to comply with the provisions of section 13 A(1) and (2) of the Pension Funds Act (the Act) in not providing contribution schedules to the Fund and failing to make contributions to it since December 2013.

The Fund approached the courts and the Supreme Court of Appeal ordered on 2 April 2019 that the Municipality provide the prescribed contribution statements, within 30 days of the order. The Municipality furnished the information, which enabled the Fund to calculate the arrear contributions up to March 2021. The Fund advised the Municipality that the arrear contributions plus interest up to 31 October 2021 on 13 June 2022 amounted to R4 471 814.91. The Municipality paid arrear contributions in the sum of R2 231 831.60 to the Fund.

The Municipality however resisted payment of the balance. It contended that interest owed is not owed in terms of section 13A(7) of the Act but had altered its nature, becoming a debt that accrued interest at the prescribed rate of interest in terms of the Prescribed Rate of Interest Act, 1975. The Municipality also argued that it is entitled to a partial exemption from interest based on the delay by the Fund in computing the debt, and that whatever interest due is limited to the capital portion of the debt, which is R2 231 823.60 by virtue of the *in duplum* rule.

The Fund contended that the Act prescribes the rate of interest and the *in duplum* rule does not apply to interest on late pension fund contributions provided for in section 13A(7) of the Act. The Act and its regulations set out how the contributions are to be calculated and when due to be paid over to the Fund.

The High Court agreed with the Fund that the Act imposes the liability for the payment of interest and stipulates the rate of interest applicable and when it accrues, and the parties cannot contract otherwise. The Prescribed Rate of Interest Act does not apply and neither does the *in duplum* rule.

#### Order

The High Court ordered the Municipality to pay the amount of R2 239 991.34 to the Fund. Interest on this amount must be calculated at the rate prescribed in section 13A(7) of the Act from 31 October 2021 to date of payment.

The High Court found that the *in duplum* rule does not apply to arrear contributions, since the interest arises by operation of a statute (the Pension Funds Act) and not by a contract between the employer and the fund.

**Comment:** This High Court ruling stands in contrast to the view of the Adjudicator expressed in the PFA Quarterly Digest of April 2023 where it stated: “It is important for the Adjudicator and funds to apply the *in duplum* rule as these entities have a duty to be fair and impartial, not only to members of the fund but to the employers that participate in funds as well. In light of the *in duplum* rule, it cannot be considered fair for an employer to pay interest that exceeds its principal debt. Employers are encouraged to lodge complaints against funds that ignore this common law rule”.

In the Overnight Logistics<sup>2</sup> case the Adjudicator also held that late payment interest prescribed in terms of section 13A(7) of the Act is subject to the *in duplum* rule.

The draft Conduct Standard published in May 2020 (in anticipation of Conduct Standard 1 of 2022) contained the following sentence:

*For purposes of section 13A(7) of the Act, compound interest on late payments or unpaid amounts .. (c) may not exceed the principal debt due in respect of the unpaid amounts, inclusive of all costs associated with the recovery of the unpaid amounts.*

This provision was omitted from the final Conduct Standard, and it appears from the consultation report that the Regulator believed it is not necessary to specifically include it, because the National Credit Act sufficiently provides for the scenario.

The judgement therefore contradicts the views of the Adjudicator and the Regulator as the court did not extend the *in duplum* rule to apply to arrear contributions.

<sup>1</sup> Municipal Workers Retirement Fund v Umzimkhulu Local Municipality and Others (11458/2015) [2023] ZAKZPHC 80 (10 August 2023)

<sup>2</sup> Overnight Logistics (Pty) Ltd v Transport Sector Retirement Fund and Others (PFA/GP/00056795/2019/YVT)

# Constitutional court case

## Retrospectivity of rule amendments

### *Mudau v MEPF*<sup>1</sup>

The case of Mudau was discussed in [In Perspective 2 of 2022](#). Mr Mudau was employed by a local municipality and was a member of the Municipal Employees Pension Fund (MEPF). At the time of his resignation during May 2013, the rules of the MEPF stipulated that he became entitled to a resignation benefit of three times contributions made to the MEPF.

According to an actuarial valuation report received by the MEPF in January 2013, the high withdrawal benefit offered by the MEPF was placing a significant financial strain on the fund, and it was at risk of failing to meet its liabilities. The board of the MEPF resolved in June 2013 to amend the rules retrospectively with effect from 1 April 2013 to provide for a withdrawal benefit of only one and a half times the member's contributions. The rule amendment was submitted to the FSCA during July 2013 and the FSCA approved the rule amendment on 1 April 2014, with an effective date of 1 April 2013.

Mr Mudau resigned during May 2013 and was paid a withdrawal benefit in October 2013 of one and a half times contributions based on the new rule that reduced the withdrawal benefit. Mr Mudau lodged a complaint with the Pension Funds Adjudicator in December 2013 that he was entitled to three times his contributions as he resigned prior to the new rule being registered by the FSCA. The Adjudicator ordered the MEPF to pay the full benefit of three times contributions to him. The MEPF took the matter to the High Court for review, where the application was dismissed. It was then appealed again, where the Supreme Court of Appeal found that section 12 of the Pension Funds Act empowers a fund, subject to the approval of the FSCA, to amend its rules and to determine the date on which the amendment will become effective. It provided that once the rule amendment was registered, the amended rule could apply retroactively to all withdrawal benefits which had accrued to MEPF's members from 1 April 2013. The Supreme Court of Appeal therefore found that Mr Mudau is only entitled to the new reduced benefit. Aggrieved with this decision, Mr Mudau took the matter to the Constitutional Court.

The Constitutional Court ruled on the matter on 2 August 2023. The court found that retirement funds enjoy a wide remit to alter, rescind or add to their rules in terms of section 12 of the Pension Funds Act. These amendments:

- must be made in compliance with the trustees' fiduciary duties;
- must be done in accordance with the rules of the fund;
- may not affect any right of a creditor of the fund;
- may not be inconsistent with the Pension Funds Act;
- must be financially sound;
- must be registered by the FSCA; and

- will take effect on the date determined by the fund or if no date was stipulated, from the date of registration.

The Constitutional Court found that in the *Mostert*<sup>2</sup> case, the Supreme Court of Appeal correctly held that although rules may have retrospective application after registration, they do not have binding effect prior to registration. A retrospective rule amendment can therefore not take away benefits that have already accrued (vested).

While the rule amendment in question was to take effect retrospectively, the rule that was in existence at the time Mr Mudau had his withdrawal benefit determined and paid, must be examined. During the period when the withdrawal benefit accrued and was paid (between May 2013 and October 2013), only the old rule was in existence. The MEPF had to apply the old rule at the time, notwithstanding the fact that they anticipated a registered amendment. A proposition that an unregistered rule cannot have binding effect on a fund and its members, also aligns with the fiduciary duties that a fund owes to its members, one of these being to manage a fund in terms of its rules, legislation, and common law.

The concepts of retrospectivity and retroactivity are distinguishable but interrelated.

- A **retroactive** amendment reaches into the past and operates at a time prior to the amendment such that events that were previously invalid becomes valid and vice versa, so it affects acts completed before the new rule comes into operation.
- A **retrospective** amendment in turn is forward looking. It imposes new consequences for events that have already taken place, but it does not invalidate what was previously valid.

The court did not determine whether retroactivity could be used to unsettle accrued or vested benefits, as this was not the issue before the court, but the court remarked that there is a presumption against retrospectively "in the sense of taking away or impairing a vested right acquired under existing laws" unless clearly intended otherwise.

The common law presumption states that legislation only applies in respect of the future unless the legislation provides otherwise. Legislation trumps common law, which means that the legislature could trump the presumption either expressly or by necessary implication. For example, if the relevant rule amendment clearly provided that its retrospective effect was to apply to pending actions, the presumption against retrospectivity may have been rebutted. There was however nothing in the amended rule to conclude that the rule amendment was intended to apply to pending claims or actions which could unsettle vested or accrued benefits. The court did not rule on this issue.

The MEPF therefore had to pay the difference between one and a half times contributions and three times contributions to Mr Mudau.

<sup>1</sup> Pandelani Midas Mudau v Municipal Employees Pension Fund, Akani Retirement Fund Administrators (Pty) Ltd, Vhembe District Municipality and Institute for Retirement Funds Africa NPC. Case CCT 142/22.

<sup>2</sup> Mostert N.O. v Old Mutual Life Assurance Co (Pty) Ltd, 2001 (4) SA 159 (SCA)

The court found that rule amendments may be backdated, but that the MEPF could not act on the amendment before its registration by the FSCA.

**Comment:** Funds should strive to submit rule amendments prior to their effective date, allowing enough time for communication with members, FSCA consideration, queries, and approval. If benefits are backed by insurance policies, these will also need to be amended prior to the effective date.

*Rule amendments need to be clear on how the amendment will apply to members and whether vested rights will be affected, should the rule amendment not be registered in time, or where funds have no other choice but to make retrospective rule amendments. Reasons and justification will have to be provided. It must be made clear in the rule amendment who will be affected and how it will apply after the proposed effective date. It is also important that prior notice of such rule amendments is given to members. Members must be given meaningful and adequate opportunity to make submissions to the Fund on the appropriateness of a rule amendment before its approval.<sup>3</sup>*

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<sup>3</sup> Municipal Employees' Pension Fund and Another Mudau and Another (61555/14) [2017] ZAGPPHC 157 par 44.