CASE SUMMARIES 2012 / 2013

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CONSTITUTIONAL COURT

Wiese v Government Employees Pension Fund and others CCT 111/11 [2012]ZACC 5 (30 March 2012)

This matter went on confirmation to the CC after the High Court upheld the applicant's claim that the GEPF statute unfairly discriminated against spouses who could not access pension interest allocations on divorce(as was the case with members of funds subject to the Pension Funds Act). Although the applicant was entitled to her costs, including the costs of appealing portion of the relief, the CC ruled that the issue was now moot, as a statutory amendment had been passed which brought the position of members in the GEPF to parity with private funds. Although holding that the absence of a live controversy is not an absolute bar to a matter's justiciability, and that a practical effect on the parties or *on others* is a factor to be considered, the CC declined to pronounce on the validity of the GEPF statue.

SUPREME COURT OF APPEAL

Roestorf and another v Johannesburg Municipal Pension Fund and Others (235/11) [2012] ZASCA 24 (23 March 2012)

The appellants were medically boarded in 1995. The Fund was a defined benefit scheme and, from 1995, the appellants have been in receipt of annuity payments. Some years later they formed the view that their annuity payments had been and continued to be less than what they were entitled to receive in terms of the rules. In 2006 they lodged a complaint before the adjudicator, which was partially successful. The Fund appealed against the adjudicator's award to the High Court. The appellants brought a cross-application for more extensive relief than they had initially sought before the adjudicator.

The High Court upheld the Fund's appeal against the adjudicator's determination on the basis that the complaint to her was time barred in terms of section 30I of the PFA and had prescribed in terms of section 12 of the Prescription Act. It held that it had no jurisdiction to consider the cross-application.

The employees appealed to the SCA. Their appeal failed. Though several of their procedural arguments were accepted in a minority judgment (per Heher J), the majority (Nugent, JA, Navsa, Cachalia and Tshiqi JJA concurring) held the view that it was unnecessary to decide several of these points.

Heher J found that the employees' claims had not prescribed. The majority held that the claims had prescribed in part. The majority held that the question of prescription was not material to the outcome of appeal and therefore gave no reasons for its conclusion on the prescription issue.

Heher J found that the High Court did have jurisdiction to determine the employees' cross-application, but found against the employees on the merits of their case, which turned on a construction of the Fund's rules. The majority agreed.

Heher J also found that the claim to the adjudicator was not time barred. The majority held that the employees' cross-application had effectively superseded their claim before the adjudicator. It was therefore not necessary to decide whether their approach to the adjudicator was time barred.

Although the employees' appeal was dismissed, each party was ordered to pay its own costs on appeal. The Court criticised the Fund and the employer for the procedural obstacles placed in the way of a decision on the merits of their claim.

Sentinel Mining Industry Retirement Fund and Another v Waz Props (Pty) Ltd and Another (Pty) Ltd (779/11) [2012]ZASCA 124 (21 September 2012)

Included only to note – this really has nothing to do with pension law. It deals with a commercial contract, guarantees, obligations etc, in the context of a particular fund investment – in this case the development of the Melrose Arch property.

Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZA SCA 13 (15 March 2012)

The retired member was a senior employee who, although he was only 43 years old, was credited in the Fund with 45 year's service. On his resignation from his employment he was entitled in terms of the rules to receive, and received, a lump sum withdrawal payment of some R2,7 million.

The rules of the Fund provided that "*…should at any time the pensionable emoluments of a member…increase in excess of that assumed by the actuary from time to time for valuation purposes…then the committee, on the advice of the actuary, may direct that the local authority employing such member pay an adjusted contribution*". Acting on the advice of the actuary, the Fund directed the local authority to pay an adjusted contribution in excess of R2.5 million. The claim failed before the High Court.

On appeal to the Supreme Court of Appeal, the High Court's judgment was overturned and the Fund's claim succeeded. The Court accepted that the provision was addressed to the problem of local authorities giving staff increases that were excessive in the light of the assumptions in regard to salary increases made by the actuary. It accepted that manoeuvres of the type undertaken by the employee in this case were not present in the minds of the drafters when the Rule was introduced. However, the Court was satisfied that on a proper interpretation of the provision, the present claim should succeed.

HIGH COURT

Boshoff v Iliad Africa Trading (Pty) Ltd t/a Builders Market Welkom [2012] JOL 29400 - Free State High Court (26 January 2012)

The pension fund paid the member's benefit to the employer after the employer obtained judgment against the employee in respect of a civil debt. The employee / member had been a member of a close

corporation which had contracted with the employer, and for which monetary obligations he had stood surety. This was the debt which formed the subject of the judgment.

The Court held (correctly) that section 37D(1)(b)(ii) contemplates a '*causa* tainted by an element of discreditable or untrustworthy conduct on the part of an employee towards his employer'. The fund had not been entitled to pay the benefit to the employer.

It is notable, however, that the pension fund was not a party to this application – the member sued the employer directly for recovery of the pension monies advanced to it. Much of the judgment relates to the question as to whether the employer could raise set-off as a defence against the employee's claim against it, based on its civil claim against the employee. On the facts it was held that it could not.

Birkholtz and Others v Transport Pension Fund and Others – South Gauteng High Court, case no 16554/2000 (22 June 2012)

The plaintiffs were former members of the pension fund, a defined benefit pension fund, who had exited on retrenchment or early retirement during the period 1997 – 1999. The fund had been in deficit at the time they exited and a 'reduction factor' of 11%, which had been recommended by the Fund's actuary, had been applied to their benefits. They claimed that they had not been paid their full benefits.

The Court had to determine whether the recommended 11% reduction formed part of the calculation of benefits '*in accordance with a formula as determined by the actuary*' as required by the fund rules, or whether it was an independent recommendation outside of the formula to be applied.

Following an earlier WLD judgment it was held, particularly in the context of a balance of cost scheme where the employer is the 'ultimate guarantor' of the financial obligations of the fund, that the reduction factor did not form part of the formula as determined by the actuary. The plaintiffs accordingly obtained a declarator that the application and adoption by the fund of the reduction factor was contrary to its rules and a breach thereof.

Risk and others v FAIS Ombud and others North Gauteng High Court Case no 38791/11 (4 September 2012)

The FAIS Ombud was taken on application to High Court (whether review, appeal or interdict proceedings is not entirely clear) aimed at compelling her to refer the matter to High Court in terms of her powers under s27(3)(c).

What is significant about this case is the comments made by the Court on the nature of the investigation and form of proceedings before the FAIS Ombud. The applicants claimed that the inquisitorial process followed by the Ombud pursuant to section 27(5)(a)was an infringement of the applicants' right to access to court under section 34 of the Constitution.

Section 27(5) of the FAIS Act is very similarly worded to section 30J of the Pension Funds Act which provides that the Adjudicator '*may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.*'

The analogous provision in the FAIS Act states '*The Ombud may, in investigating or determining an officially received complaint follow and implement any procedure which the Ombud deems appropriate to follow, and may allow any party the right to legal representation.*'

The Court, commenting on the latter provision, stated '*It has been submitted and I accept that first respondent administers an institution which in terms of FAIS demands efficiency and economy and that this may indeed justify the lack of a public hearing in circumstances which may be resolved quickly and with minimal formality.*'

City of Cape Town Municipality v SALA Pension Fund and Another Western Cape High Court Case no 25945/11 (13 December 2012)

The SALA fund, a defined benefit fund operated for employees of local government, effected a rule amendment to provide for increased employer contributions in order to rectify a historical funding deficit. The trustees took the resolution in 2003 and it was approved by the Registrar in 2006 with retrospective effect to 2003.

Two pieces of litigation flowed from this. (1) The fund launched proceedings in the High Court to recover arrear contributions from the City. The City's plea to this amounted to a collateral challenge to the validity of the rule amendment. (2) The City lodged a complaint with the Adjudicator alleging maladministration in relation to the rule amendment. The Adjudicator declined jurisdiction on the basis that section 30H(2) of the PFA precluded her from dealing with a complaint which formed the subject matter of court proceedings.

The City thereafter launched the present proceedings in which it claimed relief in two parts: (1) an appeal in terms of section 30P against the Adjudicator's ruling, and (2) a Rule 53 review to set aside the decisions of the trustees and the Registrar in effecting the rule amendment.

Held as to the section 30P appeal, this must fail. A broad interpretation of section 30H(2) is required. The referring party need not be the same in both cases, nor does the cause of action have to be the same. It is sufficient if the subject matter would overlap significantly. This is a variant of *lis pendens*.

Held as to the review proceedings that the City was substantially beyond the 180 day limit in terms of PAJA and had not established grounds for condonation. As far as public interest was concerned important factors were the nature of the scheme (a balance of cost arrangement), the entitlement of stakeholders to certainty, and the disruption of completed transactions leading to the liability of the fund to restore contributions to employers.

Fritz v Fundsatwork Umbrella Pension Fund and Others Eastern Cape High Court Case no 2323/2011 (28 August 2012)

This concerns a pension interest claim. The applicant (the non-member spouse) was married in community of property to the member. They divorced in 1992 and the member, after entering into a second marriage, subsequently passed away. The divorce order contained an order for division of the joint estate but no express provision for pension interest.

The applicant sought a declarator that she was entitled to a 50% share of the pension interest or benefit at date of divorce, together with interest to date of payment. The fund opposed the application on the basis that the deceased had not been a member of the fund at the time of divorce (his interest in the previous fund had been transferred to the respondent fund subsequent to divorce), and that no order had been made against the fund.

The deceased's surviving spouse was also cited as a respondent in her own capacity and in her capacity as guardian of the minor child born of the marriage. The trustees had made an allocation of the death benefit, 87% to the surviving spouse (which had already been paid out) and 13% to the minor child which amounted to R130 000 and was being withheld by the fund pending the outcome of the declaratory application.

The court, after reviewing the decisions in *Sempapalele* (which held that a court cannot grant a section 7(7) order after granting a divorce order) and *Maharaj* (which held that a court can grant such an order notwithstanding that there is no reference to a spouse's pension interest or interest on the divorce order), approved *Maharaj.* However it distinguished it, holding that in that case, the joint estate still fell to be divided, whereas in the present case the division had already taken place by agreement in 1995. The agreement recorded and divided various movable and immovable assets, but was silent on the question of pension interest. The Court held that where a division of the joint estate has already occurred, it is not competent to grant an order in terms of section 7(7).

Conceptually, if the asset were only discovered by the non-member spouse after division, it would have to be treated like any other such matrimonial asset and could still fall to be divided. The court would not necessarily need to make a section 7(7) order, the pension interest is already an asset *because the legislature has deemed it so*, but might confirm an entitlement to 50% thereof. The Court alluded to scenarios of this type but concluded that it was not necessary to make a finding in this regard as there was no allegation of fraud or exclusion of assets, and, if there had been, the executor of the estate would have had to have been joined as a necessary party, which the applicant had elected not to do.

What was not dealt with in any detail was the role of the pension fund. In order to bind the fund there would have to be a section 7(8) order, not a section 7(7) order.

Gradwell v Bidpaper Plus (Pty) Ltd and others – case no. EL 46/2012 as yet unreported judgment of the High Court (Eastern Cape, Grahamstown)

This is a case dealing with a pension fund's right to withhold a benefit in terms of section 37D(1)(b)(ii) pending the finalisation of a civil claim against an employee for damages. In this case the employee had allegedly breached a restraint of trade agreement by passing on confidential information to the participating employer's competitors. The court held that such conduct, if proved, would fall squarely within the compensation contemplated in that subsection 'by reason of any theft, dishonesty, fraud, or misconduct by the member'. Previous case law having determined the right of a fund to withhold a benefit pending the outcome of such proceedings, the court dismissed the applicant's claim for immediate payment of the benefit.

Marion v Avusa Limited Pension Fund case no. CA 169/10 – full bench decision of Eastern Cape High Court (Grahamstown) 23 May 2012

This case deals with the perennial problem of disability benefits from pension funds where there are tri-partite legal relationships between the member, the fund and the insurer, and particularly where there are different underwriting contracts for temporary and permanent disability benefits. Typically in these situations a member will become entitled on disability to a temporary benefit with a 24 month waiting period (usually a separate scheme set up by the employer independent of the fund). During such time the member remains a member of the fund and the temporary disability scheme pays a monthly salary. Deductions continue to be made in respect of contributions to the fund for ongoing membership. Thereafter if the permanency of the condition is confirmed the member will be entitled to a permanent disability benefit from the fund, in this case a lump sum determined with reference to final salary.

The question for determination in this case, which was an appeal from the Adjudicator's determination and a subsequent High Court appeal, was whether the 'pensionable salary' of the member for purposes of quantifying the lump sum benefit should have been calculated with reference to her salary in 2005 when she was deemed to be temporarily disabled, or from 2007 when permanent disability was confirmed (the member having been absent from employment since commencement of the temporary disability).

The decision in this case is complex and fact-bound and turns on the interaction and interpretation of the various fund rules and policy provisions, there being notably no definition of the term 'becoming disabled'.

On the facts of this case the Court held that the appellant was only entitled to a computation of the permanent lump-sum disability on her actual earnings in 2005, and not the projected increase she would have received in 2007 (after 2 years' receipt of temporary disability payments).

The importance of this case lies in the lesson to funds in constructing their rules (and their underwriting policies) to reflect with accuracy what amounts are payable with reference to which income levels and dates of disablement, whether temporary or permanent. The problem in this case was the imprecision and ambiguity with which these rules and clauses had been drafted.

FSB APPEAL BOARD

Nederduitse Gereformeerde Kerk in die OVS – Amptenare Pensioenfonds v Registrar of Pension Funds (3 August 2012)

The appellant submitted a nil surplus apportionment scheme, having created an employer contribution reserve as contemplated in the definition in the PFA of 'contingency reserve account' ('CRA') based on an anticipated increase in the employer contribution liability. The Registrar was not satisfied with the motivation for this and rejected it, with the consequence that the scheme as a whole could not be approved. The Fund appealed against the Registrar's decision.

It was held that there was nothing before the Registrar to show that the account had been established on the advice of the Fund's valuator. There was also nothing which would persuade him that the CRA would enhance the interests of all concerned (especially beneficiaries) or why it was considered prudent to establish the CRA and for what explicit contingencies. The Registrar was entitled to information showing a detailed differential comparison of the respective positions of employer and members without the establishment of the CRA and after its establishment. The mere fact that the employer had exceeded its liability to contribute in the past was unhelpful in and of itself. Something more was required.

It was left open to the applicant to appeal again should the Registrar refuse to recognize the CRA after consideration of further submissions to him.

Klein Karoo Kooperasie Pensioenfonds vir Maandelikse Besoldigde Personeel v Registrar of Pension Funds (6 August 2012)

Similar circumstances to the above. The appellant submitted a nil surplus apportionment scheme, having created a contingency reserve account ('CRA') in respect of a possible claim by the employer for overpayments to the fund. The Registrar was not satisfied with the motivation for the CRA and rejected it, with the consequence that the scheme as a whole could not be approved. Part of the fund was still run on a DB model, but it had been administered on a DC basis for years despite the fact that the relevant rule amendment which would have effected this conversion had not been approved by the Registrar. The overpayments by the employer had arisen in part through contributions made on a DC funding basis and in part from injections into the fund over a period of 18 years to enhance benefits and

ensure solvency. It was common cause that the failure to create the CRA would result in the fund falling into deficit on distribution of surplus. The CRA was limited to the amount of the deficit – R7 652 000.

It was held that in order to justify a CRA the fund needed to show that it was necessary to create the reserve to cater for the contingent liability. On the facts it was determined that there was no binding agreement obliging the fund to refund overpayments, and accordingly no potential liability. The appeal board was sceptical about a letter of demand from the employer and regarded its authenticity as tainted. In terms of Regulation 35 (1)(b) a reasonable inference could be shown that the establishment of the CRA was contrary to the duties of the board under section 7C(2)(b) of the PFA and motivated by bad faith.

The Registrar was accordingly justified in rejecting the CRA.

Nelson Mandela Bay Metropolitan Municipality and Another v Registrar of Pension Funds and Another (2 November 2012)

This is a very important decision and needs to be considered in conjunction with the judicial pronouncements on rule amendments which have a retrospective effect on local government contributions to DB funds. At the heart of this problem is (1) the nature of DB funds which require ongoing actuarial assessment of employer contributions to maintain the financial stability of the fund, and (2) the effect of retrospective (in this case 3 years) amendments concerning contribution rates.

This appeal was brought as an application for condonation for the late filing of an objection to the Registrar’s approval of a rule amendment sanctioning a retrospective increase in employer contributions. (The appellants had already instituted High Court review proceedings, but abandoned these on realising they needed to exhaust internal remedies first – ie a FSB Appeal Board appeal.)

Condonation was refused as the application was found to be unsound on the merits. The Board held that the Registrar had acted within his powers, that the employer appellants had been duly represented on the board of trustees of the fund and were therefore cognisant of the intended amendment. The ‘audi’ principle had accordingly been observed. The Registrar's duty to act fairly was owed to the fund as the party which had requested him to act, and not to other stakeholders. The Registrar had acted within the four corners of the Act when approving the amendment.

Chamber of South African Security v Registrar of Pension Funds and others (11 January 2013)

This decision concerns an industrial fund established by sectoral determination and deals with the conflicting imperatives of negotiating forums in the labour field and management of the fund by a board of trustees (in this case appointed by the Registrar in terms of section 26(2) of the Pension Funds Act).

At the core of the dispute was the legality of a decision by the Registrar to approve a rule amendment providing for certain representativeness thresholds on the part of participating employers. The appellants were employers who felt aggrieved and marginalised by the representativeness thresholds, and they appealed the registration of the rule amendment on the basis that it was not consistent with agreements reached in the relevant labour forums.

The Appeal Board held that the pension fund was an independent entity governed by the Pension Funds Act. When the Registrar was requested to approve a rule amendment (in this case governing the procedure for appointing the board of trustees of the fund) he could not take account of any requirements other than those prescribed by section 12(4) of the Pension Funds Act. Those had been complied with, and the approval could not be set aside on the basis that it did not conform with negotiated labour imperatives.

NWK Pensioenfonds v Registrar of Pension Funds (29 October 2012)

The fund appealed against the Registrar's refusal to note a nil apportionment scheme. The Registrar was of the view that there had been improper utilisation of surplus by the employer in an amount of R20million. The fund contended that the employer had made additional contributions of R23million, and that they were made in respect of the improper utilisation. This would have brought the employer within the provisions of section 15B(6)(c)(ii) of the Act which permits improper utilisation to be reduced by contributions made specifically for the purpose of that utilisation.

The Board assumed in favour of the Registrar that the retrospective application of the improper utilisation provisions was constitutional. The Board held that the test adopted by the Registrar was too stringent, and a lenient approach to the employer's tendered proof must be taken. Given the retrospective nature of the utilisation provisions, there would have been no need for the employer to

record its specific intention at the material time. The Board directed the Registrar to approve the nil surplus apportionment scheme.

Lion Match Rosslyn Provident Fund v Registrar of Pension Funds (25 September 2012)

The employer and the fund had agreed at inception through a collective bargaining forum that the employer would contribute at a rate of 9,5% of salary, inclusive of risk benefits. When the rules were registered, they were framed in such a way that the employer was liable to contribute 7% to retirement funding as well as the cost of risk benefits and administration. Over the years the risk and administration costs vastly exceeded the 2,5% cap originally contemplated. The fund and employer had in practice executed the terms of the original agreement and the employer was not aware that the rules reflected a greater liability. To regularise the situation the fund submitted a rule amendment in 2008 to reflect the 9,5% employer contribution rate inclusive of risk and administrative costs. It requested that the amendment take effect from 2007. The amendment was approved. In 2010 the fund requested the Registrar to make the rule amendment retrospective to 1996. The Registrar refused on the ground that it was in conflict with section 13(4) which provides that a retrospective rule amendment cannot affect the liability to pay a contribution which was payable before it was resolved to amend the rules.

The Board held that the original agreement between the parties was to be sourced in the collective agreement and not the registered rules which did not correctly reflect the intention. Taking all the circumstances into account the Registrar ought to have registered the rule with retrospective effect to 1996 as requested by the fund.

Robert Bosch Retirement Benefit Fund v Registrar of Pension Funds (17 April 2012)

This was an appeal against the Registrar's refusal to approve an application to transfer monies in an employer reserve account to an employer surplus account in terms of section 15F. The Registrar contended that there had been no proper negotiations with stakeholders in a manner consistent with the principles underlying section 15B and 15C. The monies in the reserve account had been transferred in from a previous fund in 2000 pursuant to a negotiated surplus distribution in the previous fund. The Board held that there had been insufficient consultation with stakeholders and former members had not been represented. It upheld the Registrar's decision.