



Employer Choice

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EMPLOYER CHOICE

Does the employer have the right to decide to which fund its employees must belong?



Overview

- What are the issues that may arise if members resist a transfer?
- What happens if the board becomes dysfunctional in dealing with the employer's decision?

3 Scenarios:

- 1) Employer and in-service Member want to move
- 2) Employer wants to move but in-service Member does not
- 3) Employer does not want to move but in-service Member does

Themes:

- Freedom of association
- Ts & Cs of employment
- Section 14 interpretation and compliance

Section 18

FREEDOM OF ASSOCIATION

Section 18, Constitution: *“Everyone has the right to freedom of association”*

Section 36, Constitution:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

Section 18 (cont)

Umzimkhulu & Ntabankulu cases (SCA) Mar 2019

- Confirms constitutionality of fund rules prohibiting withdrawal while “in service”
- (1) *“compulsory membership of a pension fund which only holds financial implications for a member, does not constitute a limitation on the right to freedom of association”*
- (2) Limitation *“self-inflicted”*: Employees had choice at outset to decide on one of several funds and had to accept the restrictions that flowed from the decision.
- (3) Employees may join other funds.
- ConCourt refused leave

Section 18 (cont)

How to take the section 18 argument forward - suggestions

- Seek forward-looking 'floor-crossing' style relief
- Consider what would constitute non-financial implications to membership, e.g. union membership?
- Do employees have a choice at start of employment on which fund to join? Bargaining council vs single employer context
- Can factual allegations be made that additional pension fund membership is not practical or realistic given e.g. relatively low salary
- Once establish limitation – section 36 analysis

Scenario 1

Both employer and employee want to move

- Permissible provided both funds' rules & employment contracts permit it
- ER must plan exit on forward-looking basis having regard to fund rules
 - *Sasol*
 - *Dihlabeng*
 - *Umzimkhulu & Ntabankulu*

Scenario 1

Both employer and employee want to move

- Members' interests & trustees' fiduciary duties:
 - 13A contributions & penalty interest (*Ntabankulu* & provincial intervention)
 - Risk premiums and cover
 - Fund return
 - Admin costs
 - S 14 transfers

Scenario 2

2: Employer wants to move; members do not

- Ts & Cs of employment: check employment agreements
 - *“Belong to Fund X”* > renegotiate
 - *“Belong to fund designated by ER”* > sole prerogative of employer
(*AMCU v Anglo Am LC 2018*)
- Employees can then only resist within pension law framework
 - S 14 & Conduct Std 1/19
 - E.g. worse benefits, were not consulted, non-compliance with conduct std
 - Objections dilatory, no consent requirement
 - Non-compliance with fund rules
- Other issues when members resist a transfer

Scenario 2

Employer wants to move; members do not

- Board issues:
 - Trustees' fiduciary duties towards fund, not ER or EE/Union
 - If board becomes dysfunctional:
 - Whistleblowing obligations
 - S 26 Board
 - Statutory manager

Scenario 3

3: Employees want to move; employer does not

- Labour issue
- Renegotiate Ts & Cs of employment
- Obtain ER consent
- Freedom of association?
- Other policy considerations:
 - Long-termism (Reg 28; Tax Act)
 - *Ntabankulu* par 60: “[T]he purpose of the compulsory membership of a particular pension fund, serves to enhance pension benefits and to secure the viability of a pension fund, by ensuring that it has significant numbers of members”
 - At most: Controlled, forward-looking ‘floor-crossing’ regime expressly catered for in fund rules (*Sasol*)



THANK YOU

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