



## RECENT COURT DECISIONS: REDUCTION OF BENEFITS WITH A BACKDATED EFFECTIVE DATE

In two recently decided cases, our courts have overturned determinations made by the Pension Funds Adjudicator. In both matters, the issue concerned the binding effect of a rule amendment which had the effect of retroactively reducing fund members' withdrawal benefits, including benefits payable before the amended rule was registered. Both cases involve the same fund.

The cases are cause of some concern to retirement funds, especially as the second case discussed below was decided by the Supreme Court of Appeal.

### *Factual background to the cases*

The facts were substantially similar in both cases.

### *The generous withdrawal rule becomes too financially onerous to maintain*

The Fund rules provided that a member who joined the fund after June 1998 would, upon resignation, be entitled to withdrawal benefits of the member's contributions, plus interest, multiplied by three (**'the old rule'**).

The Fund's actuaries noted that due to the combination of lower investment returns than previously enjoyed and the generous withdrawal rule, the rule could lead to the fund not being able to meet its liabilities.

### *Fund resolution and backdated effective date*

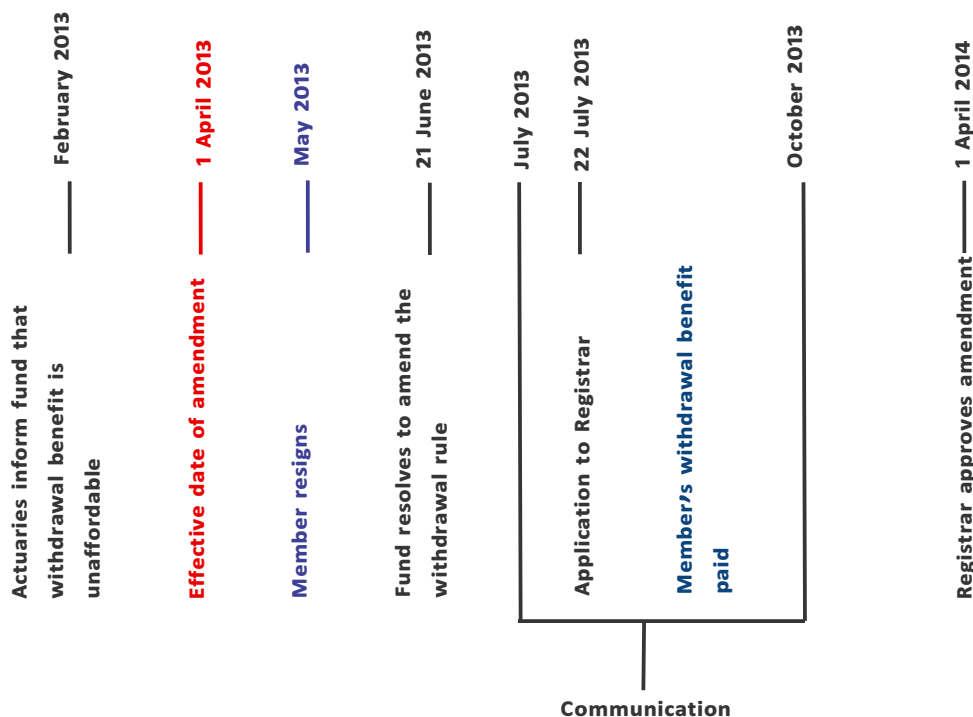
As a result, the fund resolved on 21 June 2013 to amend the rule, with backdated effect to 1 April 2013. The amendment to the withdrawal rule provided for: member's contribution, plus interest, multiplied by 1,5 (**'the new rule'**).

By backdating the effective date of the new rule, the fund sought to avoid the danger that members may resign in numbers if they were aware of the impending reduction of withdrawal benefits.

The Fund applied for the registration of the new rule on 22 July 2013, and the Registrar (before the Financial Sector Conduct Authority came into being) approved and registered it on 1 April 2014, with the effective date being 1 April 2013.

In both cases, the members resigned before the resolution to amend the rules and after the backdated effective date of the rule amendment.

#### Timeline of events



### Municipal Employees Pension Fund and Another v Matome Ronald Ramohale and Others<sup>1</sup>

This matter was an application to set aside the Pension Fund Adjudicator's determination and was heard in the Gauteng Division of the High Court.

Following receipt of his withdrawal benefit in August 2013, the member noted that payment made was not calculated in accordance with the statement of projection he had received prior to him exiting the fund. Rather, his benefit was calculated in accordance with the new rule which was less than the benefit he would have received under the old rule. He lodged a complaint with the Adjudicator in September 2014. The Adjudicator effectively ordered the fund to pay in terms of the old rule.

The rationale for the Adjudicator's decision was twofold:

- the amended rule, although applicable with retrospective effect from 1 April 2013, was only approved by the Registrar on 1 April 2014 (**"the approval date"**) and the new rule could not be applied prior to its registration and approval by the Registrar. The Adjudicator relied on *Mostert N.O. v Old Mutual Life Assurance Company (South Africa) Ltd*<sup>2</sup>; and
- the new rule could not be applied to benefits that accrued before the new rule was approved by the Registrar. In support of this finding the Adjudicator relied on *National Director of Public Prosecutions v Carolus and others*<sup>3</sup>.

<sup>1</sup> (27708/18) [2022] ZAGPIHC164 (18 March 2022)

<sup>2</sup> [2001] 8 BPLR 2307 (SCA) and *TEK Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA)

<sup>3</sup> 2000 (1) SA 1127 (SCA)



The Court had to determine, among other things, the following issues:

- **whether the Pension Funds Act ('the Act') conferred jurisdiction on the Adjudicator to make a determination in respect of the member:**

The Court stated that the Adjudicator derives her powers from the Act<sup>4</sup>. The Adjudicator was of the view that the rule amendment could not be applied to members who left the fund prior to the registration of the rule amendment on 1 April 2014. The court said that the effect of this finding by the Adjudicator is that the amended rule can only apply prospectively. The Court found that the Adjudicator had no authority to make such a ruling, commenting that “(T)his in my respectful view, amounts to venturing into an arena which the legislature never intended. First Applicant [the fund] is allowed by its rules to regulate itself and even amend its own rules. The Adjudicator has no authority to determine how the rules will apply”.

You will note that the Supreme Court of Appeal took a different approach on jurisdiction in the *Mudau* case discussed below.

- **whether the Adjudicator erred in making the Determination in that she failed to give effect to an amendment made by the fund, with retrospective effect, as the fund was entitled to do in terms of section 12(4) of the Act –**

The High Court found that the authority conferred upon the trustees by the rules to amend the fund's rules is qualified only by the requirement that such amendment be consistent with section 12 of the Act, which does not preclude an amendment for the purposes of reducing benefits. In this regard, the Court expressed the view that “(i)t is evident from the reading of section 12 that the only restrictions placed on amendments are that such amendments may not affect any right of a creditor of the fund, as opposed to a member, and they must be approved and registered by the Registrar”.

The Court referred to the matter of *National Testing Retirement Fund v Registrar of Pension Funds*<sup>5</sup>, where it was held that a rule amendment which has the effect of reducing a pension benefit, does not face foul of the prohibition in section 37A of the Act against reducing pension benefit.

Consequently, the Court upheld the appeal against the Adjudicator's determination, commenting that “(i)f the Determination of the Adjudicator is left unchallenged, it will lead to the unsustainability of first applicant [the fund] and in my view the trustees acted properly by implementing the recommendations of their actuaries”.

### **Municipal Employees' Pension Fund and Another v Pandelani Midas Mudau and Another<sup>6</sup>**

The member joined the fund during 2003 and resigned from his employment with effect from 31 May 2013. His membership of the fund also terminated on that date. The fund paid his benefit in accordance with the new rule (1.5 times contributions). The member was dissatisfied and lodged a complaint with the Adjudicator's office, contending that his benefits should have been calculated in terms of the old rule, since, in terms of s 12(4) of the Act, the proposed amendment would only take effect after it had been registered.

The Adjudicator upheld the complaint, determining that the amended rule could not be applied to the member's withdrawal benefits since it had not yet been approved by the Registrar when the benefits became due, and furthermore, that the new rule could not be applied to benefits which accrued before the amendment became effective.

<sup>4</sup> Section 30A (3) of the Act which states that if a complainant is not satisfied with the reply from the fund or the employer who participates in the fund or the employer who participates in the fund fails to reply within 30 days after receipt of the complaint, the complainant may lodge the complaint with the Adjudicator

<sup>5</sup> 2009 (5) SA 366 (SCA) paras 22-23

<sup>6</sup> [2022] ZASCA 46

The fund unsuccessfully appealed the Adjudicator's decision, which was upheld initially by the High Court and again by the full bench of the High Court.

The fund then approached the Supreme Court of Appeal ('SCA'), requesting reconsideration of the decision on two grounds, being:

- (a) the complaint fell outside the scope of the Adjudicator's powers set out in the Act<sup>7</sup>; and
- (b) the Adjudicator erred as a matter of law in finding that the amended rule could not be applied to withdrawal benefits which accrued before it came into effect on 1 April 2014, despite its retroactive operation.

Regarding the first ground of appeal (a), the SCA confirmed that section 1 of the Act defines 'a complaint' as one relating to the administration of the fund, the investment of its funds, or the interpretation and application of its rules.

The SCA found that the Adjudicator did not purport to rule on the validity of the amended rule (which would have been outside the jurisdiction of the Adjudicator), but rather its interpretation and application to benefits which accrued before its approval. The Adjudicator's ruling that the member was entitled to pension benefits calculated in terms of the original rule, was predicated on her finding that the amended rules could not be applied before they were approved and registered by the Registrar. The complaint before the Adjudicator related to the interpretation and application of the fund rules, and accordingly fell within the scope of the powers vested in her in terms of the Act.

Regarding the second ground of appeal (b), the new 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.

The Court's view was that section 12 of the Act<sup>8</sup> authorises the fund to amend its rules and to determine the effective application date thereof. The SCA referred to the case of *National Tertiary Retirement Fund v Registrar of Pension Fund*<sup>9</sup>, where it was held that a pension fund may adopt a rule reducing a member's pension benefits, provided that is it done in accordance with the fund rules and the applicable statutory regime.

The SCA noted that although there is a strong presumption in our law against legislation (or rules in this case) operating retroactively, if the wording of the statute is unambiguous and the intention of the legislature (or pension fund) is clearly to interfere with vested rights retroactively, the provisions of the retroactive instrument must be given effect to. Referring to case law, the SCA confirmed that the enquiry, in every case where the issue of retroactivity arises, must be into the language of the statute and the intention of the legislature emerging therefrom. If the amended rule explicitly states that it operates retroactively and thus reduces pension benefits due to members with effect from 1 April 2013, then it must be applied in this manner.

The Court concluded that the amended rule retroactively applied to all withdrawal benefits which had accrued to the fund's members after 1 April 2013 - the backdated effective date of the new rule.

As of the date of writing this *Dashboard*, we are not aware of an appeal being noted, as yet, in respect of this matter.

<sup>7</sup> ss 30H and 30M of the Act, read with the definition of a 'complaint' in s 1 of the Act

<sup>8</sup> section 12 of the Act permits a pension fund to alter or rescind any rule, or make any additional rule, provided that it does not affect any right of a creditor (other than a member or shareholder of the fund), and it has been approved and duly registered by the Registrar. In terms of section 12(4) of the Act, the Registrar 'shall' register the amended rule if he is satisfied that the proposed amendment is not inconsistent with the Act and is financially sound

<sup>9</sup> [2009] ZASCA 41; [2009] 3 All SA 254 (SCA)

## Problematic

While we recognise that the SCA had to deal with the issue that members could withdraw from the fund and push it further into a financially compromised position, the findings of this case are concerning.

Before these cases, funds would mostly have been of the view that settled law required that a backdated rule amendment could not be applied before the Registrar/ FSCA registered the rule and could not be applied to benefits that had accrued before the rule was registered.

Now, the SCA appears to find that where it is the intention of the fund that the amendment is to be applied from a backdated date (and the rule is clearly worded) that the amended rule may be applied before the Registrar/ FSCA registered the rules and may be applied to benefits that accrued before the rule was registered. This could put members whose benefits have accrued at risk of receiving reduced benefits from a date decided by the board even before the rule is registered.

One of the interesting comments made by the court in the *Ramohale* matter was that: “The legislature clearly intended to have any amendment of the rule registered with the Registrar because for the latter as the regulator, if there was something untoward about any amendment, the Registrar will intervene for the good of the members and all parties adversely affected by the amendment. In this case, the Registrar found no irregularity in giving effect to the application of the Amended Rules retrospectively from 1 April 2013’.

In our view, it is possibly unlikely that the Registrar would have contemplated that the fund would have intended to apply the new rule before registration and to accrued benefits before registration.

The FSCA, going forward, may find reason to scrutinise rules more closely where there are backdated effective dates and may require wording that ensures that members are protected from rules being applied before registration and where benefits have accrued.

