



RECENT COURT JUDGMENTS AND ADJUDICATOR DETERMINATIONS

The Chemical Industries National Provident Fund (“the Fund”) v Tristar Investments (“Tristar”)

The Supreme Court of Appeal was recently tasked with determining the validity of an investment consulting agreement which the parties (the Fund and Tristar) had concluded. The Fund requested the court to confirm the invalidity of the agreement on the grounds that:

- the Fund's signatories had no authority to sign the agreement; and/or
- signing the agreement was contrary to the Fund's rules.

Conversely, Tristar requested the court to uphold the validity of the agreement and to:

- order the Fund to pay for the services already rendered by Tristar in terms of the agreement; and
- award damages to Tristar as a consequence of the Fund's unlawful termination of the agreement.

Regarding the authority of the trustees to sign the agreement – the Fund relied on the fact that its rules require a two-thirds majority vote of each of its member and employer appointed trustees, which was not obtained prior to the appointment of Tristar. However, in practice, the Fund did not usually make decisions by way of a formal vote. Rather, decisions were made and if there was no significant objection to their execution, they were considered ratified. Given the wording of the rules, it was accepted that consensual adoption of decisions was usually permitted, even if some of the trustees disagreed with the

decisions. Since this was the practice adopted in appointing Tristar, the court concluded that the trustees did indeed have the requisite authority to sign the agreement.

Regarding the assertion that signing the agreement was contrary to the Fund's rules – the Fund pointed out that, in terms of its rules, any appointment of administrators or consultants may be withdrawn at any time. Since the Tristar agreement was a fixed term contract, the Fund alleged that it contravened the Fund rules. However, the court rejected this claim on the grounds that enforcement of this rule against a third party would permit the Fund to breach or repudiate any agreement. Moreover, the correct interpretation of the rule would be that it permits the Fund to terminate an agreement only in terms of the provisions of that agreement.

The court awarded Tristar the payment for the services already rendered by it in terms of the agreement, despite the Fund's assertion that the fees were not due, since they depended, in part, on the cost savings to be delivered by Tristar over the first 18 months of the agreement. Since the agreement was terminated after only three months, Tristar had been unable to demonstrate its cost saving undertaking. The court adopted the view that, although it may be speculative, it is nonetheless empowered to make an award based on the assumption that the promised cost savings would have been achieved had the contract been allowed to run its term.

Comment: in order to avoid protracted and expensive debates with service providers and possible court action, funds should ensure that their rules are clear as regard decision-making and termination of provider appointments and that their practices follow the rules. In addition, that service provider agreements are clear as regards termination.

NCM V VTM AND EVERGREEN PROVIDENT FUND

In this court application, heard in the Eastern Cape Division of the High Court, the Appellant (“the Wife”) sought an anti-dissipation interdict against the First Respondent (“the Husband”) and the Second Respondent, being the provident fund of which the Husband was a member (“the Fund”).

The Husband and Wife were engaged in divorce proceedings and the Wife was allegedly concerned that the Husband, who was due to be paid a pension benefit from the Fund, would squander her share of the benefit before the divorce proceedings were finalised. She, therefore, sought an order preventing the Fund from paying out the benefit to the Husband.

Such an order, referred to as an anti-dissipation order, is one which interdicts the respondent from disposing of assets to which the applicant has no special claim. Generally, the applicant has to convince the court that the respondent is wasting assets in order to defeat the claims of creditors.

The Wife based her claim on the fact that she had learned from the Husband's relatives that he was living extravagantly and was worried that he would dissipate her half share of the pension benefit. However, she did not advise the court of the identities of these relatives, nor did she call them as witnesses. In the circumstances, the court could not accept hearsay evidence and as a result, there was in fact no evidence before the court to justify a finding that the Husband was indeed spending her share of the benefit. Accordingly, the court denied the application for an anti-dissipation order.

Comment: it is important that members are aware of the evidence that needs to be presented to a court should they seek an anti-dissipation order.

MOEPHULI V GOVERNMENT EMPLOYEES PENSION FUND (“THE FUND”) AND ANOTHER – CONFLICTING DIVORCE ORDERS

In the Moephuli matter, the Gauteng North High Court had to deal with a case involving two conflicting court orders.

In this matter, the wife was a member of the fund.

The first order obtained by the parties stated: “each party to remain with his/her pension fund”.

The second order was obtained in a different province by the now ex-husband, unbeknown to the member. This order required the fund to pay half of the member's pension interest to the ex-husband.

The ex-husband forwarded the court order to the fund. The member then made it known to the fund that the second court order should be disregarded by the fund.

The fund took the view that the second order was binding on it and it had to pay. It then made payment of half the pension interest to the member's ex-husband. The member wanted re-instatement of her pension interest in the fund.

The court found that the second order was void and that the fund should not have paid anything until the dispute relating to the two orders was resolved. In addition, the court reminded the fund that it owed its members a duty of care.

The court allowed the application and the fund was ordered to amend its records to reflect the first order and to repay the sum of R229 000 that had been incorrectly paid to the member's ex-husband.

Comment: funds should ensure that if they receive conflicting divorce orders that this is raised with the member and their spouse (or ex-spouse) and ensure that this conflict is resolved before making payment.

COMPENSATORY DAMAGES ORDERED BY THE PENSION FUNDS ADJUDICATOR

In a complaint before the Pension Funds Adjudicator, the Adjudicator has ordered compensatory damages to be paid to the complainant.

The Adjudicator stated that “this Tribunal” has the power to grant compensatory damages in order to mark its displeasure with the conduct of a body if circumstances fit. She referred to the previous Supreme Court of Appeal case of Claase v Information Officer SA Airways (Pty) Ltd 2007 (5) SA (SCA) 469 as well as a previous Adjudicator determination.

The complaint in front of the Adjudicator involved a death benefit that should have been paid by the fund nine years previously. The unpaid death benefit was discovered during a death benefit audit.

The Adjudicator noted that although the complainant had been paid interest, this was interest the complainant was entitled to anyway and did not constitute compensation.

The Adjudicator ordered R10 000 to be paid to the complainant for miscommunication and the administrative error resulting in the unreasonable delay in the payment of the death benefit, which had prejudiced the deceased member's beneficiaries.

Funds should be aware that the Adjudicator has the power to order compensatory damages (which is different to interest) in circumstances where she believes the circumstances require such an order. In addition, funds may need to address compensatory damages in responses to Adjudicator complaints, where necessary.