Onlangse regspraak/Recent case law

Malatji v Gauteng Building Provident Fund, Alexander Forbes Financial Services (Pty) Ltd and LR Civil (Pty) Ltd (PFA/NP/9447/2011/LMP) (unreported)

Paying the price for being a careless employer or simply rewarding myopic employees

1 Introduction

The risk of becoming old and, as a result, not being able to participate or continue participating in the labour market and earn a living for oneself and dependants as well as the risk of dependants falling on hard times due to the passing on of the breadwinner are catered for in the South African social security system. One way in which these risks are covered in South Africa is by means of retirement funds (i.e. pensions fund and provident fund). It is estimated that there are about 3000 active retirement funds in South Africa (National Treasury *Charges in South African Retirement Funds* (National Treasury (2013)) 4). Being social insurance funds, the retirement funds are contributory-based. For a person and/or his or her dependants to enjoy the protection provided (such as death, disability and funeral benefits) he or she must be a member. A "member" is defined to mean:

> "in relation to (a) a fund referred to in paragraph (a) of the definition of 'pension fund organization', any member or former member of the association by which such fund has been established; (b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund" (section 1 of the *Pension Funds Act* 24 of 1956).

In addition, he or she and his or her employer must pay the requisite contributions.

At the moment, there is no general statutory duty for all employees and their employers to belong to a retirement fund. However, this does not imply that the notion of compulsory membership to a retirement scheme is foreign to the South African social security system. As a matter of fact, there are instances where an employee can be compelled to belong to a retirement fund. For example, an employee can be obliged to belong to his or her employer's retirement fund by means of a *contract of employment* and/or *collective agreement*. In addition, there are cases

where employees and employers are compelled to participate in a retirement fund by a *sectoral determination*. The *Sectoral Determination 2: Civil Engineering Sector, South Africa* GN R204 in *GG* 22103 of 2 March 2001 (as amended by GN R201 in *GG* 26049 of 18 February 2004, GN R133 in *GG* 29635 of 16 February 2007 [with effect from 1 March 2007], GN R872 in *GG* 32525 of 25 August 2009 [with effect from 1 September 2009], GN NG R 757 in *GG* 33505 of 27 August 2010] (as corrected by GN R1115 in *GG* 33804 of 26 November 2010), and GN R699 in *GG* 35634 of 28 August 2012 [with effect from 1 September 2012] (as corrected by GN R725 in *GG* 35658 of 4 September 2012)) is the case in point.

The fact that the South African social security system does not have a general duty imposed on all employees and their employers to belong to a retirement fund means that employees without foresight to make provision for their old age are most likely to end up relying on the tax-financed old age grant during their twilight years (see, for example, Van Zyl "Old age pensions in South Africa" (2003) *International Social Security Review* 108). This undermines the underlying social assistance ideal that social assistance should be provided to those needy individuals who could not safeguard themselves and their families due to factors beyond their control such as unemployment and invalidity.

The limited circumstances under which an employer can be said to be duty-bound to register its employees with a retirement fund are not as straightforward as they seem. The point is that they raise a number of questions. For instance, is an employee of an employer (who is required to register its employees as members) at liberty to waive his or her right to take up membership of the employer's retirement fund? Second, should an employee choose not to exercise such a right, is his or her employer obliged to ensure that his or her employee is registered with the pensions fund? Third, assuming that the employer does not *nolens volens* register its employee, can such an employer be held liable for failing to do so? Put differently, can it be said that the employer acted unlawfully and unfairly by failing to register an employee as a member of a retirement fund when he was supposed to?

The aforementioned questions were grappled with by the Pensions Funds Adjudicator in the unreported determination of *Malatji v Gauteng Building Industry Provident Fund and others* (PFA/NP/9447/2011/PM) of 24 January 2013. This determination involved the failure of an employer to register an employee with a pension fund thereby resulting in meagre death benefits payable following the employee's death. The purpose of this case note is to review the Pension Funds Adjudicator's determination. The primary aim is to highlight the pitfalls and challenges facing employers when dealing with the decision whether to register an employee as member of a retirement fund or not.

2 Facts

The determination of *Malatji v Gauteng Building Industry Provident Fund and others* dealt with a situation where a deceased employee omitted to acquire membership of a retirement fund until a few months prior to his death. This resulted in the benefits payable in accordance with section 37C of the Pension Funds Act, which makes provision for the disposition of pension benefits upon the death of a member, being computed to a lump sum amount of R601.94. The complainant was aggrieved by the employer's failure to register the deceased as a member of the retirement fund from the date when he commenced his employment with the employer on 8 March 2004 and as a result causing a lower death benefit becoming payable upon his death. The complainant argued that the employer registered the deceased as a member of the retirement fund when it was clear that the member was ill. This was only in April 2011. Sadly, the member passed away three months later in June 2011. The complainant sought an order to the effect that the deceased's membership of the retirement be back-dated to 8 Mach 2004.

3 Central Question Before the Tribunal

The key issue to be determined by the Tribunal was essentially two-pronged. Firstly, the Tribunal had to establish whether or not a more beneficial death benefit would have been awarded had the deceased been registered as a member of the retirement fund at the commencement of his employment in March 2004. Secondly, the Tribunal had to decide whether the employer contravened the law by only registering the deceased as a member in April 2011 (par 5.1).

4 Complainant's Main Arguments

The reason for the complainant's prayer was two-fold. In the first instance, the complainant contended that the deceased's fellow workers were registered before him. She argued further that she was advised about the employer's duty to register its employees with the retirement fund arising from the Sectoral Determination 2: Civil Engineering Sector (the Sectoral Determination). It should be recalled that section 29 of the Sectoral Determination provides that:

> "(1) All the employers who do not have a retirement benefit fund in favour of their employees in place, shall by 1 March 2001, either join the Construction Industry Retirement Benefit Fund, or, whether independently or with other employers, do whatever may be necessary to have a retirement benefit fund registered in terms of the Pension Funds Act, 1956, in favour of their employees and shall confer the benefits or membership of such fund on their permanent employees. (2) The rules of the retirement benefit fund referred to above shall require that employers and employees contribute equally in respect of each employee's membership of the retirement benefit fund. (3) The rules of the retirement benefit fund shall provide for a risk benefit fund, which shall provide death, disability and funeral benefits".

Based on the aforementioned grounds, the complainant held the view that there was no justification for the deceased not to be registered as a member of the retirement fund (par 3.2).

5 Respondents' Main Contentions

5 1 The Retirement Fund and Retirement Fund's Administrator's Reply

Both the retirement fund and its administrator, in their reply, confirmed that that the deceased joined and remained a member of the retirement fund for a period of three months prior to his untimely death. Furthermore, they conceded that subsequent to the deceased's death, a death benefit to the tune of R601.94 became due. Moreover, they acknowledged that the retirement fund only received the deceased application for membership in April 2011. For this reason, it was argued that the retirement fund cannot accept the complainant's prayer that the deceased's membership be backdated to March 2004. To further support this view, it was contended that the retirement fund's rules and the Pension Funds Act do not provide for retrospective membership (par 4.2). Thus, the complaint against the retirement fund and its administrator deserved to be dismissed.

5 2 The Employer's Response

The employer, in its response to the complainant, agreed that it was required by section 29 of the Sectoral Determination to either join the Construction Industry Retirement Fund or register a fund to which its employees shall belong (par 4.3). Secondly, it submitted that the deceased was in its employ on permanent basis since 1 March 2004 and had accepted the terms and conditions of his employment. It pointed out that the deceased's contract of employment at the time of his employment spelled out the fact that the retirement fund was not applicable to him. However, in 2005 an opportunity was presented by the employer to the deceased and his colleagues to complete forms and express their desire to join the Gauteng Building Industry Provident Fund (i.e. the first respondent). Regardless of the employer's effort, the deceased chose not to join the retirement fund. In addition, neither the deceased nor his trade union seemed to have any issues with the fact that he was not registered with the retirement fund. The lack of interest in this matter changed only in April 2011 when the deceased approached the employer expressing his intention to belong to a retirement fund. Based on the employer's submission, it appears that the deceased's change of heart was inspired by his illness. Nonetheless, the employer duly processed the deceased's membership and commenced with the payment of contributions on the deceased's behalf. The employer protested that the allegations levelled against it were unfounded. The reasons for this stance were as follows:

"(a) First, the employer was of the view that the fact that the deceased could approach the employer and request to be registered with the retirement fund confirms that he was well aware of his option to join the retirement fund but elected not to file a grievance about his unfair treatment by the employer as intimated by the complainant (par 4.4).

(b) Secondly, the employer maintained that the deceased was fully cognisant of the opportunity he was afforded to join the retirement fund and chose to turn it down.

(c) Lastly, the employer averred that it did not extend contributions and retirement fund membership on a discriminatory basis."

6 Determination and Order

The employers defence against the complaint fundamentally rests on the sentiment that it is nobody's fault but the deceased's that the benefits due to his survivors and beneficiaries are low. He had an opportunity to apply for membership. Nonetheless, he freely and voluntarily declined it. In dealing with this contention, the Tribunal referred to the Sectoral Determination and the Income Tax Act 58 of 1962. The Tribunal found that the Sectoral Determination does indeed place a duty on an employer to participate in a retirement fund. The effect of this duty is that permanent employees of such an employer become members of the retirement fund that the employer participates in. Put differently, the Sectoral Determination makes it obligatory for permanent employees in the civil engineering sector in South Africa to take up membership of a retirement fund. Even so, there is a choice to belong to the Gauteng Building Industry Provident Fund or a separate retirement fund in which their employer participates. Seeing that there was nothing to suggest that the employer participated in any other fund, the Tribunal found that it was obligatory and should have been a condition of employment of the employer's permanent employees to become members of the first respondent (par 5.8). The Tribunal proceeded by referring to section 1 of the Income Tax Act. This section defines a pension fund as "any pension, provident or dependants' fund or pension scheme established by law…that the rules of the fund provide…that membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein who enter his employment on or after the date upon which the fund comes into operation; or the employer becomes a participant in that fund".

Based on the aforementioned definition, the Tribunal found that an employer is duty-bound to "make it a condition of employment that all its employees who are eligible to become members of the fund in which it participates, become members of such a fund and remain as such throughout their period of employment" (par 5.9). It found further that the employer's averments that the employee declined the offer to join the retirement fund showed that the employer did not make it compulsory for its permanent employees to become members. This was contrary to the provisions of the Sectoral Determination and the Income

Tax Act. In so doing, the employer acted unlawfully by failing to compel the deceased to become a member of Gauteng Building Industry Provident Fund. According to the Tribunal, the employer should have registered the deceased with the retirement fund irrespective of whether he was acquiescent to such a proposition or not. Therefore, it was the employer's failure to act as prescribed by law that the deceased's survivors' and beneficiaries suffered loss of benefits in the sense that they stood to be paid far less than what they would be entitled to had the employer registered the deceased as member with effect from March 2004. Thus, the Tribunal determined that the employer was liable to pay the death benefit as it would have become payable by the retirement fund at the time of the employee's death had the employer registered the deceased with effect from March 2004 (par 5.12).

In light of the preceding pronouncements, the Tribunal ordered the retirement fund to, among others, compute the total death benefit that would have become due to the deceased's survivors and beneficiaries in accordance with its rules had he been registered by the employer as a member from his commencement of employment and assuming that he remained a member until the date of his death (par 6.1.1). The amount so calculated was to take into account the fund credit. The retirement fund was directed to investigate and allocate and award the death benefit payable to the deceased's qualifying dependants and beneficiaries in accordance with section 37C of the Pension Funds Act (par 6.1.3). The employer was ordered to pay the death benefit as calculated by the retirement fund to the survivors and beneficiaries of the deceased within two weeks of receiving the relevant information and documentation from the retirement fund (par 6.1.4).

7 Analysis

The Tribunal's decision to hold the employer liable clearly penalises the employer for neglecting to ensure that its employees are registered with a retirement fund. This is, for a range of reasons, a correct approach. Firstly, as apparent from the determination and order of the Tribunal above, the need for the employer to register its employees with a retirement fund was not an act of benevolence on the part of the employer to the extent that it could adopt an "if you don't want to, you don't have to" attitude. Secondly, assuming that it was an act of the employer's kind-heartedness, this could still raise some fairness issues if some employees were afforded the opportunity and others were not. Furthermore, it should be appreciated that the Sectoral Determination requires employers and employees to contribute equally in respect of each employee's membership. This could entail serious cost to company savings in favour of the employer if it does not have any other ways and means through which it ensures that those employees who elect not to join a retirement fund still benefit from what could have been the employer portion of the contribution. In the absence of such ways and means, it could be worth the employer's while not to try hard enough to persuade an employee to take up membership of a retirement fund.

Moreover, it should be recalled that in the complaint in question, the employer had an *ex lege* duty arising from Sectoral Determination promulgated in terms of section 56(1) of the Basic Conditions of Employment Act 75 of 1997 to comply with. Failure to comply with the duties imposed by a Sectoral Determination, as rightly contended by Van Jaarsveld and Van Eck (Van Jaarsveld and Van Eck *Principles of Labour Law* (3rd Edition) (2005) 56), may amount to "an offence, an unfair labour practice or [may] simply be unfair". Thus, the employer has to deal with the consequences of violating the law.

The overall message that emerges from the preceding pronouncements is that an employer should and will not be rewarded for failing to comply with its legal obligation. If that is the position, should an employee or his or her dependants be compensated for the employee's short-sightedness and laxity? A positive answer to the preceding question may seem severe to the penalized employer. This is mainly because, broadly speaking, it could be said that both the employer and employee in this case had a hand in the eventual and disadvantageous position that the survivors found themselves in. It should be remembered that the employee resisted the initial efforts to register him and elected to belatedly join the pension's fund. Thus, it is tempting to assert that the blame should be apportioned accordingly between the employer and employee since there has been some contributory negligence on the part of the breadwinner. In addition, this had to be reflected in the benefits payable to the survivors. If one is to view things from this perspective, it should follow naturally that an answer to the question posed above would be in the negative. Nonetheless, if one is to take a social insurance slant, such an approach is untenable and should not be endorsed. The point is that retirement funds are put in place as part of the social security system with the aim of protecting individuals and their dependants against social risks such as old age and death. Another crucial fact to be considered is that the employer acted contrary to the law (i.e. the pertinent Sectoral Determination) by making it optional for the employee to belong to the pension's fund. Put differently, the employer acted unlawfully by offering the employee an opportunity to make a choice which he should have not been provided with in the first instance. Accordingly, the employee and/or his or her dependants should not be punished for the unlawful actions of the employer. The point is that in this case the fault rests with the employer and it is the employer alone that should carry the cost of not complying with the law.

A compulsory approach, adopted by the Sectoral Determination, supports social policy objectives such as the pooling of risks (see, for example, Walker *Social Security and Welfare: Concepts and Comparisons* (2005) 76-77) and other related objectives such as preventing individuals and their dependants from becoming destitute and (unnecessarily) weighing down the public coffers. These objectives have to be taken into account when determining matters similar to the one under review. Needless to say, employers cannot be allowed to frustrate the aforementioned social objectives by neglecting to comply with their

legally imposed social security obligations. Another point to be noted is that, compulsory social insurance is generally less punitive to (prospective) beneficiaries and their dependants if doing so would expose them (severely) to social risks or make them reliant on the social grant system. For example, a person who suffers injuries at work due to his or her wilful misconduct may, in accordance with the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), be barred from claiming benefits from the Compensation Fund. This is in accordance with an approach where a person is prevented from being compensated for a risk he or she willingly assumed. However, COIDA does make provision for the payment of benefits in a situation where the accident arising from wilful misconduct results in serious disablement (s 22(3)(a)(i) of COIDA) or the employee dies as a result of the accident leaving a dependant wholly financially dependent upon him (s 22(3)(a)(ii)of COIDA). The thinking here, it seems, is that even if one voluntarily assumes risks there are instances where the risk assumed could inflict insurmountable harm to the risk taker, those close to him or her and the society at large. Thus, the most appropriate course of action to mitigate that risk is for a social insurance scheme to intervene by availing benefits – be they in cash or kind. Furthermore, social security is a human right (s 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (Constitution)) and is crucial in aiding individuals and their families to enjoy other fundamental rights such as human dignity (s 10 of the Constitution) and life (s 11 of the Constitution). Therefore, it would seem socially and morally objectionable to punish employees and their survivors for the failure of employers to comply with legally imposed social security obligations. One could aver that the breadwinner was imprudent in making the choice he made. However, as true as this sentiment may be, this does and will not warrant a situation where survivors are penalised for the foolhardiness of their breadwinner. This is primarily due to the fact that the South African social insurance law, as it can be deduced from the preceding discussion, does not subscribe to a rigid adherence to the common law doctrine of *volenti non fit injuria*.

In the final analysis, the decision reached by the Pension Funds Adjudicator is a correct one and should not be faulted. Without retracting from the correctness of the determination and the need for as well as importance of employers and their employees to take their social insurance duties seriously, it is incumbent upon social insurance institutions, social insurance administrators as well as public and private social insurance funds to embark on and/or intensify efforts to educate the public on their services, risks they cover as well as benefits they offer. This proposition stems largely from the fact that human beings are, for a variety of reasons, more concerned about the so-called "here and now risks" (e.g., putting food on the table) and have the propensity of underestimating their own risks (International Labour Office *Into the Twenty-First Century: The Development of Social Security* (1986) 97). As pointed out by McGillivray (McGillivray "Contribution evasion:

Implications for social security pension schemes" (2001) *International Social Security Review* 3 at 6):

> "Current consumption needs can lead *workers* to seek to evade paying social security contributions, especially when the contribution rate is high. Poverty, temporary financial hardship and, particularly for young workers, expenses associated with family responsibilities are more immediate and pressing than paying contributions for a future retirement benefit. Myopic behaviour - placing too low a value on future retirement consumption needs - led to state intervention to set up retirement benefit schemes, to avoid both the consequences of inadequate provision for retirement by myopic individuals and the burden which they would create for prudent persons who in a modern State would be called upon to support them." (Italics in the original).

8 Conclusion

This determination sends out a clear message to employers that if there is a legal duty imposed on them to register their employees with a social insurance fund they will be wise to comply with it lest they face the consequences. It is simply not adequate to aver that an employee had an opportunity to request that he or she be registered and did not use it. Thus, employers need to act firmly against recalcitrant employees or face the wrath of the social security adjudication institutions. Their myopic refusal to act immediately will undoubtedly cause problems in the future for the affected individuals as well as their dependants, the society at large (due to the increased cost of bankrolling the tax-financed social grant system) and most importantly, themselves as they are most likely to be ordered to cover the costs of the benefits to be disbursed.

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