

PENSION JUSTICE NPC

REDUCING PENSION BENEFITS - HOW FAR BACK CAN A FUND GO TO CUT BENEFITS?

MUDAU/ MUNICIPAL EMPLOYEES PENSION FUND

On Tuesday 7 March, lawyers for Pandelani Mudau will appear in the Constitutional Court against Mr Mudau's pension fund, the Municipal Employees Pension Fund, its administrators and the municipality where Mr Mudau worked.

Pension Justice directors, Hannine Drake and Lerato Molete will be appearing for the amicus curiae, the Institute for Retirement Funds Africa to shed light on the broader implications of the case for all pension funds, members and claimants.

Mr Mudau's resignation

Mr Mudau resigned with effect from 31 May 2013. This was his last day at work. He immediately notified the Fund of his resignation and a withdrawal benefit became payable to him.

The fund changes the game

About three weeks after resigning and notifying the Fund of his resignation, the Fund's management committee resolved to amend the rules of the Fund to reduce the benefits payable to members on withdrawal starting from effect to 1 April 2013 - two months before Mr Mudau's resignation became effective. The new rules were registered in April 2014.

As a result of the backdated amendment to the Fund rules, Mr Mudau, who was expecting a R2.1 million withdrawal benefit, received only R646,000.

Courts

Mr Mudau won his case with the Pension Funds Adjudicator and in the High Court. The Fund appealed to the Supreme Court of Appeal. Last year (2022) the SCA agreed with the Fund - saying that the Fund was entitled to change its rules and backdate the effect of the change, in ways that would even affect those members who had already resigned or left the Fund. The case is being argued in the Constitutional Court on Tuesday 7 March.

Section 13 of the Act - Who is bound by a pension funds' rules?

Section 13 of the PFA states that the registered rules of pension funds are binding on the fund and the members, shareholders, and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.

On 31 May 2013, Mudau stopped being a member of the Fund and became a claimant or creditor. Mr Mudau was bound by the Fund's registered rules as a person making a claim under those rules. At the time that Mr Mudau made his claim (31 May), the Fund's registered rules entitled him to the R2.1 million withdrawal benefit. The Fund rules had not yet been changed.

Section 12 of the Act

Section 12 regulates how Funds can change their rules - they can change their rules, provided the change to the rules only affects members and shareholders' rights, **not** creditors rights.

Mr Mudau argues that by the time the Fund's management committee met in June and resolved to change the Fund rules on withdrawal benefits, he was already a creditor, and had been for three weeks.

Section 37A of the Act

Section 37A states that no benefit provided for in the Rules of a registered fund or right to such benefit shall be capable of being reduced - even if a fund makes new rules.

PENSION JUSTICE NPC

The SCA

The SCA found that because the rule was backdated, it could apply to Mr Mudau and people in this position, to change their rights, even though they had become creditors of the Fund.

PENSION JUSTICE

Institute for Retirement Funds Africa advocate for the members and beneficiaries of pension funds across the continent - affiliates amount to over 500 funds and over 2 million fund members.

Advocates Hannine Drake and Lerato Molete, who are also **Pension Justice** directors, will argue that that even if the Fund's new rule was backdated, in the pension funds industry: (1) backdating is common, and (2) backdating is commonly understood to **not** affect the rights and benefits of people who have already made claims from the fund.

How the SCA position risks destabilising the entire retirement industry

The SCA has effectively said that a fund can backdate new rules to a date of their choosing, and interfere with members like Mr Mudau who have already become entitled to a benefit. The industry practice is essentially that a rule can be backdated, but that the rule cannot interfere with the benefits of members who have already become entitled to a benefit.

This makes sense because those members are totally unaware of any change in benefit. Imagine you know you are entitled to R2 million from your fund, only to be told months later that your fund changed its rules, to decrease your benefit by 70%? You would not have known about this rule, and not had a chance to challenge it.

The current limited backdating that takes place in the industry allows funds to plan financially for changes to claims made between the date when a rule is adopted and when a rule is formally registered. Funds must, however, stick to the original rules for claims made before the rules were changed.

If a fund is allowed to make new rules and if these rules affect people who have already made their claims, in practice, it would mean that:

1. Funds can now go after claimants to recover money paid to them if they were overpaid according to new rules.
2. Funds will have to pay claimants more money if they were underpaid according to new rules, but funds never planned for this.

Pension funds would even have to litigate for death benefits against bereaved family members if they were overpaid according to new rules. In certain types of pension funds, employers would have to recover overpayments or pay out underpayments.

Legal principles

This kind of instability is the reason why there is a legal presumption that new rules or laws are **not** retroactive - they do not apply to a time before they existed. Imagine if everyone was required to wear a face mask from the time a National State of Disaster was declared during 2020, but also, everyone who did not wear a face mask before that, had to pay a fine?

As Mr Mudau's lawyers have said: **"One can only imagine how a pension fund that does not wish to pay an accrued benefit to a former member can cynically amend rules with retrospective effect just so that it can avoid having to make payment and once payment is made under the amended rule, to change the rules again to what they were before."**