

## Sasol Limited v CINPF: The rules take precedence

Often our courts are called upon to adjudicate disputes relating to the interpretation of rules of pension and provident funds where there is a lacuna or disagreement among the relevant stakeholders. *Sasol Limited v Chemical Industries National Provident Fund [2015] ZASCA 113 (7 September 2015)* was one such matter. The issue at hand was whether members were validly transferred from one fund to another in terms of the rules of the former fund.

Briefly the facts of the matter were as follows. Prior 1 December 2011 most employees of Sasol who were members of CINPF were not entitled to terminate their membership while they remained in service. The rules of the CINPF prohibited it. A number of Sasol employees wished to transfer to other funds. As a result, an amendment to rules 3.4.1 and 10.2 of the CINPF was effected. In response to pressure from employees to transfer, Sasol decided to offer them an opportunity to do so during a "window period". Then Sasol informed CINPF that many employees wished to transfer and that a "window period" would open 1 October 2012 to 30 November 2012 during which employees would be permitted to transfer. In order to inform employees of the benefits offered by the different funds, they would be given an opportunity to attend information sessions during the window period at which presentations would be made by all the relevant funds. On 13 September 2012, Sasol instructed all of its plants to display a notice informing employees of the window period and the forthcoming information sessions. In the notice, Sasol set 1 January 2013 as the transfer date. CINPF objected that this decision was not compliant with the CINPF's rules and not in the best interests of members.

Sasol contended that after this amendment and with effect from 1 March 2013, its employees had withdrawn from the CINPF and were now members of new funds. Sasol consequently ceased paying employer and member contributions to CINPF from that date. The CINPF contended that no such withdrawal had taken place and therefore the Sasol employees remained members of the CINPF, and thus the contributions should have continued.

At the outset, the court confirmed that the rules of pension and provident funds are paramount and take precedence. The court commented as follows:

"The legal principles that apply to pension and pension funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents."

The court was also confirmed with approval the approach to be taken to the interpretation of documents as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*, in that language used in documents should be interpreted in its ordinary and grammatical meaning and such meaning which is sensible, reasonable and business-like.

The rules of the CINPF, which were pertinent to the dispute, read as follows:

- "Rule 3.4.1. Subject to the provisions of Rule 9.2.4, a Member shall not be permitted to withdraw from membership of the Fund while he remains in Service, except in the circumstances referred to in Rule 10.2.1
- Rule 10.2 Transfers out of the Fund
  - 10.2.1 Notwithstanding any contrary provision in the Rules, particularly Rule 3.4.1, existing Members who wish to transfer out of the fund while still in Service, must make a representation to the Trustees, through their Local Advisory Committee, in writing. Representation is to be made to the Trustees within such a reasonable period as the Trustees shall consider appropriate.
  - 10.2.2 The Trustees must ensure that the representation is investigated and confirmed prior to the submission of an application to the Registrar by conducting a clear and comprehensive communication exercise with the Members concerned in terms of Rule 13.1.8, and by obtaining the explicit approval of all the transferring Members.



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- 10.2.3 The Fund must be satisfied that a transfer is reasonable and equitable and that it accords full recognition to the rights and reasonable expectations of the Members.
- 10.2.4 Subject to the provisions of Rules 10.2.1, 10.2.2 and 10.2.3, if the transferred Member becomes a member of an Approved Provident Fund or an Approved Pension Fund established for the benefit of employees of the organization to which he is transferred, the Trustees shall transfer the Member's Fund Credit as at the Disinvestment Date plus any interest which may have become due to the Member by the fund, and thereafter, the Member shall have no claim on the Fund."

The court observed that the wording in these rules is not consistent. Rule 3.4.1 refers to withdrawing while rule 10.2 refers to a transfer. Sasol and CINPF accepted that the application to the Registrar mentioned in rule 10.2.2 is one made in terms of section 14 of the Pension Fund Act 24 of 1956. In view of this concession by the parties, the court commented that rule 10.2 deals with both the withdrawal of members and transfer of their assets and liabilities. Thus, the withdrawal of a member from the CINPF could not take place without the provisions of the other sub-rules being complied with and this assertion was conceded by Sasol.

The judgment read:

"In my view, this is correct. Although rule 3.4.1 mentions only rule 10.2.1, the latter rule triggers a process that requires compliance with rules 10.2.2 to 10.2.4. As mentioned, these deal with both the termination of membership and the transfer of members' assets and liabilities. This is clear from at least two factors. First, the requirement in rule 10.2.2 is that the trustees ensure that the representation (which I take to mean request or notice) to transfer out of the fund is confirmed before submitting an application to the Registrar. It makes no sense to contend that a member has already withdrawn before confirming a member's desire to do so. If a member does not confirm the representation, it can hardly be contended that the member in question has in fact withdrawn. Secondly, the requirement in rule 10.2.2 is that the trustees must obtain the 'explicit approval of the member'. This will almost certainly require the members concerned to be made aware of the financial consequences of a transfer to another fund. This is why a communication exercise must take place before the explicit approval is obtained. After the communication exercise it may well be that a member decides not to give approval. The approval must surely be obtained before it can be said that the member has transferred or withdrawn. A withdrawal from the CINPF thus requires the completion of the rule 10.2.2 process.

Under rule 10.2.3, the trustees must be satisfied in two respects. First, that the proposed transfer is 'reasonable and equitable' and, secondly, that the proposed transfer 'accords full recognition to the rights and reasonable expectations of the Members'. It was accepted by the parties that this requires a conscious decision to be taken by the trustees to the effect that they are so satisfied. It was also accepted by the parties that this must take place before an application under s 14 of the Act is submitted by the trustees to the Registrar.

I have mentioned that the rule 10.2.2 process may require completion and no decision was taken by the trustees to the effect that they were satisfied on the two aspects dealt with in rule 10.2.3. It cannot be said that the provisions of rules 10.2.1 to 10.2.3 have been complied with. The appellants accepted that effect has not been given to rule 10.2.4. As such, transfers of the 2444 affected members have not taken place."

On this basis and on the facts, the court held that Sasol have not complied with the rules of the CINPF governing transfers and as such, no transfer has taken place. Sasol was ordered to continue to pay contributions to CINPF up until such time a transfer has been validly effected in terms of CINPF's rules and section 14 of the Pension Fund Act.

The approach taken by the court in this matter is commendable and exemplary. Even though the members of CINPF wished to transfer to another fund, the rules of the provident fund were paramount and therefore strict adherence to them was imperative. In such instances, the trustees of the fund play an integral role in advancing and protecting their members' interests. Any interpretation to the contrary or otherwise will be tantamount to usurping the fiduciary duties of trustees

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