EMPLOYMENT LAW
ALERT

23 MAY 2022

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

FOR MORE INSIGHT INTO OUR EXPERTISE AND SERVICES

Can a retrospective amendment of a retirement fund rule impact accrued benefits?

For a long time, it was believed that the effect of a retrospective rule amendment to benefits that had accrued before the amendment was approved and registered by the Registrar of Pension Funds (Registrar) was settled in our law.

Clearly not, as the position has in our view now drastically been changed by the decision of the Supreme Court of Appeal (SCA) in *Municipal Employees' Pension Fund (MEPF) and Another v Pandelani Midas Mudau and Another* (1159/2020) [2022] ZASCA 46 (8 April 2022).

The central issue for determination in MEPF was effectively this: while section 12 of the Pension Funds Act 24 of 1956 (PFA) authorises the amendment of the rules of a fund with retrospective effect, does this mean that the amendment may operate to take away a right accrued in terms of the pre-amendment rule?

The PFA regulates the MEPF, which Mudau had been a member of since 2003. Mudau resigned from his employment with effect from 31 May 2013 and his membership of the fund also terminated on the same date. In 2013, section 37(1)(b)(ii) of the fund rules provided that a member who joined the fund after June 1998 would, upon resignation, be entitled to withdrawal benefits calculated as follows: the member's contributions, plus interest, multiplied by three. Having been warned by its actuaries that this rule provided for unsustainably high returns that could operate to the financial detriment of the fund, it resolved on 21 June 2013 to amend the rule, with effect from 1 April 2013, by providing for membership withdrawal benefits to be: member's contribution, plus interest, multiplied by 1,5. In other words, a lesser benefit. By making the amendment retroactive the fund sought to prevent a "*run*", that is, to avoid the danger that members might have resigned en masse 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 approved and registered it on 1 April 2014, with the effective date being 1 April 2013.

Mudau applied for his withdrawal benefits, which were paid to him on 18 October 2013, in terms of the amended rule.

APPROVAL BY THE REGISTRAR

Aggrieved by the reduced pay-out, Mudau lodged a complaint with the Pension Fund Adjudicator (Adjudicator), contending that his benefits should have been calculated in terms of the original rule. The argument was based on section 12(4) of the PFA, which provides that the proposed amendment would only take effect after it had been duly registered. The Adjudicator upheld the complaint. She held that the amended rule could not be applied to Mudau since it had not yet been approved by the Registrar when the benefits became due. Also, the amended rule could not be applied to benefits which accrued before the amendment became effective.

Aggrieved, the fund approached the High Court which on an eventual appeal upheld the Adjudicator's ruling that the amended rule could not be applied to withdrawal benefits that accrued prior to its approval by the

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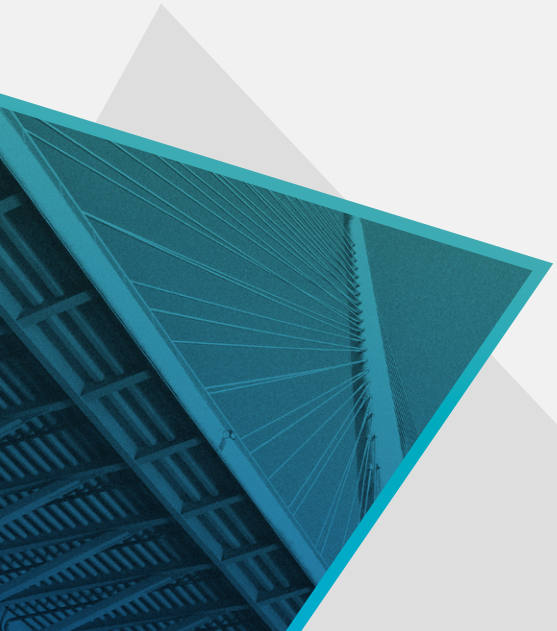

Registrar. This in our view is a correct assessment of the law. The SCA, however, held otherwise.

Like almost all other retirement funds, the MEPF under its Rule 48(1) was authorised to amend its rules, subject to the provisions of section 12 of the PFA. Section 12(4) of the PFA provides:

> *"If the Registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration."*

The Adjudicator found that the amended rules could not be applied to the calculation of a benefit that accrued to a member before the amendment had been approved and registered, even if the amendment was intended to be retrospective to a date before such time.

The Adjudicator's decision is also consistent with the well-known 2001 decision of the SCA in in *Mostert NO v Old Mutual Life Assurance Company* (SA) (2001) 4 All SA 250 (A) in which the court said:

> *"Registration [of the required rule amendments] was an essential prerequisite for any change in the status of the fund. Old Mutual's reliance upon a so-called practice in the registrar's office which allowed rule changes to take effect before registration is misplaced … [T]here is simply no basis in law for subjugating the provisions of the Act and regulations to such practice. It is one thing to give amended rules retrospective effect after registration; it is something entirely different to seek to give them binding effect before registration."*

SCA FINDING

With reference to section 12(2) of the Interpretation Act 33 of 1957, the High Court found that the PFA does not authorise the retrospective amendment of rights which have already accrued as was the case of Mudau. The SCA however disagreed, and it held that:

- section 12 of the PFA empowers a fund, subject to the approval of the Registrar, to amend its rules and to determine the date on which the amendment will become effective;
- if by the amendment of its rules the fund intends to interfere with rights retrospectively, this intention must be given effect to; and
- as the MEPF had decided that the amendment would have retrospective effect from 1 April 2013, its application to the calculation of Mudau's benefit had not been invalid and unlawful.

Can a retrospective amendment of a retirement fund rule impact accrued benefits?

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This is drastic in our view.

The SCA found that the amended rule explicitly provides that it operates retroactively. This would thus reduce pension benefits due to members with effect from 1 April 2013. The SCA held that there could hardly be a clearer indication of an intention by the fund to interfere with existing rights with effect from such earlier date. Also, the court held that there were no statutory impediments to the Registrar approving and registering a rule which sought to impair rights that accrued before its registration. These conclusions, in our view, also overlook section 37A of the PFA which states that:

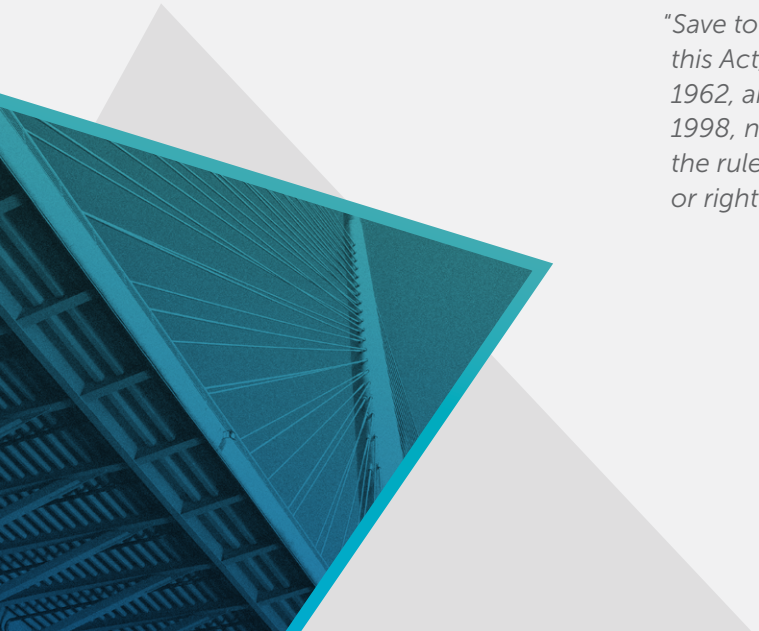
> *"Save to the extent permitted by this Act, the Income Tax Act, 1962, and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund … or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded."*

The financial consequences for member accrued benefits are dire and now become uncertain because of this judgment effectively provides that an accrued right may now be reduced on a rule amendment.

An appeal to the Constitutional Court would, in our view, be justified to now settle the law.

The MEPF case has certainly set a cat amongst the pigeons.

IMRAAN MAHOMED



A game of chance? How to select the right mediator

With the massive backlog currently being experienced at the Commission for Conciliation, Mediation and Arbitration, bargaining councils and the Labour Courts as a result of the lockdowns caused by the COVID-19 pandemic, now, more than ever, mediation is a process that should be front of mind. However, the appointment of an appropriate mediator is not a game of chance and should not be determined on a whim.

For reasons set out below, in our experience the consideration of an appropriate mediator is as important as the preparation for the mediation itself and, yes, mediation requires preparation. It should not be a random choice even where a dispute resolution agency or a mediation panel provides a list of potential mediators for the parties to consider. In Kenya, for instance, a mediation panel exists that is supervised by the courts and which provides a list of mediators for parties to consider when they elect to use mediation to resolve their dispute.

When used appropriately, mediation is an effective process for resolving conflict between disputing parties. At its core is a focus on the parties reaching an agreement of their choice through a facilitated negotiation. The mediator facilitates the negotiation process by applying a range of process, relationship, and negotiation skills. The mediator performs their role on an off-the-record basis and often in separate meetings with each of the parties. The mediator serves as a conduit between the negotiating parties. However, mediators are unique and are not necessarily suited to every dispute. The selection of the appropriate mediator for a dispute is a critical early consideration.

The parties must agree on the appointment of a mediator very soon after agreeing to use mediation as a process. This choice is ideally reached with guidance from lawyers, dispute resolution agencies, online research, or historical experience with the mediator. Quite often, a mediator is simply appointed based on someone's passing word, availability or price. Parties need to be more astute in their selection of a mediator where they seek to extract value from the process. In fact, the parties pay for this privilege and must use it wisely. This decision is not an easy one and below we seek to provide some guidance on how to go about it.

MEDIATOR'S TRAINING

There are numerous mediation courses on the market and the accreditation offered varies. A starting point would be to research the credibility of the mediator's training qualification and its recognition in the jurisdiction/s in which the dispute exists. The training qualification of a mediator does not, however, necessarily make a person *"the"* mediator for a particular process. A reliable mediator qualification is certainly the bare minimum that a party must seek. However, there are mediators who perform excellently and do not have any formal qualifications. They have the benefit of experience and, importantly, reputation. This may also mean that such a mediator is easily trusted by both parties.

EXPERIENCE

Experience is a key driver of a mediator's success as it allows the mediator to apply their tools, skills and knowledge in a wide variety of matters. With more practice the

A game of chance? How to select the right mediator

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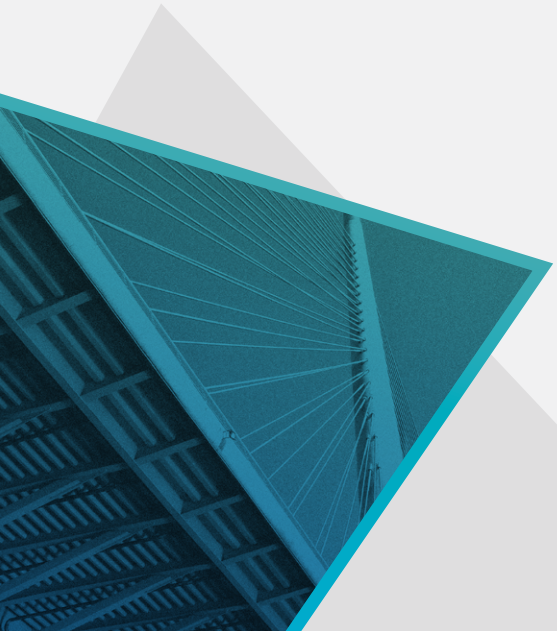

mediator's knowledge and skills evolve and their tools are sharpened. A track record of mediation is a useful basis to evaluate the extent and type of experience. It will provide guidance to the parties. Parties should consider interviewing prospective mediators before making an appointment so that they can consider the factors raised here and also consider personality, knowledge and rapport. Having said this, many new mediators do exceptionally well when provided with an opportunity. This encourages growth and diversity in the pool of mediators. At times, experienced mediators can be paired up with junior mediators to guide and advise them. Parties could also use new mediators in smaller matters first.

SPECIALISATION

There are special areas of law or facts that require a mediator to have specialised knowledge. This allows the mediator to receive information, understand and respond much quicker than a mediator who needs to be *"educated"*. Parties often find comfort in knowing that the mediator is an expert in the field of the dispute and may be inclined to select a mediator solely on this basis. Lawyers may have greater knowledge of the reputation and legal acumen of lawyers in specialised fields who are now mediating. Having said this, an experienced mediator is, however, potentially able to handle any dispute as the skills, tools and knowledge employed in the mediation process are generally the same. In addition, a mediator's lack of detailed legal knowledge on the topic in dispute may prevent the mediator from being overly evaluative of the merits. As such, if the parties seek a more facilitative mediator, they may want to select a mediator who is not a specialist in the relevant field of law. To avoid potential prejudice, the level of representation during a mediation may inform the level of specialist knowledge that the mediator must have.

REPUTATION

Reputation is earned and built over a long period of time. The reputation of the mediator is important to consider as it will provide a sense of ethical conduct, trustworthiness, and comfort. At times, mediators claim a *"status"* through effective marketing or their personalities and this may falsely guide parties. Parties must judge the reputation of the mediator based on sound factors and not simply what is portrayed on the surface. Lawyers are generally able to provide guidance in this regard.

ASSOCIATIONS OR PANELS

At times, referrals to mediators happen through associations or panels that are managed and owned by dispute resolution agencies. These associations and panels play a crucial role in ensuring that mediators obtain work. Parties rely on the credibility of the associations and panels that are managed by dispute resolution agencies or organisations. These association or panels are tasked with advising, guiding and determining which mediator is appointed to a

A game of chance? How to select the right mediator

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dispute. Where parties outsource the choice of the mediator it is imperative that the make-up, practices and ethics of the dispute resolution agency are evaluated carefully. It is advisable for the parties to work with the dispute resolution agency in considering all the factors prior to selecting a mediator.

ARBITRARY FACTORS

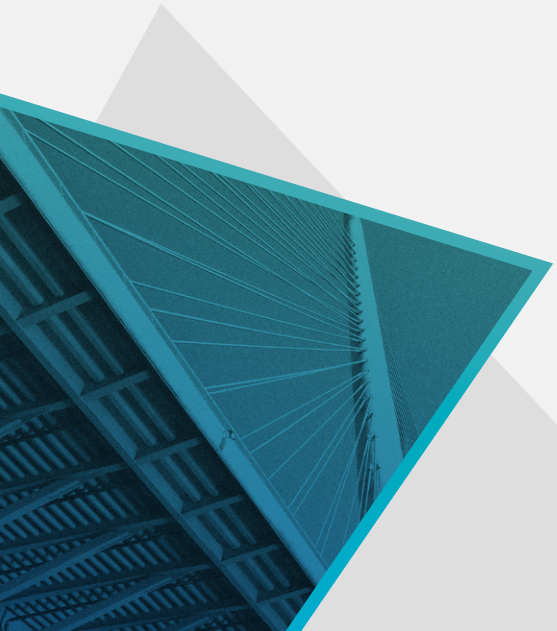
Parties may consider the ethnicity, race, religion, age, sexual orientation and similar arbitrary factors to determine whether a mediator should be appointed to a dispute. At times these factors play a greater role then the other substantive factors in determining whether a mediator will be appointed. The parties' bias, implicit or otherwise, influence the selection of the mediator. This method of selection poses risks to the parties, especially when selecting from a pool of random mediators. However, the parties may use some or all of these arbitrary factors in selecting a mediator from pool of equally competent mediators. In such an instance, the application of the arbitrary factors may enhance the impression in the minds of the parties that there were will be greater fairness.

PRACTICAL FACTORS

The parties' selection of a mediator may be constrained as a consequence of the location, price or availability of the mediator. These practical factors are unavoidable and must be considered when scheduling the mediation. Ideally, a mediator should not be appointed simply due to these factors alone. Parties must rather conduct a complete assessment of the mediator and make a decision based on more credible factors. It is better to select the right mediator overall than the cheapest and fastest available mediator.

A joint interview by both parties conducted with the mediator could give them a sense of the mediator's personality, demeanour, manner of communication and responses to a wider range of questions. The rapport between the mediator and the parties is an important factor in the success of the mediation.

Overall, the selection of a mediator is an important decision that the parties need to make with careful consideration of a range of factors. Mediation provides an opportunity for all parties to find a resolution to a dispute. It does take time and cost money, but the right mediator adds tremendous value to the parties. Parties must take advice from their lawyers and seek the expertise of professional dispute resolution agencies when selecting a mediator.



A game of chance? How to select the right mediator

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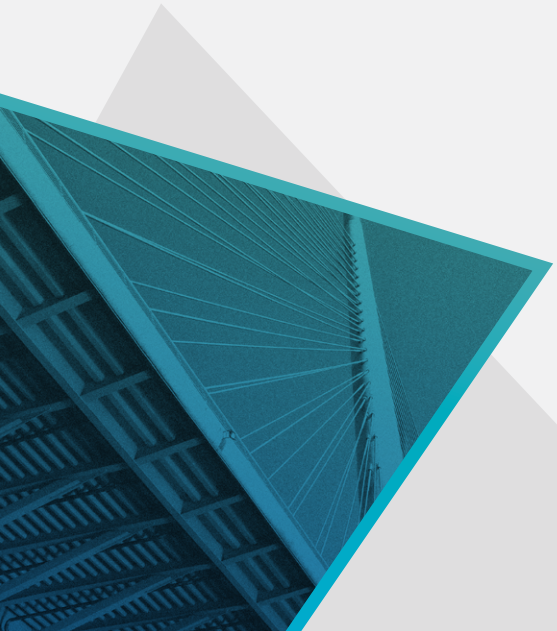
We include a simple checklist below that will assist you in asking the right questions:

1. Does the mediator have suitable qualifications and accreditation?
2. Do I need a specialist mediator in the subject of the dispute? Be it legal, business, technical, or industry expertise.
3. Do I need an experienced mediator and to what level? 0–5 years (junior), 5–10 years (moderate) or 10 years + (senior)?
4. What is the reputation of the mediator? What do colleagues say? What do clients say? What does my adviser say? What references do I have? What does a general internet search raise?
5. Does the mediator belong to an association or panel and what advantages do I get from working through the agent?
6. Will any arbitrary factors play a role in the acceptance or credibility of the mediator in the minds of the parties? Factors such as age, race and gender could be considered.
7. Does the mediator meet the practical considerations for the process? Including price, availability, location and transportation.
8. Do I need to interview the mediator to gather more insight?

Mediation is a valuable tool in effectively resolving disputes. It is also becoming part of the civil court process and it is worthwhile for those involved in disputes to become acquainted with how to successfully use this tool with the aim of at least achieving an early resolution.

IMRAAN MAHOMED AND EBRAHIM PATELIA



More onerous and less onerous: Employment Equity Amendment Bill

The National Council of Provinces passed the Employment Equity Amendment Bill (Bill) on Tuesday, 17 May 2022. The Bill is in its final stage of promulgation as it has been sent to the President for signing. The Bill will amend the Employment Equity Act 55 of 1998 (Act).

Two of the major changes brought about by the Bill are that; the definition of "*designated employer*" has been narrowed, and the Minister of Employment and Labour (Minister) has been empowered to determine sectoral numerical targets.

In the current Act, an employer that employs fewer than 50 employees (small businesses), but has a total annual turnover that is equal to or above the applicable annual turnover contained in Schedule 4 of the Act, is deemed to be a designated employer and falls within the scope of application of Chapter 3 of the Act (which deals with affirmative action measures).

The aforementioned inclusion of small businesses has been removed in the Bill, having the effect that Chapter 3 of the Act will no longer apply to small business regardless of their turnover. Accordingly, these employers will not be required to have an employment equity plan, submit reports, and the like. In this regard it is noteworthy that section 14 of the Act, which permits for voluntary compliance with Chapter 3, has been repealed.

The second major amendment, for the purposes of this article, is that of the newly created section 15A, with the pertinent aspects being:

- The Minister may identify national economic sectors, which in terms of the Bill are defined as *"an industry or service or part of any industry"*.
- For any economic sector that has been identified, the Minster may set numerical targets to ensure equitable representation of suitably qualified people from designated groups at all occupational levels in the workplace.

The sectoral targets shall be published in the Government Gazette, allowing interested parties at least 30 days to comment on them. There is a likelihood that substantial litigation will flow from the setting of such targets.

It is envisaged by the Director of Employment Equity that all current employment equity plans will fall away and be replaced with new employment equity plans in terms of the Bill.

Several additional sections have been amended for alignment with section 15A. In this regard, section 20 has been amended by the insertion of section 20(2A). This amendment requires that a designated employer, in its employment equity plan, align numerical targets with the applicable sectoral targets as set by the Minister.

More onerous and less onerous: Employment Equity Amendment Bill

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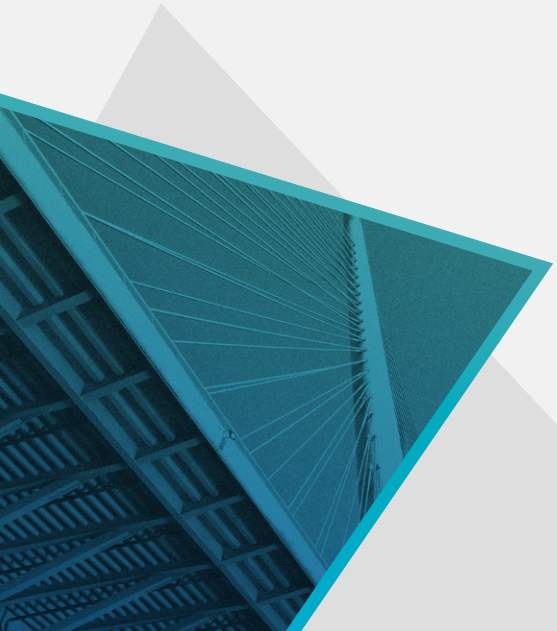
Section 42, which pertains to assessment of compliance with the Act, has been amended by the insertion of section 42(1)(aA). This amendment essentially has the effect of adding the requirement of alignment with the Minister's sectoral targets in so far as compliance with the Act is concerned. Further, the amended section 53 requires a designated employer to set its numerical targets in accordance with the applicable sectoral targets determined by the Minister as a prerequisite for a compliance certificate to permit contracting with the state.

The essence of these amendments would result in less onerous compliance for small businesses and more onerous provisions for larger businesses.

HUGO PIENAAR AND GABBY SCHAFER



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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