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Employment Law ALERT

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Criminal sanction and dismissal for failure to comply with mandatory vaccination and dissemination of false news regarding vaccine efficacy

The COVID-19 pandemic has been the most significant global public health issue in recent memory, and certainly the most serious in terms of its global effect after the HIV/AIDS epidemic that first surfaced in the 1980s.

The urgency to obtain a medical intervention that would save people from severe illness, hospitalisation, and death as a result of a COVID-19 infection came in the form of a vaccine. Since the rollout of COVID-19 vaccines, there has been broad medical consensus that the relevant COVID-19 vaccines are safe for use, including by state medical regulatory authorities. Despite this, there was and continues to be reluctance on the part of many people who doubt the safety and efficacy of the vaccine based on sources of information that constitute misinformation and which do not reflect the consensus of the medical fraternity, the World Health Organization, and local public health and medical organisations and regulatory bodies.

In South Africa, section 11(5) of the Regulations issued by the Minister of Cooperative Governance and Traditional Affairs, in terms of section 27(2) of the Disaster Management Act 57 of 2002, on 18 March 2020 during the height

of the COVID-19 pandemic, made it an offence for any person to publish any statement with the intention to deceive any other person about COVID-19, including any measure taken by the Government to address COVID-19.

In Brazil, a series of bills are before congress that seek to classify as a crime, punishable with imprisonment, the conduct of failing to submit, without just cause to mandatory vaccination in a public health emergency, such as COVID-19, as well as to criminalise the creation, dissemination or propagation of false news about vaccines or, in any way, discourage vaccination. If enacted, these laws will implement a radical legal approach to the problem of vaccine hesitancy and the circulation of false news and information not corroborated by medical consensus in relation to vaccines. While such laws may inhibit the dissemination of misinformation on vaccines and increase the uptake of vaccination, they do have a direct implication on freedom of speech and on a person's agency to determine what medical interventions they are comfortable acceding to.

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Criminal sanction and dismissal for failure to comply with mandatory vaccination and dissemination of false news regarding vaccine efficacy

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In the South African context, a middle ground was struck in the employment context where an employer is entitled to institute a mandatory vaccination policy after conducting a risk assessment and making a determination that mandatory vaccination is required in terms of securing a safe working environment and in respect of its operational requirements. In the event of an employee who objects to vaccinate on constitutional or valid medical grounds, and if after due consideration, the employer is unable to accommodate the employee, then the employer may proceed to terminate employment. However, despite this process that allows for a mandatory vaccination policy by employers, there has regrettably been an uneven and inconsistent approach by the Commission for Conciliation, Mediation and Arbitration (CCMA) in arbitrating dismissals due to a refusal to comply with a mandatory vaccination policy over the last year.

Despite a reduction in severe cases of COVID-19 globally, and the opening up of the world over the last 12 months, the use of vaccines as a first line of defence against serious illness and the spread of COVID-19 is still current. The lessons learnt from this experience will definitely inform lawmakers, public health officials, and government strategies in relation to important future public health issues including, but not limited to, the spread of infectious diseases.

We now wait patiently as the CCMA arbitration awards work their way into the Labour Court system to determine how the courts will deal with dismissals related to vaccine refusals.

**Nadeem Mahomed and
Imraan Mahomed**



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Not respecting your dying wish: Pension fund trustees are not bound by beneficiary nomination forms

In the recent case of *Ndwandwe v Trustees of Transnet Retirement Fund and Others* [2023] ZAKZDHC 8 (22 February 2023) the High Court in Durban again had to deal with the question of whether the trustees of a pension fund can deviate from the wishes of a member as recorded in the member's beneficiary nomination form.

Retirement funds rules are the main source of the rights and obligations that regulate the relationship between the fund on one hand, and its members and the employer, on the other. The board of trustees of a fund are therefore guided by the rules of that fund.

Background

A summary of the facts is set out below.

Mkhawuleni Paulus Ndwandwe (the deceased) died on 19 September 2018. He was survived by Xoshwaphi Ndwandwe (Mrs Ndwandwe), who he married in terms of customary law in 1988, and his common law wife, Thowi Alvinah Ngcobo (Ms Ngcobo).

At the time of his death, the deceased had 10 children, five born from his relationship with Mrs Ndwandwe, two born from his relationship with Ms Ngcobo, two adult sons born of another prior relationship, and Nosipho Andiswa Mbambo, a minor child born from a relationship with the sixth respondent.

At the time of his death, the deceased was employed by Transnet and was a member of the Transnet Retirement Fund (fund). On 27 October 2000, the deceased completed a beneficiary nomination form in which he nominated the following people to receive a portion of the death benefit: Mrs Ndwandwe, two of his children with Ms Ndwandwe, and two of his children with Ms Ngcobo.

Notwithstanding the nominees and percentages stipulated by the deceased in the nomination form, on 18 March 2019 the fund resolved to apportion the death benefit as follows:

- 40% each to Mrs Ndwandwe and Ms Ngcobo
- 3,66% each to the adult sons born of another prior relationship
- 12,69% to the minor child, Nosipho

Mrs Ndwandwe sought to review and set aside this apportionment by the trustees of the fund before the High Court.



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Rules of the fund

In her application, Mrs Ndwandwe contended that the trustees of the fund committed a reviewable irregularity in ignoring the contents and stipulations in the deceased's nomination form.

The trustees of the fund disagreed with Ms Ndwandwe and argued that it was not bound by the nomination form and was entitled to make an independent apportionment of the deceased's death benefit to his qualifying dependents as defined in terms of the fund's rules, and specifically Rule 10.4(iii).

In this regard, Rule 10.4 (iii) provides that:

"If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within 12 months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the trustees may deem equitable: Provided that this paragraph shall not prohibit the fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees."

The issues before the court

Although Mrs Ndwandwe raised several grounds of review, the court dealt with the following core issues that required determination:

- Did the trustees of the fund comply with the provisions of [Rule 10.4\(iii\)](#) of its rules when deciding how to apportion the deceased's death benefit?
- Did the trustees of the fund act reasonably and rationally in arriving at the decision?

Finding

The court found that Rule 10.4(iii) permitted the fund to make any distribution to nominees or dependents that it deemed equitable. Having identified the potential class of dependants, the court further held that the trustees of the fund were vested with a large discretion to determine, in the light of its assessment of their respective needs, in what proportions the death benefit of the deceased would be distributed among his dependants.

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The court consequently held that the test in law was whether the trustees of the fund had acted rationally and arrived at a proper and lawful decision in the manner that it distributed the death benefits amongst the deceased's dependants.

In this regard, the court held that the decision of the trustees of the fund was rational and equitable in terms of law and as required by Rule 10.4(iii) of the fund rules. The court further held that the decision of the trustees of the fund complied with the test, having considered the fund's rules and the surrounding circumstances of the matter.

Conclusion

This judgment accords with the prevailing law set out in section 37C of the Pension Funds Act 24 of 1956 (PFA). The PFA empowers a board of trustees to take all reasonable steps to identify and locate all potential dependents and beneficiaries of the deceased member's death benefits and to distribute the benefits in a rational and equitable manner. The board of trustees is therefore not bound to rely solely on the information that is brought to its attention through a member's nomination form.

Members of pension funds should, therefore, take note that a pension fund is not bound by their nomination form. The fund has a wide discretion to distribute the death benefits in accordance with what it considers to be rational, equitable and in compliance with its rules. This is not to say that a member should not complete a death beneficiary form as a member would be ill-advised not to do so. The form remains an important document for consideration by trustees.

The fund may therefore apportion death benefits to the member's nominees as well as identified dependents and beneficiaries who are not included in the nomination form, subject to the wording of its rules.

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