

# Legal Report April 2017

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## *Newsletter of Sanlam Employee Benefits: Legal*

### **1. Draft Information Circular on the cancellation of the registration of a fund; the termination of the participation of an employer in an umbrella fund; the appointment of trustees in terms of section 26(2) of the Pension Funds Act**

The Financial Services Board (FSB) on 5 April 2017 issued the above draft information circular for comment. Comments must be submitted to the FSB by 15 May 2017.

The circular seeks to provide clarity on the requirements for the cancellation of the registration of a fund, and the termination of the participation of an employer in an umbrella fund. The circular further provides clarity on the appointment of trustees in terms of section 26(2) of the Pension Funds Act ("the Act").

#### The cancellation of the registration of a fund

A fund will have ceased to exist when it no longer has any assets, liabilities or members, or any pending litigation against it. So as to enable the Registrar of Pension Funds ("the Registrar") to be satisfied that a fund has ceased to exist, the Registrar must be provided with a declaration by at least two of the following persons:

- A former member of the board of the fund;
- The principal officer of the fund;
- A member of the board of the fund;
- The fund's valuator or actuary who was the fund's valuator immediately before the termination of the fund;
- The fund's auditor;
- A representative of the fund's administrator or former administrator.

If the fund has ceased to exist as a result of a full transfer in terms of section 14 of the Act, the above persons must in the declaration confirm that the fund has terminated as all assets, liabilities and members have transferred in terms of a full transfer.

If the fund has ceased to exist as a result of the last member receiving his/her benefit, the above persons must in the declaration confirm that they have taken all reasonable steps to ensure that all benefits due to members have been paid, and that the fund has no further assets, liabilities and members.

In both the above scenarios the relevant persons must also in the declaration confirm the following:

- that there are no outstanding contributions due to the fund;
- that there are no unresolved complaints in respect of the fund; and
- that they are not aware of any possible prejudice that may be incurred by any member or beneficiaries of the fund.

The Registrar will prior to the cancellation of a fund publish a notice of the intention to cancel the fund, in accordance with the requirements of the Promotion of Administrative Justice Act, and on the FSB website, for a period of 30 days, during which period any person may submit reasons to the Registrar why the fund should not be cancelled.

#### The termination of the participation of an employer in an umbrella fund

The participation of a participating employer in an umbrella fund will have terminated when the fund no longer has any assets, liabilities or members in respect of the participating employer, or any pending litigation against it in respect of the participating employer.

If the participation of an employer in an umbrella fund has terminated, the board of the umbrella fund must apply for the withdrawal of the registered special rules of such participating employer.

If the participation of the employer has terminated as a result of a full transfer in terms of section 14 of the Act, the Registrar must be furnished with a declaration by the chairperson of the umbrella fund confirming that the participation of the employer terminated, and that all assets have been transferred to the transferee fund.

If the participation of the employer has terminated as a result of the last member of the employer receiving his/her benefit, the Registrar must be furnished with a declaration by the chairperson of the umbrella fund confirming that the participation of the employer in the fund terminated. The chairperson must further confirm that he/she has taken all reasonable steps to ensure that all benefits due to members have been paid, and that the employer has no further assets, liabilities and members.

In both the above scenarios the chairperson of the umbrella fund must also in the declaration confirm the following:

- that there are no outstanding contributions due by the participating employer;
- that there are no unresolved complaints in respect of the participating employer; and
- that he/she is not aware of any possible prejudice that may be incurred by any member or beneficiaries in respect of the participating employer.

#### The appointment of trustees in terms of section 26(2) of the Act

Section 26(2)(a) of the Act provides that the Registrar may make appointments to the board of a fund in the circumstances contemplated in section 26(2). The duties of a section 26(2) board are the same as that of any other board, and may be further expanded by the Registrar according to the circumstances of the fund. These duties may *inter alia* include the following:

- constituting a board in terms of the rules of the fund;
- management of the fund;
- ensuring compliance with all applicable laws;
- applying for exemption in terms of section 7B of the Act;
- submitting rule amendments to the Registrar for approval;
- entering into or renewing contracts and service level agreements with service providers;
- the approval and submission of outstanding annual financial statements, actuarial valuations, surplus apportionment schemes, regulation 28 quarterly reports and reports required by the South African Reserve Bank;
- collecting of outstanding contributions or schedules from any participating employer;
- opening a bank account in the name of a fund;
- taking investment decisions in accordance with the investment policy of the fund;

- providing members with annual benefit statements;
- transferring of assets, liabilities and members to other funds;
- paying benefits in terms of the rules of the fund;
- maintaining fidelity cover for the fund and its officers; and
- in the event that a valid board cannot be established - apply to the registrar for the approval of the appointment of a liquidator; or apply for the cancellation of the fund.

*Retirement funds or other clients requiring more information should not hesitate to contact their consultant.*