Sanlam

Legal Report January 2018

Insurance | Financial Planning | Retirement | Investments | Wealth

Newsletter of Sanlam Employee Benefits: Legal

1. Taxation Laws Amendment Act, 2017 (“TLAA”)

The TLAA was promulgated on 18 December 2017. The main provisions affecting retirement funds are the following:

1.1 Postponement of annuitisation requirement for provident funds to1 March 2019

In 2015, amendments were made to the Income Tax Act to the effect that provident funds will be treated like pension and retirement annuity funds and will be required to annuitise retirement benefits. This implies that on retirement, members of a provident fund will be permitted to take up to one-third of the retirement benefit as a lump sum and must annuitise at least two-thirds. However, this will only be applicable in respect of contributions made to a provident fund after the implementation date of the amendments. All contributions made before the implementation date, and growth on those contributions, may still be taken as a lump sum on retirement.

The above-mentioned amendments were supposed to come into effect on 1 March 2016 but were postponed for two years until 1 March 2018 in order to provide sufficient time for the Minister of Finance to consult with interested parties, including National Economic Development and Labour Council (NEDLAC), regarding the annuitisation requirements for provident funds after the publication of the comprehensive policy document on social security, and to report back to Parliament on the outcome of those consultations no later than 31 August 2017.

Since discussions on the comprehensive paper on social security are still underway at NEDLAC, the TLAA postponed the provisions relating to the annuitisation requirements for provident funds for one year from 1 March 2018 to 1 March 2019. The deadline for the Minister of Finance’s report referred to above has also been postponed for a year, i.e. to 31 August 2018.

Note that the annuitisation requirements discussed above with regard to provident funds will also apply in respect of provident preservation funds.

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1.2 Transferring retirement benefits after retiring from employment

In 2014 changes were made to the Income Tax Act to allow members to elect when to retire from a fund, and the date on which the lump sum benefit accrued to the member for tax purposes depended on the date on which the member elected to retire, and not on the date of retirement from employment. As a result, members of retirement funds were allowed to postpone retirement from the funds by keeping their benefits within their funds after retirement from service. However a transfer of a retirement benefit to another fund after retirement was not permitted.

In terms of the TLAA members who retired from service will be able to transfer their retirement benefits to a retirement annuity fund. This will apply from 1 March 2018. A transfer of such benefits to any other fund, e.g. a preservation fund, is however still not allowed.

1.3 Tax exempt status of pre-March 1998 build-up in public sector funds

In the past the tax-free status of the pre-March 1998 build-up in public sector funds was retained upon the first transfer from such fund to a private sector fund, but was lost upon any subsequent transfer. The Income Tax Act has been amended with effect from 1 March 2018 to allow the tax-free status to be retained when one further transfer to another fund is made.

1.4 Removing the 12-month limitation on joining newly established pension or provident funds

The Income Tax Act used to provide that if an employer establishes a new pension or provident fund, existing employees have up to 12 months to apply to join that fund. An employee who failed to apply to join within the 12 month period was not permitted to join that fund. In order to encourage employees to contribute towards their retirement, the limit of 12 months has now been removed so that existing employees as at the date of commencement of the employer's participation in the fund are allowed to join the fund at any time, subject to the rules of the fund. This amendment comes into effect on 1 March 2018.

It should be borne in mind that the position remains that membership of the fund throughout the period of employment must be a condition of service for all qualifying employees who enter the service of the employer on or after the commencement of the employer's participation in the fund.

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1.5 Deduction in respect of contributions to retirement funds

The deduction for employee contributions to a pension fund was historically included in section 11(k) of the Income Tax Act, while deductions for contributions to a retirement annuity fund were included in section 11(n). As part of the wider retirement reform objectives, the tax deductibility of contributions to retirement funds was harmonised across all retirement funds (i.e. pension funds, provident funds and retirement annuity funds) through a replacement of section 11(k) from 1 March 2016.

According to the explanatory memorandum issued by National Treasury, the replacement of section 11(k) has created technical complications, e.g. it can “create anomalies such as generating an assessed loss from contributions to retirement funds that are above the allowable limit when taxable gains are a part of the higher limit”. A new section 11F has therefore been inserted in the Income Tax Act and is deemed to apply with effect from 1 March 2016, effectively replacing section 11(k). The amendment should not affect most members of pension funds and provident funds.

1.6 Disallowing the exemption for a lump sum, pension or annuity from a SA retirement fund or insurer in respect of foreign service

Section 10(1)(gC)(ii) of the Income Tax Act exempts from tax any lump sum, pension or annuity received by or accrued to any resident from a source outside the Republic (according to SARS such source should be a foreign retirement fund) as consideration for past employment outside the Republic, other than from any SA pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund. However the exemption does apply in respect of any amount transferred to such SA fund from a source outside the Republic in respect of the member concerned.

The TLAA amended section 10(1)(gC)(ii) by excluding (from the exemption) not only amounts from SA funds, but also any lump sum, pension or annuity received by or accrued to any resident from a SA insurer. However the exemption will also apply in respect of any amount transferred to that SA insurer from a source outside the Republic in respect of the member concerned. This amendment will apply as from 1 March 2018.

2. Tax Administration Laws Amendment Act, 2017

The above-mentioned Act contains the following items of interest to retirement funds:

Exemption from submitting a return in respect of dividends

Since retirement funds are tax exempt entities, they have also been exempted from submitting returns regarding dividends.

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Spreading of tax deduction where annual cap of R350 000 applies

For purposes of calculating income tax, employees are able to deduct contributions (made by the employee and/or employer) to pension, provident and retirement annuity funds from their income in terms of section 11F of the Income Tax Act. The deduction is limited to the lesser of R350 000 or 27.5% of the greater of remuneration or taxable income.

In terms of the Amendment Act, where the annual cap of R350 000 applies, the deduction for employees' tax purposes may not at any time during a tax year exceed an amount that bears to the R350 000 the same ratio as the period during which remuneration was paid by an employer to an employee, bears to a whole tax year. In other words the deduction must be spread on a cumulative basis, i.e. over the tax year.

3. PF Notice 4/2017: Notice of intention to cancel retirement funds

The Registrar of Pension Funds has published a list of retirement funds for which applications for cancellation for registration have been made. If the Registrar is of the opinion that a fund has ceased to exist, after consideration of all documentation and objections, the application for cancellation will be processed and the fund's registration will be cancelled. In terms of a subsequent letter of the Registrar of 4 December 2017 objections against the proposed cancellations can be lodged until 28 February 2018.

4. Information Circular 5/2017: Investments in Steinhoff

Following the sharp and significant decline in the share price of Steinhoff International Holdings, Steinhoff Investment Holdings and subsidiaries, the Registrar issued this circular on 8 December 2017 in order to determine the extent of retirement fund investments or exposures to Steinhoff. Funds were requested to complete and submit a survey document in this regard by 12 December 2017.

5. Information Circular 1/2018: Disclosures to the Registrar

This circular is, among others, about the process for "whistle blowing" by administrators, trustees, principal officers and deputy principal officers, auditors and valuators, i.e. the duty to inform the Registrar of any matter relating to the affairs of a fund, which in their opinion, may prejudice the fund or its members.

The circular seeks to clarify that -

- such persons have two options in making such reports or disclosures, i.e. either anonymously or disclosing their identity;

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- in order to constitute a protected disclosure in terms of section 9B of the Pension Funds Act, the report or disclosure must clearly indicate that it is made as a section 9B disclosure.

The report or disclosure will be treated in a manner that ensures appropriate confidentiality if the person submitting such report expressly indicates that he/she requires -

- the report to be treated confidentially or wishes to remain anonymous; or

- the protection afforded in terms of section 9B of the Act.

Disclosures in terms of section 9B can be sent by e-mail to the Registrar, addressed to: FSB.PDisclosure@fsb.co.za.

A board member, principal officer and deputy principal officer, auditor, valuator and administrator of a retirement fund may also submit anonymous tip-offs via the FSB website: www.fsb.co.za by clicking on the Anonymous Tip-Offs tab at the bottom of the webpage.

6. PF Notice 1/2018: Administrative penalties imposed by the Registrar

In terms of a notice from the Registrar of Pension Funds the maximum administrative penalty for any failure by a retirement fund, administrator or third party to submit any scheme, statement (e.g. financials), report, return or other document or information required in terms of the Pension Funds Act within the relevant period prescribed or required, has been increased from R1000 per day to R4000 per day with effect from 1 March 2018.

7. Compensation for Occupational Injuries and Diseases Act: Increase of maximum amount of earnings on which the assessment of an employer shall be calculated

The Minister of Labour gave notice of her intention to increase the maximum amount of earnings on which the assessment of an employer shall be calculated to the amount of R430 944 per annum with effect from 1 March 2018.

8. Revised Policyholder Protection Rules

The revised Policyholder Protection Rules ("the rules") were published in the Government Gazette on 15 December 2017. The rules will have a huge impact on the way that insurers do business, and insurers will have to study the rules in detail to see in what manner they will have to adjust their current practices.

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From an employee benefits perspective the most important change introduced by the rules is that an insurer of risk benefits provided under a fund or in terms of an employer policy must liaise directly with the members of the fund or with the employees insured in terms of the policy. It would in other words not be sufficient for the insurer to liaise with the fund or the employer, as has been the case up till now. The only circumstance where the insurer does not have to liaise directly with the members or the employees is where this is not “reasonably practicable”. It is however not clear from the rules under what circumstances it would not be “reasonably practicable” to liaise directly with members or employees.

Some of the most important amendments to the rules from an employee benefits perspective are briefly highlighted below - the implementation dates are indicated in brackets:

Rule 1 (15 December 2018)

Rule 1 sets out various requirements that an insurer must comply with to ensure the fair treatment of policyholders. All these requirements also apply to members of a fund or group scheme.

Rule 11 (15 December 2018)

Rule 11 deals with information that must be disclosed to policyholders by the insurer, and sets out very extensive information that must be disclosed to policyholders before a policy is entered into, after inception of the policy and on an ongoing basis as long as the policy remains in force.

Where it is not reasonably practicable for the insurer to communicate directly with the members of a fund or group scheme, the insurer must have processes in place to ensure that the information is provided to the members by the fund or the employer.

Rule 13 (15 December 2019)

Rule 13.4 requires that the insurer must have access to the names, identity numbers and contact details of all its policyholders, which includes members of funds and group schemes. Such contact details must be as complete as possible, and must, where available, include the mobile numbers and e-mail addresses of the members.

Rule 17 (15 June 2019)

Rule 17 deals with claims management. Rule 17.8.9 will have far-reaching implications for the insurers of benefits provided under a fund or in terms of an employer policy. In terms of rule 17.8.9 the insurer must namely liaise directly with the claimant unless the claimant has consented that communication may take place via the fund or the employer.

Rule 18 (15 June 2019)

Rule 18 deals with complaints management. Of particular importance is that a beneficiary of a benefit under a fund has the right to lodge a complaint directly with the insurer underwriting the benefit. The beneficiary does in other words not have to direct his complaint to the fund.

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Rule 20 (15 December 2019)

Rule 20 deals with the steps to be followed when a group scheme policy is cancelled. These requirements will apply where an unapproved risk policy is cancelled, either by the insurer or by the employer.

There will also be certain obligations on the insurer before it can issue a new unapproved risk policy to an employer. If the employer previously had risk cover in terms of another policy, the insurer must at least 31 days before entering into the policy provide the employees who will be insured in terms of the policy with details of any material differences between the terms and conditions of the new policy and the previous policy, and the reasons for such differences.

9. Amendments to Long-term Insurance Regulations

Certain amendments to the Long-term Insurance regulations ("the regulations") were published in the Government Gazette on 15 December 2017. From an employee benefits perspective some of the important amendments are as follows.

9.1 Commission

The table for the payment of commission in respect of a group scheme or fund policy is amended with effect from 1 January 2018. In terms of the new table commission is payable as follows:

Maximum commission as percentage of annual premium -	Annual premium of which the amount -	
	Exceeds	**Does not exceed**
7.5%		200 000
5.0%	200 000	300 000
3.0%	300 000	600 000
2.0%	600 000	2 000 000
1.0%	2 000 000	Unlimited

9.2 Binder fees

A new Part 3C, which deals with binder fees, is inserted in the regulations. The maximum binder fees payable to a non-mandated intermediary that is authorised to render advice are as follows:

i. 3.5% for entering into a policy if the binder holder does not perform any of the binder functions of determining the wording of a policy, determining premiums or determining the value of policy benefits.

ii. 5% for entering into a policy plus performance of any of the binder functions of determining the wording of a policy, determining premiums or determining the value of policy benefits.

iii. 4% for settlement of claims.

No fee is payable for the binder functions of determining the wording of a policy, determining premiums or determining the value of policy benefits if the binder holder does not also perform the binder function of entering into a policy.

It is important to note that the fees as set out above are the maximum that may be paid, and is not a default fee payable in all cases. In terms of regulation 3.20(1)(a) the binder fee “must be reasonable and commensurate with the actual cost of performing the binder function, taking into account the nature of the function and the resources, skills and competencies reasonably required to perform it”.

The fee caps as set out above will apply from the following dates:

i. on 1 January 2018 for binder agreements entered into on or after this date;

ii. for binder agreements entered into after 1 January 2017 but before 1 January 2018, the earliest of -

- 1 July 2018; or
- the date on which any amendment to binder fees payable under the binder agreement is made;

iii. for binder agreements entered into before 1 January 2017, the earliest of

- 1 January 2019; or
- The date on which any amendment to binder fees payable under the binder agreement is made.

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9.3 Stricter requirements in respect of binder agreements

Stricter requirements in respect of binder agreements have been introduced. Except for two provisions, the new requirements with regard to binder agreements all apply from 1 January 2018. The new requirements are inter alia as follows:

- An insurer may only enter into a binder agreement with a binder holder if this "is intended to promote the delivery of fair outcomes to customers".
- An insurer must before entering into a binder agreement, and at all times thereafter, be satisfied that the binder holder's information technology system can be integrated with that of the insurer so as to enable the insurer to have immediate access to data held by the binder holder. This requirement will come into effect on 1 January 2020.
- New requirements are introduced regarding the matters that must be addressed in binder agreements. Insurers will accordingly have to amend their binder agreements.
- New reporting requirements with regard to binder agreements have also been introduced. In terms of these new requirements an insurer must, at least 30 days before entering into a binder agreement, notify the Registrar of Long-term Insurance of the proposed binder agreement.

10. Registrar of Medical Schemes declared certain acts to be an irregular or undesirable business practice

In terms of a Notice published in the Government Gazette on 5 December 2017 the Registrar of Medical Schemes declared certain acts to be an irregular or undesirable business practice. Among others, it will be an irregular or undesirable practice for an employee or director of a person who renders contractual, administrative or intermediary services to a medical scheme to approach and/or persuade any person to stand as a candidate for election to be member of the board of trustees of the relevant medical scheme.

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

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