

Legal Report September 2018

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Newsletter of Sanlam Employee Benefits: Legal

1. Annuitisation of retirement benefits from provident funds

On 12 September 2018 National Treasury and the South African Revenue Service (SARS) presented to Parliament's Standing Committee on Finance a Draft Response Document containing a summary of their draft responses to public comments received on the draft Taxation Laws Amendment Bill (TLAB) and the Draft Tax Administration Laws Amendment Bill.

The Draft Response Document contains, among others, the following comment on the TLAB and the response of Treasury and SARS thereon:

Comment: *Clarity requested as to when the provisions governing the annuitisation of provident funds are likely to come into effect. In the event that the effective date of 1 March 2019 still stands, further deferral is requested so as to provide industry ample time to make system changes as well as changes to fund rules.*

Response: *Noted. The 2018 Draft TLAB does not contain amendments related to annuitisation for provident fund members. The process of consultation with NEDLAC is still ongoing, and an interim agreement on an approach to retirement reform with timelines is expected shortly. Government will introduce further legislative amendments shifting the effective date of 1 March 2019 by one or two years, in line with the NEDLAC constituencies' recommendation. An agreement on this recommendation is expected to be reached before the end October 2018."*

We expect the final TLAB to be tabled in Parliament during October 2018 and at this stage it seems that it will probably include a postponement of compulsory annuitisation of retirement benefits from provident funds until 1 March 2020 or 2021. (Currently the Income Tax Act provides that such compulsory annuitisation is required as from 1 March 2019).

2. Adjudicator decisions can be taken on appeal to Financial Services Tribunal

In a press release by the Pension Funds Adjudicator, Ms Lukhaimane, on 4 September 2018 she stated that parties who are aggrieved by decisions of the Pension Funds Adjudicator may now lodge appeals with the Financial Services Tribunal.

Until recently the determinations of the Pension Funds Adjudicator could only be taken on appeal to the High Court, which appeal had to be lodged within six weeks of the determination.

The press release explains that the Financial Sector Regulation Act, 2017 considers the Pension Funds Adjudicator as a "decision-maker" and his/her decisions are "decisions" as respectively defined in paragraphs (e) and (d) of section 218 of the Act. This section came into effect on 1 April 2018. Therefore the Tribunal is now in a position to entertain appeals of determinations handed down by the Office of the Pension Funds Adjudicator (OPFA).

Ms Lukhaimane welcomed the change and said that anyone who is aggrieved with the outcome of a determination is entitled to lodge an application for the reconsideration of the determination within 30 days of the date of the determination to the Financial Services Tribunal. The Adjudicator said that the new measure "is greatly appreciated by the OPFA as it will avail an inexpensive avenue for all those aggrieved to lodge appeals and not be prohibited to do so by costly High Court processes."

An order of the Financial Services Tribunal has the effect of a civil judgement and may be enforced as if lawfully given in a competent court.

3. Adjudicator has an equity jurisdiction from 1 October 2018

The Pension Funds Act has been amended with effect from 1 October 2018 to stipulate that "the Adjudicator must apply, where appropriate, principles of equity". In the same manner as the Ombudsman for Long-term Insurance, the Pension Funds Adjudicator accordingly now has a so-called equity jurisdiction.

4. Constitutional Court judgement on cancellations project

National Treasury on 24 September 2018 issued a media statement with regard to the recent Constitutional Court judgement on the project in terms of which the former Financial Services Board (FSB) cancelled funds without properly constituted boards. The media statement amongst others states the following:

"The National Treasury welcomes the judgement by the Constitutional Court dismissing the appeal by former Financial Services Board (FSB) Deputy Executive Officer (DEO) Rosemary Hunter to procure yet another investigation into the cancellations project implemented by the FSB between 2007 and 2013. Under the project, over 4 600 pension funds without properly constituted boards were cancelled by the Registrar in terms of section 27(1) of the Pension Funds Act (PFA)."

"In a split judgement, 7 of the 10 judges dismissed the application because three such investigations had already been conducted. The majority judgement noted that "not one, not two but at least three investigations with a view to determine whether irregularities that are potentially prejudicial to pensioners were committed in the cancellations process" (paragraph 42). The majority judgement concluded that "The danger with the approach adopted by Ms Hunter is that it is very likely to yield a never-ending investigation. Investigations would be difficult to bring to finality as long as, in her view, something might just be uncovered. This observation must be understood within the context of the several credible investigations already conducted by people whose capacity to address actual or perceived irregularities is beyond doubt."

"The conclusion of this case enables the National Treasury and FSCA to proceed with the Retirement Reform programme, ensuring that the retirement fund industry better serves members of retirement funds, and that the industry and funds are regulated more effectively and intensively, in the best interests of members. This includes accelerating fund consolidation, which aims to deregister genuinely inactive funds and further consolidate small active funds to achieve better economies of scale and reduce costs and charges, thereby contributing to the maximization of benefits to members rather than industry."

"The FSCA has established a tracing function on its website and through the SMS system to assist claimants. As at the end of June 45 000 enquiries had been received of which 8 000 possible matches were identified with a value of R1.8 billion rand traced for beneficiaries."

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