

# Legal Report October 2018

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*Newsletter of Sanlam Employee Benefits: Legal*

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## 1. Taxation Laws Amendment Bill, 2018

The Taxation Laws Amendment Bill has been presented to Parliament. The most important amendments affecting retirement funds are as follows:

- It is proposed that the annuitisation of retirement benefits under a provident fund and provident preservation fund be postponed from 1 March 2019 to 1 March 2021. The Minister of Finance must in the meantime continue deliberations on this aspect with interested parties, including deliberations at the National Economic, Development and Labour Council (NEDLAC). The Minister must table a report in Parliament by 31 August 2020 on the results of the aforesaid deliberations.
- It is proposed that a member of a pension fund or a provident fund from 1 March 2019 be allowed to transfer his/her retirement benefit to a preservation fund. The single allowable withdrawal applicable to preservation funds will however not apply to a retirement benefit transferred to a preservation fund.
- A member of a retirement annuity fund who emigrates can terminate his/her membership of the fund by making a full withdrawal of his/her benefit. It is proposed that from 1 March 2019 a member of a preservation fund also be allowed to withdraw the full value of his/her post-tax benefit upon emigration. Such emigration must be recognised by the South African Reserve Bank for the purposes of exchange control.
- It is proposed that the Income Tax Act be amended with effect from 1 March 2017 so that a taxable fringe benefit in the member's hands does not arise on the transfer of surplus from an employer surplus account to the employer surplus account in another fund in which the employer participates.

## **2. PFA Guidance Notice No. 5 of 2018: Requests for additional information when applying for registration of amendment of fund rules**

The Financial Sector Conduct Authority (FSCA) published the above notice to provide guidance on the process where queries with regard to the registration or amendment of fund rules are not responded to within the prescribed time. As from 1 October 2018 the following will apply:

- Where a fund has applied for registration, and the FSCA requests additional information, or requires the fund to verify information in its application, but the fund fails to furnish the FSCA with the required information or verification within 60 days from the date of the request, the application will lapse.
- Where a fund has submitted a proposed amendment to its rules for registration by the FSCA, and the FSCA requested additional information, but the fund does not furnish the FSCA with the required information within 180 days from the date of the request, the application will lapse.

The FSCA will send notification to the fund of its intention to lapse the application, and should the fund fail to provide the relevant information within the period as set out in the Guidance Notice, the fund will be required to submit a new application and pay the fees as prescribed.

Where an application has lapsed and a re-application is made for the registration of a new fund, or an umbrella fund re-submits special rules, the applicant must indicate on the on-line system that the application is in relation to a lapsed case. The re-application must not be submitted on the previous case number as such case would have been closed on lapsing.

## **3. PFA Guidance Notice No. 6 of 2018: Payment of arrear contributions collected by an attorney on behalf of a fund**

The FSCA published the above notice to provide guidance on the process where arrear contributions to a fund are recovered by an attorney on behalf of the fund.

The recovery process normally results in defaulting employers paying arrear contributions into the attorney's trust account. In terms of the notice the fund must in such case enter into an agreement with the collecting attorney, and such agreement must at least provide that -

- any amount recovered by the attorney in respect of arrear contributions must be transmitted into the fund's bank account within 7 business days of receipt thereof; and

- the defaulting employer must provide the contribution statement as required in terms of section 13A and regulation 33 of the Pension Funds Act together with the outstanding contributions.

## 4. Guide on the calculation of the tax payable on lump sum benefits from retirement funds

The South African Revenue Service (SARS) has published a guide on the calculation of the tax payable on lump sum benefits from retirement funds. The guide is available on the SARS website or can be accessed by clicking on the following link: [Guide on the calculation of the tax payable on lump sum benefits](#)

## 5. FSCA's Regulatory Strategy and memoranda of understanding with other regulatory authorities

The FSCA has adopted its Regulatory Strategy for the period 2018 to 2021, and has entered into memoranda of understanding with other regulatory authorities. The FSCA has in this regard issued a press release, in which it states the following:

“The Financial Sector Conduct Authority (FSCA) is pleased to announce the adoption of its Regulatory Strategy for the period 2018–2021, in accordance with the provisions of section 70 of the Financial Sector Regulation Act, 9 of 2017 (FSR Act).

As required by the FSR Act, the regulatory strategy sets out the FSCA's regulatory and supervisory priorities for the next three years; the intended key outcomes of the strategy; guiding principles and matters the FSCA should have regard to when performing its functions; its approach to administrative actions as well as how it will give effect to requirements of openness to consultation, accountability, and consistency with relevant international standards.

The FSCA has identified six strategic priority focus areas which are expanded on in the document:

- building a new organisation;
- an inclusive and transformed financial sector;
- a robust regulatory framework that promotes fair customer treatment;
- informed financial customers;
- strengthening the efficiency and integrity of our financial markets;
- understanding new ways of doing business and disruptive technologies.

The FSR Act also emphasises the importance of cooperation and collaboration between the FSCA and other regulatory authorities in the Twin Peaks regulatory framework and requires the authorities to enter into memoranda of understanding (MoUs) to achieve this. The FSCA has concluded MoUs with the Prudential Authority, the National Credit Regulator, the Financial Intelligence Centre and the South African Reserve Bank.

The Regulatory Strategy can be accessed on the FSCA website at home > About Us > FSCA Strategy and the MoUs can be accessed on the website at: home > About Us > Regulatory Liaison > National Memoranda of Understanding.”

## **6. Pension Funds Adjudicator’s equity jurisdiction postponed**

The Pension Funds Act was amended earlier in the year to stipulate that: “the Adjudicator must apply, where appropriate, principles of equity”, thereby giving the Pension Funds Adjudicator a so-called equity jurisdiction. The Adjudicator’s equity jurisdiction was due to come into effect on 1 October 2018, but has now been postponed to 1 April 2019.

## **7. SARS Interpretation Note 104: Exemption with regard to foreign pensions and transfers**

The South African Revenue Service (SARS) has issued an interpretation note on the interpretation and application of section 10(1)(gC)(ii) of the Income Tax Act to a lump sum, pension or annuity received by or accrued to a person resident in South Africa from a source outside South Africa. The position is summarised as follows at the end of the Interpretation Note:

“Section 10(1)(gC)(ii) exempts from normal tax any lump sum, pension or annuity received by or accrued to any resident from a source outside the Republic as consideration for foreign services rendered. This exemption does not apply to a lump sum, pension or annuity received by or accrued to a resident from a local retirement fund or an insurer, except to the extent that an amount (which relates to foreign services rendered) was transferred to that local retirement fund or insurer in respect of that member.”

The Interpretation Note can be accessed by clicking on the following link:

[Interpretation Note 104](#)

## **8. Pension Funds Act Guidance Notice No. 4 of 2018: Exemption from the requirement that members of a retirement fund have the right to elect members of the board**

The FSCA has issued the above Guidance Notice to set out its position in respect of applications for exemption from the requirement that members of a retirement fund have the right to elect members of the board.

Section 7A(1) of the Pension Funds Act (“PFA”) stipulates that every fund must have a board consisting of at least four members, at least 50% of whom the members of the fund shall have the right to elect. In terms of section 7B(1)(b) of the PFA the following types of funds may be granted exemption from the aforesaid requirement:

- umbrella funds;
- retirement annuity funds;
- beneficiary funds; and
- preservation funds.

Exemptions were previously not granted for a period of longer than three years. Exemptions will however in future no longer be time bound, and may, depending on the circumstances, be of indefinite duration.

The granting of exemption for an indefinite period is not automatic. Funds that therefore currently have exemption, must apply for an exemption with indefinite duration before the expiry date of the existing exemption.

In addition to any other conditions the FSCA may impose, inter alia the following conditions may be applied to funds which are granted exemption:

- At least fifty per cent of the members of the board must be independent board members. If a fund cannot adhere to this requirement, it must provide reasons and timelines for compliance, which the FSCA will consider.
- Bargaining council, sectoral determination, trade union and municipal funds, which provide for alternative forms of member representation other than direct member elections in their rules, may make representations that the FSCA not impose, or relax, the above condition.
- Every independent board member must continuously demonstrate the ability to exercise an independent discretion, and have the experience or expertise required for the effective fulfilment of his/her duties, which the fund and/or sponsor of the fund must demonstrate it has considered before making any appointment.
- If the board utilises sub-committees, the chairperson of the sub- committee must be an independent board member.
- The rules of the fund must provide for a quorum of at least four board members, including the independent trustees, and no decision of the board will be binding unless the decision was supported by more than 50 (fifty) per cent of the members of the board present at the meeting, of which no less than 50 (fifty) per cent of the members present at the meeting are independent board members.
- Depending on the size of an umbrella fund, the FSCA may consider it necessary that management committees at employer, sector or regional level be established, so that there is sufficient transparency, timeous communication and consultation in the decision-making process of funds.

After a fund has been granted an exemption, the fund must, within 30 (thirty) ordinary days of the appointment of an independent board member, provide the FSCA in writing with certain prescribed information about the board member. If, after considering the information provided on the independent board member, and any other relevant information, the FSCA informs the fund that it is not satisfied that the independent board member is a fit and proper person to occupy a position of trust in relation to the fund, the fund must procure the immediate termination of the board member's appointment. The FSCA will take appropriate regulatory action in the event of any failure by the fund and its board to adhere to any of the provisions stipulated in the Guidance Notice.

Funds must amend their rules to comply with the conditions as set out in the Guidance Notice within 180 days from the date of an exemption being granted.

## **9. Amendments to Policyholder Protection Rules and Long-term Insurance Regulations**

Certain further amendments were made to the Policyholder Protection Rules and Long-term Insurance Regulations, in other words in addition to the extensive amendments that were published in the Government Gazette on 15 December 2017. It is not practically possible to provide a summary of the amendments within the scope of this document, and insurers will have to study the amendments in detail to see what the impact is on them. We shall in what follows merely highlight two aspects that are of particular interest.

Policyholder Protection Rule 10.4.13, which applies from 1 July 2018, stipulates as follows:

“An advertisement may not use the term “funeral” or any derivative thereof in relation to a policy, or suggest or create the impression that a policy is intended to cover funeral costs or any costs associated therewith unless the benefit under the policy is a lump sum, or specified or determinable equal or unequal sums of money payable at specified intervals to cover the cost associated with a funeral or the rendering of a service on the happening of a death event.”

Part 8 of the Long-term Insurance Regulations lay down detailed requirements that must be complied with in cases where an intermediary collects premiums on behalf of a long-term insurer. Some of these requirements apply from 1 July 2018 and others from 1 July 2019.

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