

Legal Report September 2019

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Newsletter of Sanlam Employee Benefits: Legal

FSCA Retirement Fund Conference

The FSCA held its first Retirement Funds Conference at Pretoria on 12 September 2019. In his keynote address Mr Olano Makhubela, Divisional Executive: Retirement Funds Supervision, touched on various topical issues.

Costs and consolidation of funds

Mr Makhubela emphasized the impact of costs on returns and said that, linked to the issue of costs, is the need for consolidation in the retirement funds industry. He pointed out the following in this regard: “At least 1500 funds are active. There are simply too many funds, and too many small funds, which are even audit exempt. Retirement funds are about economies of scale - the better the scale, the better the costs as you are able to spread them among a larger number of members.”

Mr Makhubela stated that “a good outcome and interim step could be a few number of funds made up of a combination of umbrella funds, large and few medium sized standalone funds, subject to them demonstrating value for money and good governance”.

He said, “Going forward, as part of our new enhanced regulatory approach of being intrusive, intensive and pro-active, we will be looking closely at funds’ financial statements to analyse how their costs compare to benchmarks or industry averages. Funds will be asked to explain major deviations from benchmarks”.

Trustees’ conduct

Mr Makhubela said that there are trustees who have failed and are failing their funds and members. He said, “These failings could be attributed to lack of sufficient and regular training and skilling, lack of integrity – which no formal education can teach you, lack of proper judgment – which links to over reliance on consultants and asset managers. Remember that as trustees, as much as you can seek expert advice, and you are encouraged to do so, you are still required to make the decision on that advice”.

With regard to Directive 8, Mr Makhubela said:

“We have issued Directive 8 to stop gratification and undue influence on you by service providers, because we have records of how such behaviour can lead to conflict of interests and compromise members’ savings. Trust me, we are monitoring compliance, and you will be called to account.

You should also not be scared to whistle-blow, because we cannot visit all the funds at the same time. We therefore rely on you to assist us and will treat the information carefully with the necessary confidentiality.”

Transformation

Mr Makhubela stated, “It will be remiss of us not to talk about transformation. We all know our history as a country, the legacy of which still lingers to a certain extent. However, we now have 25 years after our first democratic elections, and therefore we should be seeing reasonable progress on some of our critical societal and economic objectives like attaining a more fair, equal and just society”.

But Mr Makhubela added the following caveat:

“However, this must also be said, we are dealing with long term savings here. We are dealing with sacrifices workers are making every day to get a decent income in retirement. We, therefore, need to do the right thing with other people’s money. We need to show a higher care than we would with our own money and do things properly.

We need to adhere to high standards in the products and services we deliver, and not lower them for historical or transformational reasons.”

Responsible Investing

As regards responsible investing, Mr Makhubela said, “Balance is key. The returns that companies make are the returns your funds earn and therefore your members benefit from. There is nothing wrong with making a financial return, as long as it is made sustainably and does not hurt anyone in the process”.

Mr Makhubela also provided the following advice to trustees:

“Be active asset owners, ask questions of the asset managers and the companies they invest in. You give them the money and mandate – it has never and should never be the other way round. It is your mandate that asset managers should carry out.

And responsible investing does not and will never mean charity or sub-optimal investing! It also does not mean allocating 10% in green bonds or infrastructure and saying you have achieved responsible investing. No! Regulation 28(2)(c)(10) and Guidance Notice 1 of 2019 on sustainable investments are clear - you must assess that all the investments you make, the asset classes you are in, are sustainable.”

Mr Makhubela said that the FSCA is expecting funds to start reporting on their responsible investment approach in their next financial years.

Prescribed Assets

In recent months, the possible introduction of so-called prescribed assets for retirement funds has been the subject of much debate. Should such measure eventually be introduced after the necessary consultation and parliamentary processes as required by law were duly followed, it could entail that funds be forced to invest a portion of their assets in government bonds, state-owned enterprises, etc. (Many years ago funds were subject to such a requirement, but this was abolished during 1989.) However, at this stage the government has not yet commenced with the said formal processes and it is not clear if it intends to do so.

Mr Makhubela had the following to say in this regard:

“This leads me to the recent topical issue of prescribed assets. The arguments presented against prescribed assets have been sufficiently ventilated in the public. It is my view that it might not be necessary to re-introduce prescribed assets. Instead, we would prefer that the regulator be given an opportunity to nudge the industry into supporting the initiative to kick-start the economy through investments in infrastructure and other factors of production.”

Mr Makhubela urged funds and associations to take part in the debate on prescribed assets and said:

“This is too important an issue for you as funds and your associations to be quiet about.

At least express a view.”

Due payment of contributions

On the issue of taking steps against an employer who fails to pay contributions as required in terms of section 13A of the Pension Funds Act, Mr Makhubela said:

“... as trustees you probably worry about the repercussions of taking your employer to court. You do, though, have a duty to enforce this law. We are also engaging with SARS and other law enforcement agencies on how we can assist trustees in enforcing section 13A which deals with contributions, and have received encouraging feedback. As trustees, you should not hesitate to put the employer on notice when it comes to arrear contributions.”

Terminating funds

Mr Makhubela referred to Information Circular No. 1 of 2019 that relates to the termination of dormant funds and said that dormant funds had to be deregistered as they simply add clutter to the system and divert regulatory resources. He said that all that needs to be ensured is that such termination does not entail any fund that still has assets. He added, “We are tightening the process, and hence our request to the auditing profession to assist us in checking, to the best of their ability, that funds applying for termination do not have assets in them”.

Unclaimed benefits

According to Mr Makhubela the latest value of unclaimed benefits is R42 billion. He said that this money rightfully belongs to workers who contributed to retirement funds and/or to their dependants, and therefore all efforts must be made by funds, insurers and administrators to trace them.

He also said, “At some point, we will need a policy direction on what to do with unclaimed benefits [where] we know it will be near impossible to trace beneficiaries”.

Obtaining and maintaining sufficient and accurate information of members is important and in this regard, Mr Makhubela stated:

“We are also considering adopting the principle of KYC - Know-Your-Client - for retirement funds. This is an important principle which should be applied to every financial entity, including retirement funds. It will assist with ensuring that employers and funds, when they onboard workers or members, obtain the right details about them and constantly update such information. And honestly, even the least income paid person in South Africa has a cellphone, and we hardly change our cell numbers.”

Distribution of death benefits

The interpretation and application of section 37C of the Pension Funds Act has been the subject of much debate over the years and on this issue Mr Makhubela said:

“We have also been sensitised to the vexed issue of section 37C, which deals with the distribution of retirement benefits upon the death of a member. Last month I requested your associations, Batseta and IRF, and the Pension Lawyers Association, to work together and advise the regulator what are the practical challenges with the provision and how they can be overcome, including also possible legislative amendments.”

Section 14 transfer delays

Mr Makhubela said that he has been very disheartened by the number of applications the FSCA receives from funds requesting extensions in relation to section 14 transfers. He said:

“I understand, to a certain extent, that part of the challenge is the missing tax directives, which also talks to missing tax numbers when you onboard employees. The process of transferring members takes too long, and is therefore not fair on members and the regulator. Unfortunately, many of you abuse the 180 and 60 days periods in the PFA [Pension Funds Act]. We are starting to reject many of these extension requests, and are also now considering proposing to the policy-maker the reduction of these periods.”

Delays in submitting statutory returns and reports

Mr Makhubela conveyed the following message to the conference delegates:

“The FSCA is going to be very intrusive, and it is going to make some of you uncomfortable. We are going to ask uncomfortable questions. Delays in submitting statutory returns and reports will attract penalties (currently R4000 per day of non-compliance), and you will have to explain to your members why you did not perform your duties properly or in time.”

Conference presentations

Mr Makhubela's full keynote address and the presentations of other speakers at the conference are available at www.fsca.co.za under Regulatory frameworks/Industry communication/Retirement Fund/Conference 2019.

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