# Legal Report February 2021



*Newsletter of Sanlam Corporate: Legal*

## 1. 2021 National Budget

The following proposals and information provided in either the Budget Speech or the Budget Review (published on http://www.treasury.gov.za) are relevant to the employee benefits industry:

### Allowing members to use retirement interest to acquire annuities at retirement

At retirement, a member of a retirement fund may receive an annuity. The annuity is to be provided with the balance of the member's retirement interest following commutation (where the member is allowed to take, or commute, a lump sum equal to a maximum of one-third of the retirement interest when he/she retires). The retirement fund can provide the annuity by paying it directly to the member or purchasing it from a South African registered insurer in the name of the fund, or purchasing it in the name of the retiring member. If a member opts to receive an annuity, the full value of the retirement interest following commutation must be used to provide either of the abovementioned annuities. Therefore, a member is prohibited from using the retirement interest to acquire various annuities. To increase flexibility for a retiring member and maximise the retirement capital available to provide for an annuity, Government proposes expanding the amount of retirement interest that may be used to acquire annuities.

### Applying tax on withdrawals of retirement interest when an individual ceases to be a tax resident

When an individual ceases to be a South African tax resident, retirement funds are not always subject to withdrawal tax in terms of the Income Tax Act ("the Act"). At issue is the tax treatment of retirement interest when an individual ceases to be a South African tax resident, but retains his/her investment in a South African retirement fund, and only withdraws from the retirement fund when he/she dies or retires from employment. Section 9(2)(i) of the Act deems such amounts to be from a South African source, thus remaining within South African tax jurisdiction despite the individual no longer being a South African tax resident.

The challenge arises when the individual ceases to be a South African tax resident before he/she retires and becomes a tax resident of another country. When that individual withdraws from the retirement fund, due to the application of the tax treaty between South Africa and the other country, the retirement fund interest will be subject to tax in the other country as the individual will, in terms of the tax treaty, be regarded as a tax resident in that other country. The provisions of the tax treaty between South Africa and the new resident country will result in South Africa forfeiting its taxing rights. To address this anomaly, Government proposes changing the legislation as follows.

When the individual ceases to be a South African tax resident, the retirement fund interest will form part of the assets that are subject to retirement withdrawal tax. The individual will be deemed to have withdrawn from the fund on the day before he/she ceases to be a South African tax resident.

If the individual ceases to be a South African tax resident but leaves his/her investment in a South African retirement fund, and only withdraws from the retirement fund when he/she dies or retires from employment, then the retirement withdrawal tax (including associated interest) payment will be deferred until payments are received from the retirement fund or as a result of retirement. When the individual eventually receives payments from the fund, the tax will be calculated based on the prevailing lump sum tables or in the form of an annuity. A tax credit will be provided for the deemed retirement withdrawal tax as calculated when the individual ceased to be a South African tax resident.

## Transfers between retirement funds by members who are 55 years or older

The Income Tax Act stipulates that any transfer by a member of a pension, provident or retirement annuity fund (who has opted to retire early) into a similar fund would be considered a taxable transfer. The policy in this regard is not intended to tax transfers from a less to a more restrictive fund, or between similar funds. To address this anomaly, Government proposes allowing tax-free transfers into more or similarly restrictive funds by members who have already opted to retire.

## Early access to retirement savings

The COVID-19 pandemic has influenced many countries to consider allowing individuals to access their retirement savings as an interim relief measure. Alongside the 2020 Medium Term Budget Policy Statement, the National Treasury published an explanatory note with financial sector updates that noted numerous requests to allow limited pre-retirement withdrawals from retirement funds under certain conditions, such as disasters. Government continues to engage with trade unions, regulators and other stakeholders to discuss how to allow these withdrawals, together with mandatory preservation requirements.

## Minimum value for paid-up retirement annuities

The minimum value for paid-up retirement annuities has not been adjusted since 2007/08. This value will increase from R7 000 to R15 000 from 1 March 2021. This means that if a member of a retirement annuity fund ceases contributions, and his/her fund value is less than R15 000, he/she can withdraw the benefit.

## Amendments to regulation 28

The Minister indicated that National Treasury will publish draft amendments to regulation 28 of the Pension Funds Act for public comment. The proposed amendments seek to make it easier for retirement funds to increase investment in infrastructure. The proposed amendments refer to infrastructure investment already permitted through various asset classes and suggest delinking the asset category related to “hedge funds, private equity funds and other assets not referred to in this schedule”. Delinking this asset category will make private equity a separate asset class with a higher investment limit.

### Auto-enrolment

The Minister said NEDLAC constituencies have agreed to accelerate the introduction of auto-enrolment for all employed workers, and the establishment of a fund to cater for workers currently excluded from pension coverage, as an urgent intervention towards a comprehensive social security system.

### Conduct of Financial Institutions (COFI) Bill

The second draft of the COFI Bill was published in 2020 for public consultation. The National Treasury is engaging stakeholders to discuss and clarify comments received. A revised draft of the Bill will be tabled in Parliament in 2021.

### Transformation and financial inclusion

The Financial Sector Transformation Council established seven subcommittees to review the targets in the Financial Sector Code to strengthen transformation. The subcommittees are developing targets for management control and skills development, socioeconomic development and consumer education, retirement funds and ownership, access to financial services, preferential procurement and empowerment financing. This year, the subcommittees will finalise and submit the revised targets to the Financial Sector Transformation Council for approval and then to the Department of Trade, Industry and Competition to publish for public comment.

## 2. FSCA RF Notice 2 of 2021 - application fees in respect of Covid-19 rule amendments

The Financial Sector Conduct Authority (FSCA) has published an exemption in terms of which it reduces by half the application fees in respect of all Covid-19 rule amendments submitted by retirement funds between 1 August 2020 and 30 April 2021.

If a fund wishes to request a refund of application fees already paid, the fund must lodge an application for a refund with the FSCA and include the case number of the affected application. Funds that have lodged an application for a Covid-19 rule amendment between 1 August 2020 and 30 April 2021, and whose employers/members remain in financial distress, and are required to effect extensions to their initial applications, will qualify for the reduced application fee until 31 July 2021.

## 3. Draft Financial Sector Levies Bill

The following was stated in the 2021 Budget Review:

"With the implementation of the Twin Peaks regulatory system since 1 April 2018, regulated companies in the financial sector will be expected to pay a levy towards the regulatory costs. A bill to impose levies on the financial sector is expected to be tabled in early 2021, and the resulting revenue will fund the Prudential Authority, the Financial Sector Conduct Authority and other entities and activities outlined in the Financial Sector Regulation Act."

Pursuant to the above, the Draft Financial Sector Levies Bill was published for comment on 24 February 2021. The proposed levies in respect of retirement funds and retirement fund administrators are set out on pages 28 to 29 of the Bill, and on pages 33, 34 and 36. Comments on the Bill must be submitted to National Treasury by 31 March 2021.

# 4. Withdrawal of South African Revenue Service General Note 16 (GN 16) – commutation of small annuities

GN 16 was withdrawn on 17 February 2021. GN 16 made provision for the commutation of a guaranteed annuity if the value of the member's retirement benefit on his/her retirement date was below a certain amount.

It is uncertain whether the withdrawal of GN 16 means that a guaranteed annuity that is already in payment can never be commuted, regardless of the value of the member's retirement benefit on his/her retirement date. The retirement industry will in all probability contact the South African Revenue Service to obtain clarity in this regard.

The above problem does not arise in the case of living annuities. In the case of living annuities the living annuity capital can in terms of Government Notice 619 be paid as a lump sum when the value thereof becomes less than R125 000.

# 5. Prudential Communication 1 of 2021 - transfer of living annuities

Directive 135, issued in terms of the Long-term Insurance Act, provided standing approval for the replacement of a living annuity policy issued by one insurer with a living annuity policy or conventional annuity policy issued by another insurer. The provision in the Long-term Insurance Act dealing with the transfer of insurance business was repealed by the Insurance Act with effect from 1 July 2018, which had the effect that the standing approval that was granted in terms of Directive 135 became obsolete. This had the further effect that all transfers of living annuities effected in terms of Directive 135 after 1 July 2018 were without any legal basis.

To address the above problem, the Prudential Authority has on 17 February 2021, in terms of Prudential Communication 1 of 2021, retrospectively granted standing approval in terms of section 50 (1) of the Insurance Act for all transfers of living annuity policies that were effected between 1 July 2018 and 17 February 2021. This is subject to the conditions set out in the Communication.

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