

Legal Report April 2022

[Insurance](#)[Financial Planning](#)[Retirement](#)[Investments](#)[Wealth](#)

Newsletter of Sanlam Corporate: Legal

1. Spouse's pension upon the death of a member in a permanent life partnership

The Constitutional Court in 2004, in the matter of *Volks NO v Robinson and Others*, held that a permanent life partnership is not a marriage for purposes of the Maintenance of Surviving Spouses Act, and that it is, for purposes of this Act, justified to differentiate between married couples and permanent life partners. The Pension Funds Adjudicator ("the Adjudicator") was up till now, in reliance on the Volks judgment, of the view that it is allowable to differentiate between spouses in a marriage and partners in a permanent life partnership for purposes of spouses' pensions.

The Constitutional Court has however in December 2021, in the matter of *Bwanya v Master of the High Court, Cape Town and Others*, held that the Volks judgment was wrongly decided, and that a marriage for purposes of the Maintenance of Surviving Spouses Act includes a permanent life partnership in which the partners undertook reciprocal duties of support. The court further said that permanent life partnerships are deserving of legal protection.

The Adjudicator's office discusses the Bwanya judgment in its quarterly newsletter, and comes to the following conclusion:

"Since section 37C(1) of the Pension Funds Act, 1956 provides that spouses' pensions must be dealt with in accordance with the registered rules of the relevant fund, it will be necessary for funds to assess their rules and determine whether it accords with the Constitutional Court judgment in Bwanya. The FSCA too, must be mindful of the Bwanya judgment when registering rules pertaining to spouse's pensions and funds may well find themselves receiving rejections or queries relating to same if it does not accord with the Constitutional Court's judgment. It appears, as well, that it can no longer be held that a differentiation in the rules between spouses in a marriage and partners in a permanent life partnership is justifiable. As set out by the Adjudicator in Maritz (discussed above), these are issues which affect funding of benefits based on actuarial calculations and assumptions and funds would be well advised to draw this recent judgment to the attention of their actuaries."

2. Duty of the board of trustees to keep proper records

In terms of section 7D(1)(a) of the Pension Funds Act (“the Act”) one of the duties of the board of trustees of a retirement fund is “to ensure that proper registers, books and records of the operations of the fund are kept”. Although the record keeping function is in practice usually outsourced to a retirement fund administrator, the Office of the Pension Funds Adjudicator (“the Adjudicator”) has in its quarterly newsletter stressed that such outsourcing does not mean that the board is absolved from its duty in this regard. The Adjudicator in this regard said the following:

“A board should be wary of an over-reliance on the administrator or any other service providers to the fund. Funds should regularly assess the record keeping capabilities of their appointed administrator to ensure that members’ records are complete and up to date. A board should maintain an oversight function of the administrator and any other service provider to whom it has outsourced its functions. The administrator should also act in accordance with its record keeping duties failing which it could be subject to regulatory action and potentially have implications on its licence issued in terms of section 13B of the Act. Thus, the board and administrator each have unique roles and functions insofar as they relate to record retention and both parties are responsible for record keeping albeit in different capacities.”

The Adjudicator also referred to three recent cases in which funds were, due to problems on the side of the administrator, unable to provide members with a breakdown of their contributions. As the board is ultimately responsible for ensuring that proper record keeping is maintained in terms of section 7D(1)(a) of the Act, the fund was in all these cases found to be non-compliant with section 7D(1)(a).

3. Information request in respect of crypto assets

The Financial Sector Conduct Authority (FSCA) has issued FSCA Information Request 3 of 2022 (FAIS), in terms of which all Financial Services Providers (“FSPs”) are requested to furnish information on crypto asset related activities performed by them.

The purpose of the Information Request is to assist the FSCA in obtaining a better understanding of the extent to which FSPs are currently operating in the crypto asset environment. It is envisaged that the requested information will assist the FSCA in making more informed decisions regarding the potential future regulation of crypto asset related activities.

The requested information must be provided by completing an electronic survey by no later than 31 May 2022. A failure to provide the specified information within the timeframe specified will constitute an offence in terms of the Financial Sector Regulation Act.

4. Exemption from using certain prescribed formats for preparing financial statements

The Financial Sector Conduct Authority (FSCA) has published FSCA RF Notice 5 of 2022, in terms of which retirement funds are exempted from using certain formats as prescribed in Board Notice 77 of 2014 when preparing financial statements, on the condition that such funds use the revised illustrative section 15 retirement fund agreed-upon procedures reports (the revised report formats), as approved by the Independent Regulatory Board for Auditors (IRBA).

The following is stated in the Communication accompanying the exemption:

“Various funds will be submitting financial statements through the use of IRBA's revised report formats, notwithstanding the requirements prescribed in the Board Notice. In order to acknowledge these reports and facilitate compliance with the Board Notice, the exemption will apply as from the IRBA effective date of the revised report formats.

The effect of this approach is that any fund which –

- submitted financial statements in accordance with IRBA's revised report formats, after the IRBA effective date, can rely on the exemption and is therefore in compliance with the requirements of the Board Notice; or
- did not submit financial statements in accordance with IRBA's revised report formats, after the IRBA effective date, would still be in compliance with the requirements of the Board Notice.”

The exemption applies to the preparation of financial statements of funds in respect of financial year-ends beginning after 1 January 2022.

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