1. Amendments to regulation 28 of the Pension Funds Act

Draft amendments to regulation 28 of the Pension Funds Act were published for comment in February 2021 and October 2021. The final draft has now been tabled in Parliament for review, whereafter the amendments will be published in the Government Gazette.

The amendments are aimed mainly at making it easier for retirement funds to invest in infrastructure. Some of the more important amendments are as follows.

A definition of “crypto-asset” is introduced, and a fund is prohibited from investing in crypto-assets.

The definition of “hedge fund” is replaced by a new definition, and it is stipulated that a fund may invest in a hedge fund, subject to conditions that may be prescribed.

“Infrastructure” is defined as “*any asset that has or operates with a primary objective of developing, constructing and/or maintaining physical assets and technology structures and systems for the provision of utilities, services or facilities for the economy, businesses, or the public*". This includes both public and private infrastructure.

Infrastructure is not introduced as a new asset class but is recognised within the existing asset classes specified in regulation 28. The aggregate exposure of a fund to infrastructure, excluding any debt instrument issued or guaranteed by the South African government, may not exceed 45% of the total assets of the fund.

The exclusion of the look-through principle in respect of the underlying assets of a hedge fund or private equity fund, does not apply in the case of infrastructure investments in a hedge fund or private equity fund.

A new Table 2 is inserted in regulation 28, which must be used for reporting the top 20 holdings in infrastructure investments.

The aggregate (in other words combined) exposure limit to the following is increased from 35 percent to 45 percent:

- certain debt instruments not listed on an exchange;
- preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange;
- immovable property, preference and ordinary shares in property companies, and linked units comprising shares linked to debentures in property companies, not listed on an exchange;
- hedge funds;
- private equity funds
- any other asset not referred to in Table 1 of regulation 28.

The limit applicable to private equity funds is increased from 10% to 15%.

The aggregate (in other words combined) exposure limit to the following is increased from 15 percent to 20 percent:

- preference and ordinary shares in companies, excluding shares in property companies, not listed on an exchange;
- private equity funds.

The aggregate exposure by a fund per issuer or entity, in respect of all asset categories specified in Table 1 of regulation 28, irrespective of the limits referred to in Column 1 of Table 1, must not exceed 25 percent of the aggregate fair value of the total assets of the fund, excluding any debt instruments issued by, and loans to, the government of the Republic and any debt or loan guaranteed by the Republic.

The maximum exposure by a fund in respect of housing loans to members is decreased from 95% to 65%. The new limit will apply in respect of housing loan guarantees entered into on or after 1 September 2023. The limit will not apply in respect of housing loan guarantees that have been entered into prior to 1 September 2023.

Regulation 28(8)(b) currently makes provision for certain assets to be excluded in applying the limits set out in regulation 28. These exclusions will no longer apply once the amendments to regulation 28 come into effect.

The amendments will come into effect on 3 January 2023.

2. Marriages out of community of property, and without the accrual system, entered into on or after 1 November 1984

The legal position up till now has been that in the case of a marriage out of community of property, and without the accrual system, the parties to the marriage have no claim to each other's assets. Section 7(3)(a) of the Divorce Act however provides that a court granting a decree of divorce in respect of such a marriage may, despite the terms of the antenuptial contract, on application by one of the parties to the marriage, order that such assets of the other party as the court may deem just, be transferred to the party who has applied for such an order. Such an application can however only be made in respect of a marriage entered into before 1 November 1984, and not in respect of a marriage entered into on or after 1 November 1984.

The High Court has now in the matter of *Greyling v Minister of Home Affairs and Others* declared section 7(3)(a) of the Divorce Act inconsistent with the Constitution, and invalid to the extent that its operation is limited to marriages out of community of property entered into before 1 November 1984. The court further ordered that section 7(3)(a) must be read as if an application as provided for in section 7(3)(a) can also be made in respect of a marriage entered into on or after 1 November 1984. This does however not apply retrospectively to divorces granted before the declaration of unconstitutionality.

The court, in coming to the conclusion that section 7(3)(a) is invalid to the extent set out above, said that "*the innate restriction in s 7(3)(a) based solely on the date on which a marriage was concluded, does not in 2022, muster constitutional scrutiny*". The court further said that "*the cut-off date contained in s 7(3)(a) unfairly discriminates against people married according to a system of complete separation of property on the ground of the date of their marriage*".

It is important to note that although the High Court, in terms of section 172(2)(a) of the Constitution, is empowered to declare an Act of Parliament invalid, such an order has no force unless it is confirmed by the Constitutional Court. The declaration of invalidity as described above will accordingly only be effective once it has been confirmed by the Constitutional Court.

The effect of the court's judgment is that, once it has been confirmed by the Constitutional Court, a party married out of community of property and without the accrual system, on or after 1 November 1984, will also, on divorce, be able to apply that such assets of the other party as the court may deem just, be transferred to him/her.

The judgment does not have any implications with regard to the allocation of pension interest to a non-member spouse. In terms of section 7(7)(c) of the Divorce Act a member's pension interest is not, in a divorce action, deemed to be part of his/her assets in the case of a marriage out of community of property, and without the accrual system, entered into on or after 1 November 1984. The judgment did not deal with section 7(7)(c), and the situation is accordingly still that no allocation of pension interest to a non-member spouse can be made in the case of a marriage as aforesaid. In view of the fact that the court has found that it is unconstitutional to limit the operation of section 7(3)(a) to marriages entered into before 1 November 1984, there is however in principle no reason why it would not also be unconstitutional for a member's pension interest, in the case of a marriage out of community of property and without the accrual system, to only be deemed part of his/her assets if the marriage was entered into before 1 November 1984. It can accordingly be expected that section 7(7)(c) will also in due course be declared invalid.

3. Withholding of a member's benefit pending legal action against the member

The Board of Trustees of a retirement fund ("the Board") can in terms of section 37D of the Pension Funds Act authorise a deduction from a member's benefit in respect of damages caused to the employer by reason of theft or fraud on the part of the member, provided that the member has either admitted liability in writing or the employer has obtained judgment against the member. The Board is also empowered to withhold a member's benefit so as to enable the employer to obtain judgment against him/her.

The Pension Funds Adjudicator ("the Adjudicator") until fairly recently held that a member's benefit may not only be withheld pending civil action against the member, but also pending a criminal case against the member. This was based thereon that a criminal court, in the case of conviction, is empowered to make a compensation order against the member in terms of section 300 of the Criminal Procedure Act. The Financial Services Tribunal ("the Tribunal") has however taken a different stance, and has in a number of cases ruled that a member's benefit may only be withheld in the case of a civil action, and not in the case of a pending criminal case against the member. This has caused the Adjudicator's office to change its previous position, and the Adjudicator during 2021 confirmed that it will in future follow the same approach as the Tribunal and will also only allow a member's benefit to be withheld in the case of a civil action, and not in the case of a pending criminal case against the member.

The Tribunal has now in the matter of *Tape Aids for the Blind v Palhad and Others*
clarified its view by saying that a compensation order in terms of section 300 of the Criminal Procedure Act "*has the effect of a civil judgment*", and that "*it would follow that such an award by a criminal court may entitle the Fund to withhold payment of pension benefits*".

Despite the fact that a deduction may be made from a member's benefit in the case of a compensation order in terms of section 300, the Tribunal has however once again confirmed that a benefit may not be withheld pending criminal proceedings.
The situation is accordingly still that a member's benefit may only be withheld pending a civil action, and not in the case of a pending criminal case against the member.

4. Fraudulent and dishonest claims statistics for 2021

The fraudulent and dishonest claims statistics for 2021 have been released by the Association for Savings and Investment South Africa (ASISA). South African life insurers detected 4 287 fraudulent and dishonest claims, worth R787.6 million, in 2021. This is a significant increase from 2020, when 3 186 cases of fraudulent and dishonest claims, to a value of R587.3 million, were uncovered.

Funeral insurance once again attracted the highest incidence of fraud and dishonesty, followed by death cover, disability cover, hospital cash plans and retrenchment benefit cover. Although the number of fraudulent funeral and death claims are higher, dishonest disability (including critical illness) claims are also not uncommon. While the case numbers are typically lower, the value of fraudulent and dishonest disability claims exceeds the value of fraudulent funeral claims by a significant margin. The total value of fraudulent and dishonest disability claims detected in 2021 was R195.9 million, compared to R128.2 million for funeral claims.

5. Standardised definitions for critical illness products

The Association for Savings and Investment South Africa (ASISA) Medical and Underwriting Standing Committee reviewed the ASISA Standard on Disclosures for Critical Illness Products and proposed a number of changes. The changes were approved by the ASISA Life & Risk Board Committee, and the revised version of the Standard will come into effect on 1 July 2022.

In terms of the Standardised Critical Illness Definitions Project (SCIDEP), standard definitions were developed for the following four diseases which make up more than half of all critical illness claims:

- Heart attack
- Cancer
- Stroke
- Coronary Artery By-pass Graft (CABG)

It is stated in the Standard that although it would be ideal for all insurers to use the standardised definitions in their quotations and contracts, there are some practical restrictions that may make this difficult to implement. Insurers must however state that they will honour claims according to the SCIDEP definitions. If a claim is declined on the insurer's definition, the policyholder will have the right to insist that it is also assessed according to the SCIDEP definitions.

Adherence to the disclosures as set out in the Standard is mandatory for all ASISA member companies.

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