

# Legal Report October 2022

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*Newsletter of Sanlam Corporate: Legal*

## 1. Conduct Standard on retirement fund contributions - reporting formats

The Conduct Standard on retirement fund contributions was published on 19 August 2022 and will come into operation on 19 February 2023. The Conduct Standard makes provision for certain standard notifications and reports, but the formats for these were not included in the Conduct Standard. These formats have subsequently been published on 30 September 2022.

The following formats have been published:

- the format in which a fund must inform a participating employer of its duties and obligations under section 13A of the Pension Funds Act, and request the employer to notify it of the identity of every director who is regularly involved in the management of the employer's financial affairs;
- the format in which the Financial Sector Conduct Authority (FSCA) must be informed of a contravention of section 13A of the Pension Funds Act;
- the format in which a criminal complaint must be laid against the employer relating to non-payment of contributions or failure to submit contribution schedules.

## 2. Payment of death benefits to a beneficiary fund

In terms of section 37C of the Pension Funds Act the board of trustees of a retirement fund has a discretion whether to pay a death benefit due to a minor beneficiary to his/her guardian or to a beneficiary fund. The Office of the Pension Funds Adjudicator ("the Adjudicator") in a recent article set out its views as to the circumstances under which a death benefit may be paid to a beneficiary fund.

The Adjudicator in the above-mentioned article says that *"payment of the minor child's benefit to her or his legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the parent of the duty to take charge of her minor children's financial affairs and the right to decide how the funds due to the minor should be utilised in the best interests of the minor"*

*child*'. According to the Adjudicator the following factors must be considered when determining whether to pay the benefit to the minor child's guardian:

- the amount of the benefit;
- the qualifications (or lack thereof) of the guardian to administer the monies;
- the ability of the guardian to administer the monies;
- the benefit should, as far as it may be practical, be utilised in such a manner that it can provide for the minor until he/she attains the age of majority.

In instances where the board of trustees departs from the ordinary route of effecting payment of the benefit directly to the minor's legal guardian, it will have to show the existence of good grounds giving rise to an apprehension that the guardian will fail to fulfil his/her duty.

The Adjudicator concludes as follows:

*"Therefore, there is a duty on the board of management of a fund to investigate the guardian's capacity to administer the money on behalf of the minor child before it decides to pay the benefit into a beneficiary fund. It is only in cases where there is reason to believe that it would not be in the best interest of the minor child to pay the benefit to his/her guardian, that the fund may decide to pay the benefit into a beneficiary fund."*

### **3. Declaration of crypto assets as financial products**

The Financial Sector Conduct Authority (FSCA) has declared crypto assets as financial products under the Financial Advisory and Intermediary Services Act. This brings providers of financial services in relation to crypto assets within the FSCA's regulatory jurisdiction.

Although crypto assets are now recognised as financial products, retirement funds will still not be able to invest in crypto assets. In terms of the amendments to regulation 28 of the Pension Funds Act, which will come into effect on 3 January 2023, a fund is namely prohibited from investing in crypto assets. It is in this regard stated in the media statement accompanying the amendments that *"the excessive volatility and unregulated nature of crypto assets require a prudent approach, as recent market volatility in such assets demonstrates"*.

## 4. Taxation Laws Amendment Bill, 2022

The Taxation Laws Amendment Bill, 2022 (“the Bill”) has been tabled in Parliament by the Minister of Finance. The Draft Bill was published for public comment earlier in the year, and this is the final version of the Bill, which includes certain amendments based on the comments received during the public commentary process. The proposed amendments affecting retirement funds are as follows.

### **Transfer of total interest in a retirement annuity fund**

The current situation is that if a member of a retirement annuity fund wants to transfer to another retirement annuity fund, the member must transfer his/her total interest in the retirement annuity fund. If a member has more than one contract in the fund, he/she can accordingly not choose to only transfer one of his/her contracts. It is proposed that the definition of “retirement annuity fund” in the Income Tax Act be amended so as to allow retirement annuity fund members to transfer only one, or only some, of their contracts in the fund, subject to the following conditions:

- the value of each individual contract being transferred must exceed R371 250;
- where a member does not transfer his/her total interest in a retirement annuity fund to another retirement annuity fund, the value of the member’s remaining interest, in other words after the transfer, must exceed R371 250.

The minimum of R371 250, referred to above, does not apply in the case of a full transfer from a retirement annuity fund, in other words where the entire benefit is transferred.

The above amendment will come into effect on 1 March 2023.

### **Protection of vested rights when transferring to a public sector fund**

The so-called T-day amendments, which make provision for compulsory annuitisation, came into effect on 1 March 2021. The amendments make provision for the protection of vested rights, in other words benefits that are not subject to annuitisation. Vested rights may also be transferred into another retirement fund without forfeiting their vested rights protection.

It has come to Government’s attention that the current provisions have the effect that vested rights would be forfeited if transfer is made into a public sector fund. To address this anomaly, it is proposed that the definitions of “pension fund” and “provident fund” in the Income Tax Act be amended to ensure that vested rights remain protected upon transfer to a public sector fund.

Although it was stated in the Explanatory Memorandum to the Draft Bill that the above amendment will come into effect on 1 March 2021, the Bill provides that the amendment will come into effect on 1 March 2023. National Treasury during a workshop on 9 September 2022 said that the effective date of the amendment will be rectified to align with the Explanatory Memorandum. This has however not been done, and the Bill still provides that the amendment will come into effect on 1 March 2023.

### **The applicability of T-day to public sector funds**

It was stated in the Explanatory Memorandum to the Draft Bill that the T-day amendments (referred to under the previous heading) also apply to public sector pension funds that operate similarly to provident funds. Paragraph (eA) of the definition of “gross income” in the Income Tax Act does however not mention public sector funds that operate similarly to provident funds. As such, there is no clarity with regards to whether or not annuities received from a public sector pension fund that operates similarly to a provident fund should be included in paragraph (eA) of the definition of “gross income”.

To provide clarity, it is proposed that paragraph (eA) of the definition of “gross income” be amended to include annuities from public sector funds that operate similarly to provident funds.

Although it was stated in the Explanatory Memorandum that the T-day amendments also apply to public sector pension funds that operate similarly to provident funds, the South African Revenue Service (SARS) holds a contrary view. SARS is of the opinion that, in terms of the current provisions of the Income Tax Act, the T-day amendments do not apply to such funds. It is not yet known whether the proposed amendment to paragraph (eA) of the definition of “gross income” will cause SARS to change their opinion in this regard.

The proposed amendment will be deemed to have come into effect on 1 March 2021.

### **Retirement of a provident fund member on grounds other than ill health**

Paragraph 4(3) of the Second Schedule to the Income Tax Act currently stipulates that if a member of a provident fund who is younger than 55 retires for reasons other than ill health, any lump sum received shall be taxed as a withdrawal benefit rather than a retirement benefit. This does not apply to members of pension or retirement annuity funds. Paragraph 4(3) will be repealed, with effect from 1 March 2023, so that there is no longer any distinction between provident funds and other retirement funds in this regard.

## **Tax-neutral transfers from a pension to a provident fund**

Before 1 March 2021 transfers from a pension fund to a provident fund or provident preservation fund were taxable. From 1 March 2021, in accordance with paragraph 6(1)(a) of the Second Schedule to the Income Tax Act, such transfers are no longer taxable. Contrary to the intention, such transfers are however only tax-neutral in respect of contributions made to a pension fund after 1 March 2021. An amendment will be made so that such transfers will also be tax-neutral in respect of contributions to a pension fund before 1 March 2021.

## **Transfer of in-fund living annuities from one fund to another**

In terms of the current definition of “living annuity” in the Income Tax Act it is not clear that an in-fund living annuity would still fall within the definition of “living annuity” if it is transferred to another fund. The definition of “living annuity” will be amended to clarify that an in-fund living annuity cannot only be provided by the fund that the living annuitant was a member of on his/her retirement date. The in-fund living annuity can in other words be transferred to another fund.

## **Transfer to an unclaimed benefit fund of certain benefits contemplated in section 37C of the Pension Funds Act**

Section 37C(1)(c) and section 37C(5) of the Pension Funds Act make provision for the transfer of death benefits to an unclaimed benefit fund in the circumstances therein set out. The definitions of “pension preservation fund” and “provident preservation fund” in the Income Tax Act do however not currently make provision for the receipt of benefits in the aforesaid circumstances. The definitions will be amended, with the aim of enabling such transfers to an unclaimed benefit fund. The wording of the proposed amendments is however not ideal, and needs further refinement.

## **Transfer of benefits from pension preservation fund to provident preservation fund**

The definition of “pension preservation fund” is amended to make it possible for a member to transfer from a pension preservation fund to a provident preservation fund. The definition does however still not make provision for a transfer from a pension preservation fund to a provident fund.

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