Sanlam

Legal Report

February 2023

1. Repeal of regulation 33 of the Pension Funds Act

The requirements relating to the payment of retirement fund contributions were until 19 February 2023 contained in regulation 33 of the regulations under the Pension Funds Act. The Financial Sector Conduct Authority (FSCA) however on 19 August 2022 published Conduct Standard 1 of 2022 (RF), which has replaced regulation 33. Regulation 33 has accordingly been repealed with effect from 20 February 2023. From 20 February 2023 the requirements relating to the payment of retirement fund contributions are no longer contained in regulation 33, but in Conduct Standard 1 of 2022 (RF).

2. Exemption of retirement funds from certain of the conditions for exemption from section 28 of the Pension Funds Act

Board Notice 75 of 2009 (Directive PF No. 4), hereinafter referred to as “the Board Notice”, sets out the requirements with regard to the dissolution or partial dissolution of retirement funds. Paragraph 9(2) of the Board Notice sets out the conditions for exemption from the liquidation requirements contained in section 28 of the Pension Funds Act. These conditions are as follows:

(a) the average benefit per member is less than R50 000;

(b) the fund or the relevant participating employer withdrawing does not have more than 50 members;

(c) the fund or the relevant participating employer has assets of less than R50 million; and

(d) the surplus apportionment scheme or nil return has been approved or noted by the Financial Sector Conduct Authority (FSCA).

The FSCA has previously published a draft exemption for public comment. The exemption notice has now been finalised, and the FSCA has now issued the final exemption in terms of FSCA RF Notice 5 of 2023. In terms of the exemption funds are exempted from the requirements of paragraphs (a) and (b) above, on the following conditions:

(a) that on the date that the fund takes a resolution to liquidate or partially liquidate the fund, the fund or the relevant participating employer does not have more than 100 members; and

(b) that all remaining requirements and conditions in the Board Notice are complied with.

The above in effect means that a fund can, in an application for exemption from the requirements of section 28, also request to be exempted from the conditions that the average benefit per member is less than R50 000 and that the fund or the withdrawing participating employer does not have more than 50 members. The exemption from both the aforesaid conditions is subject thereto that, on the date that the fund takes a resolution to liquidate or partially liquidate the fund, the fund or the relevant participating employer does not have more than 100 members.

3. Conduct Standard on retirement fund contributions - amended reporting formats

The Conduct Standard on retirement fund contributions was published on 19 August 2022 and came into operation on 19 February 2023. The Conduct Standard makes provision for certain standard notifications and reports, which formats were published on 30 September 2022.

The following formats were 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.

It has subsequently come to the attention of the FSCA that the format in which the FSCA must be informed of a contravention of section 13A is not conducive to the reporting of contraventions by funds with multiple participating employers, in other words umbrella funds. The FSCA has accordingly amended the reporting formats to allow for the submission of bulk information, as well as electronic submission via the FSCA's Pensions Online System.

The new reporting formats came into effect on 19 February 2023.

4. Fees in respect of transfers between retirement annuity funds

The Financial Sector Conduct Authority (FSCA) has published a Guidance Notice on the application of section 14(7)(b) of the Pension Funds Act. In terms of section 14(7)(b), the fees or commission payable in respect of financial services rendered after the transfer from one retirement annuity fund to another, may not exceed the maximum allowed in terms of the Long-term Insurance regulations, except if agreed to in writing by the transferring member on an annual basis.

No provision is however made in the Long-term Insurance regulations for a transferring member to agree to fees in excess of the maximum commission caps. Section 14(7)(b) of the Pension Funds Act is accordingly in conflict with the Long-term Insurance regulations in this regard. The purpose of the Guidance Notice is to set out how the FSCA will deal with this conflict.

The FSCA in the Guidance Notice say that section 14(7)(b) of the Pension Funds Act is primary legislation whereas the Long-term Insurance regulations are subordinate legislation, and that it is trite law that, in the case of a conflict between primary legislation and subordinate legislation, the primary legislation must prevail. The FSCA will therefore, after the transfer from one retirement annuity fund to another, allow the agreement of fees in excess of the maximum commission caps, despite the fact that this is not allowed in terms of the Long-term Insurance regulations.

The Guidance Notice further sets out the requirements that a fee agreement in terms of section 14(7)(b) of the Pension Funds Act must comply with.

5. 2023 National Budget

The Minister of Finance delivered his Budget Speech on 22 February 2023. The following proposals and information provided in either the Budget Speech or the Budget Review are of interest to the employee benefits industry:

Adjustment of retirement tax tables

The brackets for retirement fund lump sum benefits and retirement fund lump sum withdrawal benefits will be adjusted upwards by 10% with effect from 1 March 2023. This means that the tax-free amount that can be withdrawn at retirement increases from R500 000 to R550 000.

The new tables are as follows:

Retirement fund lump sum benefits

Taxable lump sum (R)	Rate of tax
0 – 550 000	0% of amount
550 001 – 770 000	18% of amount exceeding R550 000
770 001 – 1 155 000	R39 600 + 27% of amount exceeding R770 000
1 155 001 and above	R143 550 + 36% of amount exceeding R1 155 000

Retirement fund lump sum withdrawal benefits

Taxable lump sum (R)	Rate of tax
0 to 27 500	0% of amount
27 501 to 726 000	18% of taxable income exceeding R27 500
726 001 to 1 089 000	R125 730 plus 27% of taxable income exceeding R726 000
1 089 001 and above	R223 740 plus 36% of taxable income exceeding R1 089 000

Two pot retirement system

The two pot retirement system, which will give members access to a portion of their retirement fund benefits before termination of service, will come into effect on 1 March 2024.

Four areas require additional work:

- a proposal for seed capital, in other words that members should have immediate access to a portion of their fund values on the implementation date of the two pot system, despite the fact that they have not yet built up a savings pot;
- legislative mechanisms to include defined benefit funds;
- legacy retirement annuity funds;

- the possibility of withdrawals from the retirement pot if a member is retrenched and has no alternative source of income.

The first three matters will be clarified in forthcoming draft legislation. The final matter will be reviewed as part of a second phase of implementation.

Clarifying the amount of employer contributions to a retirement fund to be deductible

Section 11F(4) of the Income Tax Act ("the Act") deems an employer contribution to a retirement fund as a contribution made by the employee, and it is calculated as the amount equal to the cash equivalent of the value of the taxable benefit. However, there is no requirement that the calculated cash equivalent be included in the employee's income, as is the case in sections 6A and 6B of the Act. This is against the policy rationale of the Act's provisions. To address this, it is proposed that the Act be amended to require that the cash equivalent of the taxable benefit for employer retirement fund contributions be included in an employee's income before a tax deduction is allowed.

Transfers between retirement funds by members who have reached the normal retirement age

It has come to Government's attention that there are some instances where active contributing pension and provident fund members who have reached retirement age, and been subjected to involuntary transfers to another pension or provident fund, may be subject to tax. To address this, it is proposed that members of pension or provident funds who have reached the normal retirement age as stipulated in the rules of the fund, but have not yet opted to retire, should, as part of the involuntary transfer, be able to have their retirement interest transferred without incurring a tax liability.

Auto enrolment

In 2023, National Treasury will finalise policy proposals on how to expand the participation and coverage of all formal and informal workers in a retirement fund. These proposals will build on National Treasury's December 2021 discussion paper entitled Encouraging South African Households to Save More for Retirement. Consideration will be given to a voluntary and flexible savings scheme for informal workers.

Fund governance

Legislative amendments to improve governance of retirement funds, particularly commercial umbrella funds, will be published in 2023 and tabled in Parliament thereafter.

Unclaimed assets

In September 2022, the Financial Sector Conduct Authority (FSCA) published a discussion paper on unclaimed assets in the financial sector, in which certain recommendations were made. Further consultation on these recommendations will take place in 2023 and a final paper will be published in 2024.

Apportioning the retirement fund contributions deduction when a member ceases to be a tax resident

It is proposed that section 11F(2)(a) of the Income Tax Act be amended to apportion the annual limit on the deduction of retirement fund contributions when a member ceases to be a tax resident.

Conduct of Financial Institutions Bill

National Treasury has revised the Conduct of Financial Institutions Bill based on feedback from stakeholders. The Bill is expected to be tabled in Parliament in early 2023.

Transformation and financial inclusion

The FSCA published its draft transformation strategy for the financial sector in 2022. In the first phase of implementation, the FSCA will engage with industry and other stakeholders on the current legal landscape governing transformation. In the second phase, it will set and supervise specific licensing and regulatory requirements for financial institutions in line with the relevant legislation. The final strategy will be published by March 2023.

Financial education policy

In 2023, National Treasury will publish a consumer financial education policy document for public comment. This policy document will address consumer protection in the financial sector in the context of financial inclusion and transformation.

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