Legal Report

March 2024

1. Green Paper on Comprehensive Social Security

The cabinet has at its meeting on 28 February 2024 approved the publication of the revised *Green Paper on Comprehensive Social Security*. A Green Paper is a discussion document that sets out the government's thinking on a particular issue, and provides the public with an opportunity to provide comments.

The Green Paper was initially published in August 2021, but was withdrawn shortly thereafter so that some of the matters contained in the Paper could be clarified.

The following was stated in the Statement on the Cabinet Meeting:

"*The paper aims to introduce a mandatory social security pension system that provides retirement, disability and death benefits to all workers. Low-income earners would have their contributions subsidised in line with existing provisions.*"

The revised Green Paper has not yet been published, but the previous draft proposed the establishment of a National Social Security Fund (NSSF) to provide mandatory retirement, death and disability benefits for all workers. It seems clear from the extract quoted above that the revised Green Paper will contain a similar proposal.

The NSSF has been on the cards for many years, and it seems unlikely that it will be introduced in the near future. It was also stated in the previous draft of the Green Paper that once the NSSF is in place, a transition period of between five and ten years will apply.

2. Establishment of National Financial Ombud Scheme South Africa

In 2021, National Treasury and the Financial Sector Conduct Authority mandated the World Bank Group to carry out a diagnostic review of the South African financial ombud system. One of the World Bank's key recommendations was to consolidate the ombud system into a new single Ombud scheme, to cover the whole of the financial sector (excluding retirement funds until a later stage).

In anticipation of the broader consolidation of the ombud system proposed in the World Bank review, the Credit Ombud Association, the Ombudsman for Banking Services, the Ombudsman for Long-term Insurance and the Ombudsman for Short-term Insurance have voluntarily embarked on an amalgamation exercise. This has culminated in the formation of the National Financial Ombud Scheme South Africa, hereinafter referred to as "the new Ombud Scheme".

The Ombud Council has, with effect from 1 March 2024, in terms of the provisions of the Financial Sector Regulation Act, recognised the new Ombud Scheme as an industry ombud scheme. The recognition of the previous schemes referred to above, whereunder the Ombudsman for Long-term Insurance, has consequently been revoked with effect from midnight on 29 February 2024. The previous ombud schemes accordingly no longer exist, and have been replaced by the new Ombud Scheme.

The new Ombud Scheme will ensure that complainants and financial institutions will, for at least six months after the commencement of the new scheme, be able to continue using the contact details of the previous ombud schemes to access the services of the new Ombud Scheme. Any complaints in the process of being dealt with by a previous ombud scheme, will be managed to completion by the new Ombud Scheme.

The rules of the new Ombud Scheme have also been published. One of the aspects of note in the rules of the new Ombud Scheme is that the new scheme, like the former Ombudsman for Long-term Insurance, will have an equity jurisdiction, meaning that it will not be bound by legal principles, but will also be able to take considerations of fairness and equity into account. It is in this regard stipulated in the rules of the scheme that the scheme "*must determine what in its opinion is equitable, fair and reasonable in all the circumstances*".

It is further stipulated in the rules that any complaint which falls under the jurisdiction of the Pension Funds Adjudicator or the FAIS Ombud is excluded from the jurisdiction of the new Ombud Scheme, unless the Pension Funds Adjudicator or the FAIS Ombud has declined to deal with the complaint and agreed that the new scheme should deal with the complaint.

National Treasury has in the meantime also published documents on the planned reform of the ombud system, from which it appears that the intention is to, in due course, also incorporate the remaining industry ombud schemes plus the FAIS Ombud into a new, consolidated ombud scheme, the National Financial Ombud.

The Pension Funds Adjudicator will not be affected by the above developments and will continue to exist. This is because National Treasury considers that it would be too complex a transition for the National Financial Ombud to absorb the work of the Pension Funds Adjudicator at this stage. However, this is likely to happen in the medium term, once the National Financial Ombud has been up and running for a while.

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3. Section 37C of the Pension Funds Act not applicable to unclaimed benefits

The Financial Sector Conduct Authority (FSCA) on 25 March 2020 published FSCA Interpretation Ruling 1 of 2020 (RF), which dealt with the applicability of section 37C of the Pension Funds Act to paid-up members, deferred retirees and unclaimed benefits. According to this interpretation ruling, section 37C applied to paid-up members, deferred retirees and unclaimed benefits, where no election to withdraw has been made by the member prior to his/her death.

The FSCA has now issued FSCA Interpretation Ruling 1 of 2024 (RF), which replaces FSCA Interpretation Ruling 1 of 2020 (RF). As mentioned above, section 37C of the Pension Funds Act according to the previous interpretation ruling also applied to unclaimed benefits. The new interpretation ruling in essence confirms the interpretation as set out in the previous interpretation ruling, except for the fact that it is stated that section 37C of the Pension Funds Act does not apply to unclaimed benefits. The following is in this regard said in paragraph 4.6 of the interpretation ruling:

"*The unclaimed benefit is not due and payable because of the death of a member, and accordingly section 37C will not be applicable when that member dies. Where the person entitled to an unclaimed benefit dies, the benefit, which has vested in that person, must be paid to that person's estate and must not be dealt with in terms of section 37C.*"

It is respectfully submitted that the FSCA is correct that section 37C does not apply to unclaimed benefits. The correctness of the remainder of the interpretation ruling (both the new one and the previous one) is however unfortunately not beyond doubt. There is namely a school of thought which for the following reasons is of the view that section 37C does not apply to paid-up members and deferred retirees. Section 37C applies to "*any benefit … payable … upon the death of a member*". The benefit of a paid-up member or deferred retiree becomes payable when he/she withdraws from service or retires. When a paid-up member or deferred retiree dies, one is accordingly not dealing with a benefit that became payable <u>upon the death</u> of the member as contemplated in section 37C. The benefit had namely already become payable upon the member's withdrawal from service or retirement, with the result that section 37C is not applicable.

It is stated in the interpretation ruling that it is issued to "*promote legal certainty and to ensure clear and consistent interpretation and application of section 37C of the Act*". It is however doubtful whether the ruling provides such certainty. The only effect of the ruling is namely that the FSCA must in terms of section 142(3) of the Financial Sector Regulation Act interpret section 37C in accordance with the ruling. The ruling is not binding on third parties, and more specifically on the executor of a deceased member's estate. If a fund pays the benefit in respect of a deceased paid-up member or deferred retiree in terms of section 37C, and the executor of the member's estate subsequently claims that the benefit should have been paid to the estate, it would therefore be no defence to say that the fund acted in terms of an FSCA interpretation ruling.

The Pension Funds Adjudicator ("the Adjudicator") has in the April 2023 issue of its Quarterly Digest confirmed that it will follow the FSCA's opinion as set out in the interpretation ruling. It is however important to note that although

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the Adjudicator has confirmed how it will deal with benefits that become payable upon the death of paid-up members and deferred retirees, this does still not resolve the legal uncertainty in this regard. It is namely not known whether the Financial Services Tribunal or a court of law will follow the same approach. The lack of certainty with regard to the applicability of section 37C of the Pension Funds Act to paid-up members and deferred retirees accordingly remains, and funds would be well-advised to deal with such cases with circumspection.

4. Amendments to the Pension Funds Act

The Pension Funds Amendment Bill ("the Bill"), which proposes amendments to the Pension Funds Act, is currently before Parliament. The February 2024 Legal Report provides more detail about the proposed amendments.

National Treasury has on 19 March 2024 published its responses to comments received on the Bill, from which it appears that the Bill will be amended in, inter alia, the following respects:

- To make provision for the two pot system in respect of public sector funds, amendments to the following public sector pension laws will be included in the Bill: the Government Employees Pension Law, the Post and Telecommunications-related Matters Act and the Transnet Pension Fund Act.

- The Bill inserts a definition of "pension interest" in the Pension Funds Act, which differs from the definition of "pension interest" in the Divorce Act. So as to resolve the conflict between the definition of "pension interest" in the Pension Funds Act and the definition of "pension interest" in the Divorce Act, a clause will be inserted in the Bill to provide that in the event of a conflict between the Divorce Act and the Pension Funds Act, the Pension Funds Act will prevail.

- It is stipulated in the current version of the Bill that fund return on the non-member spouse's portion of the pension interest will no longer accrue from the date of the deduction of such portion from the member's benefit, but from the date of divorce. This will be amended so that the status quo remains, in other words fund return will accrue from the date of the deduction.

5. FSCA Statement on Consumer Vulnerability

The Financial Sector Conduct Authority (FSCA) has published a document entitled *Statement on Consumer Vulnerability*. The background to the issuing of the Statement, and the purpose thereof, is explained as follows in the press release accompanying the Statement:

The FSCA is responsible for, among other things, protecting financial customers by promoting their fair treatment by financial institutions. It is also responsible for promoting financial inclusion. The Vulnerability Statement supports both these objectives and aims to galvanise thinking and actions in the financial sector to identify and address the needs of vulnerable consumers.

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Due to their circumstances, vulnerable customers may be more susceptible to poor customer outcomes than others in the financial sector. These stem from unsuitable or harmful financial products, unfair or misleading sales practices, and difficulty accessing and using financial products and services.

The Vulnerability Statement examines the concept of consumer vulnerability and outlines its relevance in the context of market conduct regulation for South Africa. Understanding consumer vulnerability is an important practical step towards operationalising and embedding Treating Customers Fairly (TCF) principles and driving positive consumer outcomes with maximum impact.

The FSCA will engage with stakeholders on the Vulnerability Statement with the aim of soliciting views and inputs on how an approach to consumer vulnerability can be refined and embedded within the financial regulatory and supervisory landscape.

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

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