Legal Report

April 2024

1. Two pot rule amendments

The Financial Sector Conduct Authority (FSCA) has in the first issue of a new newsletter entitled *RF Talks* confirmed that the FSCA will be accepting two pot rule amendment applications from 1 May 2024 to allow sufficient time for the processing and registration of rule amendments. These rule amendment applications should only deal with two pot related changes, and should not contain amendments dealing with any other aspects.

The FSCA has previously issued FSCA Communication 3 of 2024 (RF), in which they set out the FSCA's requirements for two pot rule amendments. The FSCA has confirmed in the above-mentioned newsletter that another Communication will be issued to further clarify what the rules should contain.

2. Trustee Training Toolkit

Section 7A(3) of the Pension Funds Act requires trustees of retirement funds to attain prescribed levels of skills and training within 6 months after being appointed or elected and to retain such prescribed levels throughout their term of appointment.

Conduct Standard 4 of 2020 prescribes the Trustee Training Toolkit as the official minimum training requirement for all trustees of retirement funds in South Africa. The Trustee Training Toolkit is a free e-learning programme which has been specifically developed to provide trustees with a better understanding of their roles and to assist them in performing their fiduciary duties more effectively and efficiently.

The Financial Sector Conduct Authority (FSCA) has redesigned the Trustee Training Toolkit, and has on 27 September 2023 published a notice in which it determines the dates for completion of the new Trustee Training Toolkit. In terms of this notice, trustees who were appointed on or before 26 September 2023 had to complete the first 11 modules of the new Trustee Training Toolkit within six months from the date of publication of the notice, in other words by 26 March 2024.

Due to a significant number of trustees experiencing problems in accessing the portal for completing the Trustee Training Toolkit, the FSCA has now extended the completion date for the first 11 modules of the Trustee Training Toolkit to 30 September 2024. The FSCA has, at the same time, launched the second 11 modules of the Trustee Training Toolkit, which must also be completed by 30 September 2024.

All new trustees appointed or elected after 28 March 2024 must complete all 22 modules of the Trustee Training Toolkit within six months from the date of appointment or election.

The FSCA has reminded trustees that completion of the Trustee Training Toolkit is compulsory, and that the FSCA will monitor its completion and take regulatory action where there is a lack of compliance.

3. Prudential Standard on regulation 28 quarterly reporting requirements

The Financial Sector Conduct Authority (FSCA) has on 2 April 2024 published FSCA Prudential Standard 1 of 2024 (RF), which sets out the quarterly reporting requirements in terms of regulation 28 of the Pension Funds Act. The purpose of the Prudential Standard is to align the regulation 28 quarterly reporting requirements with the amendments to regulation 28 which came into effect on 3 January 2023. It perpetuates the current approach of quarterly reporting on non-compliance with regulation 28 (so-called exception reporting). The FSCA is currently busy consulting on a so-called holistic reporting Prudential Standard, which will require both non-compliance reporting and reporting on assets held in compliance with regulation 28. Once the holistic reporting Prudential Standard is made final, it will repeal the exception reporting Prudential Standard, in other words the Prudential Standard that has now been published. The exception reporting Prudential Standard will in other words only be in force as a temporary measure until such time as the holistic reporting Prudential Standard has been finalized.

The Prudential Standard came into operation on date of publication, being 2 April 2024.

4. Calculation of late payment interest on retirement fund contributions

The Financial Sector Conduct Authority (FSCA) has during May 2023 issued FSCA Communication 15 of 2023 (RF), dealing with the calculation of late payment interest on retirement fund contributions.

In terms of section 13A(3)(a)(i) of the Pension Funds Act contributions to a retirement fund must be paid "*not later than seven days after the end of the month for which such a contribution is payable*".

Section 13A(7) of the Pension Funds Act stipulates that "*interest at the rate as prescribed shall be payable from the first day following the expiration of the period in respect of which such amounts were payable*".

FSCA Conduct Standard 1 of 2022 (RF) ("the Conduct Standard"), dealing with the requirements related to the payment of retirement fund contributions, came into effect on 19 February 2023. In terms of paragraph 5(1)(a) of the Conduct Standard "*compound interest on late payments or unpaid amounts must be calculated from the first day following the expiration of the period in respect of which such amounts were payable until the date of receipt by the fund*".

According to the FSCA the combined effect of the above provisions is as follows:

"*The wording in paragraph 5(1)(a) of the Conduct Standard read with sections 13A(3)(a)(i) and 13A(7) of the PFA is clear and unambiguous. Section 13A(3)(a)(i) of the PFA requires that contributions must be paid not later than seven days after the end of the month for which such a contribution is payable. It follows, in terms of the wording of paragraph 5(1) of the Conduct Standard and section 13A(7) of the PFA, that LPI must be calculated from the day after the seventh day referred to in section 13A(3)(a)(i) of the PFA.*"

In accordance with the FSCA's opinion, as set out in the Communication, late payment interest must accordingly be calculated from the 8th day of the month following the month in respect of which the contributions were payable.

The matter has recently been complicated by the fact that the Pension Funds Adjudicator's office has in OPFA Communication 1 of 2024 expressed the exact opposite opinion, and stated that late payment interest must be calculated from the first day following the month in respect of which the contributions are payable. Late payment interest in respect of the January contributions, for example, must therefore, according to the Pension Funds Adjudicator, be calculated from 1 February.

The fact that the FSCA and the Pension Funds Adjudicator have different views about this matter obviously places funds in a difficult position. The FSCA has now, in the first issue of a new newsletter entitled *RF Talks*, confirmed that the FSCA has requested an opinion from Senior Counsel in this regard, and that it will in the meantime not withdraw FSCA Communication 15 of 2023. The FSCA will on receipt of the opinion decide on the appropriate course of action.

5. Framework for unclaimed assets

The Financial Sector Conduct Authority (FSCA) in 2022 published a discussion paper on a framework for unclaimed financial assets ("the Discussion Paper") and invited public comment on it. The FSCA has now published a response report in which they summarise the comments received, set out the FSCA's response to key themes and outline the FSCA's next steps for advancing the recommendations outlined in the Discussion Paper.

One of the more controversial proposals in the Discussion Paper was that financial institutions must be compelled to transfer unclaimed assets into a Central Unclaimed Assets Fund or, alternatively, to the National Revenue Fund. It is stated in the response report that the transfer of unclaimed assets to a central fund and/or the National Revenue Fund presents various complexities, and that the FSCA recognises that these complexities require further consideration before advancing the recommendation to establish a central unclaimed assets fund.

It is however stated in the report that as the identification and monitoring of unclaimed benefits is materially more advanced in the retirement funds industry than in the rest of the financial sector, the establishment of a central fund for retirement fund benefits can progress. This is pursuant to a proposal by National Treasury in this regard.

With regard to next steps, the following is stated in the report:

- The immediate next step will be to develop a framework that outlines the requirements relating to the identification, monitoring, management, tracing and reporting of unclaimed assets.

- To ensure the success of the work with regard to unclaimed assets, the FSCA will continue to actively engage all relevant stakeholders to obtain their insights, expertise and perspectives. The FSCA in this regard intends to approach industry representative bodies for assistance in developing an unclaimed assets taxonomy. They further aim to solicit input and feedback from the broader public and relevant stakeholders on the proposed framework for unclaimed assets before the end of 2024.

- In parallel with the above, the FSCA will continue to support National Treasury in its efforts to establish a central unclaimed retirement benefit fund.

6. Sustainable Finance

The Financial Sector Conduct Authority (FSCA) in March 2023 published a Statement on Sustainable Finance. National Treasury has in 2021 defined sustainable finance as financial models, services, products, markets and ethical practices that deliver resilience and long-term value in each economic, environmental and social aspect, contributing to sustainable development goals and climate resilience.

The FSCA has now published a report in which it sets out the current status of the work done with regard to sustainable finance, and from which it is, inter alia, clear that there will be an increased focus on ESG (Environmental, Social and Governance) factors.

It is stated in the report that the FSCA will engage, coordinate and cooperate with stakeholders as it implements its sustainable finance programme of work. Insights from stakeholders will inform further refinement and integration within the regulatory and supervisory landscape.

With regard to retirement funds, the Prudential Authority has recently published its Draft Guidance on Climate-Related Disclosures for banks and insurers. The FSCA anticipates releasing similar voluntary disclosure guidance for non-bank and non-insurance financial institutions, such as retirement funds. It is stated in the report that such voluntary disclosure is likely to begin with retirement funds given that regulation 28 of the Pension Funds Act already requires funds to consider ESG in their investment policies.

7. Updated ASISA guidelines on the Protection of Personal Information Act

The Association for Savings and Investment South Africa (ASISA) in July 2021 issued guidelines for its members who are responsible parties as defined in the Protection of Personal Information Act (POPIA), to assist them in implementing POPIA. ASISA has since updated the guidelines, and has in March 2024 published the updated guidelines.

The guidelines inter alia apply to life insurers and category II, IIA and III financial services providers. Retirement fund administrators act primarily as operators for purposes of POPIA, and not as responsible parties. Where a company is both a life insurer and a retirement fund administrator, it may however also follow the guidelines with regard to its retirement fund administration business.

Responsible parties are cautioned that "*whilst the Guidelines may serve as useful background to the industry as to how Personal Information should be protected, they are non-binding and each ASISA member ought to take their own independent views and decisions as to how they wish to protect Personal Information and implement POPIA requirements*".

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