

# Legal Report August 2021

Insurance

Financial Planning

Retirement

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Wealth

*Newsletter of Sanlam Corporate: Legal*

## 1. Early access to retirement savings

The Minister of Finance during a media briefing on 28 July 2021 said that National Treasury is in discussions with the National Economic Development and Labour Council (NEDLAC) on allowing early access to retirement savings. The Minister said the following in a media statement issued on the same date:

*“Government continues to engage with trade unions, regulators and other stakeholders to discuss how to allow limited withdrawals linked to tightening preservation by closing current loopholes, and also to expand coverage so that all those employed or earning an income are required to put aside a small proportion for saving for their future.”*

National Treasury in a media statement issued on 11 August 2021 provided the following further information regarding the above:

*“Even before the advent of COVID-19, the government recognised that many members may need to access part of their savings in particular unexpected circumstances. It is for this reason that the Minister of Finance noted in the 2020 Medium Term Budget Policy Statement (MTBPS) and 2021 Budget that consideration is being given to allow limited pre-retirement withdrawals from retirement funds under certain conditions, provided that this is accompanied by mandatory preservation upon resignation from a job.”*

*“Any consideration for early access will require legislative and fund-rule amendments because the current law and policy prohibits any pre-retirement access to retirement savings unless an employee resigns or is retrenched. It is expected that the earliest that any changes would become effective for a new withdrawal mechanism is 2022.”*

*“Government has been working on a more structured two-bucket system that will enable the restructuring of future contributions. One bucket is to be preserved until retirement, and the second bucket will allow for pre-retirement access during emergencies or extra-ordinary circumstances.”*

*“Members of retirement funds are advised NOT to contact their retirement funds to withdraw funds (unless retiring, resigning or retrenched), as these retirement funds*

*are legally not empowered to allow pre-retirement withdrawals until the law is enacted.”*

National Treasury on 24 August 2021 provided further information on what the new dispensation may look like by saying that retirement fund contributions would be made into two “pots”, only one of which would allow withdrawals (anywhere between 10% to a third of the savings being accessible after three to five years). Between 75% and 80% of retirement fund contributions would be made to the other pot. No withdrawals may be made from this pot before retirement, including withdrawals on resignation.

## **2. Draft Conduct Standard - conditions in respect of retirement fund administrators**

The Financial Sector Conduct Authority (FSCA) has published a draft Conduct Standard with regard to the conditions applicable to retirement fund administrators. These conditions are currently prescribed in Board Notice 24 of 2002. The FSCA has however identified a need to strengthen the existing regulatory framework set out in Board Notice 24 of 2002 and is for this reason consulting on the draft Conduct Standard, which is intended to replace Board Notice 24 of 2002 as the new enhanced regulatory framework applicable to fund administrators.

The draft Conduct Standard attempts to strengthen the existing framework governing fund administrators in order to ensure that, amongst other things, specific fundamental conduct risk areas are addressed. The draft Conduct Standard also attempts to balance outcomes-, principles- and rules-based requirements to ensure that administrators deliver fair customer outcomes in a disciplined, transparent and consistent manner.

The draft Conduct Standard repeats some of the conditions that are currently prescribed in Board Notice 24 of 2002. The requirements relating to these conditions are however expanded on. The draft Conduct Standard also includes conditions that are not currently dealt with in Board Notice 24 of 2002, including requirements relating to the following:

- business principles, culture and governance;
- notification to the FSCA where certain business information changes;
- appointment of a responsible key person to manage and oversee the business of the administrator;
- fit and proper requirements;
- outsourcing;
- conflicts of interest;

- communication, disclosures and complaints management;
- data management and maintenance of records;
- financial matters;
- operational ability.

Comments on the draft Conduct Standard can be provided to the FSCA until 13 September 2021.

### **3. Draft Taxation Laws Amendment Bill, 2021**

The Draft Taxation Laws Amendment Bill, 2021 has been published for comment. The proposed amendments affecting retirement funds are as follows.

#### **Allowing members to use retirement interest to acquire annuities on retirement**

A retiring member will be allowed to choose a combination of an in-fund annuity and an annuity purchased from an insurer, which is actually already the case after the withdrawal of SARS General Note 18. There is no limitation on the number of annuities that may be purchased, but the portion of the retirement interest utilised to purchase each annuity must exceed R165 000.

#### **Applying tax on retirement fund interest when a member ceases to be a tax resident**

When a member ceases to be a South African tax resident, and withdraws his/her benefit prior to retirement or death, the member will be deemed to have withdrawn from the fund on the day before he/she ceased to be a South African tax resident. The tax payment will however be deferred until payment of the member's withdrawal benefit, and the tax will be calculated based on the prevailing withdrawal tax tables. A tax credit will be provided for the deemed tax as calculated when the member ceased to be a South African tax resident.

The situation will be the same if the member preserves his/her benefit in the fund until death or retirement, except that when the benefit is eventually paid, the tax will be calculated based on the prevailing retirement fund lump sum tax tables or in the form of an annuity.

#### **Transfers between retirement funds by members who are 55 years or older**

In terms of paragraph 2(1)(c) of the Second Schedule to the Income Tax Act any amount transferred for the benefit of a member on or after normal retirement age forms part of the member's gross income. Paragraph 6A of the Second Schedule makes provision for a deduction in respect of such a transfer, but only in the event of a transfer from a pension or provident fund to a preservation fund or a retirement

annuity fund. It is proposed in the Draft Bill that paragraph 6A be amended to also make provision for a tax-free transfer from a preservation fund to another preservation fund or retirement annuity fund.

### **Clarifying the calculation of the fringe benefit in relation to employer contributions to a retirement fund**

It is proposed that self-insured risk benefits under a retirement fund be classified as a defined contribution component for fringe benefit purposes. This will ensure that retirement funds that provide both defined contribution component retirement benefits and self-insured risk benefits can account for the fringe benefit in respect of employer contributions based on the actual contribution. As a result, the value of the risk premiums under self-insured risk benefits will be determined based on the cost to the employer (i.e. the actual contribution made by the employer).

### **Paragraph 2B of the Fourth Schedule to the Income Tax Act**

Paragraph 2B, which is to come into operation on 1 March 2022, currently stipulates that if a taxpayer receives remuneration from more than one source (including a pension from a retirement fund or insurer), the tax rebates applicable to the taxpayer are not to be taken into account by the retirement fund or insurer when calculating the taxes to be withheld on the pension. It is proposed that paragraph 2B be amended so that the tax rebates should still be taken into account in the aforesaid circumstances. The retirement fund or insurer paying the pension should instead apply the fixed tax rate as directed by the South African Revenue Service (SARS) in determining the tax to be withheld.

## **4. Green Paper on Comprehensive Social Security and Retirement Reform**

The Minister of Social Development has published a Green Paper on Comprehensive Social Security and Retirement Reform (“the Green Paper”). A Green Paper is a government policy discussion paper that details specific issues, and articulates possible solutions that are yet to be adopted by Government.

Some of the proposals that are of importance to the employee benefits industry are as follows.

### **National Social Security Fund (NSSF)**

The Green Paper proposes the establishment of a National Social Security Fund (NSSF) to provide mandatory retirement, death and disability benefits for all workers.

All employees will be obliged to contribute between 8 and 12 per cent of their salaries up to a ceiling of R276 004 per annum to the NSSF. In respect of that portion of their salaries that exceed R276 004 per annum, employers will be obliged to auto-enrol employees into either the employer’s occupational retirement

fund or the NSSF. Where an employer does not have an occupational fund, the employees will be enrolled in the NSSF. Employees will also be allowed to opt out of the employer fund in favour of the NSSF should they deem it more suitable.

Employees earning below R22 320 per year will not be obliged to contribute to the NSSF for retirement or risk benefits. A simplified contribution arrangement for self-employed individuals and informal workers will also be established.

The NSSF will be a defined benefit fund. An employee's pension in retirement will be based on career earnings and the duration of contributions. The disability and death benefits will be based on the employee's salary at the time of injury or death. The NSSF will also pay a flat-rate funeral benefit.

The NSSF will also be an annuity product provider.

### **Reform of the current retirement fund system**

Preservation of retirement savings until the end of a worker's career will become compulsory to improve retirement outcomes, except under clearly specified circumstances, for example, emergency use.

It is stated in the Green Paper that Government acknowledges numerous requests to allow limited pre-retirement withdrawals under certain conditions, such as disasters. To this end, Government continues to engage with trade unions, regulators and other stakeholders to discuss how to allow these withdrawals, together with mandatory preservation requirements.

### **Approved funds framework**

The Green Paper proposes the introduction of an approved funds framework that will determine which funds are eligible for tax-incentivised supplementary savings, in other words over and above the contributions to the NSSF.

The proposed framework will include principles of independence of the board of trustees and an appropriate balance of power between the board and service providers. Umbrella funds will be subject to specific governance provisions, such as requiring employer and employee representation on the board.

### **Basic income grant**

A basic income grant is proposed. The financial cost of this will be approximately R200 billion and will require a 10-percentage point increase in income taxes. The proposal to increase taxes by 10 percent, so as to fund the basic income grant, is somewhat surprising in view of the fact that Government has in the 2021 Budget Review stated that *"lowering South Africa's tax rates will increase its competitiveness"*, and that *"government aims to reduce the rate over time by increasing the tax base through greater economic growth, employment and enforcement"*.

## Way forward

It is stated in the Green Paper that the proposals as therein set out require careful consultation with the public and community organisations, business and trade unions, the retirement fund industry and regulatory bodies. The Green Paper is the first stage in the consultation process.

It is also made clear that the proposed social security system cannot be introduced overnight. Once the NSSF is in place, a transition period of between five and ten years is proposed for alignment of existing retirement funds with the NSSF and the approved funds framework.

Comments on the Green Paper can be provided until 10 December 2021.

## 5. Levies on financial institutions

The Financial Sector Conduct Authority (FSCA) has published the adjustments to the annual levies payable by financial institutions, including retirement funds, for the levy year 1 April 2021 to 31 March 2022.

The new levies which are relevant for the retirement fund industry are as follows:

### Levy on retirement funds

(a) The levy in respect of a retirement fund registered in terms of the Pension Funds Act, excluding a retirement annuity fund, pension preservation fund, provident preservation fund and a commercial umbrella fund, is an amount of:

- R1 356.53 plus an additional amount of R16.05 per member of such fund and in respect of every other person who receives regular periodic payments from such fund (excluding any member or person whose benefit in the fund remained unclaimed, and beneficiaries of death benefits), or
- R3 108 288,

whichever total amount is the lesser.

(b) The levy in respect of a commercial umbrella fund, pension preservation fund and provident preservation fund is an amount of R1 356.53 plus an additional amount of R16.05 per member of such fund and in respect of every other person who receives regular periodic payments from such fund (excluding any member or person whose benefit in the fund remained unclaimed, and beneficiaries of death benefits).

(c) The levy in respect of a retirement annuity fund is an amount of R1 356.53 plus an additional amount equal to 0.0097% of the value of the assets of the fund.

## Levy on fund administrators

The levy in respect of an administrator approved in terms of section 13B of the Pension Funds Act is an amount of R8 659.42 plus an additional amount of R675.06 per retirement fund under its administration, and an amount of R0.81 per member and in respect of every other person who receives regular periodic payments from such fund, excluding any member or person whose benefit in the fund remained unclaimed, and beneficiaries of death benefits.

## Levy for Pension Funds Adjudicator

The levy for the Pension Funds Adjudicator in respect of a retirement fund registered in terms of the Pension Funds Act, including a pension preservation fund, provident preservation fund, a retirement annuity fund and commercial umbrella fund, is an amount of R6.99 per member of such fund and any other person who receives regular periodic payments from such fund, excluding any member or person whose benefit in the fund remained unclaimed.

## 6. Draft amendments to the Policyholder Protection Rules

The Financial Sector Conduct Authority (FSCA) has on 30 July 2021 published draft amendments to the Policyholder Protection Rules for comment. The proposed amendments include, inter alia, the following.

### Rule 1.4

Rule 1.4 currently stipulates that “*an insurer must have appropriate policies and procedures in place to achieve the fair treatment of policyholders*”. It is proposed that this be amended to provide that the insurer must also have appropriate systems in place.

### Rule 1.4(b)

Rule 1.4(b) currently requires that “*products are designed to meet the needs of identified types, kinds or categories of policyholders*”. It is proposed that this be amended to provide that products must also meet the objectives of policyholders. According to the FSCA this “*is to ensure that long-term objectives of the policyholders are taken into account when designing a product, alongside the more immediate needs of the customer*”.

### Rules 2.2.2 to 2.2.5

These rules deal with product design principles, and inter alia provide that the board of directors of an insurer is responsible for the appropriateness of all products that are introduced in the market. It is also stipulated that “*an insurer must, when developing products, ensure that the product design –*

(a) *is based on realistic assumptions; and*

(b) *will not result in terms, conditions and product features that are overly complex*".

### Rule 2.3

An insurer must establish, maintain and operate an adequate and effective product design framework to ensure the fair treatment of policyholders. This framework must inter alia *"provide for relevant objectives and key principles for the development of new products and effecting any material change in design of existing products"*.

It is further provided that *"an insurer must test all products appropriately before starting to market, offer or enter into specific policies in respect of a new product and before effecting any material change in design of an existing product"*. This inter alia entails that the insurer must *"assess whether the product will on an ongoing basis and over the lifetime of the product meet the identified needs, objectives and characteristics of the kinds or categories of policyholders or members it is intended for"*.

### Rule 2.4.2

An insurer must establish a product approval committee which must approve its products.

### Rule 2A

Rule 2A deals with the product standards applicable to microinsurance and funeral policies, and is currently only applicable to funeral policies provided under the funeral class of life insurance business. It is proposed that rule 2A be amended to extend its application to all funeral policies, regardless of the class of life insurance business under which it is provided. According to the FSCA this *"is to ensure level playing fields, consistency, and fair practices in the funeral insurance market, curb potential abuse, and avoid regulatory arbitrage"*.

### Rule 10.14.7

Rule 10.14.7 deals with advertisements that references loyalty benefits, no-claim bonuses or rebates in premiums, and inter alia stipulates that such an advertisement *"must not be used to induce a policyholder to enter into a policy"*.

### Rules 11.4.3(e), 11.6.3(e) and 14.4

An insurer must monitor the sustainability of income of a living annuity, and warn the living annuitant that there is no guarantee that the income from the living annuity is sustainable.



### Rule 12.1A

An insurer must ensure that it has processes and controls over its distribution channels that:

- reduce the likelihood that unsuitable products will be issued to its policyholders; and
- effectively mitigate the risk of poor outcomes to policyholders.

### Rule 15.7A

If an insurer increases premiums by more than twenty percent, it must at least 60 days before implementing the increase notify the FSCA in writing of its intention to increase the premiums, including details of –

- the reasons for the increase; and
- the alternatives to the increase in premiums that the insurer proposes to offer to policyholders.

### Rules 15.9 to 15.11

An insurer must establish and maintain a Principles and Practices of Premium Review policy, which must be approved by its board of directors, and must set out all the relevant practices and principles adopted by the insurer related to premium reviews.

### Rule 17.3.1(j) and (k)

The insurer's claims management framework must provide for:

- claims management and practices that support the prevention of insurance fraud and which are aligned to the insurer's Insurance Fraud Risk Policy;
- the establishment of a training programme on detection and prevention of insurance fraud for all persons responsible for the handling of claims, or making decisions or recommendations in respect of claims.

### Rule 22

Rule 22 deals with the reinstatement of policies. The following requirements are proposed in this regard.

If an insurer reinstates a policy, the insurer:

- must do so on at least the same terms as were applicable immediately prior to the policy lapsing;

- may not impose a new waiting period under the reinstated policy; and
- must confirm to the policyholder that if the policyholder settles the arrear premiums that caused the policy to lapse, the policyholder will enjoy cover for the period of the non-payment of premiums, and will be entitled to institute a claim that arose during that period.

If a policy lapsed due to the non-payment of premiums, and the insurer enters into a new policy with the same policyholder within two months after the previous policy lapsed, the insurer may not impose a waiting period under the new policy. This does not apply where the policyholder had not completed a waiting period imposed under the lapsed policy, in which case the insurer may impose a waiting period not exceeding the unexpired part of the waiting period under the lapsed policy.

An insurer must before electing to reinstate a policy, take into account the affordability of the policy for the policyholder.

#### Commencement date of proposed amendments

It is proposed that the amendments take effect six months after the date of final publication, to allow for a transitional period for the insurance industry to make the necessary changes to their systems and policies.

## **7. FSCA's expectations regarding premium increases on funeral policies**

The Financial Sector Conduct Authority (FSCA) has issued FSCA Communication 17 of 2021 (INS) in which they set out their expectations regarding premium increases on funeral policies.

It is stated in the Communication that the FSCA notes with concern the high premium increases that are being implemented by insurers on funeral policies. It is further stated that the FSCA is aware of the impact of COVID-19 on mortality rates and funeral policy claims. Insurers are however expected to ensure fair outcomes for policyholders. The following are the FSCA's expectations when insurers effect premium increases on their funeral books of business:

- Insurers must ensure that, in line with rule 1.2 of the Policyholder Protection Rules, they act with due skill, care and diligence when dealing with policyholders in implementing any increase in premiums.
- Premiums must be priced correctly at the inception of the policy so that any increases which may be implemented would still result in fair outcomes for policyholders and the policy continuing to perform as expected. If policies were not priced correctly at inception of the policy, and exorbitant increases are thereafter implemented due to the impact of COVID-19 or underwriting losses, this would result in unfair outcomes for policyholders.

- In terms of rule 15(1) of the Policyholder Protection Rules a premium payable under a policy may only be reviewed if the policy provides for a review and states the frequency at which, and the circumstances in which, a review will take place.
- In terms of rule 15(4)(a) of the Policyholder Protection Rules any review of a premium payable under a policy must reasonably balance the interests of the insurer and the reasonable benefit expectations of policyholders or members.
- In terms of rule 15.6 of the Policyholder Protection Rules an insurer must timeously, and in writing, inform a policyholder of a pending review, and the timing of the review, if the review is expected to result in a premium increase.
- In terms of rule 15.7 of the Policyholder Protection Rules, if a premium will be increased as a result of a review, an insurer must take reasonable steps to afford a policyholder alternatives (such as the option to terminate the policy, to reduce the policy benefit or to enter into an alternative policy) to mitigate the impact of the increase on the policyholder.
- Insurers must, with regard to premium increases, be able to demonstrate that they are complying with the provisions of the Long-term Insurance Act, particularly the Policyholder Protection Rules, and that they are treating their customers fairly.

## 8. Possible changes to the Ombud System

National Treasury and the Financial Sector Conduct Authority (FSCA) have published an invitation for public comments on a diagnostic study about the South African Ombud System. The study was commissioned by National Treasury and prepared by the World Bank Group. It aims to provide an independent review of South Africa's financial ombud system and recommends reforms to enhance customer protection and good quality outcomes in the financial services sector.

Recommendations that would impact on the employee benefits industry include the following:

- It is recommended that a National Financial Ombud be established, being a new non-statutory body to replace the current seven ombud schemes, with the exception of the Pension Funds Adjudicator. This means that the Ombudsman for Long-term Insurance would fall away.
- The Pension Funds Adjudicator is to be retained, but will be reformed, and renamed the Retirement Funds Ombud. The Pension Funds Adjudicator's jurisdiction will be expanded to complaints about advice and intermediary services concerning retirement funds. Issues relating to advice and intermediary services are currently being dealt with by the FAIS Ombud.

## **9. ASISA guidelines for responsible parties on the Protection of Personal Information Act**

The Association for Savings and Investment South Africa (ASISA) has 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.

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 will however be expected to also comply with the guidelines with regard to its retirement fund administration business.

The guidelines set out a suggested framework for responsible parties when processing personal information, and it is stated in the guidelines that all responsible parties are strongly encouraged to follow the guidelines and to take all reasonable steps to implement the guidelines effectively. Responsible parties are however cautioned that *“although the Guidelines set out standards of good practices relating to the processing of personal information and are intended to guarantee a uniform high level of information protection, individual Responsible parties must always ensure that they are compliant with the provisions of POPIA and/or any documents and guidance notes published by the Information Regulator”*.

## **10. Guidelines for assessing disability due to pulmonary disorders**

The Association for Savings and Investment South Africa (ASISA) has issued guidelines for the assessment of disability claims based on pulmonary disorders. This is an update of the previous guidelines issued by ASISA's predecessor, the Life Offices' Association (LOA).

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