

This e-mail flyer is produced by the Pension Law Division of the Employment Law and Employee Benefits Department of Shepstone & Wylie and includes commentary on new Legislation, the latest reported decision of the Supreme Court of Appeal and other information of interest for its clients.

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Articles and Recent Developments:

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We trust that you will find the content of this email flyer to be of interest.

1. Highlights of Legislative Amendments introduced by the Financial Services Laws General Amendment Act (effective 1 November 2008)

1.1 Principal Officers

The Act has introduced many new requirements in respect of principal officers ("PO"), the most important being that the Registrar may veto the appointment of a PO subject to the Promotion of Administrative Justice Act, 2000 (which imposes certain procedural requirements, including the right to a hearing etc.). The change emphasises the importance of the PO, because the appointment of a trustee doesn't even require the Registrar's approval. If the Registrar believes that the PO is not a fit and proper person to hold office or that it is not in the public interest that the PO holds office, the Registrar may object to the appointment of that PO. In assessing whether a PO is a "fit and proper" person to hold office, the Registrar will have regard to:

- The PO's competence and soundness of judgment
- Diligence with which the PO is likely to fulfil the responsibilities
- PO's previous conduct and activities in business or financial matters
- Whether the PO has been convicted of offence/s involving dishonesty (fraud, theft, etc)

- Whether the PO has ever been sentenced to imprisonment without the option of a fine
- Whether the PO has contravened law that protects the public against financial loss
- Whether the PO's conduct in prior capacity of PO contributed to fund's inability to pay debts or caused financial loss to members
- Whether the PO participated in deceitful, prejudicial or otherwise improper business practices
- Whether the PO has been associated with business practices or conduct that "*casts doubt on his or her competence and soundness of judgment*"

1.2 "Whistle-Blower" Provisions

POs and fund auditors are required to submit a written report to the Registrar detailing:

- Any matter relating to the affairs of the fund which, in the opinion of the PO/auditor, may prejudice the fund or its members;
- The perceived reasons for the termination of the PO/auditor's appointment.

1.3 Unclaimed Benefit Funds

The Financial Services Board ("FSB") seeks to have all unclaimed benefits transferred to separate funds, called Unclaimed Benefit Funds (until the FSB is in a position to establish one industry fund). These unclaimed benefit funds will be registered with the FSB as pension funds and will be approved by SARS as either pension preservation funds or provident preservation funds.

Most benefits are classified as "unclaimed" if not paid within 24 months of the benefit becoming due and payable (but, for example, the 24 month period is extended in respect of death benefits to "*such longer period as reasonably justifiable by the board*"). Only unclaimed benefits may be transferred to an Unclaimed Benefit Fund. These will include, amongst other things, retirement benefits, surplus amounts, liquidation/deregistration benefits and death benefits. .

Funds whose rules previously allowed for unclaimed benefits to revert to the fund had until 31 December 2008 to amend these rules. In any event, the rules of most funds now will need to be amended to allow unclaimed benefits to be transferred to the Unclaimed Benefit Funds.

1.4 Beneficiary Funds

Following the Living Hands and Fidentia debacle, the term "Beneficiary Fund" has been included in the definition of "pension fund organisation", so as to bring such funds under the control of the FSB. The purpose of these funds is to receive, administer, invest and pay the benefits referred to in Section 37C (death benefits). For future death benefit allocations, they effectively replace

the umbrella trust funds which had been used for the benefits of minors etc. Lump sum death benefits may now only be paid to:

- the beneficiary directly;
- *"a person recognized in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee"*
- a Beneficiary Fund
- a trust specifically nominated by the deceased member, a major dependant, nominee or caregiver of a minor beneficiary.

No payments may be made by a fund to an unregistered beneficiary fund after 1 January 2009. We understand that several Beneficiary Funds have applied to be registered. Existing trust funds are not affected, although transfers from existing trusts to Beneficiary Funds are to be facilitated in the future once the necessary tax legislation is in place.

1.5 Deductions from Pension Benefits

The problem relating to the order of preference in respect of the various deductions which registered funds are empowered to make from their member's benefits has been rectified. A hierarchy of claims has been introduced which ranks the claims as follows:

- Income tax deductions;
- Housing loans and guarantees granted to or in favour of the member (pre-dating other court orders);
- Maintenance orders;
- Divorce orders.

If a divorce order and maintenance order providing for the deduction of amounts from a member's benefits are granted simultaneously, the maintenance order ranks above the divorce order and must be given effect to first. The aggregate of all amounts deducted may not exceed the member's pension interest at any given time. Other deductions made when the member exits the fund (for example, in favour of an employer where the member stole money from the employer) rank behind the above list.

1.6 Divorce Orders

In terms of the Divorce Act, a court may grant an order that a divorced non-member spouse is entitled to a share of his or her former spouse's pension interest. Prior to the Pension Funds Amendment Act, 2007, the non-member spouse who had been awarded a portion of the member's fund benefits as part of divorce proceedings had to wait until the member left the fund before being entitled to payment of the non-member spouse's share of the benefits. The Pension

Funds Amendment Act, 2007 introduced the principle of the "clean break" but it was not clear whether this applied to divorces prior to 13 September 2007 (when the new law was introduced). The Financial Services Laws General Amendment Act clarified the position, which is summarised below.

Divorce orders granted after 13 September 2007

- Share of benefit due to non-member deemed to accrue to member spouse on the date of the divorce order.
- The fund must request the non-member spouse to make an election within 45 days of submission of the court order by the non-member spouse to the fund.
- The election period runs for 120 days from the request to make the election.
- Deduction from the member on the date of the election by the non-member spouse (whether to receive the award as a lump sum or transfer it to another retirement savings vehicle) OR on the date on which the election period expires, whichever occurs earlier.
- The fund must transfer the amount of the award accordingly within 60 of the election being made.
- Where no election is made during the election period, the amount must be paid directly to the non-member spouse within 30 days of the expiry of the 120 day expiry period (provided the fund has banking details).

Divorce orders granted prior to 13 September 2007

- Share of benefit due to non-member deemed to accrue to the member spouse on 13 September 2007.
- Paid and transferred in the same manner as divorce orders granted after 13 September 2007.
- Trustees must be aware of their obligation to request the non-member to make an election within 45 days of receiving the court order from the non-member (NOTE: some funds may already be in possession of such orders).

General provisions

- The pension interest assigned to the non-member spouse refers to the equivalent portion of the benefits to which the member would have been entitled to in terms of the rules of the fund had his or her membership terminated on the date on which the divorce order was granted.
- The current tax position is that the tax on the amount awarded is payable by the member and he or she has a right of recovery for the tax paid against the non-member. This position looks set to be changed in the near future by the Revenue Laws Amendment Bill,

2008, such that the non-member will liable for tax on the award and accordingly will be awarded a gross amount.

1.7 Administrative Penalties

The Pension Funds Amendment Act, 2007 authorised the Registrar to impose administrative penalties on administrators, pension funds or third parties for non-compliance with the Pension Funds Act. These penalties could range up to a maximum of R5 million rand per day of non-compliance. This has been reviewed and the Registrar may now only impose an administrative penalty:

- on a pension fund, administrator or third party;
- for failure to submit to the Registrar or any other person;
- within a period specified in: the Act, a directive or a condition imposed by the Registrar;
- any scheme, statement, report, return or other document or information required to be submitted in terms of the Act;
- **not exceeding R1000** or such other amount prescribed by the Registrar;
- for **every day** during which the failure continues.

This amendment has clearly restricted the Registrar's discretion to impose heavy administrative penalties, both in value and nature, as the criteria have been narrowed down from wide-ranging non-compliance with the Act to failure to submit particular documents. The Registrar may refer other non-compliance to a new body called the Enforcement Committee.

1.8 Enforcement Committee

The Financial Services Board Act has been amended to oblige the FSB to establish the Enforcement Committee, which will be responsible for enforcing compliance with the laws regulating financial institutions (such as the Pension Funds Act) and the provision of financial services. There are extensive requirements as to the composition of the Committee and the panels to be established by the Committee for the purpose of presiding over individual matters. For example, the Committee must comprise of attorneys or advocates with at least ten years experience and may include a judge. The Enforcement Committee will, in laymen's terms, "wield the big stick" for all bodies which currently operate in terms of the laws under the administration of the FSB. Hearings before the Enforcement Committee will only take place after affidavits have been exchanged between the Registrar (who is the complainant in all cases) and the allegedly non-compliant party.

2. Developments from the Office of the Pension Funds Adjudicator

2.1 Scorecard

The Adjudicator has implemented an industry-wide scorecard in order to "*address the inefficiencies of in the industry and unlock the industry's potential and growth*". The main purpose of the scorecard is to regulate the handling of complaints at fund level, in particular, responses to the complainant and the Adjudicator. The scorecard seeks to regulate and monitor, among other things, the following:

- Response times to complaints lodged against the fund
- Quality of responses
- Relief granted to complainant
- Type and nature of complaints lodged
- Attempts to resolve the dispute prior to it being lodged with the Adjudicator.

Scoring will be based on the following five indicators:

- Type of complaint
- Complaint details
- Response quality
- Attempt to settle
- Outcome

The Office of the Pension Funds Adjudicator has expressed an intention to make public the total scorecard aggregate for each fund at the end of the financial year of the Office, despite the fact that this clearly prejudices the larger funds. After all, more members logically mean more complaints. Having been present when the scorecard was first presented to the industry, it is evident that the scorecard procedure and implementation requires much "fine-tuning" before it runs smoothly or is any sort of useful indication of a fund's "performance" in dealing with complaints. More details of the scoring process are available on the Adjudicator's website www.pfa.org.za.

2.2 Conciliation

The incumbent Adjudicator says she has already begun to exercise the legislative right of her Office to formulate guidelines prescribing the circumstances in which parties will be required to attend conciliation in an effort to reach settlement of a dispute by agreement. The following are the key principles of these guidelines:

- The Adjudicator will provide the forum in which parties can reach settlement of a dispute by negotiation with the assistance of an independent conciliator;
- The conciliation process will be confidential and conducted on a without prejudice basis;

- The Adjudicator will decide which complaints are appropriate for conciliation;
- The conciliator will decide on the form and method of the conciliation which could include a telephonic conciliation where complainants are situated in remote areas;
- Legal representation will not be allowed;
- The Adjudicator will choose an appropriate venue for the conciliation which could include conciliators travelling to complainants in remote areas but should remain cost-effective to all parties;
- At the completion of the conciliation, the conciliator shall issue a Certificate of Outcome of Dispute (COD Form) stating whether settlement has been reached;
- If settlement is reached, the conciliator must ensure that the settlement agreement is written in a clear and concise manner and signed by all parties;
- Conciliation proceedings will be conducted in English;
- A signed settlement agreement will have the same effect as an Adjudicator's determination (which means that an agreement for the payment of money can be enforced by a Court issuing a warrant of execution against property);
- Costs awards may be made by the Adjudicator in exceptional circumstances e.g. frivolous or vexatious conduct or gross maladministration.

The full set of guidelines may be obtained from the Adjudicators website www.pfa.org.za.

3. Supreme Court of Appeal Confirms Fund Entitled to Withhold Benefits

In a unanimous judgment handed on 1 December 2008, the Supreme Court of Appeal confirmed the advice we have always given our clients – that a fund has a discretion under section 37D of the Pension Funds Act to withhold the payment of pension benefits due to a member at the termination of his employment, pending the finalisation of a claim for damages allegedly suffered by the member's employer by reason of theft, dishonesty or fraud committed by the member.

The case is **Highveld Steel and Vanadium Corporation Ltd v Oosthuizen**. The fund member, Mr Oosthuizen, pleaded guilty to some of the disciplinary charges against him (including bribery, fraud, theft and other transgressions involving dishonesty) and was dismissed. At the employer's request, the pension fund to which Mr Oosthuizen belonged agreed to withhold the payment of his benefits pending the outcome of the employer's civil claim against Mr Oosthuizen to recover the losses caused by his dishonest misconduct. Mr Oosthuizen challenged the fund, but the Supreme Court of Appeal (the highest court in our land, except in relation to constitutional matters) held that section 37D of the Pension Funds Act must be interpreted purposively to

include the power of a fund to withhold payment of a member's benefits pending the outcome of the legal proceedings against the member or his written acknowledgement of liability.

Although the Court rules that the fund had acted properly in this case, it warned funds to exercise their discretion with care and to balance the potential prejudice to an employee who may urgently need access to his pension benefits and who is in due course found innocent, against the strength of the employer's claim.

4. Fund Governance Circular PF 130 and Trustee Training

By now most funds should have completed or be in the process of implementing the investment, risk assessment, communication, conflict of interests and gift policies envisaged in FSB Circular PF 130. Trustee and Principal Officer performance reviews are probably also being undertaken. Training often emerges as one of the critical components in these processes. We have devised a 1-day training course (in English and Zulu) covering the principles of good governance and practical implementation of PF 130. Please feel free to contact us as indicated below if you would like to know more about the training course, which can be customised for you and your fund.

Contact details:

Should you require additional information on any of the above issues or with regard to any other pension law issues, please contact any one of our following team members:

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