

RETIREMENT FUND REFORM DISCUSSION PAPER

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1. Employment Law and Pension Law Interface

- 1.1 One of the principles of retirement reform outlined on page 4 of the discussion paper is to “encourage employers and employees to provide for retirement funding as part of the remuneration contract”. This principle is expressed in different ways, particularly in Annexures 2 and 4 to the discussion paper¹.
- 1.2 There are a number of retirement funds which are fully bargained, but on the other hand there are also a number of funds in existence where only some, or none, of the matters contemplated in paragraphs 1.6.1, 3.3 and 3.5 of Annexure 2 are matters for negotiation between employer, employees and/or the management board of the fund. Questions of negotiating benefit and contribution levels and the nature and identity of the employees’ default retirement fund, raise legal questions regarding the extent, if any, to which the rules of a retirement fund are incorporated into the employment contract. This matter is extremely complex and has been the subject of academic debate as well as a number of opinions by several eminent senior counsel. We do not have a firm-wide view as to the correct approach to be taken, but simply wish to recommend that the opinion of leading practitioners (which varies quite extensively) be obtained prior to the promulgation of legislation in this respect.
- 1.3 We recommend that the first line of paragraph 6.5.1.2 in Annexure 4 should refer to “such initial contributions”.

¹ Principles, page 9; Annexure 2: paragraphs 1.6.1, 3.3, 3.5.3.1; Annexure 4: paragraphs 6.5.1, 6.5.2, 6.6

2. Death Benefits

- 2.1 In paragraph 3.4.1.4 of Annexure 3, it is recommended that benefits be distributed in accordance with a member's beneficiary nomination form "unless compelling reasons exist why this should not be followed".
- 2.2 Section 37C(bA) of the Pensions Funds Act² requires the board of a fund to distribute death benefits between dependants and nominated beneficiaries "in such proportions as the board may deem equitable". The "compelling reasons" standard is, in our view, likely to be perceived as a stricter standard for boards of funds, although it is our understanding that in making a determination on an equitable basis, any compelling reasons which may sway a decision in either direction are already taken into account as a matter of practice, and indeed should be taken into account as a matter of law. In our view, the recommendation creates the risk that, in order to comply with the revised law, trustees will begin to make determinations that run contrary to the understood broader social policy of limiting dependency on the state.
- 2.3 The Wills Act prescribes criteria for the validity of a binding testamentary instrument. If the extent to which a beneficiary nomination form is binding upon the board of the fund is increased to the extent where it may be departed from only in compelling circumstances, then, as a matter of social policy, it may be that the criteria for the valid execution of a beneficiary nomination form should more strictly regulated. In the absence of such regulation the beneficiary nomination form would be a more viable opportunity for abuse and / or fraud.
- 2.4 In paragraph 3.15.2.3(c) of Annexure 3, it is recommended that an insurer be permitted to accelerate payments of the insured portion of a death benefit where a member is terminally ill and the fund provides income on disability with the person remaining covered under the fund's insurance policy for a death in excess of the retirement savings accounts. This would result in accrual of an insurance payment in circumstances where the insured event, namely death, has not arisen. This

² Act 24 of 1956

appears to run contrary to the principle of limiting dependency on the state, since such an enhanced, insured, benefit would result in the provision of an enhanced disability income, but would not protect the dependants of the insured after death, which, in our understanding, is the primary purpose of a death benefit.

3. Unclaimed Benefits

- 3.1 In terms of the Prescription Act³, despite the practise of many retirement funds to treat benefits as unclaimed for a period and to provide for their reversion to the fund following that period, a member should have 3 years within which to sue the fund for delivery of a benefit previously unclaimed. If money is to be paid to an unclaimed benefits fund within that 3 year period, then either the provisions of the Prescription Act should be amended accordingly or the unclaimed benefits fund would have to indemnify the retirement fund in respect of amounts transferred to the unclaimed benefits fund prior to (and preferably, also following) the expiry of any applicable period of prescription.
- 3.2 Paragraph 3.14.3.2 of Annexure 3 places the duty on the unclaimed benefits fund to trace former members. Trustees of retirement funds currently have this duty. Presumably the board of the unclaimed benefits fund would only be able to utilise its own assets in order to cover the costs of tracing former members, and if its only source of revenue is the receipt of unclaimed benefits, then such unclaimed benefits could be significantly reduced by the cost of tracing former members.
- 3.3 Paragraphs 3.14.3.3 and 3.14.3.4 of Annexure 3 provide that the unclaimed benefits fund may release monies to the state following a specified period, but that the fund may pay out benefits to former members or relatives of deceased members who subsequently approached it and are able to substantiate their claim. This would suggest that the state would need to provide an indemnity to the unclaimed benefits fund in relation to any claims successfully made against it

³ Act 68 of 1969

following payments by the unclaimed benefits fund of assets formerly held in relation to the claimed subsequently proved.

- 3.4 The Administration of Estates Act⁴ contains provisions regarding the holding of unclaimed assets held a person to the Guardian's Fund in certain, quite wide-ranging circumstances. In our view, any legislation in relation to the unclaimed benefits fund should have close regard to the provisions of the Administration of Estates Act, lest two funds should exist into which the retirement fund would have a duty to pay unclaimed benefits.

4. Unfair Discrimination

Paragraph 3.5.2.3(c) of Annexure 3 provides that differences in risk benefits payable according to age, and restrictions in risk benefits on the grounds of physical conditions should, in certain circumstances, be permitted if the premiums paid by funds for insurance products are determined with reference to the age, race and gender profile of the fund's membership. Paragraph 3.5.2 requires funds to address unfair discrimination. The boards of funds may be placed in a difficult situation if they are of the view that the criteria applied by the insurer in determining premiums amount to direct or indirect unfair discrimination. It is not clear from the discussion paper whether the board of the fund would be entitled to disregard such concerns, and if not, whether laws regarding unfair discrimination would be more strictly enforced against service providers (insurers), and if so, how.

5. Governance and Regulation

- 5.1 In footnote 22 on page 23 of the discussion paper it is speculated that trustees of retirement fund could be required to advise employees in whose interest it is to move to the National Savings Fund, to do so. This could create a conflict of duties for the trustees of the retirement fund in that they are also required to act in the

⁴ Act 66 of 1965

best interests of their fund and its members, and the maintenance of an optimal fund population would presumably serve such best interests.

- 5.2 With reference to the proposal in paragraph 1.11.8 of Annexure 4, the registrar is currently empowered to issue practice notes and pension funds circulars, and does so from time to time. Occasionally the interpretation of the registrar may differ from the interpretation of the board of the fund or one or more of its members, but the registrars' view does not have the force of law. In those circumstances the fund's board is forced to choose between a practice which it is aware the registrar will approve or an interpretation of the law which makes sense to the board, but which is unlikely to be accepted by the registrar. In our view the evidential value of codes of good practice issued by the registrar would be outweighed by the lack of clarity that such codes of practice could introduce into the law. Alternatively, such codes of good practice (as well as other practice notes and guidelines issued by the registrar's office) should not be issued without submissions having been invited and entertained.
- 5.3 With reference to paragraph 5.5 of Annexure 4, we submit that the Financial Institutions (Protection of Funds) Act⁵ ("the FIA") requires that consultants and other service providers to whom discretionary powers are granted by retirement funds are obliged to act in the best interests of such funds, and the Act applies the same level of fiduciary duty to such persons as to the boards of funds. In this regard please refer to sections 2 and section 4 of the FIA
- 5.4 With regard to paragraphs 5.6.4 and 5.6.5 of Annexure 4, we recommend that the common law duties of trustees should not be codified, but rather, to the extent that it is regarded necessary to do so in a statute, explained or clarified, without limiting such common law duties. The effect of a codification could be to restrict the statutory duties so that they are lesser in extent than the common law duties, while rendering the persons under the relevant duties free from the original common law duties.

⁵ Act 28 of 2001

- 5.5 It is not clear whose written consent is required in paragraph 5.6.7 of Annexure 4 for the advancement of the interests of one group of stakeholders at the expense of another. Presumably the written consent of the disadvantaged group is unlikely ever to be obtained.
- 5.6 With regard to paragraph 5.6.10 in Annexure 4, given the dire need for trustee training, on the one hand, and the duty of the trustees to protect the interests of the fund at all times, trustees may find themselves conflicted between the duty to educate their trustees and the duty to protect the assets of the fund, if trustee training is to be done at the expense of the fund. Such conflict maybe prevented if the party who nominates a trustee (in the case of the employer or employees) or provides the trustee (in the of an independent trustee or an employee of a service provider) were to bear the costs of initial training to a stipulated entry level, whereafter the fund itself would only be liable for the costs of continued trustee education.
- 5.7 With reference to paragraph 5.6.17.2 of Annexure 4, we agree that trustees must not be victimised by employers if they take decisions which are not in the employers' best interests, provided that such decisions also happen to be in the fund's best interests.
- 5.8 We refer to paragraph 5.6.20 in Annexure 4. Currently the so-called "sub-funds" or "employer sections" of multi-employer funds do not constitute independent funds in law but are nevertheless treated as such in practice. In our view this discrepancy between the law and practice needs to be addressed. Indeed, the entire definition of "pension fund organisation" in the Act should be revisited at this opportunity.
- 5.9 In paragraph 9.3.1 of Annexure 4 the recommendation is made that provisions enabling the efficient and inexpensive partial or total winding up of retirement funds should be extended to circumstances in which the assets of the fund are depleted by, for example, transfers to another fund. Section 14 of the Act is designed to avoid such depletion, in that the registrar is required to satisfy himself or herself that neither fund will be rendered financial unsound by virtue of the transfer. There is a danger that the effect of the recommendation could be that employers could be

required to make good shortfalls in transferor funds due to the failure of the registrar, the trustees or the actuaries of the funds involved.

6. Divorce

We wish to draw to the Task Team's attention that section 20 of the Matrimonial Property Act⁶ provides for the separation of a joint estate of spouses, in anticipation of proceedings for divorce. Accordingly, there may be circumstances where a joint estate has been divided, but the parties have not yet been divorced, in which case the provisions of the Divorce Act regarding a members' pension interest cannot apply. Such orders are usually only granted where there is a real suspicion that one spouse may deplete the assets of the joint estate at the expense of the other spouse. We recommend that any recommendations in relation to the treatment in the case of divorce, be extended to include orders for the separation of a joint estate.

7. Benefits and Investments

7.1 With regard to paragraphs 3.4.1.1 and 3.4.1.2 of Annexure 3, we reiterate the point made in our section 1 above, that benefits should not be subject of negotiation in the context of the contract of employment, otherwise recommendations such as these one could prove to be impracticable.

7.2 It is not clear how the recommendation in paragraph 3.12.3.3 of Annexure 3 relates to the recommendations regarding the establishment of an unclaimed benefits fund. There may well be circumstances where the retirement fund may transfer money to an individual retirement fund, inform the member, and then lose contact with the former member. Such benefits may then become unclaimed benefits in the hands of the transferee retirement fund.

⁶ Act 88 of 1984

8. National Savings Fund

We note that the nature of the National Savings Fund is still a matter for some consideration and accordingly we are not in a position to raise legal issues except to recommend that it be clear under whose jurisdiction such vehicle would fall. It appears from initial proposals that the National Savings Fund may well be some form of savings account as provided by a banking institution or some other form of fund established in terms of its own statute. In our view it should be clear whether the banking regulator or the pension funds regulator or some other person would have ultimate regulatory control over such fund.

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