

Goals for 2010 & beyond

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2010 PLA CONFERENCE - SPIER - WESTERN CAPE
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Speaker

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Topic

LATE CONTRIBUTIONS AND LATE PAYMENT
INTEREST PAYABLE IN TERMS OF S 13A(7)
WHAT HAPPENS TO THE INTEREST?

CONTRIBUTIONS AND BENEFITS

- The main business of a pension fund is to accept contributions and pay benefits when a member leaves the Fund or retires
- The rate of contributions payable by the members and the employer is a an agreed condition of employment and the PFA does not interfere with the issue
- The contribution rate payable must be set out in the rules of the Fund
- The earliest date on which the contributions must be paid is also a matter between the Fund, the members and the employers
- In other words, they can agree that contributions be paid at the end of every month and have this set out in the rules
- They can even agree on what will happen if contributions are not paid at the end of the agreed period

WHAT DOES THE PFA SAY ABOUT CONTRIBUTIONS?

- Board has duty to ensure contributions are paid on time (s7D(d))
- Employers have a statutory duty to pay the contributions set out in rules (s13A(1))
- s13A prescribes the latest date on which contributions must be paid

by no later than the 7th day of the month following the month on which the contribution is payable

- In the case of benefits payable to the second fund, first fund must make payment within 60 days of written request by exiting member
- What happens if contributions (or exit benefit) are not paid on time or at all?
- s13A(7) says “Interest at the prescribed rate shall be payable”

WHO MUST PAY THE INTEREST AND TO WHOM?

- S13A(7) does not say who must pay
- It can be inferred that the employer must pay the interest to the fund in the case of late contributions
- It can be inferred that first fund must pay interest to the second fund in case of exit benefits payable to second fund at member's request
- (NB) s13A does not deal with cases where benefit is payable to the exiting member in cash

CONSEQUENCES OF AMENDMENTS TO s37

- Until 13/9/07, non-compliance with s13A was a criminal offence, hence provisions in Reg 33 that it could be referred to AG
- Those provisions now seem redundant
- From 13/9/7 to Nov 08, Registrar could impose admin penalty against employer
- Now Registrar can only refer to Enforcement Committee
- You report only after 104 days??? (Reg 33(5)?) What about s8(6)?
- Registrar has discretion to refer it to SARS (Reg 33(6))

STATUS OF S13A(7) INTEREST AND WHEN IT IS PAYABLE

- Regulation 33(7) of Regulations made in terms of s36 of the PFA
- Compound interest on late payments or unpaid amounts and values shall be calculated for the period from the **first day of the month following the expiration of the period in respect of which the relevant amounts or values are payable** or transferable until the date of receipt by the fund at the rate prescribed from time to time by the Minister under section 13A(7) of the Act by notice in the Gazette
- Such interest shall constitute investment income for the Fund
- This interest is no compensation for loss suffered by Fund or member
- Shall be payable to the fund by no later than the end of the second month following the month in respect of which the amount is received or the value transferred, as the case may be

IS THIS INTEREST THEN PART OF THE MEMBER'S FUND CREDIT OR EXIT BENEFIT?

- Unless the rules and the Act say so, then the answer has to be NO!
- Bear in mind that subject to the PFA, the members are only entitled to benefits prescribed in the rules
- See, s13 and *Meyer v Iscor Pension Fund* [2003] 3 BPLR 4427 (SCA) para [16]
- See also, *Tek Corp Provident Fund and others v Lorentz* [1999] 4 All SA 297 (A)
- Just like surplus, it is an asset of the Fund and no individual member may lay a claim to it or a specific portion of it

WHAT ARE MEMBERS ENTITLED TO IN TERMS OF THE PFA?

- S 14A and B prescribe the minimum benefit to which members are entitled
- They do not prescribe the maxima
- S14A says members who leave the Fund are entitled to minimum individual reserve
- S14B prescribes the formula for calculating minimum individual reserve
- Formula provides that members are entitled to contributions actually paid plus fund return

DOES PENALTY CONSTITUTE “FUND RETURN” AS DEFINED?

“**fund return**”, in relation to -

(a) the assets of a fund, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on the assets of the fund, net of expenses and tax charges, associated with the acquisition, holding or disposal of assets; or

(b) any portion of the assets of a fund if the assets are separately identifiable, means any income (received or accrued) and capital gains and losses (realised or unrealised) earned on those assets, net of expenses and tax charges associated with the acquisition, holding or disposal of assets; or

(c) ..., which in any such case may be positive, negative or nil;”

HOW MUST FUNDS DEAL WITH PENALTY INTEREST?

- The rules must say how it will be treated

WHAT IF CONTRIBUTIONS ARE PAID AFTER MEMBER HAS LEFT & INTEREST PAID LATER?

- Member entitled to value of contributions and interest thereon until date of payment
- Member not entitled to penalty interest unless rules say so

RATE OF INTEREST

- GN 338 of April 2001 prescribes the rate of interest applicable

“shall be the same as the maximum annual finance charge rate which on the date on which the amounts and values became claimable, applies in accordance with section 2 (1) of the Usury Act, 1968 (Act No 73 of 1968), by virtue of a determination under the lastmentioned section for the purposes of the lastmentioned Act.”

IMPACT OF NCA

- NATIONAL CREDIT ACT NO. 34 OF 2005
- **Schedule 3:** Transitional provisions
- **Clause 5. Maximum interest rate.**—The maximum annual finance charge rate set in terms of the Usury Act, 1968 (Act No. 73 of 1968), and in effect immediately before the effective date continues in force despite the repeal of that Act, as the maximum interest rate, until the Minister first prescribes a maximum rate of interest in terms of section 105.

Thank you

QUESTIONS ARE WELCOME

PENSION LAWYERS
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