ASSETS DISCOVERED AFTER A FUND CEASES TO EXIST

Before deciding what happens to assets discovered after a fund ceases to exist, we need to understand when and how that happens.

According to the Pension Funds Act, 1956, a pension fund organisation is *"an association of persons"* established to provide annuities and lump sum payments on retirement for members or former members. An association which has perpetual succession, namely a continued existence irrespective of who the members are at any one time (as in the case of a pension fund) is a body corporate and a legal person. Despite the fact that s 5(1)(a) of the Act says that on registration a fund *"shall… become a body corporate"*, a fund is only a body corporate as long as it has members. Section 5(1)(c) clearly draws a distinction between a fund and registered fund although it is the same body of persons.

More important for present purposes, it is clear from s 27(1) that a fund may cease to exist although it has not yet been deregistered. Under that section the Registrar must cancel the registration of the fund on proof that *"the fund has ceased to exist"*. An orphan fund, for instance, which has no members, no trustees and no known assets & liabilities has ceased to exist and therefore ceased to be a body corporate.

When a body corporate ceases to exist its assets become *bona vacantia* (assets without an owner). Such assets vest in the State.

It may happen that after the fund ceases to exist (e.g. no longer has any members) an asset comes to light such as a claim for undisclosed remuneration against an administrator who earned money from bulking. As soon as the fund ceased to exist that potential claim vested in the State. Consider for instance Ex Parte Sprawson (In Re Hebron Diamond Mining Syndicate Limited) 1914 TPD 458 heard in times when it was still possible to litigate over £29. The company had gone into voluntary liquidation and was removed from the register of companies and dissolved as defunct. At the time a sum of money standing to the company's credit in the Guardians' Fund came to light. The court said (at pg 461 and for 'Crown' read 'State'):- *"The general rule is that as soon as a corporation ceases to exist, all its movable property goes as bona vacantia to the Crown. It seems to me, therefore, that the Crown is entitled to this fund. The only distinction between this and other immovable property is that it*

is a right of action, as distinguished from actual chattels; and I do not think that makes any difference. Therefore I think that the property has passed as bona vacantia to the Crown. That renders it necessary to approach the Crown and ascertain whether they have any claim to the property".

State assets are dealt with under the Public Finance Management Act, 1999. According to the latest Treasury Regulations (May 2002: Government Notice R740: Reg 10.3.1): *"Where any money, property or right accrues to the state by operation of law (bona vacantia), the relevant Treasury may exercise all powers, authority and prerogatives and fulfil any obligations on behalf of the state."*

In what manner will the Treasury exercise those powers?

Hopefully the State will adopt the pragmatic approach explained in Sanlam v Rainbow Diamonds (Pty) Ltd 1982 (4) SA 633 C. A company, Mankor (Pty) Ltd, was dissolved in 1974. Prior to dissolution, in 1971, Mankor's assets were sold to Sanlam. At the time of the sale of the assets and the liquidation, certain claims in the form of royalties payable on a diamond concession were overlooked. It was not possible to set aside the dissolution of Mankor because that had not been done within the two years provided for in the Companies Act, 1926. Sanlam therefore applied to the State for cession of the claims which had been credited to the State as *bona vacantia*. A cession agreement was concluded in terms of which the Treasury ceded the claims to the plaintiff on behalf of the State. The cession was challenged. The court held that, under s 31(1) of the Exchequer & Audit Act, 1975, the Treasury was competent to approve and effect the cession.

In the Rainbow Diamonds case, a witness from the National Treasury gave evidence to the effect that the Treasury adopts the principle that the State does not wish to enrich itself at the cost of those interested in deregistered corporations and will co-operate in redistributing *bona vacantia* assets.

Thus the State will probably be willing to give the money back. But what is to be done with it?

If sufficient money is at stake, the matter could be dealt with by the establishment and registration of a new fund under the Pension Funds Act, 1956 with the object of providing

lump sum payments to its members who would be the former members of the defunct fund. The money could be received from the State by the new pension fund and distributed in the discretion of the trustees to the former members who are now members of the new fund.

Where that is not reasonable nor economically feasible, the practical solution is to approach the State with a scheme to cede the *bona vacantia* assets to former members who have a claim to an equitable share of the money. If the scheme is fair and the State is persuaded that the distribution among former members is equitable, the State would probably be prepared to pay the money to the persons concerned. No payment should be made to a former member except in return for a waiver of all further claims and an indemnity undertaking to repay any portion required if the total number of claims ultimately received exceeds the amount paid out. If all the former members cannot be traced an amount would have to be set aside for a period to enable missing members to come forward and only paid out to the known former members after expiry of that period of time.

If one goes about it in that fashion there will be no further claims. The State does not have to pay out the money and if it chooses to do so in a certain manner that is reasonable, and therefore not subject to administrative view, there will be no further recourse.

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