

PENSION LAWYERS
ASSOCIATION

The logo features the word "revolution" in a lowercase, sans-serif font, with the letter "O" replaced by a white circle that has a small gap at the top. To the right of this graphic, the word "LOTION" is written in a bold, uppercase, sans-serif font. Below the word "LOTION", the phrase "for RETIREMENT FUNDS" is written in a smaller, lowercase, sans-serif font. The entire logo is centered within a large, light-orange circular shape that overlaps a larger, darker-orange circular shape in the background.

revolution
for RETIREMENT FUNDS

“The jurisdictional difficulties around subjecting Bargaining Council Funds to the Pension Funds Act”

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- PFA regulated private sector funds from 1 January 1958
- Purpose to protect public
- BC Funds have always been exempted provided they complied with the following conditions:
- From 1958 to 1996
 - Establishment in terms of an industrial agreement/BC agreement; and
 - Agreement published into s48 of ICL/LRA of 1956.
- Reason:
 - collective bargaining encouraged by statute;
 - Supervision of the Ministry of Labour; and
 - BC agreements having status of law.
- No exemption if above reqs not complied with.

- 1995 LRA (Act 66 of 95) as amended by Labour Relations Act 42 of 1996, amended conditions for exemption with effect from 11 November 1996.
- From 11 November 1996, amends s2(1) of the PFA.
- Conditions for exemption of BC Funds:
 - Agreement be a BC agreement in terms of Act 66 of 1996 (1995 LRA)
- Condition had to be read with transitional provisions in LRA
- Item 13, paragraph (1) and (2) of Schedule 7:
 - An agreement published in terms of section 48 of the 1956 LRA not deemed to be a collective agreement concluded in terms of the 1995 LRA.
- Item 12, paragraph (1) of Schedule 7:
 - Agreements promulgated in terms of section 48 of the 1956 LRA and in force immediately before 11 November 1996 would remain in force for a period of 18 months after 11 November 1996.
- Significance of transitional provisions lost, by both BC Funds and Registrar.

- Amends s2(1) of the PFA
- New reqs for exemption of BC Funds:
 - Establishment or continuation into 1995 LRA before 1 Feb 1999, even if further continued after 1 Feb 1999.
- S28(2) and (3) of the LRA inserted by Act 127 of 1998
- S28(2) and (3) state that all BC Funds est after 1 Jan 1999 must comply with PFA
- Bargaining Councils not qualified to deal with increased asset base of BC Funds.
- Indication made that all BC Funds will soon lose exemption
- BC Funds est after 1 Feb 1999 don't have to comply with s53 of LRA
- Act 127 of 1998 silent on other conflict areas between PFA and LRA such as s24 and s59(6).

- Published for public comment by Labour Dept
- never became law
- Purpose: remove exemption for all BC funds
- Would grant Registrar power to exempt BC Funds from provisions of PFA
- contained provisions to facilitate smooth transfer of regulatory authority over BC Funds to Registrar.

- Bargaining council funds off the radar as focus shifted to surplus legislation
- Angus judgment exposed realities that:
 - many BC funds not regulated and members not protected
 - there's uncertainty about where BC Funds fall in the scheme of things
- This prompted intervention by legislature which was hasty and not well thought through.

- 2(1):

“2. Application of Act

- (1) Subject to [section 4A](#) and any other law in terms of which a fund is established, the provisions of this Act apply to any pension fund, including a pension fund established or continued in terms of a collective agreement concluded in a council in terms of the [Labour Relations Act, 1995](#) (Act No. 66 of 1995), and registered in terms of [section 4](#).
- (2)(a) A pension fund established or continued in terms of a collective agreement contemplated in subsection (1) and not yet registered in terms of [section 4](#), must register in terms of this Act before or on 1 January 2008.
- (b) Despite any other provision of this Act, the first statutory actuarial valuation of a fund registered in accordance with paragraph (a) must be undertaken at the end of the first financial year following registration or such other date approved by the registrar.
- (3) A pension fund contemplated in subsection (2) must, pending registration in terms of this Act, furnish the registrar with such statistical information as may be requested by the registrar.”

- What is the significance of the words

“Subject to any other law in terms of which a fund is established, the provisions of this Act apply to any pension fund ...”

bearing in mind that BC funds are established in terms of the LRA and its predecessors the provisions of which are in in conflict with the LRA?

- *Premier, Eastern Cape, and Another v Sekeleni* [2003 \(4\) SA 369 \(SCA\)](#)

'except as curtailed by'

- Those words show that legislature forgot about LRA
- Bear in mind the meaning of 'in terms of' as per angus judgment !
- Act 11 of 2007 does not have transitional provisions to deal with conflicts.
- Act 11 of 2007 ignores provisions of the LRA which trump any law except the Constitution

- Object of Act 11 of 2007 is to bring BC Funds under the LRA so as:

“to ensure consistency in fund governance and dispute resolution across both bargaining council funds and occupational retirement funds”
- By failing to deal with the provisions of the LRA which are inconsistent with the PFA, the ball has been dropped and Act 11 of 2007 fails to achieve one of its main objects.
- Result:
 - Adjudicator’s jurisdiction over BC Funds a subject of dispute
 - BC Funds’ ability to comply with PFA uncertain
 - Dual regulation continues
 - BC Funds have to breach LRA to comply with PFA
 - Legal status of BC Funds uncertain, especially in the event of BC’s winding up.

- Act 11 of 2007 cant survive s210 of the LRA
- Only an Act expressly amending LRA provisions can trump it, regardless of when that Act is passed.
- Section 210 provides that in the event of a conflict between provisions of any law and provisions of the Act, the provisions of the Act prevail over the provisions of any other law except the Constitution or an Act expressly amending the Act. See, *Mzeku and Others v Volkswagen SA (PTY) Ltd and Others* [2001 \(4\) SA 1009 \(LAC\)](#); *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC); *Engen Petroleum Ltd v CCMA & others* [2007] 8 BLLR 707 (LAC); *Western Cape Workers Association v Minister of* [2006] 1 BLLR 79 (LC)
- Lesson: Cant deal properly with BC Fund unless you amend the LRA