

# Termination of Retirement Funds: Powers of Registrar to intervene in management of pension funds

## Adv S Khumalo

# FUND MANAGEMENT

- Other ways in which Courts/Regulator can interfere/intervene in the management of a pension fund:
  - Winding-up.
  - Section 18 scheme.
  - Business Rescue.
  - Curatorship.
  - Statutory Management.

# RULES OF STATUTORY INTERPRETATION

- Statute must be interpreted having regard to the language used, the background thereto, and the legislative purpose.
- (Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18).

# RULES OF STATUTORY INTERPRETATION (Cont.)

- Purpose of PFA (and FIA) is to ensure that pension funds are managed properly and members' rights are protected.
- (Pepkor Retirement Fund and another v The Financial Services Board and another 2003 (6) SA 38 (SCA) at p48 para 11; Mostert NO v Old Mutual Life Assurance Co (SA) Ltd 2001 (4) SA 159 (SCA) at p171F–H; Sage Schachat Pension Fund and others v Pension Funds Adjudicator and others [2003] 4 All SA 394 (C) at p413 para 79).

# SECTION 29 WINDING UP

- Application by the Registrar to the High Court.
- When the Registrar believes a section 18 scheme will not work (implies that s29 liquidation must be measure of last resort).
- Provisions of Companies Act regarding liquidations are applicable subject to modification by the Court.
- Fund Actuary plays a crucial role in the winding up process, so too the Liquidator and the Master of the High Court.



# SECTION 18 AND BUSINESS RESCUE

- S18 of the PFA deals with circumstances under which Registrar can interfere in running of a pension fund that is not financially sound.
- Registrar can instruct a pension fund to prepare a scheme setting out arrangements to bring pension fund back into financial soundness.
- The scheme must satisfy the Registrar in order for it to be approved.

# SECTION 18 AND BUSINESS RESCUE

## (Cont.)

- Registrar has power to reject the scheme or direct that amendments be made to the scheme.
- Scheme terminates when it has achieved its objects and when Registrar so notifies the fund.

# **RELATIONSHIP BETWEEN PFA AND BUSINESS RESCUE PROVISIONS OF COMPANIES ACT**

- Section 18A of the PFA expressly refers to business rescue provisions in the Companies Act.
- Chapter 6 of Companies Act 71 of 2008.



# RELATIONSHIP BETWEEN PFA AND BUSINESS RESCUE PROVISIONS OF COMPANIES ACT (CONT.)

- 'business rescue' ... proceedings to facilitate the (i) rehabilitation of a company in financial distress through (ii) temporary supervision of the company, management of its affairs, business and property and (iii) a temporary moratorium on the rights of claimants ...

## SECTION 18A OF THE PFA

- S18A(1) says chapter 6 of Companies Act applies to pension funds and administrators.
- The application of Ch 6 is subject to provisions of s18A of PFA and with the necessary changes.
- Registrar may make an application under section 131 of the Companies Act to place pension fund and administrator under business rescue.

# WHO MAY APPLY TO COURT TO PLACE FUND/ADMINISTRATOR UNDER BR?

- Registrar.
- Pension fund itself subject to prior approval by Registrar.
- Administrator itself subject to prior approval by Registrar.
- “Affected person”? Could mean PO, members, unions, participating employers (minefield!) – must serve papers on the Registrar

# ACTS AND APPOINTMENTS THAT REQUIRE REGISTRAR'S APPROVAL

- The resolution of a fund or administrator to begin business rescue proceedings
- The appointment of a business rescue practitioner
- The adoption of a business rescue plan
- The exercise of a power by the business rescue practitioner under the Companies Act

## EFFECT OF BEING PLACED UNDER BR

- It is a Court Order that places a pension fund/administrator under supervision and commences business rescue proceedings (s131 Companies Act).
- S133 of Companies Act says legal proceedings, enforcement action may not be commenced except with written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable.



## **EFFECT OF BEING PLACED UNDER BR** **(CONT.)**

- So legal proceedings and enforcement orders are effectively stayed.
- Liquidation proceedings also stayed.
- Powers of Regulatory Authorities like FSB are not affected. They are only required to notify practitioner if they intend to take any steps against fund.

## EFFECT OF BEING PLACED UNDER BR (CONT.)

- S 18A(6) says no new benefits may be provided, so doesn't affect accrued benefits. (unless Court orders otherwise).
- S140 – practitioner has full management control of legal entity in substitution for its board and pre-existing management.

## CURATORSHIP (ACT 28 OF 2001)

- S5 says Registrar may apply to a division of the High Court for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.
- (Executive Officer, Financial Services Board v Dynamic Wealth Ltd and others 2012 (1) SA 453 (SCA)).

## CURATORSHIP (ACT 28 OF 2001) (CONT.)

- S 5 contemplates provisional appointment made first followed by final appointment.
- The curator acts under the control of the Registrar who made the application for his appointment and in accordance with guidelines prescribed by the Registrar by notice in the Gazette.

# STATUTORY MANAGEMENT

- S5A of Act 28 of 2001
- S5A allows the Registrar, by agreement with a financial institution (fund/administrator) and without the intervention of a court, to appoint a statutory manager for that financial institution.
- A statutory manager cannot be imposed on a pension fund.
- Appointment takes effect immediately, but must be confirmed by a Court Order.



# CIRCUMSTANCES UNDER WHICH STATUTORY MANAGER CAN BE APPOINTED

- If a financial institution-
  - (i) has in a material respect failed to comply with a law;
  - (ii) is likely to be in an unsound financial position; or
  - (iii) is maladministered; and

# CIRCUMSTANCES UNDER WHICH STATUTORY MANAGER CAN BE APPOINTED (CONT.)

- If it is advisable to appoint a statutory manager in order to protect-
  - (i) the interests of the clients of the financial institution;
  - (ii) the safety and soundness of financial institutions in general; or
  - (iii) the stability, fairness, efficiency and orderliness of the financial system.

# POWERS OF STATUTORY MANAGER

- Does not replace the board.
- Must participate in the management of the affairs of the financial institution with its executive directors or managers.

## POWERS OF STATUTORY MANAGER

- Where there is disagreement between the statutory manager and the executive directors of the financial institution, the statutory manager shall take the final decision.
- Statutory manager is entitled to receive such remuneration from the institution as the Court may order.
- Appointment terminated by Court Order.

## CONCLUSION

- So, in addition to ss26 and 27 of the PFA, both the PFA and the FIA now grant the Registrar wide powers of supervision and (interference) where a pension fund is not properly managed, including the power to intervene in management and financial affairs of a pension fund!



# THANK YOU

**PENSION LAWYERS**



**A S S O C I A T I O N**

[WWW.PENSIONLAWYERS.CO.ZA](http://WWW.PENSIONLAWYERS.CO.ZA)