

## SEPTEMBER 2020: EDITION 9 2020

### *In case you missed it...*

8. [August 2020: Seshego Legal Insights August 2020 Section 37D of the Act - The Jephtha case and Determinations by the PFA](#)
7. [July 2020: Seshego Legal Insights July 2020 Prescribed Assets – What do we know?](#)
6. [July 2020: Seshego Legal Insights – Section 37C and the rights of the deceased Member's heirs](#)
5. [May 2020: Seshego Legal Insights – Prescribed Assets Revisited](#)
4. [April 2020: Seshego Insights National Budget 2020 – Effect on Retirement Funds and their members](#)
3. [March 2020: Seshego Legal Insights: The Five Coronavirus Shocks – Old Mutual Multi-Manager](#)
2. [Special Seshego Legal Insights: Your Retirement Fund And The Covid-19 Virus \(Corona Virus\)](#)
1. [February 2020: Seshego Legal Insights](#)

### FSCA Conduct Standards

Section 106 of the Financial Sector Regulation (FSR) Act No.9 of 2017 empowers the Financial Sector Conduct Authority ('the FSCA') to make conduct standards on various matters which are set out in that section of the FSR Act. Once finalised, after the industry has been given the opportunity to comment on the draft versions, the conduct standards are legislated and therefore their provisions are binding on the retirement funds industry.

We will deal in this publication with three conduct standards recently issued by the FSCA. Two of the conduct standards are not yet in their final form.

### 1. Draft Conduct Standard – Requirements Related to the Payment of Pension Fund Contributions

#### Standard Formats

The Draft Conduct Standard sets out inter alia the following:

- ✓ A standard format in which the fund must notify the employer of the employer's duties, obligations and liabilities in terms of Section 13A of the Pension Funds Act ('the Act');
- ✓ The format of reporting by the monitoring person or principal officer, other authorised persons and boards of funds related to Section 13A and Regulation 33 of the Act.

#### Contribution Statements and Information to be Supplied

Funds are required to request the employer to advise the fund of the person who is personally liable for the employer's duties with regard to contributions under Section 13A of the Act and the accompanying information. The employer is required to make the following contribution statements to the fund:

- ✓ An initial contribution statement (when the Employer starts to participate); and
- ✓ Subsequent contribution statements, meaning all statements after the first one.

In addition to the current requirements under Regulation 33 (1) (a), the contribution statements must include personal information pertaining to the member, including the following:

- ✓ Income tax number
- ✓ Contact details, including cell phone number if possible;
- ✓ Email address;
- ✓ Postal address;
- ✓ Residential address;
- ✓ Annual pensionable salary and annual cost to company remuneration.

The Protection of Personal Information Act, Act No.4 of 2013 ('POPIA'), imposes strict requirements with regard to the processing of personal information. We understand that the provision of such details to the FSCA may not be a contravention of the Protection of Personal Information Act ('POPIA') since if the Draft Conduct Standard becomes legislation, it could be argued that the provision of such details is required in order to implement an obligation imposed by law.

However, there are definitions in Section 1 of the document ('long term insurer', 'long term policy' and 'policy benefits') which relate to the insurance industry but do not appear elsewhere in the text of the Draft Conduct Standard as currently worded. We are therefore concerned that such contact details could be provided to players in that industry, thus enabling the insurers to make unsolicited contact with members in order to promote insurance products. We need the FSCA to clarify why these definitions were included in the Draft Conduct Standard and what purpose they serve.

Subsequent contribution statements must also include, *inter alia*, details of new members and of terminating membership. After Regulation 38 became effective, there is a clear difference between terminating employment where the default is for the fund member to become paid up, and fund termination. The employer is also required to provide '**any** further information' which may be relevant to contributions. This wording is extremely wide and is capable of being misinterpreted. What information in the opinion of the authorities and that of the employer regarding what is 'relevant' in relation to the contribution schedules may differ.

### Reporting Requirements

Clause 4 of the Draft Conduct Standard deals with the reporting by the principal officer or the monitoring person regarding the employer's compliance with the requirements of the contribution statements. The clause requires that any contradictions or non-compliance must be brought to the personal attention of the affected members within 30 days. The method of bringing the matter to the personal attention of the affected members is unclear, other than the requirement that it must be 'in writing'. If the method of bringing any such contradictions or non-compliance to the 'personal attention' of members should be via the company intranet or public notice forum, there would be risk of contravention of the provisions of POPIA. Depending on the profile of the membership of the fund, it is possible that some members might not have cell phones or email

addresses. The method of bringing these issues to the 'personal attention' of members needs to be clarified.

It is also unclear whether the contradiction or non-compliance needs to be material in order to trigger the reporting requirement. For example, would an incorrect email address or cell phone number need to be reported?

In terms of Clause 5 of the Draft Conduct Standard it is a requirement that any contravention or failure to comply with Sections 13A (2) (b) or 13A (3) (a) of the Act that continues for a period of 90 days must be reported to the South African Police Service on the prescribed format, within 14 days of the expiration of the 90 day period. However, it is not clear when the 90-day period starts to run.

### Comment

Once finalised, this Conduct Standard will replace Regulation 33 of the Act in its entirety.

From the above it is evident the provisions of the Draft Conduct Standard are onerous, both in terms of the information that must now be provided in the contribution schedules and the reporting requirements. It is likely there will also be further resources and costs involved both for the employer and for the fund. There are also some anomalies and areas of ambiguity that would need to be resolved before the Draft Conduct Standard is promulgated.

The industry was invited to submit comment on the Draft Conduct Standard by no later than 31 July 2020.

It is to be hoped that the FSCA will take due consideration of comment from the industry and look to resolve some of the areas of concern, in particular with a view to making the requirements less onerous.

In the current economic environment, given the effect of lockdowns due to the Covid-19 pandemic, there may be many employers who are unable to comply with the current requirements of Section 13A and Regulation 33 of the Act. Introducing more stringent legislative requirements may be counter productive.

## 2. Draft Conduct Standard – Communication of Benefit Projections to Members of Pension Funds

This Draft Conduct Standard requires all retirement funds (except for beneficiary funds and unclaimed benefit funds) to issue benefit projection statements to members. Benefit statements must be provided when the member joins the fund, annually, on withdrawal from membership and in the case of living annuities, annually after retirement.

For current members of pension funds, the statement must contain the value of the member's projected benefit at retirement and the projected monthly pension in relation to the projected monthly salary, together with a note on the underlying risks and assumptions. The benefit statement must contain a statement to the effect that the benefit projection is not binding or guaranteed and that the final amount received by the member is likely to be different.

Clause 6 of the Draft Conduct Standard sets out the methodology and assumptions to be used in the calculation of the benefit, which have to be signed off by an actuary every three years. The board of trustees can decide whether to determine the projected benefit on a prudent basis or can use the standard assumption prescribed in the Draft Conduct Standard which is a maximum of inflation plus 4%.

The benefit projection must be in 'plain language', which means it must be clear and easy to understand and must take into account the level of knowledge of the person to whom the communication is targeted.

Mr Olano Makhubela of the FSCA has advised the media that the intention of this Draft Conduct Standard is to provide members with some direction on their journey towards saving for a comfortable retirement. The thinking is that if members have some idea of the value of their current benefit in relation to the end benefit at various stages of their retirement fund membership, they may become more focused and less likely to make imprudent decisions, such as cashing in their withdrawal benefit on leaving the service of an employer. The principles of Treating Customers Fairly are aligned with the provisions of the Draft Conduct Standard.

### Comment

Several industry players who have commented on the Draft Conduct Standard consider that Clause 6, which deals with the assumptions to be used to determine the projected benefit is particularly problematic. A standardised set of assumptions could lead on the one hand to unrealistic expectations for the member as it might not be possible to realise the projected end value of the benefit. On the other hand, there is the possibility of a conflict between the assumptions in terms of the benefit projection statement and the assumptions used to determine the portfolio return objectives set out in the fund's Investment Policy Statement. The prospective returns on the fund's investment portfolios could in fact be higher than inflation plus 4%. The requirements of the Draft Conduct Standard as currently worded could therefore filter through to the way in which the fund sets out its investment objectives.

Other concerns are that the requirement to provide benefit projection statements to members at the degree of frequency specified in the Draft Conduct Standard will be onerous and costly, as input from an actuary may be required. Furthermore, the comparison of the projected monthly pension with projected monthly salary must be based on salary expressed as total cost to company and not pensionable salary. Most current administration systems use pensionable salary so administrators may have to incur the additional cost of changing their systems to accommodate this requirement.

The FSCA have advised that they are currently working through comment on the Draft Conduct Standard received from the industry. It is possible that the final version of the Conduct Standard may differ substantially from the draft.

### 3. Conduct Standard 4 of 2020 – Minimum Skills and Training Requirements for Board Members of Pension Funds

This conduct standard has now been finalised, so its provisions are binding on the industry. The main requirements of the Conduct Standard are as follows:

- ✓ Board members of fund who were in office as at 10 July 2020 (the effective date of the Conduct Standard) and who did not successfully obtain the certification prior to that date have until 10 January 2021 to complete the Trustee Training Toolkit ('the Toolkit');
- ✓ Board members newly elected or appointed to office are required to complete the Toolkit within 6 months of the date of their appointment unless they successfully obtained the certification while previously serving as a board member;
- ✓ The Toolkit must be completed under the supervision of the Principal Officer, who must sign a declaration that the board member completed the Toolkit without assistance;
- ✓ The declaration signed by either the Principal Officer or the board member, must be retained in the records of the fund.

However, there is no limit to the amount of times a board member may attempt to complete the Toolkit until they are successful.

Section 7A (3) (a) of the Act requires that board members must attain such level of skills and training as may be prescribed by the FSCA. Therefore, all members of a board of trustees must comply with the requirement in the Conduct Standard that they must complete the Toolkit. If they fail to do so, the FSCA may regard the board as improperly constituted due to having failed to comply with Section 7A (3) of the Act. It is likely that the FSCA would then require that a board be appointed in terms of Section 26 (2) of the Act.

#### **IMPORTANT:**

It is important to note that completion of the Toolkit is a minimum requirement for board members. Trustees are expected to maintain their skills and training throughout the period of their appointment.