FROM THE CONSUMERS' PERSPECTIVE: A PRACTICAL APPLICATION OF SECTIONS 14A AND 14B OF THE PENSION FUNDS ACT 24 OF 1956 AS AMENDED.

Category: Commercial Law
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It is a supported view that the primary objective of enacting the numerous amendments to the Pension Funds Act has always been to enhance the protection of pension interests of fund members, given that dedicated contributions towards their retirement often extend across their lifetimes and serve as the most significant source of saving for most individuals in formal employment.[1]

The original pension fund structure was derived from the patriarchal largesse of an older era, being a gratuitous payment by the employer to the employee who served him faithfully for most of his working life. In order to finance the life pensions of these long serving retainers, however, it was necessary for the employer to subsidise his liability to fund these benefits by generating profits from the withdrawal benefits of less faithful employees who left service prior to retirement. The pension fund was merely an economical tool in the employer's hands and disloyalty and short length of service could be financially punished[2]. This was changed or at least should have been changed by the provisions of the Pension Funds Second Amendment Act 39 of 2001 ("the Amendment Act").

Prior to the Amendment Act, funds could, at their own discretion, pay to members on withdrawal from the fund the member's contributions only or the so called member's share in the fund. Since members in defined contribution funds assume the risk of market performance, some funds could go as far as declaring a nil return. In Pankhurst and Le Roux[3], a member was granted a nil return on her withdrawal from the fund following seven years of service. The fund was a non contributory fund and members withdrawing from it were entitled to their own contribution, interest and an amount as determined by the trustees[4], meaning that in some instances the withdrawing members would leave with nothing.
Section 14A read with 14B was introduced into the Pension Funds Act 24 of 1956 ("the Act") by the Amendment Act. Essentially, this section makes provision for the payment of minimum benefits to members who exit from their respective funds in circumstances other than retirement of a member or liquidation of the fund.

Put differently, members of defined contribution pension funds are entitled to a withdrawal benefit calculated in terms of the formula prescribed by the Amendment Act. Section 14A (1)(a) states that a member who ceases to be a member prior to retirement, (in circumstances other than liquidation of the fund) must receive a "minimum individual reserve" calculated in terms section 14(B) of the Act[5]. In terms of section 14B(1) the member's individual reserve is determined in accordance with the following formula:
MC + EC – X + AS
Where
MC = member's contributions,
EC = employer's contributions,
X = expenses the board determines should be deducted from the above contributions,
AS = actuarial surplus apportioned to the member's account and
MC, EC , X and AS are augmented by the net investment returns on the assets backing the fund's liability in respect of the member.
Minimum benefit in a Defined Benefit ("DB") fund however, is determined with the provisions of section 14B (2) (a) of the Act. The provisions of these sections can be summarised to say that a

member in a DB fund is entitled to:

- his actuarial reserve value calculated as the present value of his accrued deferred pension; or
- his net accumulated contributions, together with interest which is reasonable in relation to fund

return, as well as any employer contributions that have vested in terms of the rules of the fund.
It must however be indicated that not all members of a fund are entitled to their minimum withdrawal benefit with effect from the commencement date[6] of the Amendment Act. In this regard, a distinction must be made between funds registered three months prior to the commencement date and those registered three months after the commencement date of the Act[7]. Funds which are registered three months or more after the commencement date must apply these provisions on registration. These funds do not have any discretion as to whether to align their rules with the minimum withdrawal benefit legislation. On the other hand, funds registered three moths prior to the commencement date need only apply the minimum benefit provisions from a date 12 months after their surplus apportionment date. For these funds, the minimum benefit legislation is being phased in gradually over the years from December 2001 depending on the fund's surplus apportionment date. It is therefore incumbent upon members to ascertain the funds' surplus apportionment date with a view to establishing whether or not the minimum benefit legislation is applicable to that specific fund.

Any fund that liquidates or converts from a defined benefit to a defined contribution after 7 December 2001, but before the fund's surplus-apportionment date, must introduce minimum benefits from the date of liquidation or con, as the case may be."[8]

It is also critical to indicate that the minimum benefit formula discussed herein is only applicable to Defined Contributions (DC) funds and not Defined Benefits (DB) funds[9]. The difference between the two might somewhat be complicated as it involves a complex arithmetic exercise. Without going into much detail, members of defined benefits funds become entitled to a fixed withdrawal benefit computed when a member joins the fund. DCs on the other hand are a direct opposite of DBs.

Withdrawal benefits of DC fund members are largely dependant on market fluctuations with the disadvantage being that members sometimes get far less than what they ought to receive when they withdraw from funds. Members of the latter funds often are uncertain as to the exact amount they are likely to receive as withdrawal benefits. Most funds were initially DB funds but are currently shifting towards operating as DC funds. Given the aforesaid shift, it can therefore be argued that, inter alia, the legislator intended to protect DC funds' members against adverse market fluctuations.

Funds that are not yet subject to the minimum benefit legislation are nevertheless encouraged to align their rules and benefits with the requirements enacted by the Amendment Act. Funds are also not precluded from offering withdrawal benefits which are more generous than the required minimum standard in certain circumstances.

Any suspicion that a fund did not compute a withdrawal benefit in terms of the Amendment Act should be referred to the office of the Pension Funds Adjudicator ("the PFA") with complete facts, for a determination. Though the PFA does not have equity based authority whereby it may pronounce on the fairness of a benefit, it normally applies the rules of the fund and relevant legislation in the adjudication process.
It is our view however that funds that have still failed to align themselves with the provisions of section 14A and 14B, continue to bite the hands of those whose assets they are supposed to protect. They are interfering with vested rights and benefits. It is their maladministration that contributes to denying beneficiaries their well earned money and discourages economic growth, saving and investment habits.

In a previous determination the Adjudicator made it clear that trustees of the relevant fund was mandated to determine the amount of the benefit, not whether one ought to be paid at all.[10] It is our conclusion therefore that the reading of previous determinations and the provisions of the Amendment Act suggest that "no member should be subjected to a nil return on their exit from a fund.

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[1]www.treasury.gov , Memorandum on the Objects of the Pension Funds Amendment Bill, 2007
[2] Manzini v Metro Group Retirement Fund and another (1) [2001] 12 BPLR 2808 (PFA)
[3] Pankhurst and Le Roux v Solomon Nicolson Rein and Verster and another PFA/GA1044/02
[4] Pankhurst and Le Roux v Solomon Nicolson Rein and Verster and another PFA/GA1044/02
[5] W J Coetsee Walter Roux and Associates PFA/KZN/2230/2005/nvc
[6] The commencement and inception date of the Amendment Act is on 7 December 2001.
[7] In this regard, see Section 14 (2) (a) & (b) which provides as follows:
(a) in respect of a fund which is registered on or after a date three months after the commencement date, subsection (1) shall apply on registration.
(b) In respect of a fund which is registered prior to a date three months after the commencement date-
(i) subsection (1) (a) shall apply from a date 12 months after the surplus apportionment date, and
(ii) ……..
[8] www.totrust.co.za/200605 libertylife.htm
[9] Section 14 (B) (1) specifically states that " the member's individual account in relation to an individual member of a defined contribution category of a fund shall be determined by the board in accordance with the formula-……."
[10] See Pankhurst and Le Roux ibid