

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS AMENDMENT BILL

(As amended by the Portfolio Committee on Finance (National Assembly))

(MINISTER OF FINANCE)

[B 86B—97]

REPUBLIC OF SOUTH AFRICA

WYSIGINGSWETSONTWERP OP PENSIOENFONDSE

(Soos gewysig deur die Portefeuljekomitee oor Finansies (Nasionale Vergadering))

(MINISTER VAN FINANSIES)

[W 86B—97]

ISBN 0 621274879

GENERAL EXPLANATORY NOTE:

- [Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
-
-

BILL

To amend the Pension Funds Act, 1956, in relation to the payment of contributions to pension funds and the payment of benefits or rights to benefits from one pension fund to another in certain circumstances, and to provide for the levying of interest on certain payments that are received late; to prohibit a pension fund from investing in or lending to the business of its members' employer any assets of that fund in excess of five per cent of its total assets or a greater percentage allowed by the registrar but not exceeding 10 per cent of its total assets, and to extend that prohibition to any subsidiary or holding company of such an employer that is a company; to extend the provisions governing the procedure applicable to the voluntary dissolution of a pension fund upon its total termination, to the case where a pension fund is partially terminated due to a participating employer's withdrawal from the fund, and, in appropriate cases and subject to prescribed conditions, to empower the registrar of pension funds to exempt pension funds from the provisions of section 28(6) and (7) and provide for the registrar to authorize the liquidator of a pension fund to make provisional payments to members and beneficiaries before completion of the liquidation; to make provision for the remuneration of the liquidator of a pension fund; to repeal section 19 of the Financial Institutions Amendment Act, 1992; and to provide for incidental matters.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Substitution of section 13A of Act 24 of 1956, as inserted by section 15 of Act 86 of 1984 and amended by section 6 of Act 22 of 1996

1. The following section is hereby substituted for section 13A of the Pension Funds Act, 1956 (hereafter called the principal Act):

“Payment of contributions and certain benefits to pension funds

13A. (1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely—

- (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration; and
- (b) any contribution for which the employer is liable in terms of those rules.

(2)(a) The minimum information to be furnished to the fund by every employer with regard to payments of contributions made by the employer in terms of subsection (1), shall be as prescribed by regulation.

(b) If that information does not accompany the payment of a contribution, the information shall be transmitted to the fund concerned not later than 15 days after the end of the month in respect of which the payment was made.

(3)(a) Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, or a contribution to be paid on a member's behalf—

- (i) shall be transmitted directly into the fund's account with a bank finally registered as such under the Banks Act, 1990 (Act No. 94 of 1990), not later than seven days after the end of the month for which such a contribution is payable; or
- (ii) shall be forwarded directly to the fund in such a manner as to have the fund receive the contribution not later than seven days after the end of that month; or
- (iii) in the case of a fund contemplated in section 15(4) that has been exempted from the provisions of sections 5(2) and 9 because, in operating as a fund, its assets consist exclusively of one or more policies of insurance with an insurer carrying on long-term insurance business as contemplated in the Insurance Act, 1943, shall be forwarded to the insurer concerned in such manner as to have the insurer receive the contribution not later than seven days after the end of that month.

(b) Any contribution forwarded to and received by a fund in the circumstances contemplated in paragraph (a)(ii), shall be deposited in the fund's bank account on the first business day following the day of receipt.

(4) An amendment of the rules of a fund relating to the reduction of contributions or the suspension or discontinuation of the payment of contributions shall not affect any liability to pay any contribution which became payable at any time before the date of the resolution whereby the amendment was effected, irrespective of the date on which the amendment may take effect.

(5) When a person who, for any reason except a reason contemplated in section 14.28 or 29, has ceased to be a member of a fund (in this subsection called the first fund), is in terms of the rules of another fund admitted as a member of the other fund and allowed to transfer to that other fund any benefit or any right to any benefit to which such person had become entitled in terms of the rules of the first fund, the first fund shall, within 60 days of the date of such person's written request to it, or, if applicable, within any longer period determined by the registrar on application by the first fund, transfer that benefit or right to the other fund in full. The transfer shall be subject to deductions in terms of section 37D and to the rules of the first fund.

(6)(a) For the purpose of monitoring and ensuring compliance with this section, the principal officer of the fund or any authorized person shall, at the times and in the manner and format prescribed by regulation, submit reports to the categories of persons, to be specified in those regulations, who have an interest in such compliance.

(b) In applying paragraph (a), 'authorized person' means any person who has been authorized by the relevant board to perform the function contemplated in that paragraph and of whom the registrar has been advised in writing.

(7) Interest at a rate as prescribed from time to time by the Minister by notice in the *Gazette* shall be payable on—

- (a) the amount of any contribution not transmitted into a fund's bank account before the expiration of the period prescribed therefor by subsection (3)(a)(i);
- (b) the amount of any contribution not received—
 - (i) by a fund before the expiration of the period prescribed there for by subsection (3)(a)(ii); or
 - (ii) in the circumstances contemplated in subsection (3)(a)(iii), by the insurer concerned before the expiration of the period prescribed therefor by that subsection;
- (c) the value of any benefit, or right to any benefit, not transferred by the first fund to the other fund before the expiration of the period prescribed therefor by subsection (5).”

Amendment of section 19 of Act 24 of 1956, as amended by section 13 of Act 80 of 1959, section 9 of Act 58 of 1966, section 1 of Act 80 of 1969, section 2 of Act 23 of 1970, section 7 of Act 91 of 1972, section 23 of Act 101 of 1976, section 11 of Act 94 of 1977, section 11 of Act 80 of 1978, section 14 of Act 103 of 1979, section 39 of Act 99 of 1980, section 14 of Act 82 of 1982, section 20 of Act 46 of 1984, section 17 of Act 86 of 1984, section 11 of Act 50 of 1986, section 5 of Act 51 of 1988, section 36 of Act 9 of 1989, section 8 of Act 53 of 1989 and section 11 of Act 64 of 1990

2. Section 19 of the principal Act is hereby amended—

(a) by the substitution for subsection (4) of the following subsections:

“(4) Except as provided for in subsection (4A), no assets of a registered fund in excess of five per cent of their fair value, shall be invested in or lent to the business of an employer participating in the scheme or arrangement whereby the fund has been established. Where the employer is a company (in this subsection called the employer company), the business of every other company which—

(a) is a subsidiary—

- (i) of the employer company; or
- (ii) of any subsidiary of the employer company; or
- (iii) of any successive subsidiary within the same hierarchy; or

(b) is the holding company—

- (i) of the employer company; or
- (ii) of the holding company of the employer company; or
- (iii) of any successive holding company within the same hierarchy.

shall be deemed, for the purposes of this subsection, to be part of the business of the employer company. In applying paragraphs (a) and (b), “subsidiary” and “holding company” respectively mean—

(aa) a ‘subsidiary company’ or ‘subsidiary’ as defined in section 1(1) of the Companies Act, 1973 (Act No. 61 of 1973);

(bb) a ‘holding company’ as defined in that section.

(4A) The registrar, on application by the Board, may allow a greater percentage of the fund's assets, but not exceeding 10 per cent of the fair value of the fund's assets, to be invested in or lent to that employer's business for the period and on any conditions determined by the registrar if, in that application, the Board has certified—

- (a) that it has consulted with the members about the proposed investment in or loan to the employer's business; and
- (b) that the members support the making of that investment or loan.

(4B) Notwithstanding the provisions of subsections (4) and (4A), no assets of a fund may be invested in or lent to such a participating employer's business unless it is in the best interest of the fund to do so;”

and

(b) in subsection (6)(a), by the substitution for the expression “subsection (4), (5) or (5B)(a)” of the expression “subsection (5) or (5B)(a)”.

Amendment of section 28 of Act 24 of 1956, as amended by section 15 of Act 103 of 1979, section 25 of Act S3 of 1992 and section 6 of Act 22 of 1996

3. Section 28 of the principal Act is hereby amended—

5

(a) by the substitution for subsection (1) of the following subsection:

“(1) Subject to the provisions of this section, a registered fund may be terminated or dissolved, whether wholly or in part, in **[such]** the circumstances (if any) **[as may be]** specified for that purpose in its rules, and in the manner provided by **[such]** those rules. **[and] In** such an event, the assets of the fund, or, in the case of the partial termination of the fund, those assets of the fund attributable to the members connected to the participating employer whose withdrawal from the fund has caused its partial termination (as the case may be), shall, subject to the **[said]** provisions **[in that event]** of this section, be distributed in the manner provided by **[the said]** those rules.”:

10

15

(b) in subsection (4) by the substitution for paragraph (a) of the following paragraph:

“(a) The liquidator shall as soon as may be possible, deposit with the registrar the preliminary accounts prescribed by regulation, signed **[by him]** and certified **[by him]** as correct by the liquidator and showing the assets and liabilities of the fund as at the commencement of the liquidation **[and]** as well as the manner in which it is proposed to realize the assets and to discharge the liabilities, including any liabilities and contingent liabilities to or in respect of members, or, in the case of the partial termination of the fund, the assets and liabilities of the fund attributable to the members connected to the participating employer whose withdrawal from the fund has caused its partial termination.”:

25

(c) by the substitution for subsection (5) of the following subsection:

“(5) If **[deemed fit]**, the registrar may **[in his discretion]** direct the liquidator to furnish a report, drawn up by an independent valuator or other competent person nominated by the registrar **[upon the preliminary account and preliminary balance sheet]** on the preliminary accounts.”:

30

(d) by the substitution for subsection (6) of the following subsection:

35

“(6) The preliminary **[account] accounts [preliminary balance sheet]** and report (if any) referred to in subsection (5) shall lie open for inspection by interested persons for a period of 30 days at the office of the registrar and at the registered office of **[such]** the fund, and where the registered office of the fund is not in **[any]** the district **[other than the district wherein]** in which the office of the registrar is situate, at the office of the magistrate of the district in which the registered office of the fund is situate **[for inspection by interested persons for a period of thirty days].”:**

40

(e) by the substitution for subsection (7) of the following subsection:

45

“(7) The registrar shall direct the liquidator to publish a notice, at the cost of such a fund, **[cause to be published]** in the *Gazette* and in one **[English and one Afrikaans]** newspaper in the English language and one in the Afrikaans language, or, if deemed necessary in the circumstances, in any other official language, circulating in the district in which the registered office of **[such]** the fund is situate **[a notice stating]** and in which is stated the period during which and the places at which the preliminary **[account] accounts [preliminary balance sheet]** and report (if any) shall lie open for inspection **[as aforesaid]** by interested persons. **[and such]** The notice shall call upon any interested persons who have any objection to the **[said]** preliminary **[account] accounts**

55

[preliminary balance sheet] and report (if any) to lodge their objections in writing with the registrar within **[a]** the period stated in the notice. **[not being less]** which period shall not be shorter than fourteen days, calculated as from the last day on which **[the aforesaid]** those documents lie open for inspection.”:

(f) by the insertion of the following subsection after subsection (7):

“(7A) If, in the case of a particular fund or a particular participating employer whose withdrawal from the fund has caused its partial termination, the registrar is satisfied on reasonable grounds that there exist special circumstances which justify exemption from the provisions of subsections (6) and (7), the registrar, having due regard to the rights of interested persons, may exempt the fund from all or any of the provisions of those subsections if deemed expedient in the circumstances. Such an exemption shall be subject to the conditions determined from time to time by the registrar by notice in the *Gazette*.”:

(g) by the substitution for subsection (12) of the following subsection:

“(12) **[The liquidator shall]** Within **[thirty]** 30 days after **[the]** completion of the liquidation, the liquidator shall lodge with the registrar **[a final account and a final balance sheet]** the final accounts prescribed by regulation signed and certified **[by him]** as correct by the liquidator and showing—

(a) the assets and liabilities of the fund, as at the commencement of the liquidation, or, in the case of the partial termination of the fund, those assets and liabilities of the fund which, at the commencement of the liquidation, are attributable to the members connected to the participating employer whose withdrawal from the fund has caused its partial termination; and

(b) the manner in which the assets have been realized and the liabilities (including any liabilities and contingent liabilities to or in respect of members) have been discharged.”:

(h) by the insertion after subsection (12) of the following subsection:

“(12A) Notwithstanding any provision to the contrary in this section, the registrar, on good cause shown, may authorize the liquidator to make payment of any amounts to the members and beneficiaries of a fund before submission of the final accounts and report (if any), subject to the conditions that the registrar may prescribe from time to time by notice in the *Gazette*.”:

(i) by the substitution for subsection (15) of the following subsection:

“(15) **[If]** The registrar [is], if satisfied that the **[said account and balance sheet]** liquidator’s accounts in respect of the fund are correct and that the liquidation has been completed, **[he]** shall—

(a) cancel the registration of the fund, in the case where the fund is wholly terminated, **[and thereupon]** whereupon the fund shall be **[deemed to be]** dissolved; or

(b) in the case of the partial dissolution of the fund, only confirm the completion of the partial liquidation of the fund.”; and

(j) by the addition of the following subsection:

“(16) For the purposes of this section, “participating employer” means any employer who participates in the scheme or arrangement whereby a fund has been established.”.

Insertion of section 28A in Act 24 of 1956

4. The following section is hereby inserted in the principal Act after section 28:

“Remuneration of liquidator

28A. (1) The registrar by notice in the *Gazette* shall determine the services for which remuneration shall be payable to the liquidator of a fund which is terminated or dissolved voluntarily, whether wholly or in part, and prescribe the tariff of remuneration in respect of those services. 5

(2) Notwithstanding subsection (1), the registrar may reduce or increase the liquidator’s remuneration if satisfied on reasonable grounds that there is good reason for doing so, and the registrar may disallow the liquidator’s remuneration because of any failure or delay to carry out the liquidator’s duties or to carry them out properly and effectively.” 10

Repeal of section 19 of Act 83 of 1992

5. Section 19 of the Financial Institutions Amendment Act, 1992 (Act No.83 of 1992), is hereby repealed. 15

Short title and commencement

6. (1) This Act is called the Pension Funds Amendment Act, 1997, and will come into operation on a date that will be determined by the President by proclamation in the *Gazette*.

(2) Different dates may be determined under subsection (1) for different provisions of this Act. 20

MEMORANDUM ON THE OBJECTS OF THE PENSION FUNDS
AMENDMENT BILL, 1997

1. By the Pension Funds Amendment Bill ("the Bill") it is proposed to effect certain modifications to the Pension Funds Act, 1956 (Act No. 24 of 1956 — "the principal Act"), and, pursuant thereto, to repeal section 19 of the Financial Institutions Amendment Act, 1992 (Act No.83 of 1992).

2. The modifications referred to, entail the substitution of section 13A, and the amendment of sections 19 and 28, of the principal Act, and the insertion therein of a new section, 28A, and are as follows:

2.1 Substitution of section 13A of the principal Act. (See clause 1 of the Bill.)

The proposed new section 13A introduced by clause 1 of the Bill, provides amongst others for the following:

- (a) That, in the case of contributions to a pension fund (i.e. a "fund") which are made up of contributions which, in terms of the fund's rules, are to be deducted from its members' remuneration by their employer(s), and contributions for which those members' employer(s) is/are liable, the employer(s) concerned must pay those contributions over to the fund in full.
- (b) That any contribution to a fund, whether it is payable by the relevant member of the fund personally or by the member's employer in the abovementioned circumstances, or is otherwise payable on behalf of the member, must be paid over within seven days after the end of the month for which the contribution is due.
- (c) That the minimum information to be furnished by employers when paying over contributions in respect of fund members in their employ, shall be prescribed by regulation. That information is necessary with a view to substantiating the amounts of the contributions paid and will facilitate the allocations to be made by notice in the *Gazette*.
- (d) The payment of interest (at a rate prescribed from time to time by the Minister of Finance) on members' contributions, and on benefits referred to in subparagraph (e) herebelow, which are in arrears, i.e. which are paid over to the relevant fund later than the time allowed therefor by the proposed new section 13A.
- (e) The transfer, from one fund, of the full benefits or rights to benefits thereunder to which a person is entitled when membership of the fund has terminated, to another fund of which the person has become a member, within a specified period,

2.2 Amendment of section 19 of the principal Act. (See clause 2 of the Bill.)

At present, a registered fund is precluded by section 19(4) of the principal Act from investing any of its assets in the business of a "participating employer", i.e. an employer "who participates in the scheme or arrangement whereby the fund has been established" (and, if the employer is a company, in any subsidiary company of the employer), except where the employer is a statutory body or a utility undertaking exempted by the Minister of Finance.

In this regard, clause 2 of the Bill proposes the following: To do away with the prohibition precluding a fund from investing its assets in such an employer's business, and with the concomitant authority to grant such exemptions, and instead to allow the assets of a fund not only to be invested in, but also to be lent to, the business of such an employer, which arrangement, where the employer is a company, will also apply to any subsidiary company or holding company of the employer. However, a fund may not so invest or lend assets of which the value is more than—

- (a) five per cent of the fair value of all the fund's assets; or
- (b) a greater percentage of that fair value allowed by the registrar on application by the Board but which may not exceed 10 per cent of that fair value.

2.3 Amendment of section 28 of the principal Act. (See clause 3 of the Bill.)

- (a) Section 28 of the principal Act at present deals with the voluntary dissolution of a fund which is being terminated or dissolved as a whole. Its provisions prescribe a specific procedure aimed at the protection of the interests of the members of the fund. Of particular significance in this regard, are the provisions of section 28(4), (5), (6) and (7) which, briefly stated, provide for the disclosure of the liquidator's preliminary accounts and records, the furnishing of a report thereon by an independent valuator (if the registrar so requires), and a mechanism and the procedures for the inspection of those accounts and records by interested persons, and for objecting thereto. However, these safeguards of members' interests do not apply in the case where a fund is only partly terminated due to a participating employer's withdrawal from the fund: In such a case the members employed by that employer simply leave the fund with payments made to them in terms of the rules of the fund and do not benefit from the abovementioned protection afforded to members when the fund is terminated or dissolved as a whole. The amendments proposed by clause 3 are largely aimed at extending that protection so as to cover also the case where a fund is partly terminated. (See, for instance, paragraphs (a), (b), (g) and (i) of that clause.)
- (b) In the case of certain funds, for instance the smaller funds with relatively few members, the procedure governing voluntary dissolution provided for by section 28 of the principal Act is often unnecessarily long and complicated. In view thereof, clause 3(f) of the Bill proposes that a new subsection, (7A), be inserted in section 28. The proposed new subsection (7A) provides a mechanism for shortening the dissolution process in such cases inasmuch as it empowers the registrar, in appropriate circumstances, to exempt a fund from the provisions of section 28(6) and (7) on conditions (generally) prescribed by the registrar in the *Gazette*. The benefits of the shortened dissolution procedure in those cases are self-evident: It reduces the cost of dissolution and shortens the period that members (or their dependants) and beneficiaries will have to wait for payment of their benefits.
- (c) The principal Act currently does not allow any provisional payment of benefits to members of a fund which is in the process of dissolution. This state of our law may cause hardship to members of a fund, for instance where their employer has withdrawn from the fund due to insolvency and those members have lost their jobs and have or may become destitute. Clause 3(g) addresses this shortcoming inasmuch as it proposes the insertion of a new subsection, (12A), in section 28 of the principal Act. In terms of the proposed new subsection (12A), the registrar, on good cause shown, may authorize the liquidator of a fund to make such provisional payments on conditions (generally) prescribed by the registrar in [he *Gazette*.

2.4 Insertion of section 28A in the principal Act. (See clause 4 of the Bill.)

The principal Act makes no provision for the remuneration payable to the liquidator of a fund. Clause 4 of the Bill is aimed at remedying that situation inasmuch as it empowers the registrar to specify, by notice in the *Gazette*, the services for which remuneration may be paid to a liquidator and to prescribe the tariff of remuneration for those services. Provision is also made for the registrar to reduce or increase a liquidator's remuneration in particular circumstances, and to disallow the liquidator's remuneration due to indolence in the performance of the duties of that office.

3. Repeal of section 19 of the Financial Institutions Amendment Act, 1992. (See clause 5 of the Bill.)

That section, which was destined at the time to effect a substitution of section 13A of the principal Act, has not been brought into operation at any time during the five years

which that Amendment Act has been on the statute book. However, since the provisions of the section 13A that was envisaged by the dormant section 19 of [the Financial Institutions Amendment Act, 1992, by and large have become antiquated since then, and, in fact, are to be superseded by the amendment contemplated in clause 1 of the Bill, section 19 of the Financial Institutions Amendment Act, 1992, and, consequently, the equally dormant section 13A it was destined to introduce in the principal Act at the time, have become redundant and should be repealed.

4. Commencement.

The date of commencement is left to be determined by the President by proclamation in the *Gazette* so as to allow pension funds, pensions administrators and employers sufficient opportunity to make the necessary adjustments and arrangements so that there may be complied with the new requirements, especially those relating to the furnishing of information and the charging of interest on contributions in arrears. It is envisaged that a period of about 12 months may be required for these purposes.

5. Consultation.

5.1 The various legislative proposals were sent to the following organizations for comment:

- * The Institute of Pension Consultants and Administrators
- * The Institute of Retirement Funds of Southern Africa
- * The Actuarial Society of South Africa
- * The Life Offices Association of South Africa
- * The South African Institute of Chartered Accountants
- * The Institute of Life and Pension Advisors
- * The Consulting Actuarial Society of South Africa
- * The Association of Retired Persons and Pensioners
- * The Congress of South African Trade Unions
- * The South African Revenue Service
- * The Black Management Forum
- * The National African Federated Chamber of Commerce and Industry
- * The South African Chamber of Business
- * The South African Co-ordinating Consumer Council
- * The Foundation for African Business and Consumer Services
- * The National Black Consumers Union
- * The following life insurers:
 - Liberty Life Association of Africa Limited ("Liberty Life")
 - The South African Mutual Life Assurance Society ("Old Mutual")
 - Southern Life Association Limited ("Southern Life").

5.2 The comments received were duly considered. Matters raised in those comments have been addressed in the Bill where appropriate. The comments that were actually received, emanated from the following organizations and institutions:

- * The Institute of Pension Consultants and Administrators
- * The Institute of Retirement Funds of Southern Africa
- * The Actuarial Society of South Africa
- * The Life Offices Association of South Africa
- * The South African Institute of Chartered Accountants
- * The Institute of Life and Pension Advisors
- * The Association of Retired Persons and Pensioners
- * The South African Revenue Service
- * The South African Chamber of Business
- * Liberty Life
- * Old Mutual
- * Southern Life.

5.3 The proposed amendments have also been considered by the Pensions Advisory Committee and were approved at its meeting on 4 February 1997.

6. Parliamentary procedure.

The view is held, pursuant to legal advice obtained, that the Bill should be dealt with in accordance with the procedure contemplated in section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).