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PRESIDENT'S OFFICE

No. 636. 19 April 1996

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 22 of 1996: Pension Funds Amendment Act, 1996.

KANTOOR VAN DIE PRESIDENT

No. 636. 19 April 1996

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 22 van 1996: Wysigingswet op Pensioenfondse, 1996.

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.

ACT

To amend the Pension Funds Act, 1956, so as to amend, insert, substitute or delete certain definitions and expressions; to provide for boards to manage pension funds; to make provision for the object of such boards; to regulate the duties of boards; to provide for the exemption of pension funds from certain provisions of the Act; to regulate the application of certain provisions of the Act to certain pension funds; to regulate the submission of complaints to, and the consideration thereof by, pension funds or employers who participate in such funds; to establish the Office of the Pension Funds Adjudicator; to provide for the disposal of complaints by a Pension Funds Adjudicator; to make provision for access to a court; to provide for certain powers of the Adjudicator, and the funds of the Adjudicator; to make provision for the terms and conditions of employment of the Adjudicator and his or her employees; to provide for the accountability of income and expenses of the Adjudicator; to provide that the Adjudicator shall submit an annual report to the Minister of Finance; to make provision for certain offences and penalties; to limit the liability of the Adjudicator; to regulate the manner by which the Office of the Adjudicator shall be liquidated; to limit the reduction of pension benefits in respect of arrear contributions owed to a pension fund; and to further regulate the disposition of pension benefits upon the death of a member of a pension fund; and to provide for matters incidental thereto.

(English text signed by the President.)
(Assented to 10 April 1996.)

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

Amendment of section 1 of Act 24 of 1956, as amended by section 21 of Act 101 of 1976, section 9 of Act 94 of 1977, section 10 of Act 80 of 1978, section 38 of Act 99 of 1980, section 3 of Act 51 of 1988, section 20 of Act 54 of 1989, section 29 of Act 97 of 1990, section 14 of Act 83 of 1992 and section 21 of Act 104 of 1993

1. Section 1 of the Pension Funds Act, 1956 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion in subsection (1) after the definition of "actuary" of the following definitions:

" 'Adjudicator' means the Pension Funds Adjudicator appointed under section 30C(1);

'board' means the board of a fund contemplated in section 7A of this Act;

'complainant' means—

(a) any person who is, or who claims to be—

(i) a member or former member of a fund;

(ii) a beneficiary or former beneficiary of a fund;

(iii) an employer who participates in a fund;

(b) any group of persons referred to in paragraph *(a)*(i), (ii) or (iii);

(c) a board of a fund or member thereof; or

(d) any person who has an interest in a complaint;

'complaint' means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging—

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;";

(b) by the addition in subsection (1) to paragraph *(b)* of the definition of "dependant" of the following subparagraph:

"(iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;";

(c) by the substitution in subsection (1) for the definition of "officer" of the following definition:

" 'officer', in relation to a fund, means any member of a **[committee appointed to manage the affairs of the fund, or any individual so appointed, or]** board, any manager, principal officer, treasurer, clerk **[or other agent]** or employee of the fund, but does not include an auditor appointed under section **[nine]** 9 or a valuator appointed under section 9A;";

(d) by the deletion in subsection (1) of the definition of "person";

(e) by the insertion in subsection (1) before the definition of "prescribed" of the following definition:

" 'Policy Board' means the Policy Board for Financial Services and Regulation established by section 2 of the Policy Board for Financial Services and Regulation Act, 1993 (Act No. 141 of 1993);";

(f) by the substitution for subsection (2) of the following subsection:

"(2) For the purpose of the application of the provisions of this Act in relation to an organization which is a pension fund organization in terms of paragraph *(b)* of the definition of "pension fund organization" in subsection (1), any reference in this Act to a fund shall be construed as a reference to that fund or to the **[person or body in control of the affairs]** board of that fund, as circumstances may require.".

Insertion of certain sections in Act 24 of 1956

2. The following sections are hereby inserted in the principal Act after section 7:

"**Board of fund**

7A. (1) Notwithstanding the rules of a fund, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect.

(2) Subject to subsection (1), the constitution of a board, the election procedure of the members mentioned in that subsection, the appointment and terms of office of the members, the procedures at meetings, the voting rights of members, the quorum for a meeting, the breaking of deadlocks and the powers of the board shall be set out in the rules of the fund: Provided that if a board consists of four members or less, all the members shall constitute a quorum at a meeting.

Exemptions

7B. (1) The registrar may on the written application of a fund which shall include such information as the registrar may require—

(a) authorise a fund to have a board consisting of less than four board members if such number is impractical or unreasonably expensive: Provided that the members of the fund shall have the right to elect at least 50% of the board members;

(b) exempt a fund from the requirement that the members of the fund elect members of the board, if the fund—

(i) has been established for the benefit of employees of different employers which are not subsidiaries of a single holding company; or

(ii) is a retirement annuity fund as defined in the Income Tax Act, 1962 (Act No. 58 of 1962).

(2) The registrar may withdraw an exemption granted under subsection (1)*(a)* or (1)*(b)* if a fund no longer qualifies for such exemption.

Object of board

7C. (1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.

(2) In pursuing its object the board shall—

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of all members and beneficiaries.

Duties of board

7D. The duties of a board shall be to—

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;

(b) ensure that proper control systems are employed by or on behalf of the board;

(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;

(d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

(e) obtain expert advice on matters where board members may lack sufficient expertise;

(f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), and all other applicable laws.

Application of certain sections

7E. (1) Sections 7A, 7B, 7C and 7D shall apply to all funds registered on, or after, a date 12 months after the date of commencement of the Pension Funds Amendment Act, 1995.

(2) Any fund registered prior to a date 12 months after the date of commencement of the said Act, shall comply with sections 7A, 7B, 7C and 7D by 15 December 1998.".

Insertion of Chapter VA in Act 24 of 1956

3. The following Chapter is hereby inserted in the principal Act after section 30:

"CHAPTER VA

CONSIDERATION AND ADJUDICATION OF COMPLAINTS

Submission and consideration of complaints

30A. (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.

(2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.

(3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

Establishment of Office of Pension Funds Adjudicator

30B. (1) There is hereby established an office which shall be known as the Office of the Pension Funds Adjudicator.

(2) The functions of the Office shall be performed by the Pension Funds Adjudicator.

Appointment of Adjudicator

30C. (1) The Minister shall, after consultation with the Policy Board, appoint a person to the office of Adjudicator.

(2) No person shall be appointed as Adjudicator unless he or she is qualified to be admitted to practise as an advocate under the Admission of Advocates Act, 1964 (Act No. 67 of 1964), or as an attorney under the Attorneys Act, 1979 (Act No. 53 of 1979), and—

(a) for an uninterrupted period of at least 10 years practised as an advocate or an attorney; or

(b) for an uninterrupted period of at least 10 years was involved in the tuition of law and also practised as an advocate or attorney for such period as renders him or her suitable for appointment as Adjudicator; or

(c) possesses such other experience as renders him or her suitable for appointment as Adjudicator.

(3) The Adjudicator shall be appointed for a period of three years and may be reappointed on expiry of his or her term of office.

(4) The Adjudicator may at any time resign as Adjudicator by tendering his or her resignation in writing to the Minister: Provided that the

resignation shall be addressed to the Minister at least three calender months prior to the date on which the Adjudicator wishes to vacate his or her office, unless the Minister allows a shorter period.

(5) The Minister may remove the Adjudicator from office on the grounds of misbehaviour, incapacity or incompetence, after consultation with the Policy Board.

Main object of Adjudicator

30D. The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

Disposal of complaints

30E. (1) In order to achieve his or her main object, the Adjudicator—

(a) shall, subject to paragraph *(b)*, investigate any complaint and may make the order which any court of law may make;

(b) may, if it is expedient and prior to investigating a complaint, require any complainant first to approach an organization established for the purpose of resolving disputes in the pension funds industry or part thereof, and approved by the registrar.

(2) Any complaint dealt with in terms of subsection (1)*(b)* shall be recorded by the Adjudicator and shall, for purposes of section 30H(3), be deemed to be a receipt of a complaint.

(3) If the complaint, dealt with in terms of subsection (1)*(b)*, is not resolved, the complainant may again lodge the complaint with the Adjudicator, who shall deal with it in terms of subsection (1)*(a)*.

Opportunity to comment

30F. When the Adjudicator intends to conduct an investigation into a complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations.

Parties to complaint

30G. The parties to a complaint shall be—

(a) the complainant;

(b) the fund or person against whom the complaint is directed;

(c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;

(d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.

Jurisdiction and prescription

30H. (1) The Adjudicator shall, subject to section 30I, investigate a complaint notwithstanding that the complaint relates to a matter which arose prior to the commencement of the Pension Funds Amendment Act, 1995.

(2) The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.

(3) Receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), or the rules of the fund in question.

Time limit for lodging of complaints

30I. (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(3) The Adjudicator may on good cause shown or of his or her own motion—

(a) either before or after expiry of any period prescribed by this Chapter, extend such period;

(b) condone non-compliance with any time limit prescribed by this Chapter.

Procedure for conducting investigation

30J. (1) The Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.

(2) Notwithstanding section 22 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), the Adjudicator may obtain copies of any document or correspondence contained in the files of the registrar.

(3) Sections 1, 2, 3, 4 and 6 of the Commissions Act, 1947 (Act No. 8 of 1947), shall apply *mutatis mutandis* to the Adjudicator.

Legal representation

30K. No party shall be entitled to legal representation at proceedings before the Adjudicator.

Record of proceedings

30L. (1) The Adjudicator shall keep or cause to be kept, whether in writing or by mechanical or electronic means, a permanent record of the proceedings relating to the adjudication of a complaint and the evidence given.

(2) Any member of the public may obtain a readable copy of the record on payment of a fee determined by the Adjudicator.

(3) The registrar may, for purposes of the performance of his or her functions in terms of this or any other Act, rely on a copy of the record without the need of any further proof.

Statement by Adjudicator regarding determination

30M. After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons therefor, signed by him or her, to all parties concerned as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court.

Interest on amount awarded

30N. Where a determination consists of an obligation to pay an amount of money, the debt shall bear interest as from the date and at the rate determined by the Adjudicator.

Enforceability of determination

30O. (1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.

(2) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged.

Access to court

30P. (1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the Supreme Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the Supreme Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.

Powers of Adjudicator

30Q. The Adjudicator may with the concurrence of the Financial Services Board—

(a) hire, purchase or otherwise acquire such movable property as may be necessary for the performance of his or her functions and may let, sell or otherwise dispose of property so purchased or acquired;

(b) in order to perform his or her functions, enter into an agreement with any person for the performance of any specific act or function or the rendering of specific services;

(c) insure his or her Office against any loss, damage, risk or liability which it may suffer or incur;

(d) employ persons to assist in the performance of his or her functions;

(e) obtain such professional advice in the performance of his or her functions as may be reasonably required;

(f) subject to such conditions as he or she may determine, delegate any of his or her functions, except the functions contemplated in section 30E, to an employee of his or her Office;

(g) in general do anything which is necessary or expedient for the achievement of his or her objects and the performance of his or her functions.

Funds of Adjudicator

30R. (1) The funds of the Adjudicator shall consist of—

(a) funds provided by the Financial Services Board on the grounds of a budget submitted to and approved of by the Financial Services Board;

(b) money accruing to the Adjudicator from any other source.

(2) The Adjudicator shall utilise the funds for the defrayal of expenses incurred in connection with the performance of his or her functions under this Act.

(3) The Adjudicator shall deposit all the money received by him or her in an account which he or she shall open with a banking institution registered in terms of the Banks Act, 1990 (Act No. 94 of 1990).

(4) The Adjudicator may invest money deposited in terms of subsection (3) which is not required for immediate use.

(5) Any money standing to the credit of the Adjudicator in the account referred to in subsection (3) at the close of the financial year as well as money which has been invested in terms of subsection (4), shall be carried forward to the next financial year.

(6) The financial year of the Adjudicator shall end on 31 March in each year.

Remuneration and terms and conditions of employment of Adjudicator and employees

30S. (1) The remuneration and other terms and conditions of employment of—

(a) the Adjudicator shall be determined by the Financial Services Board;

(b) any employee of the Adjudicator shall be determined by the Adjudicator with the concurrence of the Financial Services Board.

(2) Any remuneration of the Adjudicator and his or her employees shall be paid out of the funds of the Adjudicator.

Accountability

30T. (1) The Adjudicator or one of his or her employees designated by him or her, shall be charged with the accountability in respect of all moneys received and payments made by the Adjudicator.

(2) The accounting officer contemplated in subsection (1) shall—

(a) keep full and correct record of all money received or expended by, and of all assets, liabilities and financial transactions of, the Adjudicator; and

(b) as soon as is practicable, but not later than three months, after the end of each financial year, prepare annual financial statements reflecting, with suitable particulars, money received and expenses incurred by the Adjudicator during, and his or her assets and liabilities at the end of, the financial year in question.

(3) The records and financial statements referred to in subsection (2) shall be audited by the Auditor-General.

Report of Adjudicator

30U. The Adjudicator shall each year within six months after the end of his or her financial year, submit a report to the Minister on his or her affairs and functions during the financial year in question, including the audited financial statements.

Offences and penalties

30V. Any person who—

(a) insults the Adjudicator;

(b) anticipates a determination of the Adjudicator in any manner calculated to influence the determination;

(c) wilfully interrupts any proceedings conducted by the Adjudicator or misbehaves himself or herself in any manner in the place where the proceedings are being held;

(d) in connection with a complaint does anything which, if done before a court of law, would have constituted contempt of court,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

Limitation of liability

30W. The Adjudicator, or any of his or her employees, shall not be liable in respect of anything done or omitted to be done in good faith in the exercise of a power or the performance of a duty conferred or imposed by or under this Act.

Liquidation

30X. (1) The Office of the Adjudicator shall not be placed in liquidation except by Act of Parliament.

(2) In the event of the liquidation of the Office, the surplus assets of the Office (if any) shall accrue to the State.".

Amendment of section 37A of Act 24 of 1956, as inserted by section 24 of Act 101 of 1976, substituted by section 12 of Act 94 of 1977, amended by section 40 of Act 99 of 1980 and section 37 of Act 104 of 1993

4. Section 37A of the principal Act is hereby amended by the substitution for paragraph *(d)* of subsection (3) of the following paragraph:

"*(d)* which is owed to a fund by a member in respect of arrear contributions, but excluding amounts which are in arrear due to the failure of the employer concerned to pay the member's contributions to the fund after deduction thereof from the member's remuneration.".

Amendment of section 37C of Act 24 of 1956, as inserted by section 24 of Act 101 of 1976, substituted by section 13 of Act 80 of 1978, section 41 of Act 99 of 1980 and amended by section 6 of Act 51 of 1988, section 21 of Act 54 of 1989, section 29 of Act 83 of 1992 and section 28 of Act 104 of 1993

5. Section 37C of the principal Act is hereby amended—

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

"*(a)* If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, **[in such proportions]** as may be deemed equitable by the **[person managing the business of the fund]** board, to one of such dependants or in proportions to some of or all such dependants.";

(b) by the substitution for paragraph *(bA)* of subsection (1) of the following paragraph:

"*(bA)* If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the **[person managing the business of the fund]** board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee **[after the coming into operation of this paragraph]** made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees."; and

(c) by the addition of the following subsections:

"(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

(4)*(a)* Any benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that—

(i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and

(ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(b) If the agreement contemplated in paragraph *(a)* is cancelled the balance of the benefit shall be paid to the dependant or nominee in full.".

Substitution of expression in Act 24 of 1956

6. The principal Act is hereby amended by the substitution for the expression "person managing the business of the fund", wherever it occurs in sections 1(1), 8(3) and (4), 13A, 16(8), 26(1) and 28(2) and (3), of the word "board".

Short title

7. This Act shall be called the Pension Funds Amendment Act, 1996.