

Retirement Matters 5/2024



Two-pot retirement system update

- The 2024 Revenue Laws Amendment Act and Pension Funds Amendment Act have both been promulgated, while the process of introducing the 2024 Draft Revenue Laws Second Amendment Bill is still underway.
- Most rule amendments to enable the two-pot retirement system has been approved by the FSCA and a list of the funds where amendments were approved was published.
- The FSCA has published Information Request 2 of 2024, requesting administrators to provide information on costs to implement the two-pot retirement system and fees being charged.
- Savings withdrawal benefits from retirement funds remain high. The FSCA has requested weekly updates from administrators on the number of two-pot system related complaints as well as an indication of the challenges that the industry experiences.
- As at 25 September 2024, the Office of the Pension Funds Adjudicator has received 247 two-pot related enquiries on how to claim benefits, administrative issues, and 14 formal complaints.

Withholding a member's benefit due to damage caused to the employer

Section 37A of the Pension Funds Act provides that a member's retirement fund benefit or right to such benefit may not be reduced, transferred or ceded or be pledged or hypothecated or be liable to be attached, except in circumstances set out in section 37D. Section 37D in turn provides for the deduction from a member's benefit of any amount due to the member's employer in respect of compensation because of damage caused to the employer by reason of theft, dishonesty, fraud, or misconduct.

Although section 37D does not specifically make provision for the withholding of a benefit, it is evident that to give effect to the purpose of section 37D, which is to protect an employer's right to the recovery of monies owed to it due to theft, fraud or dishonesty of a member, the wording in the section has been interpreted by our courts to include the power to withhold payment of the member's pension benefits pending the determination of an action or acknowledgement of such member's liability.

It is important to note that there is a difference between the stage of **withholding** a benefit and the stage of **deduction** from a benefit. The former is the area within which a board of

management can exercise its discretion subject to the fund's rules and certain other conditions.

If the withholding of a benefit is requested by the employer, the employer should provide the fund with a summary of its case and evidence of progress, including the amount that it believes it has a reasonable chance of obtaining from the member via a valid written admission of liability or court proceedings. The amount of the benefit that may be withheld under such circumstances must be limited to the potential loss suffered by the employer and reasonable legal costs.

Interdicts

Should the board of a fund refuse a request to withhold a member's benefit, the employer may apply for an interdict to prevent a fund from paying the member's benefit pending finalisation of the claim against the member. In the High Court case of *Umgungundlovu District Municipality and Natal Joint Municipal Pension Fund*, the court set out the requirements for a final interdict:

1. Proof on a balance of probabilities that the applicant has a clear or definitive legal right (in this instance in terms of section 37D);
2. An injury committed or reasonably apprehended, meaning that the applicant must show that the clear right will be infringed by the respondent to their prejudice and the prejudice can be actual or potential (in this instance the fact that the member was unemployed and unlikely to be able to satisfy any judgment the applicant may obtain); and
3. The absence of some similar protection by any other ordinary remedy – the final interdict should be the only appropriate form of relief. In this case the Fund had not yet provided a final decision to the employer, and therefore the application for an interdict was regarded as premature.

The court remarked that the employer is entitled to and should insist on a final decision by the Fund on whether they intend to withhold the benefit or release it to the member.

The matter could then be referred to the Pension Funds Adjudicator after the Fund had made a final decision on whether to withhold the benefit.

It is important for employers to establish the final decision of the fund on whether it intends to withhold the member's benefit, before taking any further action. Members must also be given the opportunity to state their case (*audi alteram partem rule*). If the fund decides that withholding is not justified, the employer may approach the Pension Funds Adjudicator for a determination. It is recommended that while the employer awaits a determination from the Adjudicator, it obtains an urgent interim interdict to prevent the fund from paying the member's benefit.

Limitations on funeral policy benefits

The Insurance Act 18 of 2017 introduced new classes of insurance business, which include a dedicated class of life insurance business for funeral policies. The Act requires the Prudential Authority to prescribe the maximum amount payable in respect of the funeral class of life insurance business. With effect from 1 July 2018, Prudential Standard GOI 7 prescribed a maximum amount of R100 000 (escalating annually by the Consumer Price Index) per life insured, per policy. This was confirmed in Joint Communication 4 of 2020. Prior to this increase, the limitation was capped at R30 000 per life insured per policy.

In addition to the R100 000 limitation, section 55 of the Long-term Insurance Act 52 of 1998 prescribes further limitations for unborn children and for certain minors.

	Old limit	New limit from 1 July 2018
Unborn and child before age 6	R10 000	R20 000
Child from age 6 to before age 14	R30 000	R50 000

The Prudential Standard therefore restricts insurers to providing a maximum cover of R100 000 per life insured, per insurance policy. For example, if a person has three policies, each with a cover of R50 000 (totalling R150 000) with the same insurer, the insurer will be prohibited from paying more than R100 000. The remaining R50 000 will be forfeited. It is important to note that the maximum payout limit comes into play only if the person has multiple funeral policies from the same insurer.

Nothing prevents a person from taking a funeral policy with a maximum of R100 000 from three different insurers. When there is a claim, all three insurers will pay R100 000 each (in total R300 000 will be paid). All three insurers are required to pay, but individually they may not pay more than R100 000.

New FSCA fees

The FSCA published General Notice 1/2024 with its new service fees, effective 1 October 2024.

Noteworthy fee increases	Previous fee since 2009	New fee from 1 October 2024
Section 14 transfer of one member	R210	R223
Section 14 transfer of multiple members	R1 020	R1 081
Rule amendments	R415	R440
Special rules amendments	R410	R435
Revised rules	R1 210	R1 283

Some noteworthy new fees:

Applications for exemptions and extensions	Fee introduced 1 October 2024
Valuation exemption	R1 856 for all applications
<ul style="list-style-type: none"> Extension of the 12 months period to submit a statutory actuarial valuation report Exemption from default regulation provisions (regulation 37, 38 and 39) Submission of financial statements 	
Section 14	
<ul style="list-style-type: none"> Extension of the 180-day period required for the submission of a section 14 application Extension of the 60-day period required for the payment of transfer amounts 	
Board	
<ul style="list-style-type: none"> Exemption from section 7A in terms of section 7B(1) 	

Terminations	Fee introduced 1 October 2024
• Application for approval to terminate a participating employer (withdrawal of special rules) in terms of section 12	R1 200
• Application for fund cancellation in terms of section 27	R1 530
• Consolidation of financial year-ends	R1 856

Appointments	Fee introduced 1 October 2024
• Auditors	R900
• Principal officer	R1 500
• Monitoring person	R1 000

Trustee training toolkit

The date for completion of the trustee training toolkit was 30 September 2024. The FSCA will publish the names of the trustees who have not completed the toolkit and will in time take regulatory action. Funds must however follow their rules and own codes of conduct or policies in terms of disciplinary measures against non-compliant board members.

If a fund is in the process of being closed, its board members may apply for exemption from completing the toolkit. The necessary form is available under the 'exemptions'-tab on the toolkit portal.

Valuation exemptions

Board Notice 59 of 2014 sets out the conditions which must be complied with when a fund applies to be exempted from appointing a valuator and submitting statutory valuation reports.

The FSCA has on 27 September 2024 published Communication 37 of 2024, providing supervisory guidance on considerations related to an application requesting exemption from performing a valuation. The FSCA clarified their considerations when assessing an application for exemption as follows:

1. Whether the fund has a lower risk due to the manner of operation.
2. The valuation date applied for must be at the expiration of a financial year-end and cannot be more than three

years after the previous statutory valuation was due.

3. As assets and liabilities are considered against the annual financial statements of the fund, it is important that those financial statements at the effective date of the application have been submitted.
4. Pensions must have been fully outsourced and such outsourcing must be clearly reflected in the rules.
5. The rules must clearly reflect that all members belong to a purely defined contribution category. This means inter alia that investment returns should have been allocated to members and the fund should not have a significant surplus.
6. Benefits exceeding members' individual accounts, must be fully insured. The reference to the rule and the limitations applicable should be provided.
7. The rules must be clear that contingency reserve accounts could never have a negative balance.
8. The fund's surplus apportionment scheme must have been approved or noted by the FSCA.
9. A fund that was in a deficit, either at the previous effective valuation date, the current effective valuation date, or any of the years in between, will not qualify for exemption.
10. Detailed reconciliations and long explanations must rather be included in a valuation report and not in the exemption application.

The exemption consideration is based on the consideration of the risks in the fund and the way the fund operates.

Q&A

The new section 14 forms came into effect on 1 September 2024. If a fund has already signed the forms in the previous format and the section 14 has not been finalised, must the forms be redrafted and re-signed in the new format?

Yes, although the new forms were only released on 30 August 2024, funds will need to redraft the forms as the use of the new forms are compulsory from 1 September 2024. It indicates the split between the retirement pot, vested pot, and savings pot.