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INFORMATION CIRCULAR ____ OF 2015

THE GOVERNANCE, WINDING UP AND CANCELLATION OF THE REGISTRATION OF A SHELL FUND OR DORMANT FUND WITHOUT A BOARD OR LIQUIDATOR

The purpose of this circular is to set out the registrar's approaches to-

- the governance; and, if applicable,
- the disposal of the assets and liabilities; and
- the cancellations of the registrations

of funds for which it is impossible to establish a board properly in terms of the rules of the fund and the applicable provisions of the Pension Funds Act, 1956.

ROSEMARY HUNTER DEPUTY REGISTRAR OF PENSION FUNDS

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INFORMATION CIRCULAR __ OF 2015

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1 INTRODUCTION

1.1 Nature of this Circular

1.1.1 This is an Information Circular. It is intended to provide the retirement *funds* industry with information regarding the current view of the registrar in relation to the matters canvassed in the circular. It does not have legislative force. It does, however, replace previous guidance circulars relating to some of these matters.

1.1.2 The following circulars are accordingly withdrawn:

1.1.2.1 *Circular PF 126* entitled '*Rules in respect of unclaimed benefits, funds consisting exclusively of unclaimed benefits, funds without a properly constituted board of management, funds with remaining assets and without an associated liability after a surplus apportionment scheme or nil scheme*';

1.1.2.2 *Circular PF 127* entitled '*Surplus submissions in the case of full section 14 transfers, unclaimed benefit funds, funds without a properly constituted board of management*'.

1.2 Definitions

For the purposes of this Information Circular, the following terms have the following meanings. These terms appear in italics in the body of the document to alert readers to the fact that these terms have defined meanings:

1.2.1 'active *fund*' means an occupational retirement *fund* which is either

1.2.1.1 a *contributory fund*, that is, an *occupational retirement fund* to which contributions are payable by or for the benefit of its *members* at regular intervals defined in the rules of the *fund*; or

1.2.1.2 a *paid up fund*, that is, an *occupational retirement fund* to which the payment of contributions by its *members* and/or their *participating employers* has ceased and which will be liable to pay benefits to its *members* and/or *beneficiaries* of those *members* as and when the liability for the payment of those benefits in terms of its rules accrue on the happening of a *trigger event*;

- 1.2.2 'beneficiary' means a 'beneficiary' as defined in the *PFA*;
- 1.2.3 '*dormant fund*' means a *fund* which-
- 1.2.3.1 immediately before the cancellation of its registration, was not an *active fund* or a *shell fund* and which did not have a board of management properly constituted in terms of section 7A of the *PFA* and the rules of the *fund*; or
 - 1.2.3.2 if the registration of the *fund* has not been cancelled, is not an *active fund* or a *shell fund* and does not have such a properly constituted board of management;
- 1.2.4 '*FSB*' means the Financial Services Board;
- 1.2.5 '*fund*' means a *fund* as defined in the *PFA* which has been registered in terms of the *PFA*, whether or not that registration has since then been cancelled;
- 1.2.6 '*in-service member*' means a *fund* '*member*' as defined in the *PFA* who has not retired from the employment of a *participating employer*;
- 1.2.7 '*interested party*' means, in relation to a specific *fund*-
- 1.2.7.1 a *member*, whether that *member* is, or was, an *in-service member* or a *pensioner*;
 - 1.2.7.2 a former *member*, whether that *member* was an *in-service member* or a *pensioner*, immediately before his or her *membership* of the *fund* ended;
 - 1.2.7.3 a *beneficiary*;
 - 1.2.7.4 a *participating employer*;
 - 1.2.7.5 a former *participating employer*;
 - 1.2.7.6 a creditor of the *fund*, other than a *member* or former *member*;
 - 1.2.7.7 a provider of products or services to the *fund*;

- 1.2.8 a '*member of a profession*' is a person who is a member of one of the following:
- 1.2.8.1 the Actuarial Society of South Africa (ASSA);
 - 1.2.8.2 one of the Law Societies making up the Law Societies of South Africa (LSSA);
 - 1.2.8.3 one of the Societies of Advocates making up the General Council of the Bar of South Africa (GCB);
 - 1.2.8.4 the South African Institute of Chartered Accountants (SAICA); or
 - 1.2.8.5 the Chartered Financial Analysts Society South Africa (CFA SA);
- 1.2.9 '*occupational retirement fund*' means a pension *fund* or a provident *fund* to which persons employed or formerly employed by one or more *participating employers* or former *participating employers* belong or belonged in terms of their contracts of employment with those employers;
- 1.2.10 '*participating employer*' means an employer contemplated in the definition of '*occupational retirement fund*' above;
- 1.2.11 '*pensioner*' means –
- 1.2.11.1 a *fund member* who has become entitled to a pension on his or her permanent disablement or retirement from the employment of a *participating employer*, whether the pension is or will be payable by his or her *occupational retirement fund* or an insurer; or
 - 1.2.11.2 a *beneficiary* who became entitled to a pension payable in terms of the rules of the *fund* upon the death of the *member* before retirement;
- 1.2.12 '*PFA*' means the Pension Funds Act, 1956;
- 1.2.13 '*registrar*' means the *registrar* of pension *funds*;

1.2.14 '*section 26(2) trustee*' means a person appointed by the registrar in terms of section 26(2) of the *PFA* as a member of the board of a *fund*;

1.2.15 '*shell fund*' means

1.2.15.1 a registered *fund* which has no assets or liabilities; or

1.2.15.2 in the case of a *fund* the registration of which has been cancelled, had no assets or liabilities immediately before its registration was cancelled,

including, if applicable, a *fund* which has or had been registered in terms of the *PFA* but which never conducted business as a *fund*;

1.2.16 '*sponsor*' means any person or body entitled in terms of the rules of the *fund* to appoint (rather than elect) some or all of the members of the board of the *fund*, such as, for example-

1.2.16.1 a *participating employer* or 'principal employer' as defined in the rules of the *fund*;

1.2.16.2 a trade union;

1.2.16.3 a trade association; or

1.2.16.4 a for-profit entity which has established a retirement *fund* for the purposes of fostering demand for financial products and services provided by it and/or parties related to it;

1.2.17 '*transferee fund*' means a *fund* to which liabilities, and assets to provide for those liabilities, are transferred from another *fund* as contemplated in section 14 of the *PFA*;

1.2.18 '*transferor fund*' means a *fund* from which liabilities and assets to provide for those liabilities are transferred to another *fund* as contemplated in section 14 of the *PFA*;

1.2.19 '*trigger event*' means the first of the following events on the happening of which a benefit may accrue or has accrued to or in respect of a *fund member* in terms of the rules of his or her *fund*:

1.2.19.1 the permanent disablement or death of a *member* before

retirement;

1.2.19.2 the termination of a *member's membership* before retirement; and

1.2.19.3 the retirement of a *member*.

1.3 The circumstances in which numerous funds became dormant funds or shell funds

1.3.1 Over the last 20 years or so, there has been a significant reduction in the number of *active funds*, due, at least in part, to the significant shift from stand-alone to umbrella *occupational retirement funds*.

1.3.2 Unfortunately, in many cases, after the assets and liabilities in respect of *in-service members* of these *funds* have been transferred to other *funds*, such as umbrella *funds*, their old *funds* have been left without boards of management. This meant that there were no people able to act as the “directing minds and wills” of the *funds* in making decisions on matters such as-

1.3.2.1 the apportionment of actuarial surpluses;

1.3.2.2 the terms on which providers of various services to the *fund* are remunerated for those services;

1.3.2.3 claims by the *funds* to

1.3.2.3.1 the proceeds of insurance policies in terms of which some or all of the liabilities of the *funds* were underwritten;

1.3.2.3.2 the proceeds of shares allocated on the demutualisation of their underwriters to the *funds*;

1.3.2.3.3 ‘secret profits’ repayments by service providers and the like;

1.3.2.4 the treatment of-

1.3.2.4.1 the remaining liabilities of the *funds*, including, in some cases, liabilities in respect of

unclaimed benefits and, if applicable,

- 1.3.2.4.2 the remaining assets, including, in some cases, 'agterskot' payments to the *funds* in terms of smoothed bonus policies;
 - 1.3.2.5 the tracing of those entitled to unclaimed benefits;
 - 1.3.2.6 the selection of unclaimed benefits *funds* to which to transfer assets and liabilities in respect of unclaimed benefits;
 - 1.3.2.7 the making of applications to the *registrar* for his approval of the transfers of assets and liabilities to other entities;
 - 1.3.2.8 the appointment of liquidators, if applicable, and
 - 1.3.2.9 the cancellation of the registrations of the *funds*.
- 1.3.3 This position was problematic because, amongst other things –
- 1.3.3.1 no one had the power to wind down the businesses of these *funds*;
 - 1.3.3.2 no meaningful attempts could be made to trace and pay those entitled to unclaimed benefits held by the *funds*;
 - 1.3.3.3 no one could take responsibility for the apportionment of actuarial surpluses or the submission to this office of "nil schemes" as required in terms of section 15B of the *PFA* following its insertion into the *PFA* by promulgation on 7 December 2001; and
 - 1.3.3.4 the annual budgeting process for the *funding* of the *FSB's* operations was premised on the basis of levies expected to be paid by all persons and entities subject to regulation and supervision by it, including all retirement *funds* registered in terms of the *PFA*. However, a budgeting process based on the assumption that levies would be paid by all such retirement *funds*, including *shell funds* and *dormant funds*,

would be inaccurate and unreliable because *shell funds* and *dormant funds* could not pay such levies.

1.3.4 Over the years, various measures to address these problems were adopted by the *registrar* after discussions with various industry role-players.

1.3.5 The *registrar* has recently reviewed the measures adopted during the period 2007 to 2013 and has decided that it would be appropriate to change some of the approaches to be taken to these matters in the future.

1.4 Steps taken in the past to try to address these problems

1.4.1 The various measures adopted by the *registrar* to address these problems during the period 2007 to 2013 entailed the following:

1.4.2 March to September 2007

1.4.2.1 During this period the *registrar*-

1.4.2.1.1 encouraged administrators to procure the cancellation of the registrations of the numerous *shell funds* and *dormant funds* on their books, of which there were approximately 9500 in 2006; and

1.4.2.1.2 in consultation with, amongst others, representatives of *fund* administrators with numerous *shell funds* and *dormant funds* on their books, designed a process by which the *registrar* would appoint persons to act as the boards of those *funds* so that they could dispose of the *funds*' remaining assets and liabilities, if any, and thereafter to request the *registrar* to cancel their registrations in terms of section 27(1) of the *PFA*.

1.4.2.2 That section then said (as it does now):

'The registrar shall cancel the registration of a *fund* –

- (a) on proof to his satisfaction that the *fund* has ceased to exist; or

- (b) if the registrar and the *fund* are agreed that the *fund* was registered by mistake in circumstances not amounting to fraud.

Provided that in the circumstances stated in paragraph (b), the registrar may suspend the registration in lieu of cancelling it, if he is satisfied that by so doing the fund will be furnished with an opportunity of rectifying the said mistake to the satisfaction of the registrar, the latter shall thereupon reinstate the said registration, as from the date of suspension but if the mistake is not rectified within a period specified by the registrar he shall cancel the registration of the fund.¹

1.4.2.3 Before September 2007, the process referred to in paragraph 1.4.2.1.2 entailed the appointment by the *registrar* of persons nominated by the administrators of *shell funds* and *dormant funds* and others as “authorised representatives” to act in place of the boards of some of the *funds* to –

1.4.2.3.1 submit ‘nil schemes’ indicating that the *funds* had no actuarial surpluses to apportion in terms of section 15B of the *PFA*;

1.4.2.3.2 appoint providers of services to the *funds*, determine their investment strategies and transfer their assets and liabilities to other entities; and

1.4.2.3.3 apply for the approval of the appointment of liquidators to wind up the businesses of the *funds* in terms of section 28(2) of the *PFA* or, in the case of *shell funds*, for the cancellation of the registrations of the *funds*.

1.4.2.4 In the context of the review referred to in paragraph 1.3.5, the *registrar* has formed the view that, while these measures reflected a laudable attempt to deal with the practical difficulties associated with the governance, closure and cancellations of the registrations of dormant and *shell funds*, he did not have the power to make these appointments and the appointees did not have the powers they thought they were entitled to exercise.

1.4.3 September 2007 to August 2013

1.4.3.1 Before it was amended in September 2007, section 26 of

the *PFA* provided that:

- (1) If in the opinion of the registrar a registered *fund* is not in a sound financial condition, and if such *fund* has failed to act in accordance with the provisions of section eighteen, or if such action is necessary as a result of an investigation under section twenty-five, the registrar may apply to court for an order directing that the rules of the *fund* relating to the appointment, powers, remuneration (if any) and removal from office of the board, or relating to such other matter as the registrar may regard as appropriate, be altered in a manner to be specified by the registrar in such application.
- (2) The court shall consider the equitable interests of the members of the *fund* (or of the several classes of members, if there is more than one such class) and of any other person who has rendered, or who intends to render financial assistance to the *fund*, and, subject to such considerations as aforesaid, shall make such order as it deems most advantageous to the members of the *fund*.
- (3) ...'

1.4.3.2 In September 2007 section 26(2) was amended to empower the *registrar* to appoint members of the board of a *fund* without a board that was properly constituted in terms of the *PFA*. Following its amendment the section provided that:

- (2) Where a *fund* has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days' written notice by the registrar, the registrar may, notwithstanding the rules of the *fund*, at the cost of the *fund* —
 - (a) appoint so many persons as may be necessary to the board of the *fund* or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and
 - (b) assign to such board such specific duties as the registrar deems expedient.
- (3) A board constituted in terms of subsection (2) holds office until the registrar is satisfied that the *fund* has constituted a valid board in terms of section 7A and the registrar has relieved the former board in writing of its duties.'

1.4.3.3 At the time, the *registrar* was advised that he could use this provision to appoint as "section 26(2) trustees" of *dormant funds* persons nominated by their administrators and to empower them to take the steps referred to above. Accordingly, after consulting administrators, he made numerous such appointments, following which, the assets and liabilities of numerous *dormant funds* were disposed of by the persons appointed after which the registrations of

those *funds* were cancelled in terms of section 27 of the *PFA* because the *registrar* was satisfied that they had 'ceased to exist'.

1.4.3.4 As part of the *registrar's* review referred to in paragraph 1.3.5 he has formed the view that section 26(2), when read with section 26(3) of the *PFA*, and even after its further amendment on 28 February 2014, may not have authorised him to appoint *section 26(2) trustees* for a *fund* for a purpose other than to procure the establishment of a properly constituted board. In particular, it did not authorise the *registrar* to appoint them for the purpose of disposing of the *fund's* assets and/or liabilities and thereafter asking the *registrar* to cancel its registration.

1.4.4 August 2013 to February 2014

Since 10 September 2013 the *registrar* has declined to cancel the registrations of *funds* at the request of section 26(2) trustees.

1.4.5 March 2014 to date

1.4.5.1 Section 26(2) was amended with effect from 28 February 2014 by the insertion of the words underlined below:

'(2) Where a *fund* has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days' written notice by the registrar, or where a *fund* can not constitute a board properly or where a board fails to comply with any requirements prescribed by the registrar in terms of section 7A(3), the registrar may, notwithstanding the rules of the *fund*, at the cost of the *fund* —

- (a) appoint so many persons as may be necessary to the board of the *fund* or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and
- (b) assign to such board such specific duties as the registrar deems expedient.

1.4.5.2 As subsection (3) was not amended at the same time to indicate that a person may be appointed in terms of subsection (2) for a purpose other than to procure the establishment of a properly constituted board, the *registrar* has declined to make further appointments of *section 26(2) trustees* or to cancel the registrations of dormant or shell

*fund*s at the requests of persons who had been previously appointed as *section 26(2) trustees*.

2 APPROACH TO BE ADOPTED TO SHELL FUNDS IN THE FUTURE

2.1 The wording of section 27 of the *PFA* (see paragraph 1.4.2.2) indicates that it is not necessary for a *shell fund* to have a board to apply to the *registrar* for the cancellation of the registration of the *fund* in terms of section 27 of the *PFA*. On the contrary, no formal application for cancellation of the *fund's* registration is required by the section.

2.2 Instead, at the written request of-

2.2.1 the board of the *fund*, if it has a board properly constituted in terms of section 7A of the *PFA*; or, if there is no such board,

2.2.2 a person who was a member of the board of the *fund* immediately before it ceased to be properly constituted; or

2.2.3 the auditor, valuator or principal officer of the *fund*; or

2.2.4 a former member or former participating employer; or

2.2.5 an interested party;

the *registrar* will cancel the registration of the *fund* if he is satisfied that the *fund* has ceased to exist in that it is a *shell fund*.

2.3 The *registrar* will not be satisfied that the *fund* is a *shell fund* unless and until

2.3.1 the *registrar* has received and has had the opportunity to assess and consider-

2.3.2 either

2.3.2.1 financial statements prepared as at a date within six months prior to the date on which the request for the cancellation of the *fund's* registration has been made and in which is set out the manner in which the assets and liabilities of the *fund* have been disposed of since the last date as at which financial statements of the *fund* submitted to the *registrar* in terms of section 15 of the *PFA* (and not rejected by him in

terms of section 15(3)) were prepared; or

- 2.3.2.2 such other reliable documentary evidence of the manner in which the assets and liabilities of the *fund* were disposed of as the registrar may regard as sufficient for the purposes of deciding whether those disposals were lawful and proper;
- 2.3.3 affidavits deposed to by no fewer than two of the following persons, at least one of whom must be a *member of a profession* –
 - 2.3.3.1 a former *member* of the board of the *fund*;
 - 2.3.3.2 the principal officer of the *fund*;¹
 - 2.3.3.3 a *member* of the board of the *fund*;
 - 2.3.3.4 the *fund's* valuator or the actuary who was the *fund's* valuator immediately before his or her appointment as such ended;
 - 2.3.3.5 the *fund's* auditor;
 - 2.3.3.6 a representative of the *fund's* *sponsor* or former *sponsor*;
 - 2.3.3.7 a representative of the *fund's* administrator or former administrator,in which each declares that he or she has taken all steps reasonably required to identify and locate the assets and liabilities of the *fund*, if any, and has found that it has neither assets nor liabilities;
- 2.3.4 the *registrar* has compared the information provided in those affidavits against information in the *registrar's* records to determine if there are significant discrepancies that must be resolved before the *registrar* can be satisfied that the *fund* has no assets or liabilities and, if there are, conducting such further investigations as may be appropriate in the circumstances;
- 2.3.5 there has been published-

¹ So, for example, if the principal officer is a member of a profession, he or she, and a former member of the board of the fund, even if he or she is not a member of a profession, could be signatories of these affidavits.

2.3.5.1 on the website of the FSB on www.fsb.co.za;

2.3.5.2 in the *Government Gazette*; and

2.3.5.3 in one or more newspapers circulating in the region(s) in which a significant number of the former *members* of the *fund* were employed while they were *fund members* and in no fewer than two official languages,

a notice of the *registrar's* intention to cancel the registration of the *fund* unless, by a date specified in the notice (which date will be a date not less than 30 days after the date on which the notice was last published), the *registrar* has received information which, in his opinion, indicates that the *fund* is likely to have assets and/or liabilities; and

2.3.6 after the expiry of that notice period and after considering all of the information by then received by the *registrar*, he is satisfied that the *fund* has no assets or liabilities and accordingly has 'ceased to exist'.

3 APPROACH TO BE ADOPTED TO DORMANT FUNDS IN THE FUTURE

3.1 If a board can be properly constituted

If it is possible for a board to be constituted in compliance with its rules and section 7A of the *PFA*, this must be done. For this purpose, and at the written request of an interested party, the *registrar* will-

3.1.1 appoint one or more *section 26(2) trustees* as *member* or *members* of the board of the *fund*; and

3.1.2 instruct the *section 26(2) trustee(s)* to take such steps as may be required to ensure that, within a reasonable period of time, a new board for the *fund* is constituted in terms of section 7A and the rules of the *fund*, including, if necessary, applying to the *registrar* for his approval of such amendments to the rules of the *fund* as the *section 26(2) trustee(s)* may consider appropriate for the purpose.

3.1.3 If the *fund's* sponsor exists and is willing to appoint board members and the *fund* has members who can be reached

3.1.3.1 If the *fund's* sponsor –

3.1.3.1.1 has not formally withdrawn from participation in

the *fund* in terms of its rules;

3.1.3.1.2 is entitled to appoint *members* of the board in terms of the rules of the *fund*; and

3.1.3.1.3 is willing and able to do so,

the section 26(2) trustee must ask it to do so.

3.1.3.2 If there are persons who -

3.1.3.2.1 are still *members* of the *fund* as defined, in that they were admitted to membership of the *fund* in the past and have not yet received all of the benefits payable to them in terms of the rules; and

3.1.3.2.2 can be contacted and given the opportunity to elect members of the board in terms of the rules,

the *section 26(2) trustee(s)* must take all reasonable steps to contact them and give them that opportunity. What steps may be reasonable will depend on the specific circumstances of the *fund*.

3.1.3.3 Then, if taking into account the circumstances of the *fund*, a reasonable number of the *members* referred to in paragraph 3.1.3.2 are given the opportunity to exercise their right to elect no fewer than 50% of the *members* of the board, and

3.1.3.3.1 one or more of them exercise that right; or

3.1.3.3.2 none of them exercises that right,

the board constituted as a result will be properly constituted in terms of section 7A of the *PFA* because the *members* will have been given the 'right to elect' as it requires, even if some or all of them have failed to exercise it. Whether the board is also properly constituted in terms of the rules of the *fund* will depend upon the wording of those rules.

3.1.4 If the *fund's* sponsor exists and is willing and authorised by the rules of the *fund* to appoint board members and the *fund* has no members

3.1.4.1 In the circumstances contemplated in paragraph 3.1.3.1, and provided that the rules of the *fund* authorise it to do so, the *sponsor* may appoint board members in terms of the rules of the *fund*.

3.1.4.2 If all amounts payable to *members* of the *fund* have been paid and the *fund* thus has no *members* as defined in section 1 of the *PFA* but there are still unclaimed benefits payable in terms of the rules to *beneficiaries*, then there will be no persons with the 'right to elect' no fewer than 50% of the members of the board of the *fund* as contemplated in section 7A(1).

3.1.4.3 In those circumstances –

3.1.4.3.1 provided that the rules allow for this, a board may be properly constituted in terms of section 7A if all of its *members* are appointed by the *sponsor*;

3.1.4.3.2 if the rules do not allow for it, the board comprising the *sponsor*-appointed board members and *section 26(2) trustee(s)* ('the interim board') may adopt, and ask the *registrar* to approve, an amendment to the rules of the *fund* to provide that the board *members* appointed by the *sponsor* will be entitled to appoint persons to fill the balance of the board posts subject to the approval by the *registrar* of those appointments.

3.1.5 If the *fund's* sponsor exists and is willing to appoint board members and the *fund* has members who cannot be reached

3.1.5.1 In the circumstances contemplated in paragraph 3.1.3.1 the *sponsor* may appoint board *members* in terms of the rules of the *fund* and, if a *section 26(2) trustee* has been appointed to the *fund*, he or she must ask the *sponsor* to do so.

3.1.5.2 However, subject to legal advice to the contrary, in the opinion of the *registrar*, the board will not be capable of being properly constituted and application will have to be made for the appointment of a curator for the *fund*.

3.1.6 The powers of section 26(2) trustees before properly constituted boards are established

3.1.6.1 Regardless of any inconsistent statement in the letter in which the *registrar* may have confirmed his appointment of a *section 26(2) trustee* for a *dormant fund*, such person may not dispose of any of the assets of the *fund* other than in the 'normal course of business', that is, in-

3.1.6.1.1 paying fees and other amounts to providers of products and/or services to the *fund* in terms of

- existing agreements with them; or
- new agreements with them concluded on terms not materially different from the terms of their previous agreement(s) with them; or
- new agreements with them concluded on terms approved in writing by the *registrar*; and

3.1.6.1.2 paying benefits which have accrued in terms of the rules of the *fund*

in the manner in which a properly constituted board would have done in the exercise of its fiduciary duties to the *fund* so that, in due course-

3.1.6.1.3 the properly constituted board of the *fund*; or

3.1.6.1.4 if no such board is constituted, the curator of the *fund*,

in good conscience may ratify the decisions or other steps

taken by the *section 26(2) trustee*.

3.1.6.2 A *section 26(2) trustee* may not take any decisions that would have the result that the rights of any of the *fund's members* or other interested parties would be substantially altered, such as decisions to –

3.1.6.2.1 make substantial changes to the *fund's* investment policies and strategies;

3.1.6.2.2 appoint new providers of services to the *fund* (unless its previous providers of those services have ceased to provide them);

3.1.6.2.3 adopt amendments to the rules of the *fund* that will have a material impact on

- the value of benefits payable by the *fund*;
- the financial soundness of the *fund*;

3.1.6.2.4 prepare and/or submit to the *registrar* any financial return required to be submitted in terms of the PFA, a scheme for the apportionment of the *fund's* actuarial surplus or a 'nil scheme' as at its surplus apportionment date or an exemption from compliance with such a provision;

3.1.6.2.5 transfer a part or the whole of the *fund's* business to another entity such as another *fund*; or

3.1.6.2.6 appoint a liquidator for the *fund*.

3.1.6.3 These are powers that can only be exercised by a properly constituted board, or, if no such board can be established, by a person appointed by a court as curator of the *fund*.

3.2 If a properly constituted board cannot be established

3.2.1 Appointments of curators

3.2.1.1 If a properly constituted board cannot be established for a *dormant fund*, then, the only way to procure the appointment of a person with the legal right to act as the “directing mind and will” of a *dormant fund* will be for the *registrar* to apply to court for the appointment of a curator for the *fund*.

3.2.1.2 Section 5(1) of the Financial Institutions (Investment of Funds) Act, 2001 (‘the FIA’) provides that the *registrar* may, on good cause shown, apply to a division of the high court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or a part of the business of an institution, including a *fund*.

3.2.1.3 Section 5(5) of the FIA then says that the court may make orders regarding, amongst other things –

3.2.1.3.1 the powers and duties of the curator; and

3.2.1.3.2 any other matter the court deems necessary.

3.2.2 Powers which may be granted to a curator

If the *registrar* applies to court for an order appointing a single curator for a number of *funds* falling within a particular category (such as *dormant funds* administered by a specific administrator before the cancellations of their registrations), the court could, for example, grant a provisional order on terms such those set out in Annexure A.

3.2.3 Bulk curatorships

3.2.3.1 To minimise the costs to the *dormant funds* associated with the appointment of such curators, the *registrar* proposes to apply to court for the appointment of a single curator-

3.2.3.1.1 for some or all *dormant funds* under administration by a specific *fund* administrator;
or

3.2.3.1.2 in the case of administrators with only a few *dormant funds* on their books, all of the *dormant funds* under administration by several administrators

and subject to the condition that it is agreed with the proposed curator, that, if he or she is appointed –

3.2.3.1.3 the curator's functions will be limited to those agreed with the *registrar* and/or ordered by the court; and

3.2.3.1.4 the curator will not be remunerated for any work done in respect of *funds* without assets of a minimum value agreed with the *registrar*.

3.2.4 Criteria for selection as recommended candidates for appointment by court

The *registrar* will ask the court to appoint as a curator of one or more *dormant funds* only a person who has satisfied the *registrar* that he or she-

3.2.4.1 has the skills, knowledge and experience in relation to retirement *funds* required for the proper conduct of the business of a *fund* under his or her curatorship;

3.2.4.2 will not have, or reasonably be perceived to have, divided loyalties in the relation to the conduct of the curatorship.

3.3 Disposals of the assets and liabilities of a dormant fund

3.3.1 Whether the fund must be placed in liquidation

3.3.1.1 If the rules of the *fund* provide that, on the termination of the last *participating employer's* participation in the *fund*, or in other specified circumstances, the board (or curator, if applicable) of the *fund* must appoint a liquidator subject to the approval of the *registrar*, then the rules must be complied with and the *fund* must be made subject to liquidation in terms of section 28 unless-

3.3.1.1.1 on application by the *fund*, the *registrar* in

terms of section 2(5) of the *PFA* has exempted it from compliance with section 13 of the *PFA* to the extent that it makes the specific liquidation rule binding on the *fund*; and

3.3.1.1.2 the *fund* complies with the conditions prescribed by the *registrar* for compliance with section 28; and

3.3.1.1.3 the board or curator has adopted such amendments to the *fund's* rules, if any, as may be required for the orderly disposal of the *fund's* assets and liabilities other than in the course of a liquidation in terms of section 28 and the *registrar* has approved those amendments.

3.3.1.2 Section 2(5) of the *PFA* says that, if 'practicalities impede the strict application of a specific provision of [the *PFA*]', the *registrar* may exempt a *fund* from compliance with that provision on such conditions as the *registrar* may determine.

3.3.1.3 To satisfy the requirement of 'impracticality', more than mere inconvenience, effort or expense must be demonstrated.

3.3.1.4 Some *members* of the boards of retirement *funds* think that it is always best to avoid the costs of liquidation. But this is not true. The consequences of the liquidation of a *fund* may be different to the consequences of the simple cancellation of its registration and the board or curator of the *fund* must consider the advantages and disadvantages for the *fund* of its stakeholders of either approach. The *registrar* must do the same if the *fund* asks for exemption from compliance with the liquidation provisions in its rules and/or section 28.

3.3.1.5 The *registrar* will not grant the exemption application unless he is persuaded that the disposal of the assets and liabilities before the *fund* is placed in liquidation will not be inconsistent with any applicable law by, for example, being of greater advantage to some of the *fund's* creditors (such

as its *members*) than to others, or being to the prejudice of others, such as

3.3.1.5.1 providers of products and/or services to the *fund* with claims against the *fund* in terms of their agreements with it; or

3.3.1.5.2 persons whose claims against the *fund* are the subject of litigation between them.

3.3.2 Unclaimed benefits

3.3.2.1 The exemption in Section VI of Directive 6 of December 2011 from compliance with section 14(1) for the purposes of transfers of assets and liabilities to unclaimed benefits *funds* will be withdrawn shortly, even before Directive 6 is replaced by a new notice in which the *registrar's* requirements in regard to transfers and amalgamations are prescribed.

3.3.2.2 Following the withdrawal of the exemption, when application is made to the *registrar* for his approval of the transfer of some or all of a *fund's* liabilities in respect of unclaimed benefits to an unclaimed benefits *fund*, the *registrar* will require the following for the purpose of deciding whether, in his opinion, the transfer scheme is “reasonable and equitable” as contemplated in section 14 of the *PFA*:

3.3.2.2.1 Evidence demonstrating that the application for the approval of the transfer scheme is made by a person with the authority to represent the *transferor fund*;

3.3.2.2.2 Reference to the rule in the registered rules of the *transferor fund* which, in the opinion of its board or curator, authorises the transfer of the assets and liabilities in respect of the unclaimed benefits;

3.3.2.2.3 An affidavit signed by

- the chairperson of the board of the *fund*, or

such other *member* of the board as the board may have agreed will sign the affidavit on behalf of the *fund* in place of its chairperson; or, if applicable,

- the *fund's* curator,

in which is set out

- the various reasons why, in the opinion of the board or the curator, (if applicable) the benefits were not claimed after they had accrued and were ready for payment;
- the various categories and aggregate amounts of the *fund's* liabilities for unclaimed benefits determined by reference to those various reasons;
- in a separate schedule for each category, attached to the affidavit, and in relation to each unclaimed benefit falling within that category
 - the name of the *member/beneficiary*;
 - his or her identity number, or, if that number is not known, other information useful in the identification of that person such as his or her passport number, date of birth, place of birth, and/or last known physical address;
 - the amount of the unclaimed benefit due to him or her;
 - the steps taken to date to try to trace and pay him or her and, where possible, documentary proof that such steps were taken;
 - whether the benefit accrued to the

member or *beneficiary* before the date on which the *registrar* approved the amendment of the rules of the *fund* to provide for the transfer of its liability in respect of an unclaimed benefit to an unclaimed benefits *fund* if it remained unclaimed for a specified period after the date on which it accrued;

- the amount that the *fund* proposes to transfer to the unclaimed benefits *fund* to provide for all unclaimed benefits within that category to be transferred and, if it is different from the face value of the liability to be transferred, the reason for the difference and the basis on which the amount to be transferred to provide for the aggregate liability has been determined;
- the reason why that unclaimed benefits *fund* was chosen above others available in the market;
- the name and registered address of the unclaimed benefits *fund* and contact details for the person to whom enquiries in relation to the unclaimed benefit may be addressed;
- why, in the opinion of the board, the fulfilment of the objects of the *fund* in relation to the unclaimed benefits is likely to be achieved more efficiently and cost-effectively if the liability for the payment of those benefits is transferred to the unclaimed benefits *fund* than if the *transferor fund* were to retain that liability;
- whether the board intends to apply for the cancellation of the registration of the *fund* within 12 months after the date upon which

its application for the approval of the transfer scheme in terms of section 14 will be made; and

- if so, whether it is intended that the application for the cancellation of the *fund's* registration will be made-
 - at the conclusion of the liquidation of the *fund* in terms of section 28 of the *PFA*; or
 - after the whole of the assets and liabilities of the *fund* have been disposed of other than in the context of the liquidation of the *fund*.

3.3.2.3 If the *fund* is not going to be closing within the next 12 months, the *registrar* will not approve a scheme for the transfer of the *transferor fund's* liabilities in respect of unclaimed benefits that accrued before the date on which the *registrar* approved the amendment of the rules of the *fund* to provide for the transfer of its liability in respect of an unclaimed benefit to an unclaimed benefits *fund* if it remained unclaimed for a specified period after the date on which it accrued other than in the context of the impending closure and cancellation of the registration of the *fund*.

3.3.2.4 Of course, if the *fund* is going to be closed in the near future, the position is different. A *fund* cannot be expected to remain open until all benefits for which it is liable have been claimed and paid, particularly if many of its former *members* cannot be traced. In the circumstances, the *fund* must be able to dispose of its assets and liabilities in the manner provided for in its rules, including, if applicable, the transfer of its liabilities in respect of unclaimed benefits, and assets with an aggregate value equal to the actuarial value of its liabilities in respect of the unclaimed benefits, to another *fund*, including, if appropriate, an unclaimed benefit *fund*.

3.3.3 Amounts standing to the credit of employer surplus account, member surplus account, contingency reserve accounts and/or unallocated assets, if applicable

These amounts must be dealt with in terms of the rules of the *fund* and the PFA.

4 LOOKING BACK

4.1 Duty to investigate whether there is a material risk of substantial prejudice

4.1.1 In its judgment in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*², the Constitutional Court said, amongst other things, that

4.1.1.1 the Constitution imposes an obligation on public officials to act reasonably and lawfully when exercising public power;

4.1.1.2 the Constitution does not require public officials to act without making mistakes; but

4.1.1.3 if they do make mistakes, and prejudice is suffered as a result, they must correct those mistakes, even if it means applying to court to set aside their erroneous past decisions. They cannot simply ignore the fact that those decisions may have had legal consequences that cannot be reversed other than by order of court.

4.1.2 The *registrar* does not need to apply to court for an order setting aside-

4.1.2.1 the cancellations of the registrations of all funds the registrations of which were cancelled at the requests of 'authorised representatives' or *section 26(2) trustees* or *interested parties*; and/or

4.1.2.2 decisions taken by such persons ('appointees') and/or the *registrar*.

4.1.3 What is, however, required of the registrar is that he must apply to court for such orders in relation to specific *funds* regarding which he has been persuaded that there is a risk that unauthorized actions by

² [2014] ZACC 6 dated 25 March 2014.

the *registrar* and/or any of these appointees or *interested persons* may have resulted in material prejudice to any of the affected *funds* and/or *interested parties*.³

4.1.4 Considering whether material prejudice may have been sustained by a *fund* and/or any *interested parties* does not mean that the *registrar* will re-exercise his discretion in terms of section 27 of the *PFA*. Having decided that he was satisfied that a *fund* had ceased to exist, the *registrar* became *functus officio* and his decision cannot be changed other than in terms of a court order.⁴

4.1.5 To comply with his duty to consider whether material prejudice may have been suffered by any of the affected *funds* and/or any interested parties, the *registrar* has decided to investigate the circumstances in which the registrations of a sample of *dormant funds* were cancelled in the period 2007 – 2013. If it appears that there is a significant risk that material prejudice may have been suffered by a larger number of *funds* and/or related *interested parties*, the registrar will expand the scope of his investigations. Then:

4.1.5.1 In regard to those *funds* for which the *registrar* has and/or receives information sufficient to satisfy himself that

4.1.5.1.1 they had indeed ceased to exist before their registrations were cancelled; and

4.1.5.1.2 no material prejudice is likely to have resulted from such unauthorised conduct, if any,

he intends to “let sleeping dogs lie” – that is, to take no further steps; and

4.1.5.2 in regard to those *funds* in relation to which possible

³ See the judgment of Cloete JA of the Supreme Court of Appeal in *Pepkor Retirement Fund & another v Financial Services Board & another* [2003] 3 All SA 21 (SCA) at para 47.

⁴ Because some decisions by public officials result in people acquiring rights or obligations, members need to be able to make their decisions on the assumption that those decisions will not be changed. It is for this reason that it is a legal principle that, once a public official with the legal power to make such a decision has exercised that power, he or she is said to be *functus officio* and cannot reverse that decision. See, for example, *Financial Services Board and another v De Wet NO & others* 2002 (3) SA 523 (C) and *Pering Mine (Pty) Ltd v Director-General: Mineral & Energy Affairs & others* [2005] 4 All SA 641 (T) at p645. Only a court may on application review and set aside the decision of the registrar to cancel the registration of a fund on specific grounds. See also section 6 of the Promotion of Administrative Justice Act, 2002, for the various grounds on which a court may review a decision by an administrative or public official.

material prejudice has been identified, the *registrar* will take such action as he may then consider appropriate to remedy or mitigate that prejudice. See paragraph 4.3.1 below.

4.2 Material prejudice

The ways in which material prejudice to specific *funds* and/or related *interested parties* might have been caused may include –

- 4.2.1 a failure to establish a properly constituted board when
 - 4.2.1.1 its establishment was possible; and,
 - 4.2.1.2 if it had been established, it would have included in its members people with access to information in relation to people entitled to unclaimed benefits, with the result that it would have been likely that some, if not all, of those benefits would have been paid to such people rather than to an unclaimed benefit *fund*;
- 4.2.2 a failure by an ‘authorised representative’ or *section 26(2) trustee* to ensure that all of the assets of the *fund* were taken into the custody of the *fund* and disposed of in accordance with the law (including the rules of the *fund*) with the result that the *fund’s interested parties* did not or will not derive the benefit from those assets that they otherwise might have done. These assets may have included -
 - 4.2.2.1 amounts payable by an underwriter of some or all of the *fund’s* liabilities to the *fund* in terms of an insurance policy issued by the former to the latter;
 - 4.2.2.2 shares, or proceeds on the sales of shares, issued to the *fund* on the demutualisation of an insurer in which it which it had invested;
 - 4.2.2.3 amounts payable to the *fund* by a provider of services to it as compensation for ‘secret profits’ enjoyed by that provider as a result of the services provided by the provider to the *fund*;
 - 4.2.2.4 the financial benefits of an option which the *fund* is entitled to exercise in terms of an agreement but has not exercised

to date; and

- 4.2.2.5 arrear contributions payable by *participating employers*; and/or
- 4.2.3 a failure by the appointee to exercise independent discretion and to fulfil his or her fiduciary duties when concluding agreements on the terms on which providers of various products and/or services to the *fund* (including, but not limited to, administrators by which those appointees were employed) were remunerated for those services with the possible result that the *funds* paid substantially more for such products and/or services than they otherwise would have done; and/or
- 4.2.4 a failure by the appointee to a *dormant fund* which had actuarial surplus available for apportionment in terms of section 15B of the *PFA* to comply with that section, with the result that *interested parties*, including former *members* of the *fund*, were deprived of shares of those surpluses to which they otherwise would have become entitled; and/or
- 4.2.5 the transfer of assets in respect of liabilities for unclaimed benefits to a *fund* which was not empowered to accept those liabilities⁵ with the possible result that the intended *beneficiaries* cannot claim payment of their benefits from the *transferee fund*; and/or
- 4.2.6 a failure by the appointee to exercise independent discretion and to fulfil his or her fiduciary duties when-
 - 4.2.6.1 deciding to transfer the *fund's* assets and liabilities to an unclaimed benefit *fund* without first trying to trace and pay those entitled to the benefits (by, for example, asking for assistance for this purpose from former *participating employers* or unions to which former *members* belonged while *in-service members* of the *fund*) with the possible result that *beneficiaries* who otherwise might have been traced reasonably easily and cheaply may not be traced and paid, either easily and reasonably cheaply or at all;

⁵ It has come to the attention of the registrar that a number of the *occupational retirement funds* to which assets and liabilities in respect of unclaimed benefits were transferred together with assets and liabilities in respect of *in-service members* were not authorised by their rules to accept liability for the payment of those unclaimed benefits to their intended recipients. The registrar urges all occupational retirement funds that have received assets and liabilities in respect of unclaimed benefits from other *funds* to check whether their rules authorised them to do so and, if they did not, to adopt amendments to their rules to provide this authorisation with retrospective effect to the first date as at which such transfers took place and to apply to the registrar for the approval of those amendments as soon as possible.

and/or

4.2.6.2 the theft of assets by unscrupulous appointees and/or employees of product and service providers.

4.3 Taking steps to remedy or mitigate substantial prejudice, if any

4.3.1 to remedy or mitigate any potential material prejudice that may have been identified in the course of his investigations or brought to his attention, the *registrar* may-

4.3.1.1 apply to court for an order setting aside the cancellation of the *fund's* registration or direct such other person whose acts and/or omissions, in the opinion of the *registrar*, were the principal causes of the prejudice to do so; and then

4.3.1.2 if a board of management for the *fund* can be established, take the steps, and/or require that the steps described in paragraph 3.1 be taken; and

4.3.1.3 if a board of management for the *fund* cannot be established, take the steps, and/or require that the steps described in paragraph 3.2 be taken.

4.3.2 If material prejudice to a *fund* and/or any *interested party* resulting from unauthorised acts and/or omissions by the *registrar* and/or such an appointee in relation to the *fund* comes to the attention of an *interested party*, he or she may be able to appeal against the *registrar's* decision to cancel the *fund's* registration and ask the appeal board to set the cancellation aside. The appeal board has granted already granted one such request.

5 FREQUENTLY ASKED QUESTIONS

5.1 Why could the registrar not appoint persons in terms of section 26(2) of the PFA to the boards of dormant funds?

5.1.1 Section 26(2), even after its amendment on 28 February 2014,⁶ did not

⁶ With effect from 28 February 2014, section 26 of the PFA was amended in terms of the Financial Services Laws General Amendment Act, 2013, with effect from 28 February 2014, by the insertion of the underlined words below:

(2) Where a fund has no properly constituted board contemplated in section 7A and has failed to constitute a board after 90 days written notice by the registrar, or where a fund can not constitute a board properly or where a board fails to comply with any requirements prescribed by the registrar in terms of section 7A(3), the registrar

authorise the *registrar* to appoint persons to act as the directing minds and wills of *dormant funds* with a view to the disposal of their assets and liabilities and their closures and the cancellations of their registrations. Instead, section 26(2) must be read with section 26(3) which appears to indicate that section 26(2) appointments have a limited purpose and are temporary in nature.

5.1.2 If a statutory power is given to a person for a specific purpose, he or she may not use it for a different purpose.⁷

5.2 Could the Registrar not just appoint a liquidator for the fund?

Section 28 of the *PFA* says that a *fund* may be dissolved voluntarily (that is, not by a court order) in the manner provided for in the rules of the *fund*. So, unless the registered rules of the *fund* empower someone other than the board of the *fund* to appoint a liquidator of the *fund*, the *fund* cannot be made subject to voluntary liquidation unless and until either a properly constituted board or a curator of the *fund*, acting as 'directing mind and will' of the *fund*, appoints a liquidator. The *registrar* is not empowered by the *PFA* to make the decision for the *fund*.

5.3 Could the Registrar exercise his power in terms of section 28(17) to exempt all dormant funds from compliance with section 28?

No. Section 28(17) gives the *registrar* the power to prescribe circumstances in which a *fund* may be exempted from compliance with the provisions of section 28 and the requirements which must be met by the *fund* if that exemption is to be granted to it. The *registrar* cannot use this exemption power to authorise the liquidation of a *fund* which has not itself decided that it must be liquidated because it does not have a 'directing mind and will' to make that decision. Likewise he cannot use his general exemption power in terms of section 2(5) of the *PFA* for that purpose.

may, notwithstanding the rules of the fund, at the cost of the fund -

- (a) appoint so many persons as may be appropriate to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and
 - (b) assign to such board such specific duties as the registrar deems expedient.
- (3) A board constituted in terms of subsection (2) holds office until the registrar is satisfied that the fund has constituted a valid board in terms of section 7A and the registrar has relieved the former board in writing of its duties.

⁷ See, for example, the judgment of the court in *van Eck NO & van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A).

5.4 Could the Registrar not apply to court in terms of section 29 for the appointment of liquidators for dormant funds?

Section 29 of the *PFA* authorises the *registrar* to apply to court for an order placing a *fund* under compulsory liquidation only if the *registrar* is of the opinion that the *fund* is so financially unsound that it cannot be restored to financial soundness by the implementation of a scheme provided for in section 18 of the *PFA*. Counsel has advised the *registrar* that section 29 does not provide a generally applicable solution to the problems posed by *dormant funds*.

5.5 Could the Registrar not exempt dormant funds from the duty to give members the right to elect board members?

5.5.1 Exemption in terms of section 7B?

5.5.1.1 In most cases, the only *members* of *dormant funds* are those who have not claimed, let alone received, benefits due to them in terms of the rules of those *funds*.

5.5.1.2 Section 7B of the *PFA* allows the *registrar*, on application by a *fund* (which must have a 'directing mind and will' to make the application) to exempt the *fund* from the requirement that it must give *members* the right to elect board *members* and then only if the *fund* is an umbrella *fund*, a retirement annuity *fund*, a *beneficiary fund* or a pension preservation *fund* or provident preservation *fund* as defined in the Income Tax Act, 1962. An unclaimed benefits *fund* may be a 'special purpose' pension preservation *fund* or provident preservation *fund* if its *members* are former *members* of one or more *occupational retirement funds* in which benefits accrued to them but were not claimed by them before the liability for the payment of those unclaimed benefits were transferred to the unclaimed benefits *fund*. A dormant *fund* in which unclaimed benefits originally accrued cannot be an 'unclaimed benefits *fund*' as defined in the *PFA* and so it cannot be a pension preservation *fund* or provident preservation *fund* for the purposes of section 7B.

5.5.2 Exemption in terms of section 2(5)?

5.5.2.1 Section 2(5) of the *PFA* says:

The registrar may, where practicalities impede the strict application of a specific provision of this Act, exempt any *fund* from, or in respect of, such provision on conditions determined by the registrar.

(aA) Any exemption in terms of paragraph (a) may apply to *funds* generally or be limited in its application to a particular *fund* or kind of *fund*, which may, for the purposes of this subsection, be defined in relation to either a category or type of *fund* or in any other manner.

(b) The registrar may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), at any time by notice on the official web site withdraw, wholly or in part and on any ground which he or she deems sufficient, any exemption granted under paragraph (a).

5.5.2.2 The *registrar* cannot use his general exemption power in terms of this section to exempt *dormant funds* from the requirement that they give their *members* the right to elect *members* of its board. Amongst the reasons for this is the fact that section 5(1) of the Financial Institutions (Protection of Funds) Act, 2001, provides the solution to the problem in the form of a court ordered curatorship of a *fund* that does not have a properly constituted board and has not been granted an exemption in terms of section 7B.

5.6 What are the legal consequences of a section 27 cancellation of registration?

5.6.1 The *PFA* requires the *registrar* to cancel the registration of a *fund*-

5.6.1.1 at the conclusion of its winding-up (liquidation) in terms of section 28(15)(a) or section 29(8);⁸ or

5.6.1.2 if the *registrar* is satisfied that the *fund* has 'ceased to exist',⁹ that is, it no longer has assets or liabilities; or

5.6.1.3 if the *registrar* and the *fund* agree that the *fund* was registered by mistake.

5.6.2 If the registration of a *fund* is cancelled at the conclusion of its winding up in terms of section 28, then the *fund* immediately ceases to exist.

⁸ See ss 28(15)(a) and 29(8).

⁹ Section 27(1).

5.6.3 If, on the other hand, the *fund* was not wound up ('liquidated') in terms of section 28 or section 29 of the *PFA* when its registration was cancelled-

5.6.3.1 the *fund* will still be a 'pension fund' as defined in section 1 of the *PFA*;

5.6.3.2 the *fund* will be an unregistered pension *fund* unless and until the cancellation of its registration is set aside by a court¹⁰ or it is registered again in terms of section 5 of the *PFA*;¹¹

5.6.3.3 the members of its board will remain members of its board unless and until they resign or are removed from office or the terms of their office expire, and, if they have incurred personal liability in their capacities as board members, that liability will not be extinguished by the cancellation of the *fund's* registration;

5.6.3.4 nonetheless, the *fund* will not be able to lawfully conduct business as a pension *fund* because that would constitute a violation of section 31(1) of the *PFA* and so, for so long as the *fund* remains unregistered, the members of its board may not exercise their powers as such;

5.6.3.5 if the *fund* did not have legal personality (that is, it was not a legal entity) before it was registered, it will cease to have legal personality on the cancellation of its registration;¹²

5.6.3.6 if the *fund* did have legal personality before it was registered, it will still have that legal personality but

5.6.3.6.1 no claims, including claims to benefits, or claims for the transfer of assets to other *funds*,

¹⁰ This is so even if the cancellation of the registration of the fund was the result of an unlawful or invalid decision of the registrar. See, in this regard, *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004(6) SA 222 (SCA) at paragraph 26 and *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at paras 87-106.

¹¹ Section 4 of the *PFA* makes it clear that an application for the registration of a fund must be made by the fund itself. See, for example, the judgment of the FSB Board of Appeal in *Cape Joint Retirement Fund & others v Registrar of Pension Funds*, a 2008 determination published on the FSB's website.

¹² This may be the case if, for example, the fund was a trust before it was registered in terms of the *PFA*.

may be enforced against it; and

5.6.3.6.2 it will not have the right to enforce any claim by it against a third party,

for so long as it remains an unregistered *fund*.

5.6.3.7 This does not mean, however, that the *fund's* claims and liabilities are extinguished by the cancellation of its registration. They are merely rendered unenforceable for so long as the *fund* remains unregistered.¹³ Thus, a creditor who wishes to enforce a claim against a deregistered *fund* that has not been liquidated may apply to court to have the cancellation of its registration set aside. If the application is successful and the *fund* is thereafter re-registered, the creditor may then seek to enforce its claim against it.

5.6.4 If, for example –

5.6.4.1 in terms of the rules of a *fund* (the ABC fund), a right to a benefit accrued to a *member* (Mr. A) before the rules were amended to allow the *fund* to transfer its liabilities for unclaimed benefits to an unclaimed benefits *fund* if they remained unclaimed for periods of two years after the dates on which they accrued;

5.6.4.2 Mr A failed to claim his benefit within two years after his right to the benefit accrued in terms of the registered rules of the *fund* as they were then worded;

5.6.4.3 the ABC *fund* purported to transfer its liability in respect of Mr A's benefit to an unclaimed benefit *fund* in terms of a scheme for the transfer of assets and liabilities approved by the *registrar*;

5.6.4.4 the registration of the ABC *fund* was thereafter cancelled; and

5.6.4.5 thereafter Mr A sought to claim his benefit,

¹³ See, for example, *Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 295.

then

5.6.4.6 because a debtor cannot transfer its liability towards its creditor to a third party without the creditor's consent, Mr A will have a claim against the ABC *fund*, even if the assets previously held by the ABC *fund* were paid to the unclaimed benefits *fund* in terms of the approved section 14 transfer scheme; but

5.6.4.7 Mr A will not be able to enforce his claim against the ABC *fund* for so long as it remains an unregistered *fund*; although he may have a claim against the persons who were *members* of the board of the *fund* as at the date on which its registration was cancelled if he can demonstrate that, by the reckless and/or unlawful acts and/or omissions of those persons, he has suffered a loss. Of course, if he is paid his benefit, he will no longer have suffered the loss.

5.7 If the registration of a fund was cancelled by mistake, can the Registrar simply reinstate that registration?

5.7.1 There have also been instances in which the registration of a *fund* was cancelled as a result of *bona fide* errors on the part of the *registrar* or erroneous representations made by an interested party on which the *registrar* relied in good faith when deciding that a *fund* had ceased to exist.

5.7.2 In the past, when such errors were brought to the attention of the *registrar*, he reinstated the registration of the *fund* because the reinstatement of the registration appeared to be to the advantage of the *fund* and its *members* and other stakeholders and did not appear to prejudice the rights of any other persons.¹⁴ In future, however, the registrar will only be willing to reinstate the registration of a dormant *fund* in terms of an order of court or the FSB appeal board.

5.7.3 In 2014 the FSB appeal board set aside a decision by the *registrar* to cancel the registration of a *fund* in reliance upon information given to

¹⁴ Our courts have said that an administrative official can reverse his or her own decisions in very limited circumstances. In particular, a decision may be reversed –

- (1) With the consent of all affected parties; or
- (2) If the reversal would be to the advantage of all affected parties (that is, there would be no persons prejudiced by it).

See, for example, *Nkosi v Khanyile NO and Another* 2003 (2) SA 63 (N).

him by an interested party which was subsequently found to be wrong. The *registrar* did not oppose the appeal by that interested party against his decision.

5.8 What is the legal status of a fund whose registration was reinstated by the registrar after it was cancelled in error?

In the opinion of the *registrar*, he is not required to apply to court for an order reviewing and setting aside his decision to reinstate the registration of a *fund* unless the *registrar* has good grounds for believing that the reinstatement of the *fund's* registration has resulted in material prejudice to any person.

5.9 What is the legal status of decisions taken by an 'authorised person' or section 26(2) trustee whose appointment was invalid?

Those decisions are not binding on the *fund*. However, if either a properly constituted board for the *fund* is established, or a curator is appointed to a *fund* without such a board, the board or the curator may ratify the decisions taken by the 'authorised person' or *section 26(2) trustee* if they were decisions that a reasonable board of management in the position of that person would have taken in the circumstances in which they were taken.

5.10 If the cancellation of the registration of a fund is set aside by court, what will this mean for

5.10.1 Its former participating employer, particularly if it no longer exists

The *registrar's* understanding of the legal position is this:

5.10.1.1 If the formerly *participating employer* has been liquidated, there will be no consequences for it as it will not exist.

5.10.1.2 If the registration of the *participating employer* in terms of the Companies Act has been simply cancelled, and there is evidence that it has a liability towards a registered *dormant fund*, application may be made for the reinstatement of the registration of the company so that the amount of that liability may be claimed from it or, if appropriate, from its directors.

5.10.1.3 If the *participating employer* is currently registered but is not actively conducting business, then, if a registered *dormant fund* has a claim against it, that claim may be pursued by

the *dormant fund* if it has a 'directing mind and will' in the form of a curator.

5.10.2 Its former administrator? Will it have to pay for the cost of the court application?

5.10.2.1 As mentioned, it is not the *registrar's* intention to seek the reinstatements of the registrations of all *dormant funds* the registration of which have been cancelled in the past.

5.10.2.2 Administrators can only be held liable to *fund* the cost of re-opening *funds* if they were responsible, alone or with anyone else, for substantial prejudice suffered by such *funds* and/or their *beneficiaries* as a result of unauthorised or unlawful.

Annexure A: Sample curatorship order

It is ordered that:

- (1) The whole of the businesses (“the businesses”) of the *funds* listed in Annexure A to this order (“the Funds”) be placed provisionally under curatorship in accordance with the provisions of section 5 of the Financial Institutions (Protection of Funds) Act, No. 28 of 2001 (“the Act”), and in accordance with the provisions of this order.
- (2) _____ be appointed curator (“the curator”) of the business of the Funds and, as such, be absolved from furnishing security.
- (3) The businesses be and is hereby placed provisionally under the curatorship and management of the curator, subject to the supervision of the Registrar of Pension Funds (“the Registrar”), and any other persons, now vested with the management of the businesses, be and is hereby divested of control of those businesses.
- (4) Pending the return day of this order, all actions, proceedings, the execution of all writs, summonses and other processes against the Funds be stayed and not instituted or proceeded with, without the leave of the Court.
- (5) The curator be and is hereby, pending the return day referred to in paragraph 6 hereunder—
 - (a) authorised to take immediate control of, manage and investigate the businesses and operations of and concerning the Funds, together with all assets and interests relating to such businesses, such authority to be exercised subject to the control of the Registrar in accordance with the provisions of section 5(6) of the Act, and with all such rights and obligations as may be reasonably required for the proper conduct of the curatorships;
 - (b) vested with all executive powers and responsibilities which would ordinarily be vested in, and exercised by, the boards of management of the Funds, whether by law or in terms of their rules, including, but not limited to, the power to ratify decisions previously taken by an ‘authorised person’ or ‘section 26(2) trustee’ appointed by the registrar to act as the board of the *fund* when the registrar did not have the power to make such appointment;
 - (c) directed to take custody the assets of the Funds;
 - (d) authorised to conduct any investigation with a view to identifying and locating assets of a Fund, including, but not limited to, assets in the form of cash, securities, fixed, movable or intellectual property, insurance policies and claims;
 - (e) permitted, subject to the consent of the registrar, to appoint to assist him or her such persons with skills and qualifications of a legal, accounting, actuarial, administrative, financial, investment or other professional or technical nature as he or she may consider appropriate for the proper conduct of the curatorship and the operation or operations of any one or more of the Funds;
 - (f) authorised to institute or prosecute any legal proceedings on behalf of any one or more of the Funds and to defend litigation against any one or more of them;
 - (g) directed to exercise the powers vested in him with a view to attend to the finalisation of the affairs and winding down of the business of the Funds including, but not limited to –
 - (i) applying to the Registrar for his approval the transfer of business of any of the Funds to other *funds* or persons in terms of section 14 of the Pension Funds Act, 1956;

- (ii) attending to “agterskot” payments to former *members* and *pensioners* of any of the Funds;
 - (iii) applying to the Registrar for his approval of such amendments to the rules of a Fund or Funds as the curator may consider to be appropriate for the proper management and administration of the Fund and/or compliance with the law;
 - (iv) preparing and submitting to the Registrar for his consideration such financial statements and/or reports on the actuarial valuation of one or more of the Funds as may be required for compliance with the law;
 - (v) if he or she considers it appropriate, applying to the Registrar for the exemption of one or more of the Funds from compliance with specific provisions of the Pension Funds Act in the circumstances contemplated in section 2(5), section 28(17), regulation 28 and/or any other provision in which the power of exemption is conferred on the Registrar
 - (vi) preparing and submitting to the Registrar for his consideration a ‘nil scheme’ or scheme for the apportionment of actuarial surplus in terms of section 15B of the Pension Funds Act, and implementing any approved scheme;
 - (vii) applying to the Registrar for the approval of the appointment of a liquidator (who may be the curator) for one or more of the Funds;
 - (viii) if appointed as liquidator for one or more of the Funds, procuring the winding up of that Fund or those Funds in terms of section 28 of the Pension Funds Act; and
 - (vix) if no liquidator is appointed for one or more of the Funds, procuring the disposal of the Fund’s or Funds’ assets and/or liabilities and thereafter furnishing to the Registrar such proof as he may require to satisfy himself that the Fund has or the Funds have ceased to exist as contemplated in section 27 of the Pension Funds Act such that the registration of the Fund or Funds may be cancelled;
 - (h) directed and authorised, at any time during his term of office, to report to the Registrar should he deem it necessary or expedient that application be made to court for a change in the curatorship order.
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