



FSCA

Financial Sector
Conduct Authority



2019

RETIREMENT FUNDS SUPERVISION DIVISION WORKSHOP



0800 20 FSCA(3722)

Financial Sector
Conduct Authority 2

RULES OF A RETIREMENT FUND

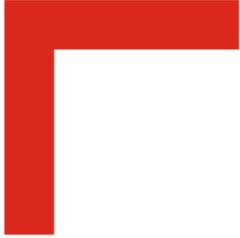
27 MAY 2019

Presented by:
**YOLANDA MAGENGENENE &
RETSHEDISITSWE (MPHO) MOKOENA**

RETIREMENT FUNDS REVIEWS AND AUTHORISATIONS DEPARTMENT

Content Outline

1. Types of Retirement Funds
2. Importance of Retirement Fund Rules
 - Founding Document/Charter
 - Binding force/Supremacy of Rules
 - **Section 13** of the *Pension Funds Act* 24 of 1956 ('PFA')
 - *Sasol Limited & others v Chemical Industries National Provident Fund* [2015] JOL 33910 (SCA)
 - *Tek Corporation Provident Fund & others v Lorentz* 1999 (4) SA 884 (SCA)
 - *Mtshixa v Mine Employees Pension Fund* [2008] 2 BPLR 189 (PFA)
 - Why be familiar with the Rules of a Fund as a trustee?
3. PFA Provisions: New Rules & Amendments (Overarching Provisions)
 - **New Rules:** Section 4(3) of the PFA
 - **Amendments:** Section 12(4) of the PFA
 - **Special Rules:** *Security Employees National Provident Fund v Registrar of Pension Funds and another* [2017] JOL 37957 (FSAB)
 - **Extensions:** Section 279(1) of the *Financial Sector Regulation Act* 9 of 2017 ('FSR Act')
- 3.1 Section 4(4) & the Meaning of "Public Interest"
 - *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003] 3 All SA 21 (SCA)
- 3.2 Section 12(4) & the Meaning of "Not Contrary to the [PFA]"
 - **The Narrow View:** *National Tertiary Retirement Fund v Registrar of Pension Fund* [2009] JOL 23376 (SCA)
 - **The Broad View:** *Security Employees National Provident Fund v Registrar of Pension Funds and another* [2017] JOL 37957 (FSAB)
- 3.3 Extensions
 - Section 279(1) of the FSR Act



Content Outline

4. The Format of Rules

- Regulation 30(1)(a)
- Resolutions (Regulation 20)

5. The Content of Rules

- Important Definitions
- Membership/Eligibility Requirements
- Contributions
- Nature and Extent of Benefits
- Appointment of a Board, Principal Officer and other Officers
- Deductions, Unclaimed Benefits and Annual Financial Statements
- Indemnity Cover, Transfers, Termination of Funds
- Revised Rules/Amendments/Consolidated Rules
- Special Rules

6. Conclusion

- Questions



1. Types of Retirement Funds

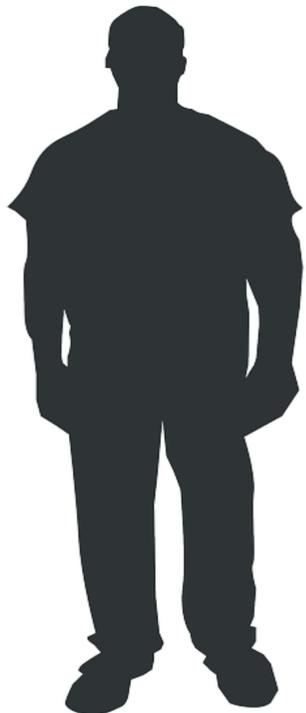
DIFFERENT TYPES OF FUNDS	
TYPE	FUNCTION
Pension Fund	Employer/employee relationship. Allows 1/3 of a benefit to be commuted for a lump sum; 2/3 of a benefit for purchasing an annuity.
Provident Fund	Employer/employee relationship. Allows an entire benefit to be commuted for a lump sum.
Retirement Annuity Fund	No employer/employee relationship. Members contribute voluntarily; benefits become accessible at the age of 55 or later. One third of a benefit may be commuted for a lump sum; 2/3 of a benefit for purchasing an annuity.
Preservation Fund	No employer/employee relationship. Fund is established for purposes of preserving benefits from other approved funds upon a member's termination of employment.
Beneficiary Fund (Pension/Provident)	Established to receive, administer, invest and pay benefits that become due to beneficiaries, payable on the death of a member.
Unclaimed Benefit (Pension/Provident)	Established for the receipt of unclaimed benefits. Fund can be a provident or pension fund.



Continued...

As far as rules are concerned, pension or provident funds can also be established as:

TYPES OF FUNDS	
STAND-ALONE	UMBRELLA
PRINCIPAL EMPLOYER Established for the Principal Employer and its Subsidiaries	PARTICIPATING EMPLOYERS Established for one or more employers that are unrelated



Do you stand-alone or under an umbrella?

Provide sufficient detail for the FSCA to distinguish your fund as a stand-alone or umbrella fund.

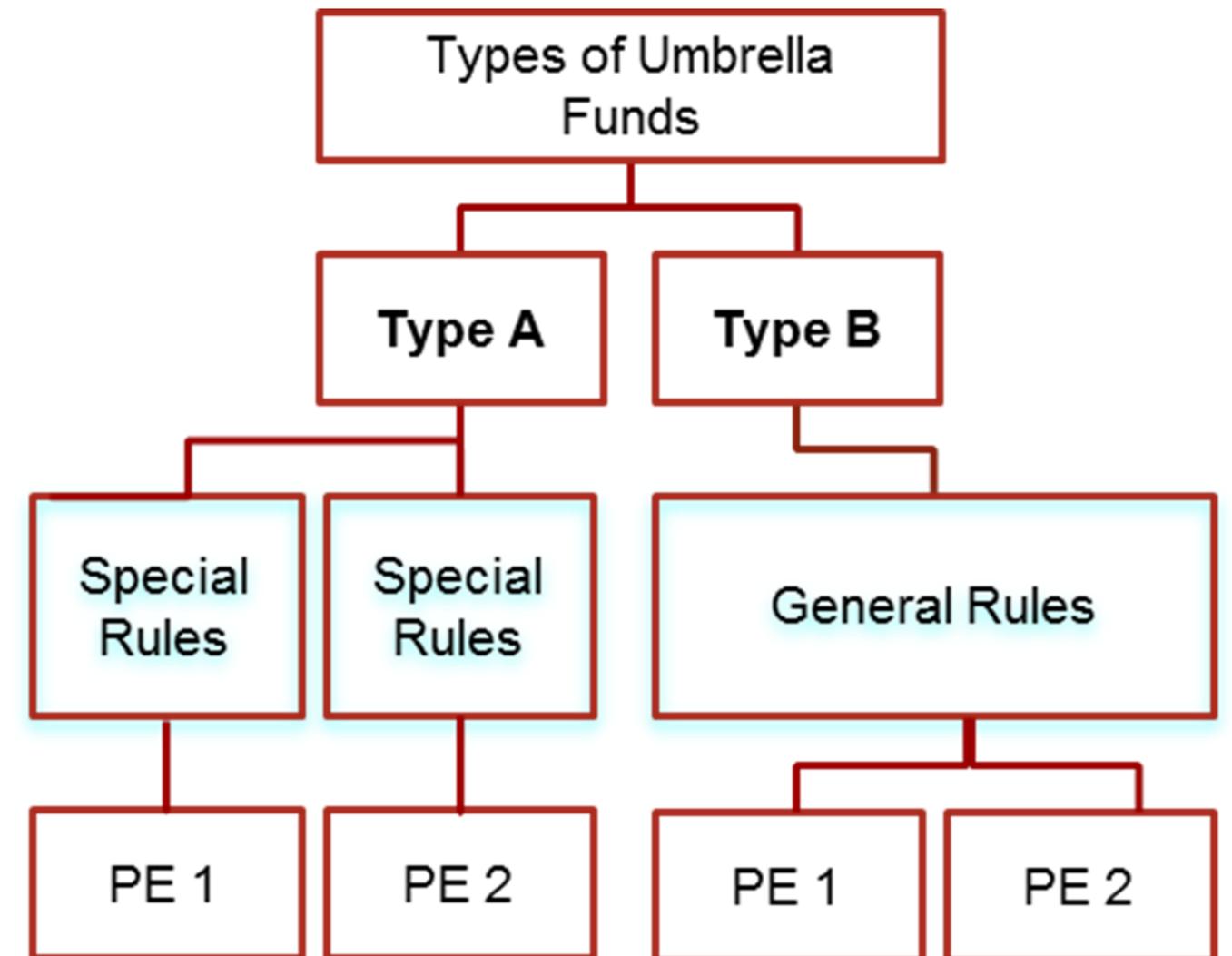
See Regulation 30(2)(t) of the PFA



Continued...

Umbrella funds are classified as Type A or Type B.

TYPES OF UMBRELLA FUNDS	
TYPE A	TYPE B
SPECIAL RULES – Each PE determines its own benefit structure within the limits set in the General Rules of a fund concerned.	NO SPECIALS RULES – One set of General Rules applies similarly to every PE; the benefit structure is the same for all.



Members & Participating Employers



2. Importance of Retirement Fund Rules

- **Founding Document/Charter**

- A retirement fund cannot exist without its rules, they are the **founding document/charter** of a retirement fund and crucial to its functions.
- Retirement fund rules **found or incorporate the fund** and afford it **separate legal personality and the ability to sue and be sued in its own corporate name**. (See section 5(1)(a) of the PFA.)
- Define the **purpose and business of the fund**, the type of fund, the **rights and obligations of members** and employers participating in the fund, circumscribe the **powers of the trustees** and other officers, and the **type of fund can be gleaned from the rules**.



Continued...

- **Binding Force/Supremacy of the Rules**

- The importance of Rules is further emphasized in section 13, which states the following:

- **Section 13**

“Subject to the provisions of the [PFA], the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming”

Sasol Limited & others v Chemical Industries National Provident Fund [2015] JOL 33910 (SCA) at para [13]:

“The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents”.



Continued...

Tek Corporation Provident Fund & others v Lorentz 1999 (4) SA 884 (SCA) para [28]:

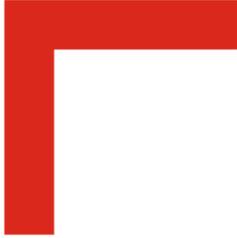
“What the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it”.

Mtshixa v Mine Employees Pension Fund [2008] 2 BPLR 189 (PFA) at para [26]:

“The trustees may only do with the fund's assets what is set forth in the rules. That the rules of a fund are supreme is confirmed by section 13 of the [PFA].”

NB: Rules are binding and enforceable in so far as they comply with the PFA and other laws. It is crucial to ensure the content of rules is compliant with the PFA, Income Tax Act (ITA) and Regulations thereto and other laws.

FSCA provides measures and guidance conducive to substantive and procedural compliance with the PFA, in the form of: **Guidance Notes** (and FSB PF & Information Circulars, Board Notices), **Interpretation Notes, Directives.**



Continued...

- **Why be familiar with the Rules of a Fund as a trustee?**
- Trustees are responsible for the management of the Fund's affairs. According to Section 7C(1) & 7D(1)(f) of the PFA "the object of a board shall be to direct, control and oversee the operations of a fund" and to ensure the rules, operation and administration thereof comply with the PFA, and all other applicable laws. (**See section 7D (1)(f).**)
- Proper discharge of fiduciary duties requires a thorough understanding of the full implications of the rules, that is, the full extent and impact of the rules as embodied in both the express and implied rules.
- Some express or implied rules may have been rendered inoperative by virtue of their non-compliance with the PFA. Therefore, acting in terms thereof will not necessarily validate the action even if the rules are registered. (See ***Security Employees*** case later.)





3. PFA Provisions: New Rules & Amendments (Overarching Provisions)

- **New Rules** (New Fund Registrations) - **Section 4 of the PFA**
- **Amended or Revised Rules** (Alterations, Rescissions & Additions) - **Section 12 of the PFA**
 - **Status of Special Rules:** Each set of special rules is an **addition to fund rules** uniquely applicable to a specific participating employer ('PE') identified therein.

Security Employees National Provident Fund v Registrar of Pension Funds and another
[2017] JOL 37957 (FSAB) at **para [6]**:

“Sub-funds are not pension funds as defined in the PFA and do not have separate legal personality and the special rules are no more than different chapters of the rules of [a fund].”

- **Extensions – Section 279 of the FSR Act** (See **Guidance Note 5 of 2018** for lapsing of applications.)





3.1 Section 4(3) & the Meaning of “Public Interest”

New Fund Registrations: Original Rules (Sections 4)

Section 4(1): “Every pension fund must, prior to commencing any pension fund business—

- (a) apply to the registrar for registration under [the PFA]; and
- (b) be provisionally or finally registered under [the PFA]”

Section 4(3): “The registrar must, if the fund has complied with the prescribed requirements and the registrar is satisfied that the registration of the fund is desirable in the public interest, register the fund provisionally and forward to the applicant a certificate of provisional registration, which provisional registration takes effect on the date determined by the fund or, if no such date has been determined by the fund, on the date of registration by the registrar.”





Continued...

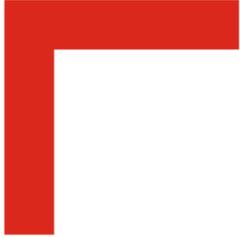
(Lapsing of Applications)

Section 4(5): “(a) If the registrar deems it necessary, the registrar may—

- (i) request a pension fund to furnish additional information in respect of its application under subsection (1); or
- (ii) require a pension fund to verify the information provided in its application under subsection (1).

(b) If a pension fund fails to furnish or verify the information contemplated in paragraph (a) within 60 days from the date of the request, its application under subsection (1) lapses.”





Continued...

1. Section 4 – New Fund Rules

Section 4(3): If a fund complies with all requirements and its registration is desirable in the public interest, the FSCA must register it provisionally; registration will be effective from the date of registration or as determined in the rules.

THE MEANING OF “PUBLIC INTEREST”:

Pepcor Retirement Fund and Another v Financial Services Board and Another [2003] ZASCA 56 [2003] 3 All SA 21 (SCA) at para [14]:

“general public interest requires that pension **funds be operated fairly, properly and successfully** and that the pension fund industry be regulated to achieve these objects. That is the whole purpose which underlies the [PFA].”

Therefore, establish in your application prospects of the fund being operated fairly, properly and successfully for the benefit of the public (primarily the members).

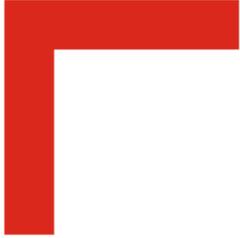


3.2 Section 12(4) & the Meaning of “Not Contrary to the [PFA]”

Amendments: Alterations, Additions & Rescissions (Sections 12)

Section 12(4): “The registrar must, if the fund has complied with the prescribed requirements and the registrar is satisfied that the registration of the fund is desirable in the public interest, register the fund provisionally and forward to the applicant a certificate of provisional registration, which provisional registration takes effect on the date determined by the fund or, if no such date has been determined by the fund, on the date of registration by the registrar.”





Continued...

Amendments: Alterations, Additions & Rescissions (Sections 12)

- Section 12(6):** “(a) The registrar may request such additional information in respect of any alteration, rescission, addition or consolidation of the rules of a registered fund transmitted or forwarded to the registrar for approval as the registrar may deem necessary.
- (b) If a registered fund fails to furnish the information requested by the registrar within 180 days from the date of that request, any submission for approval of an alteration, rescission, addition or consolidation of the rules of that fund lapses.”



Continued...

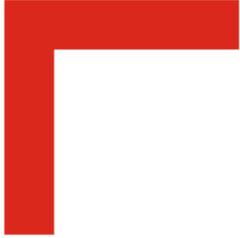
Section 12 – Amendments

Section 12(3): If any amendment affects the financial condition of the fund, submit:

- a valuator's certificate; or a statement by the fund,
- if the fund is not in a sound financial condition, what arrangements will be made to bring the fund in a sound financial condition.

Section 12(4): FSCA must register any rescission, alteration or addition if it is **not contrary to the PFA.**





Continued...

THE MEANING OF “NOT CONTRARY TO THE [PFA]”:

There are two views in this regard:

1. The Narrow View

Relevant case: *National Tertiary Retirement Fund v Registrar of Pension Funds* [2009] JOL 23376 (SCA)
(‘National Tertiary’)

2. The Broad View

Relevant case: *Security Employees National Provident Fund v Registrar of Pension Funds and another* [2017] JOL 37957 (FSAB)
(‘Security Employees’)



Continued...

FIRST: THE NARROW VIEW

National Tertiary (SCA) Case:

Facts: Fund was unable to pay a guaranteed benefit payable to a member. Fund brought an amendment providing that such a guaranteed benefit would be payable upon retirement only if a member's employer pays the guaranteed benefit, and which also sought to reduce the minimum benefit due to a member as these were determined with reference to the guaranteed benefit.

Two important issues: (1) Whether the amendment was unlawful for making payment of benefits dependent on performance by a third party; (2) whether the Registrar had a wide discretion to refuse to register an amendment even if same was not inconsistent with the PFA.

NTRF'S argument: The amendment was not inconsistent with the PFA.

Registrar's argument: The amendment is inconsistent with the PFA in so far as it seeks to reduce minimum benefits due to members in terms of the PFA and make payment thereof conditional upon performance by a third party.



Continued...

The High Court:

at para [24]:

“it is difficult to conceive how a rule amendment which had the **effect of removing the responsibility to pay a pension benefit from the [NTRF] and out of the reaches of the [PFA]**, could still remain consistent with the [PFA]. **[A]mendment is inconsistent [with] the [PFA].”**

The SCA's ruling

at para [20]: **(inconsistency with the PFA)**

“The alteration can **only be inconsistent with the [PFA] if it conflicts with the terms of the [PFA].”**

at para [16]: **(wide discretion to refuse to register amendments not inconsistent with the PFA)**

“In terms of section 12(4) the respondent 'shall' register the alteration if he finds that it is not inconsistent with the [PFA] and if he is satisfied that it is financially sound. **The [Registrar] is thus obliged, in these circumstances, to register the alteration.”**





Continued...

SECOND: THE BROAD VIEW

Security Employees Case

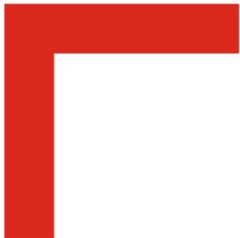
Facts: An amendment contrary to a sectoral determination issued by the Minister of Labour in terms of Chapter 8 of the **Basic Conditions of Employment Act, 1997**, ('BCEA') was submitted for registration. Registrar of Pension Funds disputed its legality.

Issue: Should an amendment's inconsistency with the PFA be tested against the PFA alone or against RSA law as a whole and, therefore, in this case, against a sectoral determination issued under the BCEA?

SENPF's argument at para [31]: "[C]onflict with the determination is an irrelevant consideration the Registrar is bound to register any alteration provided it is not inconsistent with the [PFA] itself."

Registrar's argument at para [19]: "[R]egistrar cannot register a proposed rule amendment if it contravenes a law of South Africa, this would include the provisions of the sectorial determination [issued under the BCEA]."





Continued...

SECOND: THE BROAD VIEW

At para [34]:

“Could it then be said that the [PFA] contemplated that the Registrar is entitled and obliged to register an amendment that is on its face illegal? We think not. An amendment [could] introduce[] a clause...in conflict with the **Bill of Rights** or the **Basic Conditions of Employment Act**.”

At para [36]:

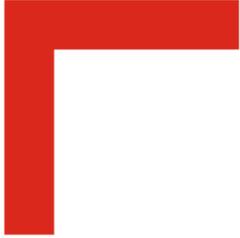
“**This means that the [PFA] does not operate in a bubble of its own. It is part of the wider legal landscape.**”

At para [39]:

“[Amendments] may predate the [sectoral] determination and have become "illegal" as a result of [the] determination. They may also postdate the determination and may have been registered in error. **To allow the amendment would then, as submitted by the Registrar, perpetuate the wrong; two wrongs do not make a right.**”

The FSCA follows the broad view of “inconsistent with [PFA]”.





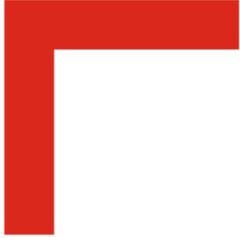
3.3 Extensions

Extensions for Non-Compliance with Periods of Compliance

Section 279(1) of FSR Act: “(1) A financial sector regulator may, for a valid reason, extend any period for compliance with, or a period prescribed by, a provision of a financial sector law, other than a provision that the financial sector regulator must comply with.

(2) A financial sector regulator may grant an extension in terms of subsection (1) more than once, and may do so either before or after the time for compliance has passed or the period prescribed has ended.”





Continued...

Section 279(1) of the FSR Act

Extension applications should preferably be received **before the period of compliance has ended.**

Therefore, submit extension applications:

- 1. Before expiry of 60 days** from the date of the query letter
(Section 4(5)(a) - New Rules)
- 2. Before expiry 180 days** from the date of the query letter
(Section 12(6)(b) - Amendments)

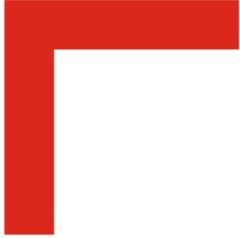
Applications **lapse on the 61st or 181st day**, depending on the type of application.
See **Guidance Note 5 of 2018** for further guidance





THE SUBSTANCE & FORMAT APPLICABLE TO RULES SUBMITTED FOR CONSIDERATION & REGISTRATION (THE CONTENT OF RULES)





4. The Format of Rules

- Rules of a Pension Fund must be in the prescribed format (**Section 11(1) of the PFA**)
 - **Regulation 30(1)** provides a clear outline of the format of the Rules

(1) The rules of a pension fund shall, unless exempted partly or in full therefrom by the Authority, comply with the following formal requirements:

- (a) They shall be printed in at least 1,5 spacing on A4 paper of at least 80 grams;*
- (b) they shall be printed on one side of the paper only with a margin of at least 30 mm on the left side of the paper;*
- (c) headings and subheadings shall be printed in bold print;*
- (d) definitions shall be printed in capital letters and used in that way throughout the text;*
- (e) no underlining shall be allowed in the document; and*
- (f) the document shall at the front contain a detailed table of contents of the rules, with references to the relevant page numbers.*

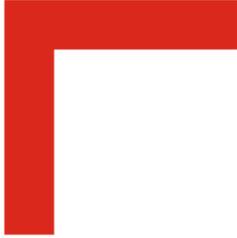




Continued...

- The resolution incorporating the amendment or Special Rules must comply with **Section 20** read with **Regulation 20** in that it must be signed by
 - The Chairperson of the Board;
 - The Principal Officer (“PO”) of the Fund
 - One other Trustee (The PO can sign twice if she is also a member of the Board. But she cannot be both the chairperson and PO.)





Continued...

- Rules of a Pension Fund must be in the prescribed format (**Section 11(1) of the PFA**)
 - **Regulation 30(1)** provides a clear outline of the format of the Rules

(1) The rules of a pension fund shall, unless exempted partly or in full therefrom by the Authority, comply with the following formal requirements:

- (a) They shall be printed in at least 1,5 spacing on A4 paper of at least 80 grams;*
- (b) they shall be printed on one side of the paper only with a margin of at least 30 mm on the left side of the paper;*
- (c) headings and subheadings shall be printed in bold print;*
- (d) **definitions shall be printed in capital letters and used in that way throughout the text;***
- (e) no underlining shall be allowed in the document; and*
- (f) the document shall at the front contain a detailed table of contents of the rules, with references to the relevant page numbers.*





Continued...

- The resolution incorporating the amendment or Special Rules must comply with **Section 20** read with **Regulation 20** in that it must be signed by
 - The Chairperson of the Board;
 - The Principal Officer (“PO”) of the Fund
 - One other Trustee (The PO can sign twice if she is also a member of the Board. But she cannot be both the chairperson and PO.)





Continued...

- Amendments to the Rules must be submitted within 60 days from the date of the passing of a resolution adopting the alteration or rescission of rule or the adoption of any additional Rule (**Section 12(2) of the PFA**)
- NB! Trustees must ensure that the FSCA receives the amendment within the prescribed period.
- Applications and submissions must be submitted online via the FSCA website





5. The Content of Rules

Highlight of a few important sections to expect in a set of rules

- Regulation 30(2) sets out in detail exactly what must be contained in the rules.
- Preamble
 - Legal status of the fund
 - Type of the Fund
 - Objects of the fund (Regulation 30(2)(d))
 - Physical address of the registered office (Regulation 30(2)(c))





Continued...

- Noteworthy definitions
 - Employer and Eligible employee
 - This is not applicable in funds like Preservation Funds or Retirement annuity Funds where there is no employer-employee relationship involved.
 - Member
 - Normal retirement date
 - Fund Credit
 - **Minimum benefits (section 14A)**
 - A benefit paid to a member who ceases to be a member before retirement (in circumstances other than liquidation) must not be less than the minimum individual reserve.

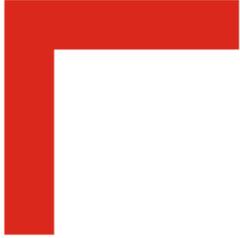




Continued...

- Membership/Eligibility conditions
 - **Regulation 30(2)(f)** provides that, rules must make specific reference to
 - The class or classes of persons who are, or may become eligible to join the pension fund
 - When membership shall be compulsory or not, as well as any period within which current employees may exercise a choice(if applicable)
 - Condition of membership referring to deferred pensioners (if any)
 - Mutual transfer arrangements with any other pension fund (if applicable)





Continued...

- Contributions
 - Rules must provide for the calculation and payment of contributions payable to the pension fund on behalf of members. (**Regulation 30(2)(g)**)
 - Contribution rate must be expressed.
 - Maximum and minimum range is acceptable, provided that the contributing party makes an election.
 - Rand value or percentage of pensionable salary
 - Which Party will be responsible for admin/insured (risk) benefit costs
 - Note that in a Pension fund and Provident fund, the contributions must be of a recurrent nature (paragraph (c) of the definition of pension fund under the ITA)





Continued...

- **Benefits (Regulation 30(2)(h))**
 - Rules must provide for the nature and extent of benefits granted by the Pension Fund as well as the payment thereof to any member or other entitled person on –
 - Normal Retirement and Early retirement
 - Disability/ill health
 - Death (**section 37C**)
 - Withdrawal
 - No withdrawal from a Retirement annuity fund before retirement age
 - Once off withdrawal before retirement in preservation funds
 - Note: Resignation, dismissal, retrenchment, redundancy (not applicable to non-occupational funds)

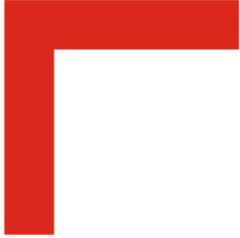




Continued...

- Appointments
 - Principal Officer (**section 8**) (**Pf Directive No.5 of 2010**)
 - Auditor (**Section 9**)
 - Valuator (**Section 9A**) unless fund is valuation exempt in terms of Board Notice 59 of 2014
- Board of trustees **section 7A (2)** and **Regulation 30 (2)(v)**
 - the constitution of the board;
 - election procedures;
 - appointments and term of office;
 - Procedures at meetings;
 - Voting rights;
 - Quorum;
 - Section 7B exemption (if applicable);
 - Note : Advisable that Rules provide for an exact number of trustees.

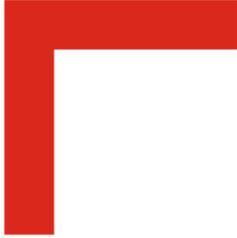




Continued...

- Deductions from pension fund
 - Only those made in terms of section 37D are permitted.
- The manner in which Unclaimed benefits will be dealt with on-
 - Death of the member
 - Liquidation of pension fund
 - Withdrawal of a member from a pension Fund.
- Indemnity and Fidelity Cover (Regulation 30(2)(u))
- Transfers into & out of the fund (Regulation 30(2)(q))
- Circumstances under which the fund shall be terminated or dissolved Regulation 30 (2)(p)

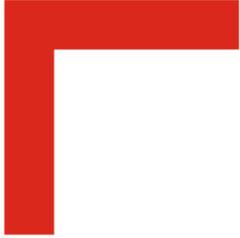




Continued...

- Consolidated Rules
 - incorporate the registered amendments of the fund and do not effect any new changes to the current rules.
 - Recommended that Rules be consolidated after 10 amendments
- Revised Rules and Amendments
 - Compliance with Section 12(2) Pension Funds Act
 - Reasons for amendment must be provided
 - **Regulation 24** - A statement explaining the necessity for the Amendment
 - Name change – CIPC Certificate
 - No amendment is valid unless registered
 - ***South African Local Authorities Pension Fund v Msunduzi Municipality (994/2013)***
[2015] ZASCA 172 at para [5]
 - To Found a claim on an Amended Rule, the Fund must prove that a Resolution has been properly adopted, transmitted to the Registrar timeously and approved by him





Continued...

- Rules can be Amended with retrospective effect
 - Member communication
 - Where the amendment affects contributions, Fund Credit, retirement age.
 - ***Shell and BP South Africa petroleum Refineries (Pty) v Murphy NO and others [2000] 9 BPLR 953 (D) at 960D***
 - An amendment to the Rules of the Fund may take place with retrospective effect.
 - **Section 12(4)** – an alteration to the rules shall take effect as from the date determined by the Fund Concerned , or if no date has been so determined , as from the date of registration





Continued...

- Special Rules
 - Compliance with 12(2)
 - Registered address of Participating Employer
 - Participation date; if more than one year before submission of Special Rules
 - Have the special rules been administered in terms of the Rules of the Fund?
 - Are contributions up to date? - provide contribution schedules for the first six and last six months since participation date.
 - Have been any withdrawals, retirements and deaths since the participation date. If yes, how were the benefits disbursed?
 - Membership/Eligibility conditions
 - Contribution rates
 - Types of benefits, including risk benefits
 - Normal retirement age





6. Conclusion

It is essential for trustees to ensure that the content of the Rules are in compliance with the Pension Funds Act, Regulations, Income tax Act, common law and all other applicable legislation.





Questions?



THANK YOU