



**INAUGURAL ANNUAL LECTURE OF THE GYS STEYN CHAIR IN FINANCIAL
REGULATION LAW**

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***“THE EFFECTIVENESS OF THE LAW IN SAFEGUARDING RETIREMENT SAVINGS IN THE
CONTEXT OF RISING PENSION FUND ARREAR CONTRIBUTIONS”***

STELLENBOSCH UNIVERSITY

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INTRODUCTION

Good evening ladies and gentlemen.

And thank you very much Professor Scholtz for the introduction. I just want to say that with regard to the alleged personal questionable choices of soccer teams to support – I neither confirm nor deny such allegations, but I reserve my rights to defend myself at an appropriate forum should I be required to do so.

Well it’s been said that *“lawyers charge by the hour and twice by the verb”*, so naturally as an economist I was a bit hesitant to accept the invitation to come and address a group of lawyers being invited by a lawyer – but I was given the assurance that I wouldn’t be receiving an invoice after this evening’s address – although, knowing lawyers, I should have probably insisted on receiving such an undertaking in writing.

It’s good to be here this evening. It’s a real privilege and an honor for me to deliver this inaugural annual lecture of the Gys Steyn Chair in Financial Regulation Law here at Stellenbosch University. I would like to begin by thanking Prof. Johann Scholtz and Prof. Smit the Dean of the Law Faculty for extending the invitation. Let me also congratulate you for their vision and foresight in establishing this Chair. It is my view that this is a pioneering initiative that will foster critical thought, deepen academic discourse on financial regulation which can only serve to improve the practice and outcomes of financial regulation—and increase confidence in financial markets and the financial sector as a whole.

There is a wide array of topics that I could have chosen as themes for today’s lecture. I could have, for example, explored the developments around the regulation of digital assets – specifically

our approach to the regulation of crypto assets, a rapidly evolving and much-debated topic, not just here but around the world, which is especially topical now with the change in leadership across the *Atlantic and the rapid rise in the prices of these assets*. I could have also focused on conduct risks in financial institutions, their implications for financial customers and their relevance for both micro and macro prudential outcomes. Perhaps I could have also unpacked our approach with regard to the regulation of financial markets, a critical pillar in ensuring the integrity and stability of our financial system – or I could have spoken about the progress we are making towards addressing the shortcomings identified by FATF which led to the country being greylisted in 2023. We can pick up on all these topics at the cocktail function afterwards – I understand there is some liquidity provision by the University later.

For the purposes of today's lecture I have decided to address an issue that has gained increasing prominence in public discourse, including in our Parliament, especially in the context of the introduction of the two-pot retirement system. That is "*How effective are our laws in protecting retirement savings, particularly in the context of rising pension fund arrear contributions?*"

As you know, many South African households struggle to save enough for retirement, with less than 10 percent able to retire comfortably.¹ On average, household savings amount to just over 2 percent of GDP, with nearly 60 percent of these savings locked in contractual retirement funds.² This heavy reliance on retirement funds makes it really important for these funds to be well-protected and managed, ensuring that contributions are made consistently and in full. At the heart of our retirement fund system – are tax subsidized contributions aimed at building a safety net during an individual's active working life, in order to provide for their financial needs and a cushion upon their retirement. This tax subsidy approach to accumulating personal savings makes it all the more important for us to ensure adequate regulatory outcomes for members of retirement funds.

One of the structural changes in our retirement funding system was the shift from Defined Benefit Funds (DB Funds) to Defined Contribution Funds (DC Funds), a shift which took place in the early 1990s. This shift meant that members of retirement funds began to shoulder more of the financial risks associated with their retirement savings. Under DB Funds, retirees received a guaranteed pension payout based on factors like salary and years of service, with the employer bearing the investment risk. However, with the move to DC Funds, the risk-responsibility shifted significantly to members of retirement funds. The retirement benefits in DC Funds depend on the amount

¹ Sanlam, 2024. Sanlam Benchmark Survey 2024: Insights. [pdf] Available at: https://www.sanlam.co.za/corporate/retirement/benchmarksurvey/Documents/Sanlam_Benchmark_2024_Insights.pdf

² National Treasury. (2021). Two-pot system retirement proposal and auto-enrolment. Available at:

https://www.treasury.gov.za/comm_media/press/2021/2021121401%20Two-pot%20system%20retirement%20proposal%20and%20auto%20enrolment.pdf

contributed by both the employer and the employee, as well as the market investment returns on those contributions over time. As a result, timely and consistent contributions are critical to the ultimate value of retirement savings over time and by extension are a significant determinant of whether or not an employee secures a comfortable retirement. When an employer fails to make timely payments into pension funds, there is a major negative impact on the employee's retirement savings. Potentially undermining the financial foundation that many South African workers depend on, leading to a direct loss in the growth potential of their savings and leaving workers vulnerable to financial insecurity in their retirement years. This negative impact on the value of retirement savings is what has made the issue of arrear contributions increasingly problematic and topical for our retirement system over the years.

In terms of the numbers, currently, 7770 employers in the public and private sectors have been reported for failing to make timely pension contributions, with 36% of these cases occurring in the Private Security Sector. The latest data indicates that the total arrear contributions amount to some R5.2 billion. When arrears accumulate in this fashion, the trust that retirement fund members place on the retirement system meant to provide for them in their later years is severely affected.

It's important to provide some context here, sometimes it is the economic hardship faced by the employer that results in them incurring arrear contributions. Sometimes it is the cyclical nature of the business and the concomitant volatility of income that contributes to this. This is especially relevant in the private security sector. The Covid-19 pandemic also exacerbated the issue of arrear contributions with many firms struggling to survive. However, it is sometimes sheer management ineptitude, and we have seen this in both the private and public sector. I'll come back to this point when I talk about pension arrears in municipalities.

The point is that, whatever the reason, pension fund arrear contributions, should they reach a prudentially significant amount, could destabilise the broader retirement ecosystem. As pension funds rely on steady contributions to maintain liquidity and fulfill their obligations, they may become strained when contributions are inconsistent or delayed. This in turn could limit their ability to invest in long-term projects, diminishing their role as major institutional investors in the economy. So it's not just the employees who suffer; the entire retirement system becomes more vulnerable. This is why addressing the issue requires a regulatory and legal response that is comprehensive, closes enforcement gaps, and ultimately secures positive outcomes for retirement fund members.

Pension Fund Arrears in Municipalities

The issue of pension fund arrears is fast becoming a pervasive phenomenon and a deeply troubling issue within the local sphere of government, with potentially devastating consequences for employees of municipalities in terms of their retirement savings outcomes. Across the country, just under 150 municipalities have been implicated in failing to remit pension contributions deducted from employees' salaries, with the total amount of unpaid contributions estimated to be about R1.4 billion.

One particularly egregious practice contributing to this is the recycling of employer pension contributions—a financial mismanagement tactic where municipalities, instead of forwarding contributions to pension funds, divert the funds for operational expenses or to pay salaries. This practice not only breaches fiduciary duties but also exacerbates the financial instability of the municipality, as it creates a backlog of unpaid pension obligations that accrue interest and penalties over time. It places employees in an untenable position, where their long-term financial security is sacrificed to meet short-term financial needs within the municipality and importantly, it increases the contingent liabilities of the state.

Encouragingly, we are beginning to see some action by law enforcement agencies to hold those responsible for these practices accountable. This progress is reflected in enforcement actions targeting both individuals and municipalities that fail to fulfill their obligations. The Directorate for Priority Crime Investigation (“the *Hawks*”) have actively pursued cases against municipal officials who have violated the Pension Funds Act (PFA), No. 24 of 1956. For example, at Renosterberg Municipality in the Northern Cape, three senior managers were charged with fraud, theft, and contraventions of the Municipal Finance Management Act (MFMA) and PFA for failing to remit R73.5 million in pension contributions between 2018 and 2023, causing severe harm to employees nearing retirement.³ Such enforcement actions further underscore the importance of holding officials accountable for pension fund mismanagement, ensuring compliance with the law, and protecting the retirement savings of workers. We hope to see more of these actions and hope to secure convictions as well.

The question now becomes: are our current laws truly fit for purpose? With this question in mind, let's look at the legal framework designed to safeguard retirement savings and assess its effectiveness in addressing these challenges.

³ South African Police Service (SAPS), 2024. Three Northern Cape municipal managers arrested for pension fund fraud. Available at: <https://www.saps.gov.za/dpci/mssspeechdetail.php?dnid=459>

THE LEGISLATIVE FRAMEWORK

The legal framework governing pension funds in South Africa is primarily underpinned by the PFA. Section 13A of the PFA is particularly crucial, as it clearly stipulates the responsibility of employers to make both their own contributions and those of their employees on time, ensuring that pension funds are adequately funded to meet their obligations. It requires employers to ensure that monthly contributions deducted from employees' salaries are fully paid to the registered retirement fund in which they participate by no later than the 7th day of the month following the month in respect of which such contributions are payable.

To complement Section 13A requirements, the FSCA published a Conduct Standard 1 of 2022 (FSCA Conduct Standard)⁴, which sets out the requirements related to the payment of pension fund contributions. This Standard aims to ensure that the Board of Trustees of the fund and employers, are fully aware of their responsibilities concerning pension contributions. It requires retirement funds to notify each employer of their duties, obligations, and liabilities under Section 13A of the PFA and the FSCA Conduct Standard, before they begin participating in the fund, and to continue providing this notification annually.⁵ This consistent communication ensures that employers remain aware of their responsibilities and helps prevent non-compliance, ultimately safeguarding employees' retirement savings.

The Role of the Board of Trustees

Crucially, the PFA places a responsibility on the Board of Trustees of pension funds to ensure compliance with contribution requirements and to facilitate the timely payment of contributions. Over the years, many Boards have actively pursued defaulting employers, either by referring cases to the Pension Funds Adjudicator or by initiating civil litigation to recover unpaid contributions. While civil litigation has proven effective in many cases, it is not without its challenges. For smaller funds, the pursuit of legal action can be financially burdensome, as the associated costs can impact the retirement savings of members.

As a result, some umbrella funds—which pool the assets of various employers into a single pension fund—have, in line with their rules, resorted to terminating the participation of employers if arrear contributions remain outstanding after a specified period. While this may serve as a deterrent for employers, it is not always in the best interest of fund members. When an employer is terminated from an umbrella fund, the fund may undergo partial liquidation, which can leave

⁴ FSCA. (2022). FSCA Conduct Standard 1 of 2022 (RF): Payment of pension fund contributions. Available at: [https://www.fsc.co.za/Notices/FSCA%20Conduct%20Standard%201%20of%202022%20\(RF\)-Payment%20of%20pension%20fund%20contributions.zip](https://www.fsc.co.za/Notices/FSCA%20Conduct%20Standard%201%20of%202022%20(RF)-Payment%20of%20pension%20fund%20contributions.zip)

⁵ Paragraph 2(1) of the FSCA Conduct Standard

members without adequate retirement coverage. This action can lead to members being unenrolled and negatively impact their financial security, especially if their share of the fund does not include arrear contributions at the time of withdrawal or transfer, as defined by the rules of some funds.

The harm to members is even more severe in situations where the rules of the fund specify that a member's share of the fund excludes any arrear contributions at the time of the member's withdrawal or transfer. Additionally, terminating participating employers from the fund under the fund's rules may disincentivize Boards from taking all necessary steps to recover arrear contributions. The focus can sometimes shift toward managing the risks and costs of litigation and fund liquidation, rather than prioritising the recovery of arrears, potentially compromising the financial security of members.

Ultimately, the role of the Board is one of balance—between taking all reasonable steps to recover arrear contributions and ensuring that those steps do not inadvertently harm the financial interests of the members they are meant to protect. It is undoubtedly a challenging role that requires a deep understanding of the fund's circumstances, the legal environment, and the potential impact on members. I will come back to how we are thinking about making some changes in terms of our approach on enforcing the fiduciary duties of the members of boards of trustees.

The Role of Members

Coming to the role of members of retirement funds. Members are not without powers when it comes to addressing issues of arrear contributions. While it is established law that arrear contributions are owed to the fund, and that the fund itself has standing to institute legal proceedings as a creditor, there have been important legal developments that strengthen the role of individual members in this regard. A significant case in point is the *Mafoko Security Patrols (Pty) Ltd v Moeketsi and Others*, where the High Court affirmed that members have the standing to bring an application for execution against an employer's property when contributions are in arrears. The right arises particularly when a member has already obtained a favourable determination from the Office of the Pension Funds Adjudicator, confirming the employer's obligation to pay.

This judgment empowers members by allowing them to directly seek enforcement of their rights. By implication, it suggests that members could also institute civil action for the recovery of arrear contributions in their own names, providing them with a direct avenue for addressing non-compliance by employers. This legal recourse is significant because it offers an additional layer of protection for members, ensuring that they are not entirely reliant on the fund or its Board to take action on their behalf.

Personal liability of Directors

Now, let us turn our attention to a critical aspect of accountability—personal liability. The legal obligation to make pension contributions does not rest solely on the company as a corporate entity. Rather, Section 13A(8) of the PFA extends personal liability to directors and senior management. This means that those involved in the financial affairs of the employer can be held directly accountable if the company fails to pay over pension contributions as required. This underscores just how important it is for directors and senior management to take their fiduciary duties seriously. Such a provision ensures that directors and senior managers cannot hide behind the corporate veil to evade their obligations, particularly in cases where employee contributions are deducted but not remitted to the retirement fund.

This principle was reinforced in the judgment in the case of *Engineering Industries Provident Fund and Another v Pioneer Mechanical CC and Another*. Here, the court ruled that the sole director was personally responsible for the unpaid pension contributions, despite his argument that the company's structure under the Companies Act, 2008, shielded him from personal liability. The court made it clear: the Legislature's intent behind Section 13A(8) is unmistakable. This law exists to ensure that retirement funds and their members have a pathway to recover what is rightfully theirs, even if it means holding individual directors accountable.

In this particular case, the Court ordered the liquidators of the defaulting employer to quantify the amount of arrear contributions owed by the employer and pay them to the affected member within a specified period. In the event that the liquidators failed to make the calculations as ordered, the member was ordered to return to court with his own quantified amount. This judgment addresses a common issue for employees seeking redress through the Office of the Pension Funds Adjudicator, where employers often fail to provide the necessary calculations for arrear contributions as ordered by the Adjudicator, hindering the ability of members to secure execution orders against them.

Arrear contributions as a criminal offence

Furthermore, under the PFA framework, failing to pay pension fund contributions on time is not just a breach of contract; it is a serious violation of the law. Section 37(1)(a) of the PFA classifies the non-payment of contributions as a criminal offence, punishable on conviction by a fine not exceeding R10 million or imprisonment for a period not exceeding 10 years, or both. This strict penalty underscores the gravity with which the law views the failure to comply with pension contribution obligations.

Paragraph 4(3) of the FSCA Conduct Standard further strengthens this provision by placing a positive obligation on the Board of the fund to report contraventions of Section 13A(2)(a) – 3(b) to the South African Police Service (SAPS). This report must be made within 14 days of the expiry of a 90-day period during which the non-compliance continues. This requirement aims to ensure that instances of non-payment are brought to the attention of law enforcement, making it clear that failing to meet contribution obligations is not just a regulatory issue but a criminal matter.

However, there is an anomaly in the legislation: while the FSCA Conduct Standard imposes a positive duty on the Board to report such non-compliance to the SAPS as a criminal offense, it does not impose a similar duty to initiate civil proceedings against the employer. Civil proceedings are crucial because they can secure the actual payment of contributions, thus directly protecting the retirement savings of fund members. This gap in the legislation means that while a fine of up to R10 million may be imposed on a defaulting employer as part of a criminal conviction, this fine is not payable to the pension fund itself. Instead, the fine serves as a deterrent to the employer for failing to comply with legal obligations, rather than directly compensating the affected fund members.

Despite this legislative gap, the deterrent effect of Section 37(1)(a) of the PFA remains significant, provided that the provision is diligently enforced. To ensure that this happens, the FSCA is actively engaging with the senior leadership of the SAPS and the NPA to enhance our mutual understanding of the relevant pension fund legislative framework and to streamline the process for handling reports of non-compliance. These efforts are aimed at ensuring that cases of arrear contributions are treated with the seriousness they deserve, enabling law enforcement to take appropriate action swiftly and effectively.

THE ROLE OF THE FSCA WITHIN THE LEGAL FRAMEWORK

What is the role of the FSCA as a regulator within this legal framework? One of the FSCA's key responsibilities is monitoring compliance with Section 13A of the PFA as it relates to the obligations of the funds and ensuring that their Boards fulfill their responsibilities in managing contributions. However, the FSCA does not currently have direct powers to regulate employers or ensure their compliance with Section 13A of the Act. We rely on the Boards of pension funds to take the necessary steps to recover arrear contributions and ensure that payments are made in accordance with the law. So, while we can provide oversight to ensure that Boards act in the best interests of their members and report cases of non-compliance, we cannot compel employers to make payments directly. This is the reason we are considering taking greater enforcement action against Boards and/or administrators which do not act, or do not take timely action, in the best interests of their members with regard to arrear contributions.

Public disclosure of defaulting employers

Recognising the current limitations in terms of the law, we have adopted several strategies to strengthen enforcement and encourage compliance. One such measure is the publication of the names of non-compliant employers. The first communication was published on 31 August 2023⁶, marking the beginning of a series of ongoing publications that list defaulting employers, detailing the duration and extent of their non-compliance in terms of arrear contributions. The second communication followed on 26 March 2024⁷, continuing the effort to shine a light on employers whose arrear contributions remain unpaid for extended periods. By publishing lists of employers who fail to meet their obligations under Section 13A, the FSCA aims to create a deterrent effect, using the power of public accountability to encourage better compliance. This measure is designed to bring greater transparency to the industry, allowing employees, trustees, and other stakeholders to be aware of which employers are not meeting their pension contribution responsibilities. It serves as a form of reputational pressure, where employers face public scrutiny for their failure to remit contributions on time, potentially affecting their business relationships and standing in the community.

This public naming and shaming approach has proven to be an effective tool for driving compliance. As a result, following the publication, almost 1000 employers took swift action to clear their arrears, recognising the potential reputational damage and legal consequences of their non-compliance. In addition, many retirement funds have used the visibility provided by these publications as leverage to enter into settlement arrangements with defaulting employers, ensuring that outstanding contributions are paid over time.

In more serious cases, funds and members have filed complaints with the Office of the Pension Funds Adjudicator, seeking formal determinations against non-compliant employers. Some funds have also escalated matters by initiating legal proceedings, obtaining court orders to compel payment, and even opening criminal cases with the SAPS against those employers who continue to disregard their obligations.

The publication of these names has also caught the attention of Parliament, political parties, and labour federations. These stakeholders have strongly condemned the employers who fail to meet their pension contribution obligations, further increasing public pressure on them to comply. Their

⁶ FSCA Communication 21 of 2023 (RF). Available at: [https://www.fsc.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2021%20of%202023%20\(RF\).zip](https://www.fsc.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2021%20of%202023%20(RF).zip)

⁷ FSCA Communication 10 of 2024 (RF). Available at: [https://www.fsc.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2010%20of%202024%20\(RF\).zip](https://www.fsc.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2010%20of%202024%20(RF).zip)

involvement and interest have amplified the visibility of the issue, pushing for greater accountability and reinforcing the importance of protecting workers' retirement savings. The latest communication on defaulting employers is scheduled to be issued later this month, continuing to hold employers accountable and encouraging timely payments to retirement funds.

EVALUATION OF THE LEGISLATIVE FRAMEWORK

I now turn to evaluate the efficacy, or otherwise, of the legislative framework. Despite a seemingly robust legislative framework, which ranks favourably against most jurisdictions, supported by case law, the substantial cumulative amount of arrear contributions owed by non-compliant employers highlights potential shortcomings, particularly concerning Section 13A of the PFA. This raises questions about the effectiveness of the legislative provisions themselves or, alternatively, challenges in the enforcement of these provisions. The persistence of arrear contributions suggests that, while the legal requirements are clear, there may be limitations in the mechanisms available for ensuring compliance and in holding employers accountable for their obligations.

A significant challenge within the current framework is the FSCA's limited jurisdiction over employers. As I mentioned earlier, while the FSCA is empowered to supervise retirement funds and ensure compliance with the PFA, it lacks direct regulatory authority over employers themselves, relying on the Boards of retirement funds to take legal action against employers, such as pursuing civil litigation or reporting non-compliance as a criminal offense to the SAPS. This reliance on indirect enforcement can create gaps in accountability, as Boards may face financial or logistical challenges in pursuing legal action, especially smaller funds with limited resources. There is also conflict of interest considerations in boards of trustees taking action against employers as the boards are made up of representatives of employees and the employer in question. As such, the lack of direct jurisdiction over employers by an independent regulatory authority, can lead to delays in the recovery of arrear contributions, compromising the financial security of fund members.

To address these jurisdictional limitations, plans are underway, particularly through the anticipated promulgation of the Conduct of Financial Institutions (COFI) Bill, which is still to be tabled in Parliament. Upon enactment, the COFI Bill will broaden the regulatory reach of the FSCA, bringing participating employers under its supervision as regulated entities, in addition to those currently under its oversight. This expanded mandate will enable the FSCA to directly engage with employers involved in retirement funds, enhancing compliance and accountability.

This extended regulatory scope under the COFI Bill presents an opportunity to collaborate with other oversight bodies to address persistent challenges in ensuring compliance. For example,

together with the Office of the Auditor-General of South Africa (AGSA), we are exploring the potential application of the material irregularity (MI) findings process in terms of which the audits of public entities which reveal significant violations of the PFA would be referred to the FSCA or other relevant public bodies for investigation and enforcement action. This is one example of a collaborative approach in the public sector which should serve to deal with the challenge of pension arrear contributions.

CONCLUSION

As we move forward, it is clear that this issue requires coordinated efforts and innovative, proactive interventions. In addition to the anticipated promulgation of the COFI Bill, we are looking at enhanced collaboration with key stakeholders, such as the SAPS, the NPA, the Office of the Auditor General, National Treasury, SARS, and others. The need is for a holistic approach to addressing arrear contributions given what is at stake – retirement savings at risk.

In conclusion, I must emphasise this, in the meantime, the primary responsibility for the governance outcomes of retirement funds, including ensuring compliance with the provisions of the PFA resides primarily and in the first instance, with the Boards of Trustees of the funds. Enhancing the powers of the FSCA over employers will not and should not shift the nexus of responsibility away from those entrusted with the day-to-day duty, to protect the hard-earned savings of members of retirement funds. This appreciation will inform the focus of our future enforcement actions in this area.

Thank you!!!