

EMPLOYEE PENSION AND PROVIDENT FUND RIGHTS

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~~PROVIDENT AND PENSION RIGHTS.~~
Pension and Provident fund rights

DECLARATION:

In accordance with Rule G5.6.3, I hereby declare that the above-mentioned treatise/ dissertation/ thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

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DECLARATION

I, Makhado Fhatuwani Richard, Student Number 211285838 hereby declare that the treatise for the Magister Legum (Labour Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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Overview of the study

Ideally, every employee is required to retire at some stage in life. Some retire at a relatively early age, whilst others work for as long as is possible. The generally accepted retirement ages are 55, 60 or 65, but vary from company to company as stipulated in the specific company's provident or pension fund rules or policy. Once retired, an individual would rely on social insurance as a source of income¹ in the form of pension or a provident fund. Social insurance, in this regard, refers to the earned benefits of employees and is often linked to formal employment². South Africa, as a middle-income developing country³, has incorporated such elements into its social security system.

The main aim of a pension or provident fund is to provide benefits for its members when they retire from employment, retrenched, unable to work due to illness and for family in the case a member dies while still working⁴. These forms of social security are key to people's survival and are referred to as safety nets⁵.

Provident funds and pension funds are retirement plans used around the world, but their specifics differ from area to area. Pension funds are offered by employers and governments which generally includes a retirement benefit to participants equal to a portion of their working income. There are some differences in how contributions are made and how benefits are accrued, with the most significant differences based on how benefits are paid⁶.

Generally, a provident fund is aimed at private sector employees and is financed through a joint employer-employee contribution from wages. Public sector employees, however, enjoy more attractive pension arrangements with defined

¹ Mywage South Africa "Social Security, Pension"(2017) <http://www.mywage.co.za/main/decent-work/social-security/pension> (accessed 2017-06-22)

² Nyenti M, du Plessis M and Apon L *Access To Social Services For Noncitizens And The Portability Of Social Benefits Within The Southern African Development Community (Sadc) South Africa Country Report: A Report To The World Bank, Centre For International And Comparative Labour And Social Security Law*, (University Of Johannesburg, South Africa) September 2007 4.

³ Triegaardt JD "Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa" (date unknown) 2.

⁴ The South African **Labour** Guide "Pension and provident funds" (date unknown) <http://www.labourguide.co.za/general/499-pension-and-provident-funds> (accessed 2017-06-12) 1.

⁵ Triegaardt JD "Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa" (date unknown) 2.

⁶ Investopedia "What are the main differences between a provident fund and a pension fund?" (date unknown) <http://www.investopedia.com/ask/answers/102814/what-are-main-differences-between-provident-fund-and-pension-fund.asp#ixzz4wVlzF1xJ> (accessed 2016-07-05) 1.

benefits. Participation on a voluntary basis by the self-employed is allowed but the take-up has been low⁷.

Employees' pension and provident rights under a pension or provident scheme do not arise only under the trusts of the scheme but also as contractual terms of the employment relationship between the employer and its employees⁸. This often takes effect on the date of taking up employment, or on entering into an agreement with the employer. Employment law covers all rights and obligations within the employee-employer relationship and covers a range of legal issues such as discrimination, wrongful termination, wages and taxation. Many of these issues are governed by the applicable law⁹.

Although the South African retirement fund system is in many respects financially sound and well regulated, a number of individuals still reach their retirement age with inadequate savings. This occurs for a number of reasons. For many people, during the course of their working life, the build-up of savings is disrupted or the costs associated with retirement fund provisioning are relatively high¹⁰. This problem is not only grave for some workers in the formal sector, but largely for those in the rapidly increasing informal sector.¹¹ Majority of people still lack effective access to an affordable retirement funding vehicle, for the most part, are completely excluded from social protection schemes, in particular social insurance schemes¹².

The South African retirement fund industry has been heavily influenced by a racially divided past and the parallel existence of developed and emerging components of

⁷ The South African Labour Guide <http://www.labourguide.co.za/general/499-pension-and-provident-funds>) 1.

⁸ *Ibid*

⁹ Findlaw Lawyers Employees Rights 101 (date unknown)

<http://employment.findlaw.com/employment-discrimination/employees-rights-101.html> (12/06/2017).

¹⁰ National Treasury "Statement on the Impact of the Proposed Retirement Reforms" (9 July 2014)

http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf

(accessed (2016-09-10) 5; Hanekom K *Umbrella funds and the development of legal principles specific to them* Paper presented at the Pension Lawyers Association Conference, Cape Town, (2012) 14.

¹¹ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 20.

¹² SMIT and MPEDI "Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?" 2010 African Journals OnLine 1.

the economy¹³. In the past, racially discriminatory exclusion from the pension fund or provident fund membership was prevalent. In many cases it was indirect discrimination based on job categorisation, such as the distinction between weekly paid and monthly paid staff. Where the staff complement was racially stratified, people were excluded from membership on the grounds of race¹⁴. Discrimination in the workplace can deny individuals opportunities and thereby deprive society of what those individuals can and could contribute¹⁵. This has unfortunately been the case in South Africa's history, the administration of pension and provident funds being one of many examples¹⁶.

A further ongoing challenge is presented by employers who, whilst deducting occupational retirement fund contributions from their employees' salaries, fail to pay over the contributions to the relevant occupational retirement funds. These employers also often fail to register themselves or their employees as participating members of occupational retirement funds when they are meant to¹⁷.

A severe loss in fund asset value caused by poor investment performance, defective fund management, or even fraud are yet more reasons. In almost all cases, however, there is an underlying failure to exercise appropriate and sufficiently rigorous standards of fund governance¹⁸.

¹³ Rosemary Hunter *Legislative changes that should be made in order to more properly reflect the pension promise that an employer makes to its employees and to better protect retirement savings presented at the Institute of Retirement Funds Conference, Johannesburg, (September 2004)* 3.

¹⁴ Wallis "Discrimination and Pension Funds" (August 2003) www.pensionlawyers.co.za (accessed 201-09-10) 3.

¹⁵ ILO "Convention concerning Discrimination in Respect of Employment and Occupation" Geneva 42nd ILC session (25 Jun 1958) 1.

¹⁶ Wallis www.pensionlawyers.co.za 3.

¹⁷ Nkosi TG The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* 2016 *Potchefstroom Electronic Law Journal* 19 1; Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" (12 December 2016) <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663> (accessed 2017-08-27) 1; Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" (12 December 2016) <http://journals.assaf.org.za/per/article/view/1663> (accessed 2017-08-27) 1.

¹⁸ National Treasury "Statement on the Impact of the Proposed Retirement Reforms" (9 July 2014) http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf (accessed (2016-09-10) 7.

Furthermore, retirement schemes that have been in existence for decades are naturally vulnerable to data errors and omissions with historic paper trails, a variety of systems, corporate mergers and conflicts with accompanying records such as payroll. Such errors often result in the loss of benefits by members, leading to disputes.

Generally member protection is linked to the character and structure of fund governance, the design and reach of the regulatory regime. Pension fund failures do not occur often, but when they do, the consequences can be catastrophic, especially for members who have spent their entire lives contributing, only to find their benefits are compromised¹⁹.

In order to ensure that the social security rights of employees are protected in South Africa, there are various retirement legislations. The Pension Funds Adjudicator (PFA) allows the regulation of all pension funds registered under the Registrar of Pension Funds and the Government Employees Pension Law of 1996. It regulates the Government Employees Pension Fund, the Transnet Pension Fund Act, 62 of 1990, the South Post Office Retirement Fund Act and the Special Pensions Act, 69 of 1996. In pension matters, the trustees' conduct is governed by the rules as well as the PFA. The regulation of employer conduct that influences the delivery of pension benefits is, however, not as simple. Section 27 guarantees everyone the right to have access to social security and, if they are unable to support themselves and their dependents, appropriate social assistance. The state has a duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Employees also have recourse to the established statutory rights and to enforce those rights through the established statutory structures.

Though there are features of the structure and depth of the South African retirement funding environment that compare well with both developed and developing countries, there are also decidedly unacceptable aspects. The existence of retirement funds is a very important vehicle for the provision of retirement benefits to

¹⁹ *Ibid.*

members. Having vested interest in a proper regulation and administration of retirement funds, Government seeks to build on the strengths of the established retirement funding environment, while progressively addressing its deficiencies²⁰ by reforming the retirement system. This is essential as where retirement benefits are adequately provided to members, the burden on government to provide these benefits through social security grants is lessened.

Many legal changes have taken place in South Africa in the recent past. With the new Constitution came the development of new laws, as well as the development of specialised courts and tribunals tasked with the administering such laws. These changes also affected the pension industry and gradually the need for legal intervention in pension matters has increased. The latest proposed reform will affect mostly provident fund members as they will effectively switch to the pension fund model, which requires the purchase of a compulsory annuity at retirement with two-thirds of their fund balance. Although the assurance has been given that their vested rights will remain under the old rules²¹, many people have expressed fears about these reforms and it has led to mass resignations of government employees²².

Despite the above mentioned efforts, the South African retirement fund laws still exclude certain groups and categories of persons from the social protection coverage widening social inequalities. These include the high percentage of the unemployed, the large informal sector employees and many working-age individuals who have periods of unemployment at different periods in their working lives. These features have to be taken into account in considering retirement funding reform options.

²⁰ Rosemary Hunter *presented at the* Institute of Retirement Funds Conference, Johannesburg, (September 2004) 3. Rosemary Hunter "Legislative changes that should be made in order to more properly reflect the pension promise that an employer makes to its employees and to better protect retirement savings" (September 2001) <http://www.bowmanslaw.com/article-documents/Institute-of-Retirement-Funds-Conference-September-2004.pdf> (accessed 2016-10-21) 5.

²¹ 10x "The impact of proposed retirement reforms" (06 June 2014) <https://www.10x.co.za/publications/the-impact-of-proposed-retirement-reforms/> (accessed 2016-10-21) 5. <http://www.treasury.gov.za/publications/RetirementReform/Draft%20Default%20Regulations%20&%20Explanatory%20Memo.pdf> (accessed 2017-03-21) 1.

²² Lenyaro S "Record number of resignations hit the public sector" SOUTH AFRICA (10 February 2015) <http://www.enca.com/south-africa/record-number-resignations-hit-public-sector> (accessed 2017-03-21) 1.

The study explores the interaction between pension and provident fund employment laws, and in particular considers whether, and to what extent, the pension promise is incorporated into the employment contract. The feasibility and difficulties of three options is explored. Firstly the paper checks if pension benefits are not incorporated into the employment contract, secondly that all pension and pension benefits are incorporated as implied terms and conditions of the employment contract, and thirdly that only the pension benefits, but not the procedural aspects of the rules, are incorporated as implied terms. Determining this issue is fundamental to determining the power of the employers and/or trustees to amend these benefits²³.

This study examines issues from a policy and legal perspective against the background of the broader social security agenda in South Africa and the vision of a comprehensive social security system, with the main focus being on the pension and provident fund rights of employees.

Furthermore, the study covers areas such as alignment with international standards; the need to develop synergies with the rest of the social security system and for institutional reform and alignment; addressing certain material deficiencies and inconsistencies in the retirement space with reference to removing the restriction on certain contributors to benefit and redefining the range of dependants.

The study seeks to address the multitude of workers and enterprises who often are not recognised and protected under legal and regulatory frameworks and who are characterised by a high degree of vulnerability and poverty, and to redress these work deficits.

The main employment rights given to a person by legislation and with the enforcement of those rights is also addressed. Employment rights should be viewed as creating a base of rights that can be built upon by negotiation with an employer. The great majority of rights dealt with may be enforced by complaint to an industrial tribunal²⁴.

²³ ILO Resolution concerning decent work and the informal economy, paper presented to the General Conference of the International Labour Organization, meeting in its 90th Session, Geneva, (2002), 5.

²⁴ *Ibid*

CHAPTER 1 Research Proposal

1.1. **Background**

Good governance is generally recognised as a vital aspect of an efficient pension system in order to enhance investment performance and benefit security. Yet, despite regulatory and industry initiatives, weaknesses in pension governance persist across the world²⁵. Pension fund trustees and pension managers deal with a variety of challenges²⁶ experienced by pension systems and key themes emerging are: closing the coverage gap and social inequalities; integrating old age pensions with other insurance programs; securing possibly better rates on returns; investing pensions into higher capital productivity; reviewing financing mechanisms to reduce employee tax; overcoming reform resistance and finding satisfying mechanisms for the full portability of pension rights across sectors²⁷.

This treatise highlights the nature of social security, in particular pension and provident fund rights in South Africa; accomplishments and challenges of social security; related policies and policy implications that contribute to the limitation and infringement of employee pension and provident rights. Finally the paper provides recommendations and a conclusion. It raises the question: What are the long-term strategies required for a comprehensive social security policy?²⁸ Another challenge raised is how to manage and deliver pensions as well as provident funds without infringing on the rights of employees.

1.2. **Problem Statement**

Most individuals in formal sector jobs contribute to pension, provident or retirement annuity funds. Some save enough in this way to be able to live adequately in retirement but many South Africans do not save or leave it too late in their careers to save enough for retirement. For many employees, the build-up of savings is

²⁵ Fiona Stewart “**Pension fund governance: Challenges and potential solutions**” (07 Jan 2009) http://www.oecd-ilibrary.org/finance-and-investment/pension-fund-governance_fmt-v2008-art17-en (accessed 2017-06-12) 1.

²⁶ *Ibid.*

²⁷ Robin Hames “The challenges facing pension schemes in 2016” (27/04/2016) <https://reba.global/content/report-the-challenges-facing-pension-schemes-in-2016> (accessed 2017-06-12) 1.

²⁸ Triegaardt JD “*Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa*” (date unknown) 2.

disrupted or do not contribute because the costs associated with retirement fund provisioning are high. Between the basic old age social grant and private contractual and voluntary savings vehicles, there is a notable lack of cost-efficient ways to appropriately meet the retirement funding needs of lower and middle income employees, as well as those whose lifetime earnings are largely informal or irregular²⁹. These excluded groups are largely comprised of certain categories of atypical workers, informal economy workers and the long-term unemployed³⁰.

1.3. Research Questions

It is against this background that the following questions arise:

- How do social insurance schemes cover different risks across the lifecycle?
- How do insurance schemes take account of inequalities in the labour market?
- How does an unequal division of labour affect access to, and benefits from, social insurance?³¹
- How will the retirement reforms benefit workers?
- What are the economic implications of retirement reforms?
- Are the new retirement reforms infringing on employees' provident and pension rights?
- Are new reforms in line with international standards?
- What must government do to ensure no infringement on employees' provident and pension funds?
- What must the government do to assure accessibility of employees to their provident and pension funds?
- How do we maximise opportunities for the poor so that they are afforded inclusivity as South African citizens?
- What is South Africa's social security policy in effecting medium to long-term strategies for developmental social welfare?³²

²⁹ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 20.

³⁰ Dupper, Olivier and Govindjee "Extending Coverage of the Unemployment Insurance-System in South Africa" 2010 *Rev* 438 4.

³¹ Holmes and Scott "Extending social insurance to informal workers: gender analysis (March 2016) <https://www.odi.org/publications/10407-extending-social-insurance-informal-workers-gender-analysis> (accessed 2009-07-27) 1.

³² Triegaardt JD "Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa" (date unknown) 2.

- How does one determine whether the pension promise is incorporated into the employment contract? Are the answers to be found in the written employment contract itself, in the fund's rules, or elsewhere?³³

The question of how well a social security system is designed and how encompassing its reach is, affects the lives of millions of South Africans on a daily basis, raising the following concerns:

- (i) Will the retirement system with its mandated and often high contribution rates survive?
- (ii) How can unknown longevity increases be addressed in the payout phase?³⁴

1.4. Aims and objectives of the study

This paper discusses the South African pension and provident fund, its accomplishments and challenges as well as the retirement system reforms and recommendations. The paper tries to understand how the reform impacts on the protection of employees with regard to the provident and pension rights as guided by the promulgation of the new Pension Funds Act, labour statutes and the Constitution.

1.5. Research methodology

There are various types of research that can be used, namely, empirical research, literature research, experimental research, and historical research. In this study the researcher focuses on a literature review method. Furthermore, a qualitative research design was used to describe the effects/ impact of retirement reforms in protecting the social security rights of employees on retirement and their life style upon retiring.

To understand the processes that characterise this topic the following will be used:

³³ Damant G "The Pension Promise: Pension Rights as Part of the Employment Contract" (2003) 24 *ILJ* 1.

³⁴ Holzmann R "Global pension systems and their reform: Worldwide drivers, trends, and challenges" 2012 *Forschungsinstitut zur Zukunft der Arbeit* 6800 16; Holzmann H "Global pension systems and their reform: Worldwide drivers, trends and challenges" (9 April 2013) <http://onlinelibrary.wiley.com/doi/10.1111/issr.12007/full> (accessed 2017-10-20) 16.

1.5.1. Primary information sources

Data was reviewed using a range of primary information sources such as academic and commercial abstracts, bibliographic databases, legislation, treaties and conventions, published books as well as relevant court decisions.

1.5.2. Secondary sources

Secondary sources used included journal articles, guides to adoption as well as other electronic sources found via internet search engines. The main purpose of the literature review was to put the hypothesis to be examined in the research report into proper perspective by supplying a theoretical foundation for the research.

A systematic collection and objective evaluation of data related to past occurrences was carried out in order to clarify issues concerning causes, effects, or trends of events. The purpose of this process was to assist in explaining present events as well as to anticipate possible future scenarios.

1.6. Research limitations

The purpose of the study was to investigate the protection of employees with regards to provident and pension rights. The methodological limitation in this research program is the reliance on the literature based on research conducted by others rather than an empirical study being conducted by the researcher.

1.7. Outline of the research

As previously mentioned, there has been high number of resignations of civil servants as a result of the new policy. This is due to a fear that they will lose their hard-earned money at retirement if it is given to them as a lump sum. A large amount of money can also be misused and spent within a short period of time. To what extent will government be able to provide for these retirees?

In this paper, Chapter 1 covers the research proposal and Chapter 2 outlines the background of the study. Chapter 3 contains a detailed discussion of certain currently excluded categories of employees as well as other factors that limit them to access pension and provident funds. It considers principled arguments for the inclusion of these categories and raises specifically the question of whether the continued exclusion of some of these categories can be legally justified. Chapter 4

addresses the legislative context of the retirement funds administration whilst Chapter 5 outlines how discrimination affects the administration of pension and provident funds. In Chapter 6 the reforms of pension and provident funds are focused on in detail.

The aim of this study is to understand how the reform impacts on employees' rights with regard to provident and pension funds as guided by the promulgation of the new Pension Funds Act. It also argues the way forward, providing recommendations for future research and practise. Furthermore it explains the current, newly signed law and the implications of these reforms in the lives of retirees.

Chapter 2 Background of the study

2.1. Introduction

The South African welfare policy document provides the framework for the public and private sectors to make provision for unexpected contingencies which will impact on the ability of individuals to earn an income, and for those who are unable to mobilise resources to take care of themselves. The generic definition of social security, therefore, is taken to include social insurance benefits, social assistance benefits and tax credits³⁵. There are two common forms of social security, namely, social insurance and social assistance³⁶ and the focus of the study is mainly on the social security with regard to pension and provident funds rights.

The International Labour Organisation (ILO) defines social security as

the protection which society provides for its members, through a series of public measures, against the economic and social distress that would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families and children³⁷.

Social security has been accepted as policy in both developed and developing nations as important for poverty prevention. Social security ensures access to a basic minimum living standard and contributes to achieving a more equitable income distribution in society and its conceptualisation incorporates notions of experiences, traditions, political nuances and levels of development³⁸. Social insurance is to protect employees and their dependents, through insurance, against contingencies which interrupt income. These schemes are contributory for both employers and employees, contributions are wage-related and the employees and the employers agree upon a percentage³⁹.

³⁵ Triegaardt JD *“Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa”* (date unknown) 2.

³⁶ Triegaardt JD *“Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa”* (date unknown) 3.

³⁷ ILO Convention 102 of 1952; ILO *Introduction to Social Security* (1984) 3.

³⁸ Triegaardt JD *“Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa”* (date unknown) 2.

³⁹ *Ibid*

Although South African law does not require employers to provide their employees with occupational retirement funding or even access to occupational retirement funding such as pension and provident funds, however, a significant percentage of employers in the formal sector do. Traditionally this has taken the form of membership of defined benefit pension funds since the 1980's and there has been a significant move towards defined contribution funds⁴⁰.

The pension fund provides financial support to allow the employer to discharge his moral obligation to employees or their dependants. Sher (1994) states that a defined benefit scheme refers to a retirement fund in which the benefit obligations are defined in terms of the member's salary at retirement. These benefits are promised to the member and guaranteed by the employer. The employer's contribution varies according to the actual performance of the fund in terms of investment income, salary escalation and staff turnover, relative to the assumptions used when determining the actuarial value of the fund liabilities. A defined contribution benefit design refers to a retirement fund in which the fixed regular contributions paid on behalf of the member are accumulated with interest until the member's retirement. At retirement the benefit paid is based on the accumulated proceeds. This contrasts with the defined benefit design wherein the retirement benefit is fixed and the contribution varies⁴¹.

Retirement funds are the largest institutions of social ownership in South Africa. A number of theories have been developed which look at the level of state involvement in the retirement industry. The main elements of the framework can be briefly summarised as follows: there have been significant changes in the policy environment in which the state is located (political, economic and normative); the state adjusts to these changes in its environment by introducing pension reforms; the enterprise/occupational pension system primarily adjusts to the changes in its own product market, the production regime is shaped by changes in technology, and in internal labour market requirements⁴².

⁴⁰ Rosemary Hunter *presented at the* Institute of Retirement Funds Conference, Johannesburg, (September 2004) 3.

⁴¹ George DT *Analysis Of South African Pension Fund Conversions: 1980–2006; Developing A Model For Dealing With Environmental Change* (UNIVERSITY OF SOUTH AFRICA) 2006 23.

⁴² *Ibid.*

2.2. Pension or provident fund as a form of social security

This is established by an employer to facilitate and organise the investment of employees' retirement funds as contributed by the employer and employee. Currently in many South African companies and government departments, full-time employees have access to a company's pension or provident fund while casual employees do not. The self-employed have to establish their own pension or provident fund arrangements⁴³.

2.2.1. Pension fund

A pension is a fund into which a sum of money is added during an employee's employment years, and from which payments are drawn to support the person's retirement in the form of periodic payments once retirement is registered. A pension may be a defined benefit plan where a fixed sum is paid regularly to an individual or a defined contribution plan under which a fixed sum is invested and is available at retirement age.⁴⁴ These are pooled-contributions from pension plans set up by employers, unions and other organisations to provide for the members' retirement benefits⁴⁵.

A pension created by an employer for the benefit of an employee is commonly referred to as an occupational or employer pension. Labour unions, the government, or other organisations may also fund pensions. Occupational pensions are a form of deferred compensation, usually advantageous to employee and employer for tax reasons. Many pensions also contain an additional insurance aspect, as they will often also pay benefits to survivors of beneficiaries or disabled beneficiaries who can no longer work.

2.2.2. Provident fund

A provident fund is a form of social safety net into which workers must contribute a portion of their salaries and employers must contribute on behalf of their workers.

⁴³ Mywage South Africa "Social Security, Pension"(2017) <http://www.mywage.co.za/main/decent-work/social-security/pension> (accessed 22/06/2017)

⁴⁴ Lemke and Lins *ERISA for Money Managers* (2015) 3.

⁴⁵ Ké Concepts "Pension Fund" (date unknown) <http://www.businessdictionary.com/definition/pension-fund.html> (accessed 2017-06-10) 1.

The money in the fund is then paid out to retirees, or in some cases to the disabled who cannot work⁴⁶.

2.2.2. (i) Advantages and disadvantages of a provident fund

There are advantages and disadvantages to receiving all your benefits in a lump sum. One disadvantage is that one may spend a lump sum very quickly. There will then be nothing remaining as financial support for the rest of one's life. In such a case, a state pension will then have to be applied for. If, however, the individual invests the full amount wisely they should not have this problem⁴⁷.

One advantage of a lump sum payment is that one avoids all the problems in receiving a private pension every month. Insurance companies and other pension funds will pay a private pension into a bank account, if a person has one, or send a cheque to their home address, or even to the previous employer who will then pass on the payment. If, however, one has no bank account or lives in a place where the postal system is unreliable, there might be difficulty in receiving and cashing one's pension cheque every month. A lump sum, in contrast, avoids all these potential problems⁴⁸.

For workers who are not well paid, the amount of a monthly pension may be so small that it provides no security anyway. In addition, individuals can also feel suspicious about leaving their money with pension fund companies after they retire. They would rather have the money to look after themselves. A person who receives a lump sum may be able to put this towards buying a house or plot of land, while a person retiring to a rural area may use it to buy cows, goats, and so on⁴⁹.

2.2.2. (ii) Difference between pension and provident funds

The main difference is in how the money is paid out on retirement. When a pension fund member retires, the member gets one third of the total benefit in a cash lump

⁴⁶ Investopedia "Provident Fund Definition" (date unknown)
<https://www.investopedia.com/terms/p/provident-fund.asp#ixzz532k6wODo> (accessed 2017-06-10) 1.

⁴⁷ The South African Labour Guide <http://www.labourguide.co.za/general/499-pension-and-provident-funds>) 1.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

sum and the other two-thirds is paid out in the form of a pension over the rest of the member's life. A provident fund member, however, can get the full benefit paid in a cash lump sum⁵⁰. A provident fund is usually more flexible than a pension fund. Part of the lump sum can be used to buy a private pension through a private pension company.

The main advantage of a pension fund is that it is paid for life. The pension will be paid out until one dies. This offers security as a certain amount of money will definitely be coming in every month. If one is not disciplined to deal with a large sum of money, then it is better to have the money paid out in small amounts every month⁵¹.

Pension funds offer better tax benefits to the worker. A worker's contributions to a pension fund are deductible for tax, while contributions to a provident fund are not. No tax is payable on a lump sum of R30 000 or less (at March 1998) paid out by a provident fund. Trade unions usually demand provident funds for their members. They feel that many pension funds are very old and have rules which don't take into account the interests of workers. Most provident funds were established more recently and have rules which suit the interests of workers. But pension funds can have rules that are as good as any provident fund⁵².

The strongest argument in favour of provident funds and the lump sum payment concerns the means test used to work out whether a person qualifies for a state old-age pension. If a person receives a private pension they are disqualified from receiving a state old-age pension (SOAP). If, however, a person receives a lump sum payment then that person can also qualify for a state pension in some cases⁵³.

It is possible for people to contribute to a private retirement or provident fund, draw the fund early if retrenched or in the case of early retirement, and then the state old-age pension may be awarded with no reference to past savings and awards. In addition to helping employers cope with the problem of their older staff retiring, a

⁵⁰ *Ibid.*

⁵² *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

retirement fund also enables them to offer benefits that will attract and keep the staff they need in their organisation. This explains why defined benefit funds were geared towards providing benefits for employees who stay with the company until they retire. Employees lost a substantial amount of their expected retirement benefits when they resigned or were retrenched before retirement.

2.2.2. (iii) Challenges facing pension and provident funds

Some individuals cash in their pension or provident savings when they lose or change their jobs as their unemployment benefits are insufficient. Others draw on their savings to meet medical costs or to pay school fees for the children. If the benefits available for dependent children are inadequate when someone dies or becomes disabled, then other family members carry an increased burden. It is often difficult to save enough due to many reasons. Many employees cash in their pension or provident savings when they change jobs, or have informal or irregular employment, which makes it difficult to save. Another contributing factor is the crash of the global economy which has contributed to the number of workers who have been retrenched. Yearly, a number of workers are retrenched in South Africa, forcing them to exit their respective pension funds and withdraw their benefits. Majority of those individuals use the money to overcome their financial problems to settle their debts or to provide for their families. The issue with withdrawal of the savings is that when such an individual gains another form of employment, as they are still far from reaching retirement, they have then used their previous savings and thus the lump sum they cash at retirement is decreased⁵⁴.

In regulating retirement funds, the dual employer/employee representation became compulsory from 15 December 1998 in both defined benefit and defined contribution funds. This led to many new trustees being appointed who did not necessarily have the legal, financial and investment skills to accept this onerous task. It became imperative for trustee training to occur, and to continue as an ongoing exercise as opposed to a once-off occurrence. In addition, it is the duty of the Board of Trustees to obtain the advice of experts on matters where the board lacks the necessary knowledge or expertise. Petersen (2001) suggests that the pension fund has

⁵⁴ George DT *Analysis Of South African Pension Fund Conversions: 1980–2006; Developing A Model For Dealing With Environmental Change* 23.

traditionally been seen as a benefit for “good and faithful” employees, to enable them to enjoy their retirement or to provide for their dependants in the event of premature death or disablement⁵⁵.

Emerging from a plethora of the literature is that pre-retirement withdrawals from provident funds have been large, reducing the amount actually available on retirement which is much lower than would be indicated by the contribution rates. This practise has worsened the already-serious problem of the inadequacy of retirement accumulation due to low contributions. With life expectancy rising rapidly, provident funds offer insufficient protection against longevity risk⁵⁶.

⁵⁵ *Ibid.*

⁵⁶ p11

CHAPTER 3

Access to social protection and challenges facing employees with regard to pension and provident fund rights

3.1. Introduction

Although there is wide coverage in South Africa of those in employment, some sectors in the country have restricted or no access to retirement funding. The problem is acute not only for some employees in the formal sector, but also for those in the fast growing informal sector⁵⁷. Most employees still lack effective access to affordable and effective retirement funding vehicle. South Africa has a high rate of unemployment, a large informal sector and many working-age individuals who have periods of unemployment scattered throughout their working lives⁵⁸. As a result, too many people reach retirement age having not accumulated adequate savings.

As mentioned, for many the build-up of savings is disrupted by many factors associated with retirement fund provisioning. There is a lack of cost-efficient mechanisms suitable to meet the retirement funding needs of lower and middle income individuals whose lifetime earnings are largely informal or irregular.⁵⁹

This chapter seeks to highlight the multitude of employees who often are not recognised and protected under legal and regulatory frameworks and who are

⁵⁷ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 7.

⁵⁸ Rosemary Hunter *presented at the* Institute of Retirement Funds Conference, Johannesburg, (September 2004) 4; National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 4; Nevondwe L “South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act” November 2010, Volume 15 4 1; Nevondwe L “South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act” (November 2010) <https://link.springer.com/article/10.1057/pm> (accessed 12 October 2017) 19; Nevondwe L “South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act” (November 2010) <https://doi.org/10.1057/pm.2010>. (accessed 12 October 2017) 19.

⁵⁹ *Ibid.*

characterised by a high degree of vulnerability and poverty due to decent work deficits.⁶⁰

3.2. Limiting factors to access a provident or pension fund

Although social protection, which includes social insurance, is a fundamental right which should be enjoyed by every employee irrespective of the sector or type of economy in which he or she is employed, and our retirement fund system is in many respects financially sound and well regulated, there are a number of variables that contribute to the limitations experienced by employees and / or their beneficiaries in receiving their pension and provident benefits and to exercise their rights.

3.2.1. Exclusions of certain categories of employees

The Labour Relations Act⁶¹ (LRA) defines an employee as:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and*
- (b) any person who in any manner assists in carrying on or conducting the business of an employer⁶².*

The same definition is captured in the Basic Conditions of Employment Act (BCEA), Employment Equity Act (EEA) and Skills Development Act (SDA), stating that the definition of an employee determines the nature and scope of the protection afforded an employee by the labour statutes⁶³. This definition, which apart from focusing only on the formal sector employment relationship, is narrower than that contained in labour laws⁶⁴ and excludes a variety of vulnerable groups from the retirement fund's scope of coverage⁶⁵ as identified below. There are still thousands of local employees who do not belong to any occupational retirement funds.⁶⁶

⁶⁰ ILO paper presented to the General Conference of the International Labour Organization, meeting in its 90th Session, 5.

⁶¹ 66 of 1995

⁶² S213 of the LRA of 66 of 1995

⁶³ Van Niekerk, Christianson, McGregor, Smit and Van Eck Law@work (2008) 61

⁶⁴ Dupper, Olivier and Govindjee 2010 Rev 438 3.

⁶⁵ Dupper, Olivier and Govindjee 2010 Rev 438 4.

⁶⁶ Rosemary Hunter presented at the Institute of Retirement Funds Conference, Johannesburg, (September 2004) 4.

3 .2.1.1. Informal Sector

In South Africa, employees in the informal economy and their dependants are mostly excluded from social protection schemes, in particular social insurance schemes⁶⁷. According Mpedi and van Niekerk, this is due to the fact that most social insurance schemes link the concept of contributor to that of an employee. This is problematic, since the notion 'employee' is by and large used to refer only to the standard set for the formal sector. Occupational and public social insurance schemes therefore generally limit their scope to traditional formal sector employees⁶⁸.

The South African informal sector is heterogeneous, ranging from casual individual workers and street hawkers to workers in sectors that are characterised by a high degree of organisation, such as bidi-rollers and rickshaw pullers and workers in the large establishments like restaurants and retailers.

MacKellar defines informal sector workers as:

- employees who work without a labour contract, and
- entrepreneurs whose businesses are not registered with the authorities⁶⁹.

The one of the reasons for the exclusion of employees in the informal economy from statutory social security coverage has been described by Van Ginneken in Smith and Mpedi as the fact that these employees are unable or unwilling to contribute a relatively high percentage of their incomes to financing social security benefits that do not meet their priority needs⁷⁰ as most of them are in an already risky position regarding income. In many cases they live from 'hand to mouth' and do not have a constant stream of income. This situation makes it hard to save or plan for the future, leaving many vulnerable. The sector also has some inherent complexities when it comes to creating appropriate social security insurance schemes⁷¹.

⁶⁷ SMIT and MPEDI 2010 African Journals OnLine 1

⁶⁸ *Ibid.*

⁶⁹ Landis MacKellar Pension Systems for the Informal Sector in Asia Edited, March 2009, SP DISCUSSION PAPER NO. 0903, <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0903.pdf>, <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0903.pdf> p10

⁷⁰ SMIT and MPEDI 2010 African Journals OnLine 1.

⁷¹ Dupper, Olivier and Govindjee 2010 *Rev* 438 7.

These include the following:

- Many schemes rely on dual payments from both the employer and employee, meaning that often only workers in the formal and private sector, or those with a traditional employment contract, can be successfully covered.
- Workers in the informal sector do not have such a contract. It is also difficult to ascertain whether they even have an employer.
- The low level of income and inconsistent revenue streams received by many members of the informal sector make it difficult to encourage them to make monthly payments into an unemployment insurance scheme. Periods of unemployment may also be quite common.
- Further difficulties which are faced when attempting to extend coverage to informal sectors include the difficulty of monitoring members of the informal sector who could receive payments.
- The informal sector has low barriers to entry and exit, making it expensive to monitor and administer the fund of the sector⁷².

The deficits of decent work are most pronounced in the informal economy as most employees in the informal economy are not recognised, registered, regulated or protected under labour legislation and social security. When their employment status is uncertain, it makes it impossible for them to enjoy, exercise and defend their fundamental rights⁷³. From the perspective of the unprotected employees, the negative aspects of work in the informal sector far outweigh the positive ones⁷⁴.

Excluded groups are largely comprised of certain categories of atypical workers and include migrant contract workers, independent contractors, dependent contractors, and the self-employed, informal economy workers and the long-term unemployed⁷⁵. Some examples are sited below:

i) Zero hours contract employees

Hundreds of thousands of workers within the borders of South Africa are working under zero hours contracts where they get jobs but never actually work or be paid. Under zero hours' contracts, workers have to guarantee their availability to

⁷² Dupper, Olivier and Govindjee 2010 Rev 438 7.

⁷³ ILO paper presented to the General Conference of the International Labour Organization, meeting in its 90th Session 9.

⁷⁴ *Ibid.*

⁷⁵ Dupper, Olivier and Govindjee 2010 Rev 438 4.

employers, but in effect remain on unpaid standby waiting to be called to work. A zero hours contract worker may eventually only work one or two hours a week, or none at all, and there is no obligation on the employer side to provide work under these contracts⁷⁶.

For example, farm workers have always been on zero hours contracts, working extra hours during harvest time, being put on unpaid time off during storms and extreme weather and generally forced to keep extremely flexible hours unilaterally determined by the farmer. The same applies to domestic workers who work irregular hours into the night and over 60 hours per week during periods of heightened social activity by their employers⁷⁷.

Another example is community healthcare workers who are not even recognised as workers, but described as volunteers, although they keep the underfunded and understaffed health system going and generally the system cannot function without them. Around the world, zero hours employees have spread throughout the fast food sectors, aged care homes sector, security and cleaning companies, casinos and many retail chains. More often, the contracts started out as a way to hire temporary workers for short periods in busy times⁷⁸.

ii) Learnerships and interns

Employees under a contract of employment contemplated in Section 18(2) of the Skills Development Act 97 of 1998 are not covered by the pension and provident fund system. The exclusion of this group is retrogressive as they fell under the ambit of the previous Unemployment Insurance Act. Furthermore, this group is generally employed for a fixed-term duration of some length.

⁷⁶ SACSIS "An Employment Contract that Violates Human Rights 'Zero hours' employment contracts completely disregard the minimum standards of 'decent work' contained in the International Declaration of Human Rights" (4 May 2015) <http://sacsis.org.za/site/article/2361> (accessed 2017-10-30) 1

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

While their exclusion said to be justified on the basis of encouraging job creation, it remains inconsistent with the inclusion generally of fixed-term employees within the framework of the South African social security system⁷⁹.

The inclusion of learners would have the dual benefit of including a greater portion of the youth into the fund at a very early stage of their working lives thereby improving the role that these can play in improving skills levels in the country. It is, therefore, recommended that learners engaged under a contract of employment in terms of the Skills Development Act be included under the ambit of the retirement fund. Should the contract of employment be terminated at the end of the learnership or internship agreement, the concerned learner should be allowed more flexible contribution and withdrawal terms until they are employed. This will assist with social insurance during initial periods of employment. This approach is helpful in providing guidance on which group of contributors should be excluded from the general principle that those who voluntarily leave their employment may not claim the benefits until retirement⁸⁰.

iii) Self-employed workers

Self-employed employees, just like most employees in the informal sector, do not enjoy the protection of pension and provident funds. Few unemployment insurance schemes cover the professionally self-employed. This is especially the case in developing countries but also common in many developed countries⁸¹.

iv) Migrant workers and their retirement

Though citizenship for purposes of contributions and benefits is generally not a requirement, as far as non-citizen fixed-term contract workers are concerned, social security insurance excludes persons who enter the South African Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking in place

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Dupper, Olivier and Govindjee 2010 Rev 438 8.

that such people must leave the country or be repatriated upon termination of the contract⁸².

For migrant workers included in the retirement fund system, when reaching the minimum retirement age, as stipulated by the fund rules or legislation, one can choose to retire at that point, and benefit from the more favourable retirement lump sum tax table. Thereafter, matters become slightly complicated, depending on whether you are a member of a pension or provident fund⁸³. If one belongs to a provident fund, has the option to withdraw the entire amount as a cash lump sum. However, if one retires from a pension fund, is obliged to invest at least two-thirds into an annuity, either a compulsory or a living annuity⁸⁴. If one purchases an annuity, whether a living or guaranteed annuity, the underlying assets cannot be converted back into a cash lump sum, any balance can be paid out as a cash lump sum to the nominated beneficiaries but only when the annuity holder dies. Beneficiaries are therefore left with an annuity that pays out in South Africa and will therefore be taxed locally per the standard income tax tables. The onus is then on the migrant to expatriate the proceeds on a monthly or annual basis and to invoke any applicable double-taxation in their home country. Expatriating funds in this way is costly and an administrative hassle, as one has to apply for each transfer separately⁸⁵. To escape the burden of costs associated with expatriating funds, emigrating pension fund members who don't want to leave their money behind, resign before they reach the fund's normal retirement age to retain the option to cash out⁸⁶.

Generally, these employees do not have the option to withdraw from a retirement annuity fund (RA) before the age of 55, unless the value of their benefit falls below a limit specified by the Minister of finance of R7000, qualify for reasons of ill-health or decide to emigrate. When retiring, they must purchase an annuity with at least two-thirds of their proceeds unless the annuity value is less than R247, 500, with the

⁸² Nyenti M, du Plessis M and Apon L *Access to Social Services for Noncitizens and the Portability of Social Benefits Within The Southern African Development Community (Sadc) South Africa Country 5*.

⁸³ 10X Investments "Emigration and your retirement fund" <https://www.10x.co.za/blog/emigration-and-your-retirement-fund> (accessed 2017-10-30) 1.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

same consequences as buying an annuity out of their pension or pension preservation fund proceeds⁸⁷. To take the RA savings abroad, emigrants need to emigrate formally and to do so before they reach their fund's specified retirement age. Formal emigration requires the individual to sign off with SARS, which triggers capital gains tax on all capital assets other than on fixed property within South Africa. Once all the tax affairs are finalised, one receives a tax clearance certificate that entitles him/her to withdraw from the RA. The proceeds will be taxed according to the withdrawal lump sum tax table. If one has invested in a life company RA, may also incur termination penalties for withdrawing early depending on the contracted investment term and fund rules⁸⁸.

The exclusion and treatment of such individuals appears to be inconsistent as far as different categories of fixed-term contract workers are concerned. Fixed-term contract workers who lose their employment as a result of the termination of their contract remain entitled to receiving their benefits. However, non-citizen fixed-term contract workers, who have to return home upon completion of the contractual period, are specifically excluded or differently treated⁸⁹.

Given the vulnerable place non-citizens hold as a minority group in their host country, they are extremely subjected to human rights abuses as well as to the exclusion from the socio-economic structures of the host state⁹⁰.

It is arguable that the exclusion of this category of workers raises problems of both constitutional and international law nature. The treatment of different categories of fixed-term contract workers is inconsistent. On the one hand, resident fixed-term contract employees enjoy the protection of the law, on the other hand, non-citizen fixed-term contract employees who are required to return to their home countries at the end of their contracts of employment, are excluded. This differential treatment of non-citizens could be challenged as discriminatory on the basis of nationality. The

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Nyenti M, du Plessis M and Apon L *Access to Social Services for Noncitizens and the Portability of Social Benefits Within The Southern African Development Community (Sadc) South Africa Country 5.*

⁹⁰ Rosemary Hunter *presented at the Institute of Retirement Funds Conference, Johannesburg, (September 2004) 5.*

absence of such arrangements in South Africa means that South Africa is in violation of its international obligations in this regard⁹¹.

It is, nonetheless, recommended that migrant workers on fixed-term contracts who have to leave South Africa upon the expiry of their contracts be allowed to contribute to the social insurance fund. This would ensure consistent treatment of all fixed term employees. In the absence of a bilateral agreement which arranges for verification by authorities of the relevant country, a specific form should be developed for completion by the beneficiary that would verify his or her identity and his or her continued unemployment⁹². This does, however, raise a number of difficulties of a practical nature. Should migrant workers on fixed-term contracts be included under the ambit of the retirement fund system, their contributions will have to be paid out while they are either in their countries of origin or in another country. In addition, verification of the continued unemployment of the migrant worker will have to be monitored.⁹³

3.3. Non-trade union members

The low-waged employment force is largely concentrated in the subsistence agriculture, domestic work and informal economy sectors. Using a cut-off of R1 000, Olivier and Mpedi indicate that 14.6% of workers in the formal economy were classified as low-wage. However, 44.4% of formal workers earn incomes below R2 500 per month. It is also indicated that trade union membership among the low-waged is insignificant with only a small fraction of employees earning below R1 000 per month having trade union membership and access to trade union services thereof. Generally trade union membership is associated with higher income brackets and that excludes a large percentage of the workforce⁹⁴, resulting in employees not:

- Exercising their organisational rights,
- benefiting from collective bargaining and agreements,

⁹¹ Dupper, Olivier and Govindjee 2010 Rev 438 20.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Olivier and Mpedi "Expanding Social Protection to families in the African Context :The Complementary Role of Formal and Informal Social Security" Presented at the 4th International reseach Conference on Social Security (2003) at para 33

- having trade union representation and protection of employee rights including pension and provident fund rights.

3.4. Unclaimed benefits

Historically, many retirement fund members were denied their benefits upon leaving service and many failed thereafter to maintain any contact with their former fund or employer and the records held by the retirement fund were inadequate to facilitate tracing them to effect payment. The usual rules of prescription of three years applied, with the notion that members had been aware of their right to claim the benefits and had failed to exercise that right. As this was to the advantage of the fund, participating employers and/or remaining members, many funds did not put much effort to trace their former members.⁹⁵

The exact total amount of unclaimed retirement benefits across all retirement funds is not known with certainty.⁹⁶ According to the Government Pensions Administration Agency (GPAA), in 2015, thousands of former civil servants having not claimed pension money resulted in R456-million owed to 17,000 former civil servants. Former provincial government department employees had not claimed R271-million, while former national government department employees had R185-million⁹⁷, excluding private pension funds. This is a huge amount to warrant serious consideration as to what should be done about these benefits. Ultimately, if left unclaimed, such benefits revert to the fund in question and become part of the surplus of the fund.⁹⁸ In the case of the death of a member, dependants that cannot be traced are denied money which is rightfully theirs.⁹⁹

⁹⁵ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 6.

⁹⁶ *Ibid.*

⁹⁷ ENCA "Millions unclaimed from government pension fund" (10 February 2015) <https://www.enca.com/south-africa/millions-unclaimed-government-pension-fund> (accessed 2017-09-09) 1.

⁹⁸ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 5.

⁹⁹ *Ibid*

In an attempt to correct the situation, the National Treasury Task Team argues that unclaimed benefits do not belong to the fund and a concerted effort is required, independent of the fund, to trace former members and their dependants and recommends that:

- The board of management of a retirement fund should be required to attempt to locate any individual or his/her dependants who are entitled to benefits under the retirement fund. After a period of no more than 24 months after benefits become due to a former member, the corresponding value should be paid to a central “unclaimed benefits fund”.
- The central “unclaimed benefits fund” must have a duty to trace former members and endeavour to make payment to them or their dependants.
- If the central fund is unsuccessful in tracing the former members or their dependants (if the former member passed away), the central fund may release moneys to the State in order to fund, for example, the social old-age pension.
- If any former members or relatives of deceased members come forward thereafter and successfully substantiate their claim, the central fund may make the benefit payment¹⁰⁰.

Contrary to the prescription date of three years, the writer recommends that the date of claiming benefits be open-ended to allow beneficiaries ample time to access their benefits and further recommends that the new Act must provide for the identification, tracing and payment of unclaimed benefits to these former members and their dependants¹⁰¹.

3.5. Payment of benefits on disability

Currently a retirement fund may not pay an income on temporary disability to a member without losing its status as an approved fund for tax purposes. Many employers purchase short-term or long-term disability benefit policies to provide these benefits to their employees. The Taylor report recommends the payment of such disability benefits by retirement funds and proposes that a minimum disability benefit equal to an income of 60% of the member’s earnings before disability be

¹⁰⁰ *Ibid*

¹⁰¹ *Ibid.*

mandatory¹⁰². Unfortunately employees in the informal sector and other categories mentioned earlier do not benefit from such arrangements.

3.6. Interest on late payment

A retirement fund does not pay lump sum benefits to the beneficiary on the date of receipt of notification of the claim. A lump sum is either paid on the date provided in the rules of the fund, or in the case of default, after the date so provided in the rules. There is lack of clarity among administrators as to how interest on such lump sum benefits should then be administered, whether the lump sum is paid before or after the date on which the fund is obliged to pay the lump sum. Some administrators include the interest in the lump sum benefit payable to a member and others pay the amount separately to the member as interest¹⁰³.

In the *Wanda Herring and Goscor Staff Pension Fund* case, a dispute arose between the complainant and the employer concerning the complainant's retrenchment and caused a delay in the payment of her pension benefit. She left the service on early retirement on 1 May 1997, but only received her benefit on 8 August 1997. The fund awarded her 8% interest and she felt that she was penalised because of a dispute with her employer¹⁰⁴.

Wanda demanded a market-related interest rate of 15% and the Adjudicator found that in order for the complainant to be entitled to interest, she must show that she is entitled to it in terms of the rules of the fund or law of contract. The rules were silent on the question of interest, so the question remained whether there was any contractual agreement between the complainant and the fund. From the evidence the Adjudicator found that interest was first mentioned in the final letter of acceptance by the union in the dispute. The relevant part read that¹⁰⁵.

¹⁰² National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 7.

¹⁰³ Kotze J "Interest on Late Payment of Retirement Benefits" (31 March 2016) <http://www.camargueum.co.za/article/31032016/interest-late-payment-retirement-benefits> (29 October 2017) 1.

¹⁰⁴ ABSA Consultants and Actuaries "The Withholding Of Benefits By Retirement Funds" (date unknown) <http://www.easyinfo.co.za/htm/custom/absa/withhold.htm> (accessed 2017/10/10) 1.

¹⁰⁵ *Ibid.*

"we further confirm that for the period beginning 30 April 1997 to date of release of the funds, interest would be added to the [said] monies".

The agreement thereafter was to pay interest from 30 April 1997. The agreement was silent on the rate of interest payable. The Adjudicator found that in the absence of an agreed rate, the rate applicable of 8% should be *reasonable*, as the funds were not invested in any money market and therefore there was no guaranteed rate of return. The fund also awarded an enhanced pension benefit to the complainant by calculating her pension as if she had retired at age 65, whereas the actual her retirement age was 63¹⁰⁶.

The case of *Marlene Lawrence v Medical Rescue International Retirement Plan*¹⁰⁷ also concerned the payment of interest on the late payment of benefits.

The Adjudicator repeated that the only basis upon which a complainant could claim interest were if it was provided for in the rules, if there was a contractual agreement, or if the debtor was placed in *mora*. For the debtor to have been placed in *mora*, an agreed time period must have expired or the creditor must have demanded performance from the debtor. In this case the complainant had failed to make a demand for payment from the fund to place it in *mora*, so there was no claim for interest¹⁰⁸.

3.7. Defaulting employers: failing to pay over contributions to the relevant occupational retirement funds.

A number of complaints have reached the office of the Pension Funds Adjudicator relating to failures of certain employers to pay fund contributions to the relevant occupational retirement funds and employers who fail to register themselves as well as to register some or all of their employees as participants of occupational retirement funds. In both instances, monies are deducted from employees but employers fail to pay those monies to the relevant occupational retirement funds as employee contributions¹⁰⁹.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Lawrence v Medical Rescue International Retirement Plan & Others* [1999] 12 BPLR

¹⁰⁸ *Ibid.*

¹⁰⁹ Nkosi TG 2016 *Potchefstroom Electronic Law Journal* 19 1; Nkosi TG <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663>; Nkosi <http://journals.assaf.org.za/per/article/view/1663> 1.

The problem is often discovered by the employees themselves upon withdrawal of their benefits from their occupational retirement funds following dismissal, resignation, retrenchment or retiring, to discover that the fund is not in position to pay the withdrawal benefits claimed. In some cases the fund is found to be in a position to pay but can pay only a portion of the withdrawal benefits claimed because the employer had made only partial contributions, prompting member employees to be aggrieved and ultimately complain to the office of the PFA¹¹⁰. Such failures have calamitous effects on the employees who are at the receiving end of these dishonest practices as they lose the value and use of their salaries through the deductions as well as the benefits of their occupational retirement funds¹¹¹.

The *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*¹¹² case reflects on the ongoing challenges presented by certain employers who, whilst deducting occupational retirement fund contributions from their employees' salaries, fail to pay over those contributions to the relevant occupational retirement funds and on those who fail to register themselves as well as their employees as participants of the retirement funds¹¹³.

Although the *Pension Funds Act*¹¹⁴ is responsive and provides sufficient mechanisms to against this practice, this paper argues that occupational retirement funds have not done enough to enforce the *Pension Funds Act* and has resulted in, and continues to result in, losses on the part of employees¹¹⁵. The paper further argues that it is not in the interest of employees for occupational retirement funds to have rules that prohibit them from paying retirement fund benefits where no contributions have been received and for the courts and the office of the PFA to

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* (1991/2001) [2002] ZAWCHC 38 (23 July 2002)

¹¹³ Nkosi TG 2016 *Potchefstroom Electronic Law Journal* 19 1; Nkosi TG <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663>; Nkosi <http://journals.assaf.org.za/per/article/view/1663> 1.

¹¹⁴ 24 of 1956

¹¹⁵ Nkosi TG 2016 *Potchefstroom Electronic Law Journal* 19 1; Nkosi TG <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663>; Nkosi <http://journals.assaf.org.za/per/article/view/1663> 1.

enforce such rules without consistently subjecting them to the *Pension Funds Act* and the Constitution for validity and legality¹¹⁶.

The paper submits that failure by occupational retirement funds to enforce the Pension Funds Act has the potential of unjustifiably limiting retirement fund members' constitutional rights¹¹⁷. Judging from the increasing number of complaints and determinations, it is clear that the defaulting and non-complying employers is rampant in the retirement fund industry and individual occupational retirement funds appear not be doing much to address the problem¹¹⁸.

It is on this basis that the case of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator* is challenged. The award implies that the only available remedy to an employee is compel the fund to calculate the outstanding contributions and demand that total sum from the employer. This still does not the problem of defaulting employers, which can be addressed by enforcing the *Pension Funds Act* as well as constantly subjecting the rules to the Act in cases of such disputes¹¹⁹.

3.8. Exclusion of state employees by the Pension Funds Adjudicator

State employees, including the Government Employees Pension Fund (GEPF) members and the Associated Institutions Pension Fund¹²⁰, as well as employees belonging to certain State enterprises such as the Telkom Pension Fund, South Africa Post Office Retirement Fund and the Transnet Pension Fund, are excluded from regulation by the Pension Fund Act¹²¹. Currently, the Adjudicator has jurisdiction only in funds that are registered with the Registrar of Pension Funds in terms of the Pension Funds Act and as such the Adjudicator lacks jurisdiction on the GEPF, the Transnet Pension Fund, Telkom Pension Fund and South Africa

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf
8.

¹²¹ *Ibid.*

Post Office Retirement Fund¹²². This creates concern as members of the above funds do not have a recourse as they have to contact the fund directly if they are not satisfied with the benefits they have received.

It will be in the best interest of all employees in South Africa if all retirement funds, including bargaining council funds, trade union funds and funds established in terms of specific statutes, are regulated by one body in terms of a single Pension Funds Act, extending the jurisdiction of the pension funds adjudicator to funds over which she has no jurisdiction now and reforming the institution of the adjudicator's office¹²³. By so doing, all employee's rights will be protected.

3.9. Misguided investment

Pensions are a valuable non-wage benefit that millions of employees rely on to provide a secure retirement. To realise this, pension funds should be managed for the exclusive purpose of providing retirement benefits to workers, with pension trustees doing their best to achieve the greatest possible return on investments¹²⁴.

It has, unfortunately, been seen that many lawmakers and pension fund officials have other priorities than doing what is best for workers. Some take billions of pension fund money they manage as an opportunity to advance their own agendas. Instead of investing the funds to earn the best return for workers, they use pension funds in a misguided attempt to boost local economies, provide kickbacks to their political supporters, reward industries they like, punish those they don't like and bully corporations into silence¹²⁵.

Furthermore, some pension funds use projected rates of return for their investments which are impossible to achieve. The use of an unrealistic rate of return camouflages

¹²² Nevondwe and Odeku "An Analysis of the Role of Pension Funds Adjudicator in South Africa" (November 2013) <http://studylib.net/doc/11808445/an-analysis-of-the-role-of-pension-funds-adjudicator-in.....> (accessed 2017-11-30) 7.

¹²³ Nevondwe L "South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act" November 2010, Volume 15 4 1; Nevondwe L <https://link.springer.com/article/10.1057/pm> 19; Nevondwe L <https://doi.org/10.1057/pm.2010>. 19.

¹²⁴ Siconolfi, Lafferty & Young, "Keeping the Promise: Getting Politics out of Pensions *by Jonathan Williams*" (date unknown) <https://www.alec.org/publication/keeping-the-promise-getting-politics-out-of-pensions/> (accessed 16/10/2017)

¹²⁵ *Ibid.*

how much a pension fund is truly underfunded because it masks the size of the problem by making projections based on inflated returns. This enables institutions to put off addressing the underfunded pension until it is too late and funds are not available to pay benefits to the pension fund members¹²⁶. For example, in December 2017, given the allegations of accounting irregularities raised at Steinhoff International, its share price dropped from around R49 to under R6 after Chief Executive Officer (CEO), Markus Jooste's departure amid an accounting scandal. According to EWN reporter Gia Nicolaides, the Public Investment Corporation (PIC) which invests on behalf of GEPF had seen the market value of its 8.56% stake in Steinhoff drop to just over R2 billion from an estimated R20 billion during a sell-off¹²⁷. The investment loss recorded was 0.6% of the total GEPF portfolio on 6 December 2017¹²⁸. While the company claims the benefits of government employees won't be affected, it raised serious concerns about governance at Steinhoff¹²⁹. Decisions such as these occur every year in pension funds across the world¹³⁰.

Consequences to such mismanagement can be huge to fund members as it can result in reduced to serve them, resulting in the decreased number of active employees contributing into the pension funds whilst at the same time the number of retirees continue to increase, thereby forcing them to make up the shortfall by increasing their annual contributions into the pension fund plans to meet minimum funding standards. The higher minimum pension payments will therefore consume a higher percentage employees' salaries. Without effective legislative reform such institutions may ultimately have no choice but to:

- decrease pension payments to retirees,
- pass the increased burden on to taxpayers, or

¹²⁶ Department of the Auditor General "Report on Municipal Pension Funds (January 2015) http://www.paauditor.gov/Media/Default/Reports/Updated%20Municipal%20pension%20special%20report_01142015_FINAL.pdf (accessed 2017-12-20) 11.

¹²⁷ Nicolaides G "Fedusa to meet PIC as Steinhoff crash hits workers pension funds hard" (11 December 2017) <http://www.capetalk.co.za/articles/284190/fedusa-to-meet-pic-as-steinhoff-crash-hits-workers-pension-funds-hard> (accessed 20 December 2017)

¹²⁸ Moneyweb "The PIC, GEPF 'deeply concerned' about Steinhoff despite recovery signs" (14 December 2017) <https://www.moneyweb.co.za/in-depth/investigations/gepf-and-pic-joint-statement-on-steinhoff/> (accessed 2017-12-20)

¹²⁹ Nicolaides G "GEPF & PIC say changes required in wake of Steinhoff scandal" (13 December 2017)

<https://www.msn.com/en-za/news/other/gepf-26-pic-say-necessary-changes-required-in-wake-of-steinhoff-scandal/ar-BBGHmBx>, (accessed 2017-12-20)

¹³⁰ *Ibid.*

- some combination of both options.¹³¹

3.10. Contrasting types of retirement plans

There is a number of different retirement funds in South Africa. The 284 local authorities in South Africa contribute to some 79 different retirement funds, of which approximately 21 are defined benefit funds. Each has its own rules, benefits and contribution structure and trustees. Rates of employer contribution to these funds range from 15% to 26% with the average rate at about 18,6% whereas the average rate of employer contribution to retirement funds in the private sector is now approximately 10,2% of pensionable remuneration. The rate of employer contribution to the Government Employees Pension Fund is currently 15%¹³².

A number of local authority retirement funds have benefit levels and special forms of benefit which are far superior to those in central government and corporate sector funds and have rules requiring the municipal employer to make additional contributions to fund these benefits. These payments can potentially have a debilitating effect on the finances of the municipality¹³³. The different rules and contributions play a major role in the disparities in terms of pay-outs of benefits received by members or their beneficiaries who are at the same salary level but in different funds.

3.11. Right to choose the scheme

Millions of the workforce find themselves automatically enrolled into their company's pension scheme. Most of them would have not opted to join the scheme, nor will they have made any decision about where their money to be invested. Employees see money deducted from their salaries and paid into a pension funds without signing of any prior consent form¹³⁴. This places full responsibility on the employer to ensure the pension fund they put in place meets their employees'

¹³¹ Department of the Auditor General
http://www.paauditor.gov/Media/Default/Reports/Updated%20Municipal%20pension%20special%20report_01142015_FINAL.pdf 11.

¹³² Department of the Auditor General
http://www.paauditor.gov/Media/Default/Reports/Updated%20Municipal%20pension%20special%20report_01142015_FINAL.pdf 11.

¹³³ *Ibid.*

¹³⁴ Simon E "How to choose the right pension for your workers" (18 Mar 2014)
<http://www.telegraph.co.uk/sponsored/finance/pension-auto-enrolment/10705305/company-pensions.html> (accessed 2017-10-09) 1.

needs¹³⁵. This, furthermore, deprives employees of the right to choose the fund of their choice tailored according to their needs.

It is argued that employees should be allowed to tailor their investment portfolio according to their individual needs and financial situation, including the choice of how much to contribute. However, these apparent advantages could also hinder some workers who might not possess the financial savvy to choose the correct investment vehicles or have the discipline to voluntarily contribute money to retirement accounts. There is the need of government to transform the Social Security system, at least in part, to a self-directed investment plans.

3.12. Accounting and administration errors

Schemes that have been in existence for decades are generally vulnerable to data errors and omissions with historic paper trails, a variety and changing systems, corporate mergers and conflicts with accompanying records such as payroll. These factors often result in the underpayment of retirement fund members, leading to disputes on retirement pay-outs.

3.13. Conclusion

The South African Constitutional Court (CC) assumes that an individual's earning capacity is protected as property under Section 25 of the Constitution. This is as Section 25(4)(b) defines property as not limited to land. It must follow, therefore, that both corporeal and incorporeal property enjoy protection. If one accepts that a retirement benefit is property under the property clause, then one should accept that members are not to be deprived of their benefits lightly¹³⁶.

The way in which *Orion Money Purchase* is implemented is to the effect that claimants can have their claims rejected, and thereby be deprived of their vested property rights, simply because the rules say so. The point being made here is that

¹³⁵ *Ibid.*

¹³⁶ Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" 2016 (12 December 2016) <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663> (accessed 2017-08-27) 5.

this over reliance on the rules of the retirement fund is dangerous, as it unlawfully deprives members of their vested benefits¹³⁷.

Although social protection policies are an important component of strategies to tackle poverty, but only formal sector workers in most low-income countries are protected while informal workers face high levels of risks yet the majority are not covered by social insurance¹³⁸. Lack of access to social insurance of income further perpetuates lack of that necessary to live in dignity¹³⁹.

The state bears the responsibility to ensure the realisation of social security rights due to its constitutional obligation for the promotion of social protection for all¹⁴⁰. In combination with a set of defined rights and rules, functioning legal institutions can help formalise the economy and create a climate of trust and order¹⁴¹ which is essential for the smooth running of retirement systems. As stated by Hunter:

The architecture of international human rights is built upon the premise that all persons, by virtue of their essential humanity, should be able to enjoy all human rights unless exceptional disjunctions, for example between citizens and non-citizens, serve a legitimate state objective and are proportional to the achievement of that objective¹⁴².

¹³⁷ *Ibid.*

¹³⁸ Holmes and Scott <https://www.odi.org/publications/10407-extending-social-insurance-informal-workers-gender-analysis> 1.

¹³⁹ *Ibid.*

¹⁴⁰ Van Niekerk et al *Law@work* 431; Olivier and Mpedi "Expanding Social Protection to families in the African Context :The Complementary Role of Formal and Informal Social Security" Presented at the 4th International research Conference on Social Security (2003) at para 33

¹⁴¹ Holmes and Scott <https://www.odi.org/publications/10407-extending-social-insurance-informal-workers-gender-analysis> 1.

¹⁴² Rosemary Hunter *presented at the* Institute of Retirement Funds Conference, Johannesburg, (September 2004) 5.

CHAPTER 4 Statutory Regulation

4.1. Introduction

It is submitted that social protection, which includes social insurance, is a fundamental right which should be enjoyed by every employee irrespective of the sector or type of economy in which he or she is employed. This is evident in the international instruments such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the Charter of Fundamental Social Rights in the Southern African Development Community (the SADC Charter) (2003).

The Universal Declaration of Human Rights. Article 22(3) of the Universal Declaration of Human Rights provides every person, as a member of society, with a right to social security. It further provides that:

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

In addition, Article 25 states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* recognises social security, including social insurance, as a fundamental right.

Article 10(1) of the Southern African Development Community (SADC) Charter *Charter of Fundamental Social Rights in SADC*, obliges Member States to create an enabling environment so that every worker in the SADC region has the right to adequate social protection regardless of status and type of employment and enjoy adequate social security benefits¹⁴³.

¹⁴³ Smit and Mpedi 2010 African Journals OnLine 12.

4.2. A constitutional dimension to labour protection

Although Section 23(1) of the Constitution¹⁴⁴ provides that everyone has the right to fair labour practices, it does not explain the nature of the fair labour practices afforded to everyone. The courts have, in this regard, developed a labour jurisprudence, recognising this fundamental right to fair labour practices, as it unfolds in the protection afforded to employees in terms of the labour rights enshrined in labour legislation whether in a fixed-term relationship or indefinite employment. The duty is therefore placed on the employer in the context of the employment relationship to act within the parameters of the protection afforded by the constitution¹⁴⁵. The constitutional right to fair labour practices is, within the meaning of "everyone", afforded equally to the employer as well as to the employee. The employer is rightfully entitled to conclude fixed-term contracts determined by the conditions such as the agreed date, the completion of a specific task or the occurrence of a particular event¹⁴⁶.

Another constitutional dimension of merit is added to the employment relationship in respect of dignity and equality. Section 1 of the Constitution promotes the values of human dignity, the achievement of equality and the advancement of rights and freedoms". These values are further manifest in section 9 of the Constitution¹⁴⁷ which affirms that:

"everyone is equal before the law and has the right to equal protection and benefit of the law". Neither the state nor any person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including sixteen grounds listed¹⁴⁸.

Section 23(1) of the Constitution¹⁴⁹ also provides that everyone has the right to fair labour practices, given effect by legislation.

The Constitution further provides at section 33 that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair".¹⁵⁰ Despite

¹⁴⁴ 108 of 1996.

¹⁴⁵ Gericke SB "A New Look At The Old Problem Of A Reasonable Expectation: The Reasonableness Of Repeated Renewals Of Fixed-Term Contracts As Opposed To Indefinite Employment" 2011 PER / PELJ 14 103.

¹⁴⁶ *Ibid.*

¹⁴⁷ 108 of 1996.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

these rights being specific and enforceable,¹⁵¹ the BCEA, EEA and the LRA have been enacted in order to regulate the aforementioned as well as other constitutional rights.

The labour relations act brings an element that needs to be debated as it defines an employee as:

any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;
and
any other person who in any manner assists in carrying on or conducting the business of an employer¹⁵².

This definition, which apart from focusing solely on the formal sector employment relationship, is narrower than that contained in labour laws¹⁵³ and excludes a variety of vulnerable groups from the retirement funds scope of coverage.

Govindjee and Dupper put forth the argument that:

The South African Constitution is one of the most admirable constitutions in the world with a lengthy list of socio-economic rights and its writers aimed at protecting the disadvantaged the poor and the vulnerable but the constitutional right to have access to social security compared to the other existing constitutional rights, appears to be an inadequate umbrella right as it fails to cover the recent policy developments which attempt to address poverty by way of a combination of social security and protection strategies¹⁵⁴. The exclusion of others poses a challenge to the realisation of South Africa's constitutional goals as well as values to improve the quality of life of all citizens. This poses the possibility of a constitutional challenge to the current situation. The state may be challenged for failing to take steps, within its available resources, to respect, protect, promote and fulfil a right contained in the Bill of Rights. The inherent limitations of the current social security system adds impetus to the need for constitutional / statutory recognition of social security for all employees and the right to a pension or provident fund¹⁵⁵.

¹⁵⁰ See s 33 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁵¹ Grogan *Employment Rights* 4.

¹⁵² S 213 of the LRA 66 of 1995; S1 of the Basic Conditions of Employment Act 75 of 1997.

¹⁵³ Dupper, Olivier and Govindjee 2010 Rev 438 3.

¹⁵⁴ Govindjee and Dupper *Unemployment Security As A Framework For Poverty Alleviation*, presented at the Law and Poverty Colloquium, Stellenbosch, (29-31 May 2011) 5.

¹⁵⁵ *Ibid*.

Although the Constitution's provisions are comprehensive, they cannot expressly cater for every eventuality – it is necessarily a product of its time and context. The need for a constitution to reserve room for its own development through the addition of new rights is essential. The Constitution, therefore, needs to be evolving to keep pace with changes in society. Section 74 of the Constitution implies that the drafters understood the need for careful amendment to any part of the constitutional text (arguably no “basic structure doctrine” applicable). Constitutionalising the “right” in question may be the ultimate expression of the notion of transformative constitutionalism and should result in a principled basis for the introduction of legislative and policy developments aimed at achieving poverty alleviation through minimising unemployment insecurity¹⁵⁶.

The constitutional right to social security and social assistance speaks of the “right to access” as opposed to an unequivocal “right to”. A comprehensive and integrated approach is required in the realisation of these rights due to the fact that the rights are interrelated, interdependent and indivisible. The “right to access” requires that realising a particular socio-economic right, such as the right to access pension and provident funds, would require that other elements which do at times form the basis of other socio-economic rights must be in place as well. Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life. The state has a duty to unlock the system so that all people, at all economic levels of society, are able to access social security. The implication being that those who have the financial means to afford social security will be placed in a position that allows them to adequately access it¹⁵⁷.

In addition to reasonable legislative measures, the state must also put in place well-directed policies and programmes, implemented by the executive, to realise this right. In order to be reasonable, the measures adopted to realise the right must not leave out of account the degree and extent of the denial of the right they endeavour to realise, and must be understood in the context of the Bill of rights as a whole.¹⁵⁸

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Nyenti M, du Plessis M and Apon L A Report To The World Bank, Centre For International And Comparative Labour And Social Security Law, (September 2007) 4.

In addition to the internal limitation contained in Section 27 of the Constitution, section 36, which contains the general limitation clause, is also relevant. A right in the Bill of Rights can only be limited to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Amongst relevant factors considered are the nature of the right; the importance of the purpose of the limitation; its nature and extent and whether there are less restrictive means to achieve this purpose¹⁵⁹.

In ensuring the social security rights of employees are protected in South Africa, employees can have a recourse to the established statutory rights and enforce those rights through the established statutory structures.

4.3. Contract of employment

The rights to pension and provident fund rights are mainly born and based contract of employment. They are an integral part of the employment relationship between the employer and employee detailing terms and conditions of employment is offered and acceptance thereof. This explains the extent to which relationship and contract of employment are connected.

By virtue of the fact that pension benefits arise out of, and because of, the employment relationship, they are inevitably and inherently connected. The South African courts have since affirmed and developed this position. It was accepted by the adjudicator in *Younghusband v Decca Contractors (SA) Pension Fund & its Trustees*¹⁶⁰ that

pension benefits form an integral part of the industrial relations bargain because are part and parcel of the costs of employing labour and remuneration which labour receives for services rendered.

The High Court in *Resa Pension Fund v Pension Funds Adjudicator & others*¹⁶¹ similarly accepted the argument that

¹⁵⁹ *Ibid.*

¹⁶⁰ *Younghusband v. Decca Contractors (SA) Pension Fund and its Trustees*(1999) 20 ILJ 1640 (PFA)

¹⁶¹ *Resa Pension Fund v. Pension Fund Adjudicator & Others* 2000 (3)SA 313 (C)

"pension rights amount to deferred pay, rather than gratuities bestowed within the benevolence of the employer, and that members are entitled to have their investment value preserved where their employment relationship is modified as a consequence of a corporate restructuring over which they have no control¹⁶².

Every employer is required by law as stipulated in section 29 of BCEA¹⁶³, to provide an employee with a written contract of employment not later than the first day of commencement of employment. The contract regulates terms and conditions of employment between the employer and employee. It states what the employee is entitled to receive in terms of company policy, company benefits, and labour legislation as well as what the employer will provide. It also regulates the behaviour of the employee in the workplace as indicated in company policies and procedures, as well as the disciplinary code¹⁶⁴.

There are various types of employment contracts such as permanent employment, fixed term employment and temporary employment. A fixed term contract of employment is similar to a contract of permanent employment with the difference being that the fixed term contract will stipulate a start and end date¹⁶⁵. In the fixed term contract the employer states whether the benefits such as pension or provident fund, medical aid, are applicable or not. Unfortunately, some employers use the fixed term contract as a means to save money by denying an employee the opportunity of pension or provident fund benefits and medical aid benefits. Moreover, if a fixed term employee is retrenched, he or she can be denied benefits like severance pay¹⁶⁶.

In most cases fixed term contract employees have very little prospect of promotion, and are more often not granted the same benefits that other employees in that specific workplace are entitled to¹⁶⁷. These disadvantages for the employees can translate into advantages for the employers as they can save costs on contributions

¹⁶² *Hoffmann v Pension Funds Adjudicator and Others* (2011) ZAWCHC 446.

¹⁶³ Basic Conditions of Employment Act 75 of 1997

¹⁶⁴ Mywage South Africa <http://www.mywage.co.za/main/decent-work/social-security/pension> 1.

¹⁶⁵ Mywage South Africa "Fixed Term Contract: All about Fixed Term Contracts, Employment Contracts, Terms and Conditions in the Workplace, Rolling over Contracts and more" (unknown date) <http://www.mywage.co.za/main/work-smart/fixed-term-contract> (accessed 22/06/2017) 1.

¹⁶⁶ *Ibid.*

¹⁶⁷ Vettori S Fixed term EMPLOYMENT contracts: The permanence of the temporary (Department of Mercantile Law, University of Pretoria) 2008 189.

to pension funds and other social security obligations¹⁶⁸. In protecting the rights of temporary employees, in the *Biggs v Rand Water*¹⁶⁹, the Labour Court held that the purpose of the LRA is to prevent the unfair practice by employers of keeping an employee on a temporary basis, without employment security such as pension and medical aid until such time as the employer wants to dismiss the employee without complying with the obligations imposed by the LRA in respect of permanent employees.

According to Damant,

Typical employment contracts, unfortunately, have proved to be of little assistance in this regard. It is rare to find an employment contract that expressly defines the nature and ambit of the pension promise, as well as the rights and obligations of each party in relation to that promise. Instead what one finds, for the most part, are clauses that merely require the employee to join a fund, which may or may not be named, or which the employer reserves the right to choose from time to time. Some employment contracts may make reference to the rules of the fund, stating simply that the rights and obligations of the parties are governed by these rules. Sometimes, the contract may make specific reference to the contribution rates of the parties, although this is more likely to be the case with defined contribution funds. In most cases, the express terms of the employment contract leave one with a pension promise that is vague and imprecise¹⁷⁰.

As with employment contracts, the rules of a fund seldom assist one in determining the nature of the relationship between employer and employee as regards the pension benefit. The rules are clear with respect to the rights and obligations vis-à-vis the trustees and members; and vis-à-vis the employer and trustees but little, if anything at all, is said about the relationship between the employer and employee - to the extent that it impacts on the pension promise¹⁷¹.

Typical rules of a fund include those which permit the trustees and employer to amend rules (and thereby benefits), permit employers to withdraw from the fund

¹⁶⁸ Gericke SB 2011 PER / PELJ 14 103.

¹⁶⁹ *Biggs v Rand Water* (2002) ZALC 103; (2003) 24 ILJ 1957 (LC) JS1480/01

¹⁷⁰ Damant G 2003 ILJ 1.

¹⁷¹ Damant G 2003 ILJ 1.

on notice, permit the liquidation of funds, and permit amalgamations and transfers should the employer choose to participate in another fund or reconstruct its business. If the rules are the only governing source of obligations then it would seem that employers and trustees are free to do as they please with the pension promise. An employer could rely on the rule which permits it to close and simply withdraw from the pension fund without providing the employee with any further pension benefit¹⁷².

Looking at the PFA, one also finds little assistance when trying to unravel this relationship between the pension benefits and the employment contract. Section 13 of the PFA simply states that the 'the rules of a registered fund shall be binding on the fund and the members... and on any person who claims under the rules... While this may be of assistance to members seeking to force the trustees' compliance with the rules, it provides little recourse for an employee against an employer¹⁷³.

He further argues that, with no clear and express answers emerging from an examination of the typical employment contract, the typical rules and the PFA, one is forced to look elsewhere for answers as to how pension benefits and the employment contract interact. He indicates that there are at least three possible relationships between pension benefits and employment law, namely

There is no incorporation of the pension benefits into the employment contract at all. On this theory, the extent of the connection between the employment contract and the pension benefit is that these benefits arise out of the employment relationship but once they come into existence, and the employee joins the fund, they are governed independently of the employment contract. The employee's pension destiny is then determined by the rules of the fund. The employer and trustees can amend the benefits at their will because the rules permit them to do so. The employer may also withdraw from the fund and thereby terminate the pension benefits entirely.

The opposite of the first, this suggests that because pension benefits arise out of, and as a consequence of, the employment relationship, the rules governing

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

the granting and administering of such benefits are wholly incorporated into the employment contract.

The third possibility lies somewhere between the two extremes and suggests that there is partial incorporation into the employment contract of only those rules necessary to give content and meaning to the pension promise. These rules would be those that define the benefits that will be obtained on retirement or withdrawal.

There is no conclusive approach in law to the question of whether and to what extent, the promise of pension support should be incorporated into the employment contract. Damant suggests that there is at least some authority for all three possibilities, although these are being applied inconsistently and without a sound basis by the courts and the PFA¹⁷⁴.

The adjudicator's determinations at times, for example, seem to suggest that there is no incorporation of the pension promise into the employment contract itself. An example of this is seen in *Hospital Industry Provident Fund v Southern Sun Hotel*¹⁷⁵ in which the adjudicator held that:

[t]he fund is not bound by the collective agreements in terms of Section 23 of the Labour Relations Act, being neither a party nor one to which the agreement can be extended . . . All employers admitted to the fund and the members of the fund cannot, even which the concurrence of the fund, waive the provisions of the fund's rules . . . by agreement, collective or individual, and thus the employers remain bound by the rules irrespective of the terms of the collective agreements¹⁷⁶.

This approach means that an agreement reached between the employer and employees with regard to pension benefits is not binding on the mechanisms established to ensure delivery of that benefit.

¹⁷⁴ Damant G 2003 ILJ 4.

¹⁷⁵ *Hospitality Industry Provident Fund v Southern Sun Hotel Interest (Pty) Ltd* 2000 8 BPLR 889 (PFA).

¹⁷⁶ *Ibid.*

In the *Olivier v Mine Employees Pension Fund & others*¹⁷⁷, the adjudicator appeared to have noticed the difficulty with the position he adopted in *Hospital Industry* and conceded that trustees do not have the power to alter arrangements established by collective agreements because, being a matter expressly covered by the collective agreement, such changes required the consent of the trade union and the employer.

In *Mellet v Orion Money Purchase Fund & another*¹⁷⁸, the adjudicator once again conceded that there is no distinction between pension benefits and contract of employment and found implied terms in the employment contract on the following basis:

There is no direct mention in the rules of the fund of a general duty on the employer to advise a member of a contingent right of which he may be unaware. However, it is common cause that membership of the fund and entitlement to the benefits in terms of the rules of the fund are incorporated in the employment contract. One may then consider whether it is an implied term of the employment contract that the employer would bring to the attention of the employee terms of the contract between them, including the terms contained in the pension fund rules that could be advantageous to the employee.

The adjudicator's approach in this case inclines towards the theory that there is partial incorporation of the rules relating to membership and benefit entitlements, but it is not clear that the adjudicator was deliberately adopting this approach.

According to Damant:

Considering all of the above, it is difficult to find a consistent thread in the adjudicator's determinations regarding the extent to which the pension promise is incorporated into the employment contract, if at all. At times, the adjudicator seems to be trying to keep pension benefits and contractual employment issues separate, while at the same time recognising and trying to deal with the challenges this poses to the regulation of employer conduct. At other times he seems prepared to accept that there is a relationship between pension benefits and the employment contract, although the exact nature of this relationship and its implications are not explored fully in his determinations.

¹⁷⁷ *Olivier v Mine Employees Pension Fund and Others* (PFA/wt/296/98/SM)

¹⁷⁸ *Mellet v. Orion Money Purchase Fund & Another* [2001] 12 BPLR 2824

Thereafter, an employer wishing to vary its employees' pension arrangements will need to consider any issues from both an employment law and pensions law perspective. In particular, the position under employees' contracts of employment as well as under the scheme's trust deed and rules will need to be considered. Particular issues will arise where an employer seeks to vary employees' pension arrangements by contractual variation without amending the provisions of the scheme's trust deed and rules¹⁷⁹.

4.4. Employee's rights when a business is transferred

Section 197 of the LRA deals with the transfer of a contract of employment and defines business to include the whole or part of any business, trade, undertaking or service>it deals with the sale of a business as a going concern takes place subject to the provisions of the LRA. Moreover, transfer means the transfer of a business from one employer to the other employer as a going concern.

If the transfer of a business takes place, unless otherwise agreed in terms of subsection (6)

- 1. The new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*
- 2. all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;*

In short, the relevant section contains provisions which protects the rights of the employees of the old employer when they are transferred to the new employer. The new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence. All rights and obligations between the old employer and an employee at the time of the transfer continue to be in force between the new employer and the employee. Any act done before the transfer by or in relation to the old employer, including the dismissals or unfair labour practices or act of unfair discrimination, is considered to have been done by the new employer.

¹⁷⁹ *Ibid.*

The transfer does not interrupt an employee's continuity of employment and the new employer is not allowed to employ the employees on terms and conditions that are less favourable than those on which they were employed by the previous employer¹⁸⁰.

The transfer from one Pension Fund to another after the transfer of the business is allowed in terms of section 197(4) as long as the criteria of section 14 of the Pension Funds Act 1956 are met¹⁸¹. Furthermore, *Section 197A-Subsection (2)* does not prevent an employee from being transferred to a pension, provident, retirement or similar fund to which the employee belonged prior to the transfer, as long as provisions in section 14(1)(c) of the Pension Funds Act, 1956 are satisfied. The act confirms that transferred employees can still enjoy the same or similar benefits of the pension and provident fund they belonged to prior to transfer¹⁸².

4.5. Pension funds and their regulation

In South Africa the pension fund itself is the owner of its assets and its board members and directors of a company, must direct and control those assets. Even though they do not have the title to the pension assets, they give direction and control of those assets for the benefit of the fund members who expect them to act in the best interests of the fund members and not in the private interests of the board members¹⁸³.

Of more significance than trustees to act impartially or disinterestedly, is that there is the all-pervasive right to have the trustees act with due care and diligence, not just in

¹⁸⁰ Potterton E "Transferred to Another Employer – What Happens to My Provident Fund" (Date unknown) <http://www.misa.org.za/news/transferred-another-employer-happens-provident-fund/> (accessed 2017-11-10) 1.

¹⁸¹ Bouwer L "Employee's Rights When a Business Is Transferred?" (9 November 2009) <http://www.retrenchmentassist.co.za/index.php/ra-newsletters/75-what-is-the-employees-rights-when-a-business-is-transferred> (accessed 2017-11-10) 1.

¹⁸² Potterton E <http://www.misa.org.za/news/transferred-another-employer-happens-provident-fund/> 1.

¹⁸³ Legal update "Withholding of benefits" (4 May 2015) https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_8-2015_Withholding_of_benefits_May2015.pdf (accessed 2017-11-10) 1.

their investment management role but also in their distributive role when exercising their discretionary powers to benefit members as individuals or class¹⁸⁴.

Basically pension trustees are to ensure proper record keeping, put control systems in place, communicate information adequate and appropriate to fund members, take all reasonable steps to ensure contributions are paid promptly to the fund, obtain expert advice where sufficient expertise is lacking and to ensure that the rules and operations and administration of the fund comply with the Pensions Fund Act 1956 (as amended), the Financial Institutions Act of 2001 and all other applicable laws. To safeguard the assets of the fund, not to carry any business other than the business of a pension fund. Trustees not act in excess of their powers, not exercise the fund's powers improperly nor cause a fund member to sustain actual or possible prejudice in consequence of the maladministration of the fund. In directing, controlling and overseeing the operations of the fund the trustees to:

- (a) take all reasonable steps to ensure that the interests of the members in terms of the rules of the fund and the provisions of the 1956 Act (as amended) are protected at all times;
- (b) act with due care, diligence and good faith;
- (c) avoid conflicts of interest; and
- (d) act impartially in respect of all members and beneficiaries¹⁸⁵.

Previously, the regulation of pension matters was perceived as being far less complicated. The employer made certain commitments regarding pension and established a trust into which it paid contributions to protect and separate those assets from those of the company and to ensure the employer's ability to meet its pension commitments. These trusts were given corporate status in 1956 with the passing of the Pension Funds Act (PFA).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

4.5.1. Pension funds adjudicator

The office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public¹⁸⁶, with its purpose being to resolve disputes in a procedurally fair, economical and expeditious manner. The adjudicator's office investigates and determines complaints of abuse of power, maladministration, disputes of fact or law and employer dereliction of duty in respect of pension funds¹⁸⁷ by ensuring that:

- its services are accessible to all
- complaints are investigated in a procedurally fair manner
- it reaches a just and expeditious resolution of complaints in accordance with the law
- they are innovative and proactive in thought and in action
- they support, encourage and provide opportunities for individual growth¹⁸⁸.

Unfortunately, as indicated earlier, State employees including the Government Employees Pension Fund (GEPF) members and the Associated Institutions Pension Fund¹⁸⁹ as well as employees belonging to certain State enterprises such as the Telkom Pension Fund, South Africa Post Office Retirement Fund and the Transnet Pension Fund, are excluded from regulation by the Pension Fund Act¹⁹⁰.

4.5.2. Established obligations of South African pension trustees and statutory rights

In South Africa, an interested or aggrieved party may lodge a complaint relating to the administration or investments of the pension or provident fund or the interpretation and application of rules, alleging that decisions were in excess of powers or an improper exercise of power, that the complainant sustained or may

¹⁸⁶ The Office of the Pension Funds Adjudicator (date unknown) "The Pension Funds Adjudicator" <https://www.pfa.org.za/Pages/default.aspx> (accessed 2017-11-10) 1.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 8.

¹⁹⁰ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 8.

sustain prejudice in consequence of the maladministration of the fund or that a dispute of fact or law has arisen. In case the trustees do not satisfy the complainant, (s)he can then lodge the complaint with the Pension Fund Adjudicator, who may make the order which any court of law may make, whose determination being regarded to be a civil judgment of any court of law had the matter been heard by such court. The PFA must provide a statement of reasons for such determination and any party aggrieved by the determination may appeal to the Supreme Court which has power to re-hear the complaint and to make any order it deems fit on the merits of the complaint in question¹⁹¹.

The South African law allows beneficiaries to point to their statutory right to lodge a written complaint with their pension trustees. Such complaint must be properly considered and replied to in writing within 30 days, with the complainant then having the right, if not satisfied with the reply, to lodge the complaint with the Adjudicator¹⁹².

The following are scenarios and the legal position applicable in each instance¹⁹³.

4.5.2. (i) Deductions in favour of an employer where the member's dishonest conduct caused a loss to the employer

The Pension Funds Adjudicator has had to deal with some cases regarding the withholding of benefits by a retirement fund and has laid down certain guidelines in this regard.

(a) Referral to the Council for Conciliation, Mediation and Arbitration (CCMA)

In the case of *Lynn Dakin and Southern Sun Retirement Fund*¹⁹⁴ the complainant was dismissed for the alleged misappropriation of funds. She then referred the matter CCMA, alleging unfair dismissal. At the time of the Adjudicator's determination, a CCMA was still pending. Following the complainant's application to the CCMA, the respondent fund amended its fund rules to allow the withholding of a benefit for a period longer than the one at the time a complainant was lodged,

¹⁹¹ Legal update

https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2015/Legal_Update_8-2015-Withholding_of_benefits_May2015.pdf 1.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA)

provided that a civil action was instituted in any court upon the employer becoming aware of the damage. The employer then instituted civil action against the complainant in the High Court.

The complainant felt that the fund acted contrary to Section 37D of the Pension Funds Act by withholding her benefits, but the Adjudicator had a different view and found that the complainant had misconstrued Section 37D. The fund had not reduced or deducted any amount from her benefit, but rather withheld it until civil proceedings were finalised, therefore, section 37D, did not apply and the fund did not contravene the Pension Funds Act. The complainant further argued that the rule entitling the respondent to withhold a benefit is unfair, unreasonable and unconstitutional.

The member's rights, should be protected as possible as it can, with little impairment and in withholding a benefit of a withdrawing member, the fund protect the value of the benefit during the period it is withheld. The member, therefore, to have the right to disinvest the benefit at an agreed rate of interest or to hedge the investment performance in some other way.

(b) Pending criminal and civil cases

In the case of *Anstey and Pegasus III Provident Fund*¹⁹⁵ Anstey's employer withheld his benefit after his dismissal. The employer stated that the complainant was indebted to it in excess of R75 000 and that it was concerned that if the benefit is paid out to the complainant, it will be spent and the employer would lose.

The Adjudicator found that the employer did not have the power to withhold the benefit for a period exceeding 12 months. In this case two years had expired. The employer had thus exceeded its powers and the Adjudicator ordered it to pay the complainant's benefit.

The other case related to this subject is *Appanna and Kelvinator Group Services of SA Provident Fund*¹⁹⁶ where the complainant was found in a disciplinary hearing that she had embezzled R77 373 and was dismissed. The employer also proceeded with

¹⁹⁵ *Anstey v Pegasus III Provident Fund & others* [2000] 2 BPLR 119

¹⁹⁶

criminal charges against her and withheld her benefit so that in the event of her being found guilty, the employer could offset the amount against her benefit. The Adjudicator held that the power to withhold a benefit must be exercised reasonably. The complainant must also be afforded some protection from suffering a decline in the value of her benefit during the period it is withheld. Further, the Adjudicator found that the fund should not be permitted to withhold the benefit indefinitely and but only be permitted to withhold an amount up to the value of the employer's claim. The Adjudicator, therefore, determined that the fund was entitled to withhold the complainant's benefit for a reasonable period pending the determination of liability for compensation for her alleged misconduct.

In the *Horne and ABSA Group Pension Fund*¹⁹⁷ case, the complainant resigned on the 27 July 1998 after the employer alleged that she had caused it substantial damages as a consequence of her wrongful and negligent conduct. Horne's benefit was withheld for 12 months pending an investigation. On 29 July 1999, the employer issued summons out of the High Court against the complainant for the recovery of R5 936 098 plus interest which was in contrary with (Rule 13.2) that stated that the employer may instruct the fund to withhold payment of the benefit for a period not exceeding 12 months following the date of termination of a member's membership of the fund. A further rule (Rule 8.12) allows for the recovery of certain amounts from benefits payable in terms of the rules, such as compensation for any loss suffered by the employer as a result of theft, misconduct, fraud or dishonesty by the member and in respect of which the member has admitted liability in writing or a court has passed judgement against the member. The Adjudicator therefore found that the fund's withholding of the benefit after 27 July 1999 was unlawful and it was ordered to pay the benefit within six weeks.

In the *Shaw v Government Employees Pension Fund*¹⁹⁸, the complainant issued summons against the defendant for payment of his pension benefits payable to him upon his resignation on 31 May 2000. The latter's defence is that it paid the complainant's pension benefit to the South African Revenue Services (SARS) and

¹⁹⁷

¹⁹⁸ (15041/2002) [2005] ZAGPHC 353 (2 December 2005)

the South African Police Services (SAPS) in terms of Section 21(3) of the Government Employees Pension Law (Proclamation 21 of 1996).

In the *Le Roux v Child Welfare Provident Fund and Another*¹⁹⁹, the Pension Fund Adjudicator, indicated, regarding Section 37D of the Pensions Fund Act 24 of 1956, that:

Section 37D of the Act creates a defence for the fund not to pay a pension benefit to a member. Therefore, the fund bears the *onus* of establishing its defence on a balance of probabilities.

*Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*²⁰⁰, The employer instituted disciplinary proceedings against Oosthuizen on alleging's dishonesty, including theft. He pleaded guilty to some of the charges and was dismissed. Shortly after his dismissal, Oosthuizen attempted to withdraw his pension benefits from the Fund. Fund agreed not to pay out the benefits due to him on the employer's request.

Oosthuizen disputed the right of the Fund to withhold payment as he had not admitted liability of the amount claimed and nor was there a judgment against him. The SCA held that Section 37D should be interpreted to include the power of a fund to withhold payment pending the outcome of instituted action but noted that Section 37D must not be interpreted solely for the employer's benefit as the facts of each case must also be considered.

The SCA held that pension benefits owed to the employer can be withheld even absent an admission of liability by the employee or a judgment for the amount, as it is often the case that a judgment will only be forthcoming sometime after the employee is dismissed for dishonesty. The SCA, therefore, confirmed that Section 37D must be interpreted to include the power of a fund to withhold pension benefits until final determination of any action pending against the employee. A pension fund is entitled to this power even if its own rules are silent on the issue²⁰¹.

¹⁹⁹ (2) [2002] 1 BPLR 2973

²⁰⁰ (2008) JOL 2284 (SCA)

²⁰¹ Coetzee and Plots "The right to withhold pension funds" (2 June 200)

<https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2009/right-to-withhold-pension-funds.html> (accessed 2017-10-10) 1.

Therefore, when interpreting legislation where the legislation is unclear or ambiguous, a determination must be made that supports or promotes the Bill of Rights as opposed to undermining it. Judgments handed down by the Constitutional Court that clarify the meaning and determine how constitutional provisions are to be applied impact directly on decisions made by the lower courts in making determinations on how similar legislative provisions are to be interpreted and applied²⁰².

4.5.3. Holding the advisor accountable

South African common law governs the conduct of persons who owe fiduciary duties to others. The High Court categorically stated that any legal advisor, an accountant or an investment adviser could be held liable for a breach of their duties of care towards the beneficiaries of a trust in relation to the advice that they gave to the trustee of the trust²⁰³.

4.6. Conclusion

The existence of retirement funds is a very important vehicle for the provision of retirement benefits to its members. Government also has a vested interest in the proper regulation and administration of retirement funds, because where retirement benefits are adequately provided to members, the burden on government to provide these benefits through social security grants is lessened. It is for this reason, amongst others, that legislature empowered the Pension Funds Act to properly regulate the private retirement funds industry. Unfortunately those who are entrusted with resolving retirement fund disputes have in many ways failed to give effect to the Pension Funds Act. In so doing they have in fact flouted the statute in favour of the rules. The rules made are guided by the Pension Funds Act, and common sense and logic dictates that where disputes arise, the rules will be enforced subject to the provisions of the Pension Funds Act, because the substance and operation of the rules must be consistently tested against the Pension Funds Act. The opposite approach, however, which favours the implementation of the rules regardless of the

²⁰² Grogan, *Employment Rights* 5.

²⁰³ *Jowell v Bramwell Jones* 1999 (1) SA 836 (W). But see (2000) 2 All SA 161 (SCA) in which the court held that the beneficiary's claim against the advisors had been brought prematurely; Rosemary Hunter *presented at the* Institute of Retirement Funds Conference, Johannesburg, (September 2004) 5.

legislation is still in practise and has had calamitous consequences for employee members who have been denied their benefits by retirement funds and were instead channelled elsewhere to seek those benefits²⁰⁴.

It is argued that the Pension Funds Act never intended for occupational retirement funds to allow employers to manipulate the rules. The Amendment Act, in introducing personal liability, tries to insulate members from losing out on their benefits. It is disappointing that the funds and the office of the PFA do not apply the provisions of the Amendment Act to force out those employers manipulating fund rules, depriving members of the fund their benefits. It is recommended that occupational retirement funds must be administered subject to the Constitution as the supreme law relating to the rights that are affected and the Pension Funds Act. No retirement fund to adopt and enforce conduct that undermines the fundamental rights of beneficiaries²⁰⁵.

Section 37D of the Pension Funds Act provides for specific circumstances in which the benefits of a member of a retirement fund may be withheld by the fund. The Retirement Funds Adjudicator has determined certain cases dealing with this issue. It is indicated that, most importantly, the power to withhold a benefit must be exercised reasonably²⁰⁶. Furthermore, competent professional advice should be sought when dealing with any contentious issues²⁰⁷.

²⁰⁴ Nkosi TG The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator 2016 Potchefstroom Electronic Law Journal* 19 1; Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" (12 December 2016) <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663> (accessed 2017-08-27) 1; Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" (12 December 2016) <http://journals.assaf.org.za/per/article/view/1663> (accessed 2017-08-27) 1.

²⁰⁵ Nkosi TG The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator 2016 Potchefstroom Electronic Law Journal* 19 1; Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" (12 December 2016) <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a1663> (accessed 2017-08-27) 1; Nkosi TG "The rules of an occupational retirement fund and the problem of defaulting employers: A Reconsideration of *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator*" (12 December 2016) <http://journals.assaf.org.za/per/article/view/1663> (accessed 2017-08-27) 1.

²⁰⁶ ABSA Consultants and Actuaries <http://www.easyinfo.co.za/htm/custom/absa/withhold.htm> 1.

²⁰⁷ *Ibid.*

CHAPTER 5 Discrimination with regard to retirement funds

5.1. Introduction

Discrimination at work occurs in many different settings, affecting men or women on the basis of their sex, race or skin colour, national extraction or social origin, religion or political opinions which differ from those of others. Often countries decide to ban distinctions or exclusions and forbid discrimination on other grounds as well, such as disability, HIV status or age. Discrimination at work denies and deprives individuals or groups the opportunities to contribute or benefit to /from society²⁰⁸. This is unfortunately also true with certain areas concerning the administration of pension and provident funds.

Constitutional law has far-reaching expression on the grounds of potential unfair discrimination in any constitutional organ anywhere in the world. All this becomes relevant to the administrators of pension funds as in terms of Section 9(4) that no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds mentioned. There is provision for national legislation to be enacted to prevent or prohibit unfair discrimination and such legislation exists in the Promotion of Equality and Prevention of Unfair Discrimination²⁰⁹. The objective of that Act is to give effect to the Constitution and to promote the equal enjoyment of all rights and freedoms by every person, the promotion of equality and the prevention of unfair discrimination and protection of human dignity. The Act binds not only the State but all persons and contains a general statement in Section 6 that:

Neither the State nor any person may unfairly discriminate against any person.

That is followed by express prohibitions of unfair discrimination on the grounds of race, gender and disability.

²⁰⁸ UAE Ministry of Labour Discrimination (Employment and Occupation) Convention, 1958 (No. 111) 2007 ILO 1.

²⁰⁹ Act 4 of 2000

5.2. The need for Retirement fund Reforms

In the past, racially discriminatory exclusion from membership of a pension fund was widespread and often blatant, staff complement was racially stratified and the effect was that people were excluded from retirement fund membership on the grounds of race. The most extreme example was the government which operated as the conventional pension fund and what it called a Temporary Employees Pension Fund. The temporary employees were constituted by all blacks and the plethora of independent homelands employees and that resulted in virtually all black members of the civil service being categorised as temporary employees²¹⁰.

Today pension funds have provisions that attract the charge of direct discrimination as far as membership is concerned. There may, however, be provisions that give rise to indirect discrimination. Certainly, provisions that exclude part-time workers from access to pension funds are discriminatory. Many employers today employ staff on a temporary basis, even though in reality it approximates far more to permanent, albeit intermittent, employment. As with part-time work the people who take these jobs are predominantly women. Once again the spectre of indirect discrimination on the grounds of gender raises its head²¹¹.

Assuming that access to membership of a pension fund is permitted on a non-discriminatory basis, this does not resolve the question of possible discrimination. Some areas more often fail to be mentioned. These are the area of pension fund contributions, the area of pension fund benefits, the identification of pension fund beneficiaries and exclusion of non-union members. These areas are highlighted and raised by way of example²¹².

²¹⁰ Wallis "Protecting Members' Rights" (17 February 2004) www.pensionlawyers.co.za (accessed 2017-06-09) 3; Wallis *Protecting Members' Rights* A paper delivered to the Annual Conference of the Pension Lawyers' Association, Cape Town, (17th February, 2004) 3.

²¹¹ Wallis www.pensionlawyers.co.za 3; Wallis A paper delivered to the Annual Conference of the Pension Lawyers' Association 3.

²¹² *Ibid.*

5.2.1. Pension fund contributions

There is a trend towards defined contribution funds which are generally fixed on the part of both the employer and members as a percentage of remuneration. The more employees earn, the more their employer contributes to the pension fund on their behalf. Bearing in mind that, even though affirmative policies are in place, the vast majority of senior and managerial positions in South Africa are still held by white males, making the possibility of a claim being raised based on indirect discrimination on the grounds that women and blacks fill the majority of subordinate positions viable. It is unlikely that such a contention would succeed but it highlights the need to identify a situation as being one of indirect discrimination²¹³.

Of more concern under this heading is the provisions in the pension fund rules that provide additional benefits if additional contributions are made. If, however, funds make additional benefits available to members such as permitting them to buy back services or benefits by way of insurance cover, this should be done with caution. On the surface of it, such benefits are available to all but practically are only available to the better paid, and therefore mostly white male members of staff, are in position to take advantage of them. Any special benefit needs to be scrutinised from the perspective of potential indirect discrimination²¹⁴.

5.2.2. The identity of beneficiaries

The other area is of the identity of beneficiaries. Most pension funds provide for a person's dependants to enjoy the benefits of a pension after the member dies and this has given rise to claims by two classes of people. The one that has attracted the most publicity, although statistically insignificant, is the claim by persons living in same-sex relationships as dependants of their partners. Such a claim has been successfully advanced in South Africa by a judge in relation to her partner and the benefits payable in terms of the Judges Remuneration and Conditions of Employment Act, 88 of 1989²¹⁵.

²¹³ Wallis "Discrimination and Pension Funds" (August 2003) www.pensionlawyers.co.za (accessed 201-09-10) 3.

²¹⁴ *Ibid.*

²¹⁵ *Satchwell v President of the Republic of South Africa and another* (2002) 9 BCLR 986 (CC).

Another possible area for complaint would be the case of a permanent relationship on a heterosexual basis where the parties had opted not to get married. In the case of Judge Satchwell the Constitutional Court expressly said that:

Same-sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying, although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage....It is quite inappropriate in these confirmation proceedings for this Court to decide on the rights of unmarried heterosexual life partners which raise quite different legal and factual issues²¹⁶.

The fact that discrimination on the grounds of marital status is one of the prohibited grounds expressly mentioned in the Constitution cannot be avoided. In the South African context, there is a potential for a complaint of discrimination to be made on the grounds that persons who are married enjoy benefits that are not available to those who choose not to marry whilst enjoying a relationship that is otherwise indistinguishable from marriage²¹⁷.

5.2.3. Exclusion of non-union members

In the South African law, an employer with discretionary powers in terms of the rules of the fund has a duty to exercise those powers in good faith as in the *Chamber of Mines of SA v Council of Mining Union*²¹⁸. The Chamber of Mines brought an application asserting that the 'all-white' union [Council of Mining Unions (CMU)] was guilty of an unfair labour practice because it excluded employees of other races to become members of their pension fund. The Industrial Court held that the racially discriminatory practice could result in labour unrest and/or that the relationship between the employer and employees might be adversely affected. The application was thus granted and the CMU was ordered to make provision for admittance and the Chamber was authorised to make the necessary rule amendments²¹⁹.

²¹⁶ *Paixao and Another v Road Accident Fund* (05692/10) [2011] ZAGPJHC 68 (1 July 2011)

²¹⁷ *Ibid.*

²¹⁸ *Chamber of Mines of SA v Council of Mining Unions* 11 Indus. L.J. Juta 52 (1990)

²¹⁹ *Ibid.*

If the employer is guilty of discrimination by limiting access to a retirement fund or in determining contributions and benefits, relief will be ordered against that employer. If retirement fund rules form part of conditions of employment, the employer will have to negotiate rule amendments with employees and/or their representatives²²⁰.

5.3. Recommendations and conclusion

Eliminating discrimination in general starts with the dismantling of barriers by ensuring equal access to training, educating all on the usage of resources. It continues with fixing conditions for setting up and running enterprises of all types and sizes and putting in place good policies and practices related to hiring, assignment of tasks, working conditions, remunerations, benefits, promotions, lay-offs and termination of employment²²¹.

Effective mechanisms are needed to address the obstacles of discrimination when they occur. A common example involves claims for the non-discriminatory payment of wages, which should be set using objective criteria that takes into account the value of the work performed. ILO principles fix minimum thresholds while national laws and practices may well take a broader approach and include more comprehensive means in eliminating discrimination at work²²².

It is not just any difference between people that will support a claim of unfair discrimination. Leaving aside the possibility that categories other than those enumerated in Section 9(3) of the Constitution may emerge, it is only differentiation on one or other of the enumerated grounds that need raise concern. Such differentiation is presumed to be unfair but that presumption can be rebutted. What is necessary to for this is a justification for the differentiation based on demonstrable factual grounds. If one differentiates, one must be prepared to defend that decision on a basis of provable facts. That is the only way of showing that differentiation is not unfair discrimination²²³.

²²⁰ Van Niekerk et al *Law@work* 431.

²²¹ ILO "The International Labour Organization's Fundamental Conventions, InFocus Programme on Promoting the Declaration"
2002 http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_095895.pdf (accessed 2017-09-21) 5.

²²² *Ibid.*

²²³ Wallis www.pensionlawyers.co.za 3.

The important legal issue is that discrimination can be both direct and indirect. In an effort to minimise discrimination in the workplace, the laws that govern the relationship between employees and their employers should be maximally enforced and monitored.

CHAPTER 6 Pension Fund Reforms

6.1. Introduction

Retirement savings in the form of pension and provident funds are a very popular form of saving in South Africa and such funds are a very important vehicles for the provision of retirement benefits to members. Government also has a vested interest in the proper regulation and administration of retirement funds to lessen its burden in providing social security grants. The government does so by instituting pension reforms. Pension fund reforms are changes in the operation of a given retirement system to reduce government deficit spending without making money²²⁴.

The objective of the fund is to see pension funds members being able to accumulate sufficient assets to provide an income after retirement. In developing proposals to pursue these objectives, it is essential to give careful attention to aspects of the retirement funding environment that may significantly shape or influence reform options²²⁵. Most reforms can take a long time to be effected, as they have to go through Parliament processes for careful consideration, some are never effected and others are postponed. Pension reform evokes certain primary questions:

- What is a pension system?
- Why must it exist? and
- What does the balance sheet of a pension system look like?²²⁶.

There is a plethora of literature on the subject, and researchers have undertaken a wide range of empirical studies²²⁷.

Across the world, pension systems and their reforms are continuously in a state of flux driven by reform needs and a changing environment and its objectives, influenced by changes in views and perceptions. The ongoing financial crisis throughout the world and the uncertainties pension systems different from past ones.

²²⁴ **CNBC Africa** “Retirement reforms to protect pension fund members” (2014-07-10) https://www.revolvy.com/main/index.php?s=Pension%20reform&item_type=topic (accessed 2017-10-17) 1.

²²⁵ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 7.

²²⁶ Modigliani and Muralidhar “Rethinking Pension Reform” 2004 *University of Cambridge* 1.

²²⁷ Modigliani and Muralidhar, 2004 *University of Cambridge* 1.

The objectives of this chapter are to:

- i) review recent and ongoing key changes that are triggering reforms;
- ii) outline the main reform trends across pension pillars over the last two decades; and
- iii) present key policy areas on which the pension reform community will need to focus to make a difference²²⁸.

6.2. The evolution of pension funds in South Africa

Modern pension system can trace its roots back to the late 19th century. The earliest record of pension provision in South Africa is in 1837 when pensions were paid by the Britain to some of its military staff. In 1956, South Africa was the first country to have a comprehensive act to regulate retirement funds. Legislation in the form of the Pension Funds Act 24 of 1956 formalised the pension fund industry and South Africa was therefore a pioneer in this field²²⁹.

According to George;

The Pension Funds Act, promulgated in 1956, codifies the second pillar of the retirement funding system. There have been a number of ad-hoc amendments to the Act and a number of commissions have assessed retirement funding. These include the Mouton Commission (1992), Katz Commission (1995), Smith Commission (1995), National Retirement Consultative Forum (1997) and the Taylor Committee (2002). The National Treasury (2004) issued a discussion paper on retirement fund reform stating that the government seeks to build on the strengths of the established retirement funding environment, while progressively addressing its deficiencies. According to the National Treasury (2004), the 1980s and 1990s saw a dramatic transfer of employees from defined benefit to defined contribution funds. Under two defined benefit arrangements, members were guaranteed a specific benefit at retirement, based on years of service, with employers funding any shortfall. Under defined contribution arrangements, members received a benefit at retirement based on contributions

²²⁸ Holzmann R 2012 *Forschungsinstitut zur Zukunft der Arbeit* 6800 ; Holzmann H <http://onlinelibrary.wiley.com/doi/10.1111/issr.12007/full> 16.

²²⁹ George DT *Analysis Of South African Pension Fund Conversions: 1980–2006; Developing A Model For Dealing With Environmental Change* 23.

made to the fund and investment growth. Members thus carried the investment risk and benefit of defined contribution funds²³⁰.

The 1996 amendments to the Act restructured the management boards of pension funds by ensuring that the employees who are members of the fund have equal stake with the employer in its administration but this was retarded by the delays in establishing management boards in accordance with the amendments, with many funds seeking an extension of the deadline of the 15th December 1998. Even before the changes had been implemented by most funds a further blow to the established regime was struck by the judgment in the court in the *Tek* case²³¹.

The pension fund administration in South Africa was basically a closed shop between employers, who established the funds, appointed trustees and administered the funds and the actuaries who advised them. The prevailing stance was that the only interest that members and pensioners had in the fund was to receive what the rules provided²³².

There can be little doubt that these events shaped the changes in the administration of pension funds. On the plus side, beneficiaries now have a say in being able to live decently and with dignity in their retirement years, pensions are no longer a matter of employer benevolence. Instead they are recognised as being a form of deferred remuneration. On the negative side the changes have resulted in litigation, pension fund lawyers and even a Pension Lawyers' Association.²³³

There remains, however, an acute problem not only for some employees in the formal sector, but largely for those in the rapidly increasing informal sector²³⁴, with many people still lacking effective access to an affordable retirement funding vehicle.

²³⁰ *Ibid.*

²³¹ Nyenti M, du Plessis M and Apon L *Access to Social Services for Noncitizens and the Portability of Social Benefits Within The Southern African Development Community (Sadc) South Africa Country 5.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf
7.

6.3. Changes in objectives and reform needs

The Minister of Finance proposed several key reforms which were announced in the 2012, 2013 and 2014 Budgets. On the 9th of July 2014, National Treasury released a press statement on the impact of the proposed retirement reforms, including those relating to preservation of savings, aimed at ensuring that pension fund members are better protected and can retire comfortably, highlighting the major concern that South Africa's national savings rate is low and savings by households are the lowest.²³⁵

According to National Treasury:

The current system makes it too easy for workers to cash out their retirement savings when they leave their employer or change jobs. Individuals end up with less money as the money was not given enough time to grow. To avoid this, government seeks to encourage pension fund members to preserve their money in their own funds or with a financial institution when they change jobs, whilst also allowing some access to the funds.²³⁶

Currently, members of provident funds get their entire accumulated retirement money as cash at retirement. Unless this cash is saved such that it provides income for the duration of a member's life this arrangement can leave retirees vulnerable to poverty in later years. Government seeks to encourage members of provident funds to take a major portion of their retirement money as monthly pension payments instead of a once-off lump sum. Once again, the result is individuals end up not having enough money for retirement because the money is not given sufficient time to grow²³⁷.

National Treasury in its statement further noted public concerns that are fuelled by rumours that Government will take away people's hard-earned pensions and prevent them from accessing their funds²³⁸. These rumours led to mass resignations by civil servants in the Department of Education as well as police officers from South African Police Services.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

The outlook on global pension systems and their reforms since the early 1990s has changed markedly over time. The most recent reassessment is triggered by the ongoing global financial crisis and its implications for funded and unfunded pensions. The worldwide reassessment of the policy approach to pension system reform is broadly the result of three changes:

- a readjustment of objectives (such as a refocus on basic protection for the vulnerable elderly);
- moving reform needs (such as recognising the urgency of addressing the effects of population aging and deferred retirement ages); and
- perceived and actual changes in enabling environments (such as more realistic views about the capacity of funded schemes to manage risks, the achievable rates of return, and the fiscal restrictions to finance transition deficits)²³⁹.

6.4. Recommendations

6.4.1. Preservation and portability

In line with the recommendations of the various commissions, National Treasury wishes to discourage leakage in the retirement system by recommending preservation of benefits on the change of jobs, but allowing the member choice as to the fund in which the benefits are to be preserved. The National Treasury Task Team (NTTT) recommends that if an employee changes jobs and ceases to be eligible to belong to his/her old retirement fund, the benefit payable from the old retirement fund must not be available in cash but must be transferred to the employee's new occupational retirement fund of employee's choice, or the National Savings Fund, with the choice of transferee fund being made by the member.

Currently members of both pension and provident fund are able to withdraw all their retirement savings as a cash lump sum upon resignation with tax implications. However, members are encouraged to keep their savings until retirement and Government intends to ensure that members seek proper financial advice from their pension and provident funds before withdrawal.

²³⁹ Holzmann H <http://onlinelibrary.wiley.com/doi/10.1111/issr.12007/full> 17.

Holzmann recommends that the following factors be addressed when funds are transferred:

“But something was different this time. The Marikana strikers’ anger was mainly directed at the country’s black political leadership, particularly the NUM, a trade union that was famously active in the black-liberation struggle and that currently forms part of the ANC led ruling coalition. The level of their anger was much greater. They torched cars and fought with those still loyal to NUM and by the time they gathered on the soccer field, several among them were dead. There was a sense that the protest had a greater, more dangerous significance than an ordinary strike. Poor blacks seem to feel as frustrated with the democratically elected black government as they did with the apartheid-era white one and the government seems inclined to crack down on them in the same brutal ways the old white government did.”²⁴⁰

- Expenses in the transfer must be minimised
- The member must give reasonable notice to the fund
- If the member has not informed the old retirement fund of his/her choice to receive the funds within a reasonable period, the old retirement fund may transfer the money to an individual retirement fund selected by the board of trustees of the old retirement fund and inform the member accordingly. As the member has the option to transfer between individual retirements funds without charge, the member may move this money at any time thereafter
- The transferor fund may not deduct any expenses from the member’s benefit
- No party may reward, directly or indirectly, any person for inducing the member to transfer his/her savings to the transferee fund
- The whole, or a portion, of the benefit may be paid in cash under one, or both, of the following circumstances:
 - (a) where the amount involved is lower than a minimum amount determined by the regulator; and/ or
 - (b) where the fund has guaranteed a member’s housing loan, and the member defaults, in which case the retirement fund must pay as much as possible of the outstanding loan (after the deduction of tax), and pay any residual amount (after the deduction of tax, if

²⁴⁰ Fairbanks 2013 *The New Republic* 28.

appropriate) to the National Savings Fund on behalf of the member²⁴¹.

6.4.2. The National Savings Fund

The South African National Treasury Task Team proposes that the National Savings Fund (NSF) be created for low income earners, particularly in the informal sector, part-time and seasonal employees, domestic and agricultural workers. It has also suggested a new savings schedule be created in consultation with organisations/associations that have initiated other measures to encourage savings. It is envisioned that this fund will provide a suitable retirement funding vehicle to many low-income workers, and possibly to individuals in the informal sector²⁴².

Furthermore, it is suggested that in order to enable such individuals to escape the poverty trap, Government to exempt the benefits paid from the NSF from the means test and that employees saving through occupational retirement fund should be removed by incentivising savings through the NSF²⁴³. It is envisioned that the NSF would:

- (a) ensure affordable administration costs. Economies of scale should be achievable through the large numbers of subscribers to the NSF;
- (b) pay competitive investment returns with possibly a bonus being payable if moneys are retained in the NSF until retirement²⁴⁴.

6.4.3. Tax, legal and regulatory proposals

The 2017 South African Budget Review, published on 22 February 2017 and it contained several statements that may be of interest to pension funds, their investment managers and administrators as follow:

“But something was different this time. The Marikana strikers’ anger was mainly directed at the country’s black political leadership, particularly the NUM, a trade union that was famously active in the black-liberation struggle and that currently forms part of the ANC led ruling coalition. The level of their anger was much greater. They torched cars and fought with those still loyal to NUM and by the time they gathered on the soccer field, several among them were dead. There was a sense that the protest had a greater, more dangerous significance than an

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

ordinary strike. Poor blacks seem to feel as frustrated with the democratically elected black government as they did with the apartheid-era white one and the government seems inclined to crack down on them in the same brutal ways the old white government did.”²⁴⁵

i) Tax

- **Preservation of benefits after reaching normal retirement dates**

Currently, once an individual elects to retire, the Income Tax Act does not cater for the transfer of lump sum benefits from one retirement fund to another. The budget review proposes that transfers of retirement interests be allowed from a retirement fund to a retirement annuity fund, subject to fund rules.²⁴⁶

- **Tax-exempt status of pre-March 1998 build-up in public sector funds**

Currently, the Income Tax Act provides for the tax-free transfer of pre-March 1998 lump-sum benefits from a public sector fund to a pension fund. The budget review proposes that subsequent transfers of these lump sum benefits to another pension fund be tax free.²⁴⁷

- **Removing the time limit required to join an employer umbrella fund**

Existing employees who do not join a newly-established employer umbrella fund have 12 months within which to join the fund, after which they are unable to join. To encourage employees to contribute towards their retirement and remove practical difficulties, the budget review proposes that the 12-month limit be removed and that employees be allowed to join without time restriction, subject to the rules of the fund²⁴⁸.

- **Application of the cap on deductible retirement fund contributions**

It is currently not clear how the overall annual cap of ZAR350 000 on contributions to pension, provident and retirement annuity funds should be applied when determining monthly employees' tax. It is proposed that the amount of ZAR350 000 be spread over the tax year, which is a more prudent approach.²⁴⁹

- **Exchange control**

²⁴⁵ Fairbanks 2013 *The New Republic* 28.

²⁴⁶ Snyckers and Sedice “What the 2017 South African budget review means for pension funds” (22 February 2017) https://www.ensafrica.com/news/What-the-2017-South-African-budget-review-means-for-pensionfunds?Id=2548&STitle=retirement%20funds%20ENSight?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original (accessed 2017-07-13) 1.

²⁴⁷ Snyckers and Sedice “What the 2017 South African budget review means for pension” (10 March 2017) <http://www.mondaq.com/southafrica/x/575754/Income+Tax/What+The+2017+South+African+Budget+Review+Means+For+Pension+Funds> (accessed 2017-07-13) 1.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁴⁹ *Ibid.*

Government proposes that local collective investment scheme management companies registered with the Financial Services Board and regulated under the Collective Investment Scheme Control Act, 2002 be allowed to list exchange-traded funds referencing foreign assets on South African exchanges. These funds will not be subject to macro prudential limits on amounts that may be invested offshore. South African institutional investors and authorised dealers will be allowed to invest in such funds, subject to their respective macro prudential limits. These funds will be classified as foreign assets for prudential purposes.²⁵⁰

ii) **Legal and regulatory**

- **Default regulations to improve market conduct**

The second revised draft of the default regulations was released for public comment in December 2016. The aim of the default strategies (investment, preservation and annuities) is to ensure that the retirement savings of members are better protected through lower charges as well as provide better value for money, especially to members who do not exercise any choice. The default annuity strategy section has been considerably simplified, given the difficulty of automatically defaulting members into annuity products that could be irreversible. While concerns on the blanket ban of performance fees and guaranteed products have been addressed, these may be reviewed in the final regulations published later this year. Further steps to lower charges will follow.²⁵¹

l ii) **regulatory proposals**

- In 2017, amendments to the Pension Funds Act considered the introduction of an umbrella fund and to clarify the extent, purpose and interpretation of the powers of the Registrar of Retirement Funds to deal with funds that do not have properly constituted boards. The National Treasury will also engage with the Financial Services Board to find a sustainable policy solution to the challenge of unclaimed benefits²⁵².

Although the government suggests that the new tax laws were put in place to safeguard the retirement savings of all South Africans who contribute to retirement funds, the Congress of South African Trade Unions (COSATU) believes the decision

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

was unilaterally taken and the National Economic Development and Labour Council (NEDLAC) process was undermined where employees are represented and their rights, including those of provident and provident funds are protected²⁵³.

6.5. Supplementary recommendations

To supplement the efforts of National Treasury regarding pension reforms, the researcher refers to MacKellar's suggestions that countries like South Africa can review their practices in line with those of international communities with regards to how to extend formal pension coverage to informal sector workers, drawing on experiences from developed but in particular developing countries. Suggestions are made below for the government to consider when reforming their pension systems and working to increase informal sector coverage.²⁵⁴ It is important that a government adopts, or at the very least considers adopting, a combination of the following initiatives rather than a single policy.

6.5.1. Flexible terms

Allowing more flexible contribution and withdrawal terms for informal sector workers can be important for encouraging their participation in mandatory or voluntary pension systems. Contribution schedules should be able to reflect part time or seasonal work, with larger contributions allowed at certain times of the year and contribution holidays during other periods. Furthermore, access to benefits should be allowed, but strictly controlled, for emergency and essential purposes. Setting up industry based schemes for workers on short contracts who change jobs frequently also allows flexibility and should therefore help to raise participation rates.²⁵⁵ An excellent example is the schemes available in Hong Kong, China for workers in the catering and construction industries.

The following should therefore be considered:

- **Target and incentivise those who are capable of extra saving**

²⁵³ Pamla S "COSATU strongly condemns the signing of the tax legislation by President Jacob Zama" (13 January 2016) <https://groups.google.com/forum/#!topic/COSATU-press/J02vQFDOJPO> (accessed 13 January 2017) 1.

²⁵⁴ MacKellar L "Pension Systems for the Informal Sector in Asia" (March 2009) <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/PensionsDP/0903.pdf>, <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0903.pdf> (accessed 2017-09-09) 33.

²⁵⁵ *Ibid.*

In order to encourage more people in the informal sector to join the structured pension system, it may be useful to target those who are capable of extra saving. Before launching a new pension system, therefore, those who are able to put aside additional money and are therefore most likely to be the new entrants to the system should be investigated and considered. Research studies could be conducted to identify and analyse the main concerns of this identified group such as their income and social profiles, for example. With this data, it should be possible to design new policies to be as attractive and flexible as possible, and adapted to the specific needs of the target group.²⁵⁶

- **Financial education campaigns**

Financial education campaigns may also be used to promote participation in the new system. The benefits of introducing a new system are consequently more likely to be maximised.²⁵⁷

- **Tax incentives**

Tax incentives should also be carefully designed, with mechanisms such as tax credits and matching contributions considered to ensure that incentives successfully reach the informal sector.²⁵⁸

- **Utilize existing infrastructure from a broad range of sectors and broad financial sector players**

Targeting the informal sector is no easy task. Such workers are a disparate group, often from rural areas, with unstructured working arrangements. These are precisely the reasons for formal pension provisioning not reaching them. Consequently governments may need to think broadly and to use different routes to reach this group and provide them with coverage for retirement. Using everyday contact points, such as post offices, credit unions, money transfer agents or rural banks as partners may be one option (as is being explored in India). Alternative finance providers, such as the retirement related microfinance programmes which are being developed in countries such as Bangladesh and the Philippines, are also an option to be explored.²⁵⁹

- **Centralised administration agency**

Costs are an important aspect of any pension system, with even small fees and charges able to erode accumulated pension assets considerably over the long-term.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

Designing low cost systems is particularly important for informal sector workers who are likely to have smaller pension balances due to lower incomes (and therefore contributions) and often interrupted and uncertain working patterns. When designing a new pension system, governments may therefore wish to consider establishing a centralised administration agency, which serves as a national clearing house and can provide several functions. These functions can include transaction settlements, account administration and record keeping, some examples of reducing costs. Furthermore, this agency could be established in the form of a semi-governmental agency in order to avoid conflict of interests. As reviewed earlier, the Indian and UK governments have considered setting up a central clearinghouse as a key integrated part of their new pension reforms²⁶⁰.

6.6. How will legislative changes affect employees?

The question is, however, how this alignment of provident and pension funds will impact on employees' rights to access their provident and pension funds when they retire or resign²⁶¹ or when they are unable to provide for themselves and their beneficiaries?

6.6.1. General terms

Both pension and provident members may be affected by the newly-introduced annual contribution cap of R350, 000. Members who currently pay more than R350 000 by way of member and / or employer's contribution, will pay tax on the contributions above the cap and will accordingly see a reduction in their take-home pay. The reference 'taxable income' enables pension and provident fund members who receive extra income like from rental, alternate employment or investments, to claim a pension fund deduction against such income. Previously such extra income could only be used to claim deductions on (Retirement Annuity) RA contributions. Members who wish to top up their retirement fund savings will no longer need to take out a separate RA.

6.6.2. Pension fund members

One notable change is that the minimum fund balance requiring annuitisation will increase from R75 000 to R150 000 for Pension fund members and members will

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

also be able to transfer their pension fund proceeds tax-free to a provident or provident preservation fund²⁶² of their own choice.

6.6.3. Provident fund members

Provident fund members are most affected by these changes as they will have to switch to the pension fund model, requiring them to purchase a compulsory annuity at retirement with two-thirds of their fund balance and their vested rights will remain under the old rules. They will also be able to claim a larger tax deduction on their contributions, increased from 20% of pensionable income to 27.5% of their gross remuneration or taxable income²⁶³.

6.6.4. Retirement Annuity funds (RA)

RA investors will receive the same tax deductions as other savers, and will also be able to claim RA deductions against pensionable or retirement-funding income within the prescribed limits²⁶⁴.

Generally, the reforms will affect the recording and attribution of the employer's contribution in respect of active members. It would also increase the amount that could be contributed to the fund tax-free for the majority of its members. These changes will mostly affect members of provident funds, who will then have to split their retirement benefit into a one-third lump sum and two-thirds pension of their benefits, while retaining the right to take all amounts accumulated until this date as a lump sum²⁶⁵.

The Revenue Laws Amendment Act 2016 postponed the reforms of retirement benefits to 1 March 2018 to allow for further consultation with the National Economic Development and Labour Council (NEDLAC). Discussions in the council and other interested parties will continue to reach consensus and if no agreement is reached,

²⁶² 10X investments "The impact of retirement reform coming into effect on 1 March 2016 16" (JANUARY 2017) <https://www.10x.co.za/blog/impact-of-the-retirement-reform-coming-into-effect-march-2016> (accessed 2017-06-10) 1; **Webmaster WL** "The impact of retirement reform coming into effect on 1 March 2016" (7th April 2016) <http://wilderlockitch.co.za/impact-retirement-reform-coming-effect-1-march-2016/> (accessed 2017-06-10) 1.

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

government will review the proposed tax models and take better account of the needs of low- and middle-income members of retirement funds²⁶⁶.

6.7. Conclusion

Leakage from the retirement fund system in South Africa is significant and has a negative impact on the replacement ratio at retirement. The costs of administration and insurance premiums huge and are a major concern and they need to be kept in check, as cumulatively over time, can have a negative impact on the benefits member are to receive at retirement²⁶⁷.

Coverage in the formal sector is relatively good, even when compared to international levels. The retirement funding system itself may be considered sound and funds which are supervised by the Registrar of Pension Funds are generally regulated to international standards. The challenge remains, however, to provide adequate mechanisms for retirement for those in the informal sector and/or those are able to make irregular contributions²⁶⁸. The point to recognise is, informal economy is likely to remain and expand in size or scope. Once this fact is acknowledged, all new policies or changes to existing policy frameworks must take note of the informal economy. If not, labour law and social protection may become completely irrelevant to the majority of South Africans²⁶⁹.

Finally, in considering treating the informal sector better and differently, pension policy developers not neglect traditional formal-sector schemes²⁷⁰.

The loss of employment can be traumatic and impose serious hardships, especially if the member is unemployed but is not permitted to access his / her retirement

²⁶⁶ Snyckers and Sedice https://www.ensafrica.com/news/What-the-2017-South-African-budget-review-means-for-pensionfunds?Id=2548&STitle=retirement%20funds%20ENSight?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original) 1.

Snyckers and Sedice <http://www.mondaq.com/southafrica/x/575754/Income+Tax/What+The+2017+South+African+Budget+Review+Means+For+Pension+Funds> 1.

²⁶⁷ National Treasury http://www.treasury.gov.za/comm_media/press/2014/2014070901%20-%20Statement%20on%20the%20Impact%20of%20the%20Proposed%20Retirement%20Reforms.pdf 8.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ MacKellar L <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0903.pdf> 33.

savings. When a member opts to exit their fund as a result of resignation, retrenchment, dismissal, disability, death or retirement, the writer recommends that an employee be permitted access to their retirement savings. If changes are implemented as proposed, however, the reforms will infringe on the rights of employees.

The writer agrees with Govindjee and Dupper on the following:

The urgent issue for pension reform is not only the need to introduce social protection systems to help alleviate demographic pressures, poverty amongst the elderly and provide support for households²⁷¹ but to ensure that the constitutional right to social security and social assistance speaks of the “right to access” as opposed to an unequivocal “right to”. A comprehensive and integrated approach is required in the realisation of these rights due to the fact that the rights are interrelated, interdependent and indivisible. The “right to access” requires that realising a particular socio-economic right, such as the right to access pension and provident funds, would require that other elements which do at times form the basis of other socio-economic rights must be in place as well. Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life. The state has a duty to unlock the system so that all people, at all economic levels of society, are able to access social security. The implication would be that those who have the financial means to afford social security will be placed in a position that allows them to adequately access it²⁷². In addition to reasonable legislative measures, the state must also put in place well-directed policies and programmes, implemented by the executive, to realise this right. In order to be reasonable the measures adopted to realise the right must be understood in the context of the Bill of Rights as a whole²⁷³.

²⁷¹ Stewart and Yermo “OECD Working Paper on Insurance and Private Pensions” 2009 *OECD* 30 2.

²⁷² Govindjee and Dupper, presented at the Law and Poverty Colloquium, Stellenbosch 5.

²⁷³ Nyenti M, du Plessis M and Apon L *Access to Social Services for Noncitizens and the Portability of Social Benefits Within The Southern African Development Community (Sadc) South Africa Country* 5.

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