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Botswana Pension Society Presents a Breakfast Seminar on

“Distribution of Death Benefits under the Retirement Funds Act 2014”

by

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OVERVIEW

- Regulatory framework on death benefits.
- Powers and duties of trustees in relation to death benefits
- Impact of the RFA on the Matrimonial Causes Act 1 of 1973, as amended
- Deductions and Withholding of death benefits (is this permissible?)

INTRODUCTION

- The Retirement Funds Act 2014 (RFA) and its regulations came into effect in April 2017.
- The RFA is part of Botswana's financial services reforms that began when NBFIRA Act 2006 was enacted.
- Experience from South Africa to extent relevant will be relied upon in the course of the day.

REGULATORY FRAMEWORK

- Death benefits are now regulated under sections 38 and 39 of the RFA and Regulation 29 of the RFA.
- Section 38 provides, in relevant parts, that:
“Notwithstanding the provisions of any written law relating to insolvency, if an estate of any person is entitled to a benefit payable in terms of the rules..., such benefit ...shall not be deemed to form part of the assets in the insolvent estate ...and may not be attached by the trustees, insolvent estate or creditors.”

REGULATORY FRAMEWORK

- Section 39 goes further and provides that:

“subject to section 38, any benefit payable by a fund upon the death of a member shall not form part of the assets in the estate of the member, but shall be paid to dependents and nominees designated in writing to the fund by that member before his death, in such proportions as the board deem equitable”

Provided that if (1) board does not become aware of any dependants and (2) the member has not designated a nominee or a nominee to receive only a portion...

The balance shall be paid to the estate of the member.”

DEPENDANT DEFINED

- Section 39 must be read together with the definition of a dependant and nominee in the RFA which says a dependant means:
“(a) any person in respect of whom the member is legally liable for maintenance;
(b) a factual dependant;
(c) a person in respect of whom the member is not legally liable for maintenance, if such person
 - (i) was in the opinion of the board dependant on the member for maintenance at the time of death; or
 - (ii) is the spouse of the member;
 - (iii) is a child of the member including...; or
- (d) a person in respect of whom the member would have become legally liable for maintenance had the member not died.



DEPENDANT DEFINED

- Factual dependant is defined as “a person who was financially dependent on the member at the time of death”
- A nominee is “a person, other than a dependant, nominated by a member as a beneficiary under a fund”

- **Regulation 29(1)** requires a pension fund to ensure members complete a beneficiary nomination when they enter the fund, when a member's dependants change or when member changes his or her nominees.
- A member has a responsibility to complete a nomination.
- Why do you think it is now a requirement for a fund to require a member to submit a nomination?
- Board may pay according to nomination if:
 1. no dependant is excluded and
 2. The nomination is reasonable.
- Board can only change the nomination if it is unreasonable and a dependant has been excluded.



PURPOSE OF SECTION 39

- To promote social protection over the wishes of the deceased member.
- It restricts a member's freedom to decide how his assets should be distributed.
- To protect people who were financially dependent on the member from being left without financial support.
- The RFA entrusts the Board with the authority to implement this policy.
- To implement this policy, the RFA imposes four duties on the trustees.



FOUR DUTIES UNDER THE FRAMEWORK

- The Board has four duties which are:
 1. Ensure that members to complete and update beneficiary nominations.
 2. Investigate the dependants and nominees of the deceased member;
 3. Exercise discretion and make an equitable distribution of the benefits to dependants/nominees within 12 months;
 4. Determine the best method of payment.

DUTY TO COMPLETE A NOMINATION

- Reg 29(1) requires trustees to ensure every member of the fund has completed or updated her nomination
- This duty must be read with sect 15(d) of the RFA. It means the Board must put in place a system to ensure members are made aware of their rights and obligations and that enable them to carry out this obligation.
- For example, the Trustees may develop a standardized form that members will be required to fill out as prescribed.
- Put in place confidentiality measures.
- Why is it now a duty of the Board to ensure nominations are completed?

DUTY TO INVESTIGATE

- There is a duty on the board to trace the dependants of the deceased.
- The mere fact that a person qualifies as a dependant does not always entitle him to a benefit because the Board has discretion to vary a nomination.
- Reg 29(3) provides that if the Board is satisfied (after an investigation) that the following two considerations are in order, it may pay according to nomination:
 1. No dependant has excluded from the nomination. AND
 2. The nomination is reasonable (objectively speaking).
- If the above conditions are not in order the Board has the freedom to ignore the nomination. The contrary is true.

- Notice that the RFA makes it hard for a nomination to be ignored.
- Only if both conditions have failed.
- It is in this context that a nomination becomes binding.
- In fact the general rule now is that a nomination becomes BINDING unless it (1) excludes a dependant and (2) it is unreasonable.
- It is important for the Board to conduct investigations.
- This has now become a major risk management issue for pension funds in Botswana.
- As a general rule, a nomination is no longer just a guide. It becomes a guide if it fails to meet the conditions above.

- Pension members have been given an opportunity to determine how their benefits should be distributed.
 - The freedom is limited through the agency of the Board in order to promote social protection .
 - What is an unreasonable nomination?
 - It is a well-established principle in administrative law that discretionary power must be exercised properly.
 - A proper exercise of discretion requires that the Board must make independent judgment by taking into consideration all relevant factors and discard irrelevant factors.
 - The decision must not reveal an improper purpose or be irrational
 - Based on these principles, the Board cannot ignore a nomination without a rational basis or a thorough investigation and consideration of all relevant factors.
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Contd

- If a complainant is able to demonstrate that the Board failed to consider all relevant factors or acted irrationally in making a decision, the Board's decision is reviewable on administrative law grounds.
- Thus I disagree with the ruling of Judge Tafa in the case of *Odisang v Debswana Pension Fund* (2016) that a decision to distribute death benefit by a pension fund does not constitute administrative action and hence is not subject to judicial review.
- I believe trustees exercise public power when they make death benefit distributions, and that those decisions are reviewable.
- It is public power because the source of that power is an Act of Parliament. This is the kind of power that is normally exercised by the state. In our case, Parliament delegated that power to trustees through the instrument of sec 39 of the RFA.

DUTY TO INVESTIGATE

- The duty to investigate requires proactiveness on the part of the Board.
- There are two important cases that were decided by the South Africa Pension Funds Adjudicator that I would like to highlight in order to emphasize a point about the duty to investigate.
- In *Dyas v CTS Provident Fund* [2003] when setting aside a death benefit distribution by a Board, the Pension Fund Adjudicator said the following:
- “As I have held previously... there is a duty on the board ... to conduct an investigation and take all reasonable steps necessary to locate the dependants of the deceased. There is a common misconception amongst the parties ... the pensions industry at large, that there is a duty on a dependant to come forward and inform the board of his or her status as a dependant. This is not so. The duty is placed squarely on the board ... to trace all the dependants of the deceased.”

DUTY TO INVESTIGATE

- The principle in *Dyas v CTS Provident Fund* is as applicable in SA as it is in Botswana.
- Trustees cannot wait for dependants to come to them.
- Even if a person comes forward and claims to be a dependant this does not relieve the board of the duty to investigate.
- Just a note on *Masupe v. Kelekwang* 2002. The court upheld a board decision to deny benefits to the mother of the deceased on, among other things, the basis that she did not establish the extent of her dependency.
- The Second case is *Peete v SACCAWU National Beneficiary Fund* [2016] where the Adjudicator frowned upon the practice by funds to obtain affidavits and make decisions solely on their basis.
- The Adjudicator set aside the Board's decision based on the following reasons:

DUTY TO INVESTIGATE

- “This Tribunal views the [Board’s] action in a very serious light as it evidently abdicated its responsibility of conducting a thorough investigation in order to identify the beneficiaries... Evidently, the board ... made no effort to conduct an investigation but relied... on the affidavits submitted by the complainant without verifying whether or not such information was correct. In the circumstance, this Tribunal is of the view that the board ... failed to conduct a proper investigation.”
- In *CALA Diaries v Orion Money Purchase Provident Fund* [2001] and other cases, the Adjudicator has consistently ruled that pension funds cannot delegate to the complainant its duty to investigate.
- The Board should investigate and find the dependant.
- Does it mean as trustees we should not rely on affidavits? No. It simply means we cannot rely on affidavits alone.

DUTY TO INVESTIGATE

- What we learn from these cases is that while affidavits are important, they do not relieve the board of its duty to investigate.
- Also, we learn that it is not the duty of dependants to be proactive in coming forth with information about their dependency.

DUTY TO MAKE EQUITABLE DISTRIBUTION

- RFA says that the Board may pay benefits in such proportions as it deems equitable.
- In the past, the law never guided the Board in this regard.
- Reg 29(5) provides guidelines to the Board on what will constitute equity by requiring it to consider the following:
 1. The degree of dependency;
 2. The age of the dependant or beneficiary;
 3. The likely duration of dependency;
 4. The relationship to the deceased;
 5. Nomination form; and
 6. Any distribution made by the deceased in his or her will.
- There is no hierarchy in these factors.

DUTY TO PAY

- Duty to Pay in 12 months- where no dependants exist.
- Payment Methods:
 1. Direct payment to a major beneficiary
 2. Payment to a trust
 3. payment to a person recognised in law or appointed by a court as the person responsible for managing the affairs of that dependant or nominee;
 4. payment to a beneficiary fund.
- Trustees in Botswana may wish to seriously consider Beneficiary Funds as a new vehicle to distribute death benefits to beneficiaries.
- Tax benefits; ring fenced; and cheaper than trusts.

IMPACT ON MATRIMONIAL CAUSES ACT

- Sec 40 of the RFA provides the Board with the power to deduct certain amounts from death benefits.
- The most predictable impact of the RFA on the Matrimonial Causes Act is that a Board may be expected to deduct any amount assigned from a member's pension benefit to a non-member spouse in terms a decree under that Act.
- The Board **MAY deduct** because the RFA places some restrictions on the potential deductions.
 1. Cannot deduct more than what is in the member's account.
 2. Any amount payable in terms of a maintenance order takes precedence over a decree under the Matrimonial Causes Act. Sec 40(4).
- Financial dependency is favoured.

POWER TO DEDUCT AND WITHHOLD

- It is important to highlight that section 40 provides that the Fund MAY, and not MUST, deduct
- This means the Board has discretion, which it may exercise against making a deduction.
- In the SA case of *Highverld Steel and Vabadium Corp v Oosthuizen* [2009], the court found that the power to withhold benefits is implied from the power to deduct.
- It found that the purpose of the power to deduct was to protect the employer and if no power to withhold was present that purpose would be defeated.
- It ruled that the Board has discretion to withhold benefits , at least in relation to money owed to an employer.

POWER TO WITHHOLD

- After withholding benefits, an employer must take steps to recover the money owed to him.
- Fund cannot withhold benefit indefinitely
- The power to withhold benefit is a discretionary power, (determined on a case by case basis).

POWER TO WITHHOLD BENEFITS

- The pension fund must balance competing interests and look at employer's case against the member
 - Employer has right not to be deprived of his property
 - Presumption of innocence in the section 10 of the Constitution of Botswana
 - Employer has right to recover misappropriated money.
- It is not clear what interpretation the courts in Botswana will give to section 40.
- This remains a open question that will have to be tested sooner or later.

CONCLUSION

- The RFA gives clear duties on death benefits to trustees than in the past.
- Despite this, trustees should ensure that they put in place proper systems as a compliance mechanism but also a risk management measure.
- As trustees when in doubt about making a decision, seek independent professional advice.
- You are not only entitled but also required to seek professional advice in terms of section 14(2)(b) of the RFA.

THANK YOU



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