BENCHTEST
REVIEW

Celebrating 20 years of Namibian excellence

1999-2019

Retirement Fund Solutions

Managed by Namibians. Trusted by Namibians.

20

years of GREAT values

Governance

Full-time internal audit ensures your peace of mind.
~
Our disaster recovery site ensures continuity.
~
Our Professional Indemnity cover stands at over N$ 70 million.

Rigid quality standards

We have 5 Chartered Accountants on our staff.
~
7 of our staff are members of relevant professional associations.
~
We have more than 1,000 years of relevant experience amongst 70 employees.
~
We have a reputation for rapid and exact service.

Excellence through ownership

What you see is what you get. We have no foreign shareholders.
~
All staff share in the profits of the company.
~
We have a long-term vision.

Added value

Our top management is involved in client service.
~
Administrator and technical resources are allocated to each client.
~
We are not bottom-line driven.
~
Our growth is measured by our customer requirements.
~
We don't have sales targets, and there are no hidden costs.

Track record

We have 20 years behind us as a company.
~
We have a stable executive team with years of experience.
~
We have an exceptional reputation.
~
We have significant market share.
~
We are known for our transparency and full disclosure.

Retirement Fund Solutions
Managed by Namibians. Trusted by Namibians.

WHAT'S INSIDE

A word from the editor 01
Tilman Friedrich on founding principles 02
A word from the managing director 05
Can you request that your death benefit be paid into your testamentary trust? 06
Transfer of retirement capital to a memberowned annuity 06
Pension and pension preservation funds: Commutation of annuities/Lump sum benefits upon death of a pensioner 07
20 Years of RFS 08
Other income can result in tax surprises for pensioners 10
Section 14 transfers and unclaimed benefits 11
PMR Awards 12
Death benefits – did you know that... 13
PF 01/2019 re payment of premiums by fund of separately insured benefits 13
Payment of pension benefits into jointly held accounts 14
Recovery of tax debt from pension benefit 16
What our clients say about us ... 18
20 Pension backed housing loans are risky business
21 The practical consequences of tax practice note 5 of 2003
21 Can a death benefit be paid in instalments?
22 Corporate governance and managing trustee expenses
24 What should a trustee's term of office be?
25 Can your employees deduct voluntary contributions to the fund?
26 How does absence from work affect the employer, the fund and the member?
29 A word from Benchmark Retirement Fund
30 What to consider and how to invest when you retire
31 Why should pension funds offer dread disease?
31 Can a fund member receive more than one disability benefit from different policies?
32 Some of our clients
34 Pension or provident fund, lump sums or pensions – where to from here?
36 Can capital be transferred from a retirement annuity to an untied insurance product at retirement?
38 2018 - Changing of the Guard

A WORD FROM
THE EDITOR

Dear Esteemed Reader,

On behalf of RFS I am honoured and delighted to introduce what we hope will be the first of many editions of the *Benchtest Review*. How did the publication get its name and does it bear any relation to the monthly "Benchtest" newsletter published by RFS? Allow me to tell you a little story about a wise man in a land far, far away....Hang on a minute, this is the wrong introduction! What I am about to tell you is no fairy tale (although the plot does contain a couple of extremely wise men). 2019 marks Retirement Fund Solutions' 2oth year in business. In celebration of this memorable occasion, Marthinuz Fabianus, MD of RFS (and one of the duo of wise men central to our story) asked me to design a publication to pay tribute to Tilman Friedrich (you guessed it; the other wise man). My brief was to ensure that all the work that Tilman Friedrich has put into the monthly Benchtest newsletter was recognized in a compilation of value to anyone with an interest in pension fund matters. My reaction at the time was literally and I quote, "Wow! This is such an exciting project and a fitting tribute to an Industry Giant. I'm honoured to be able to assist in this regard". And these are still my sentiments some four months and much editing later! The name of the publication was my small contribution to making sure we stick to the plot.

Andreen Moncur

I am indeed privileged to walk among giants at RFS.

I have been involved with RFS in one or another capacity since before its inception. My involvement stretches back to early 1999 when Tilman Friedrich and Mark Gustafsson were formulating their vision for RFS. While I cannot claim any credit for the resounding success of RFS, I can give you a glimpse of the inside story on a Namibian success story. When RFS started, I was operating on my own from home. We agreed to share our very first offices (in the swishy Namlex Chambers). Tilman, Mark, Charlotte Drayer and I shared everything from the kettle to the pc to the rent, not to mention business plans and potential client leads. Whoever was in the office doubled as receptionist. In those heady days of big, audacious, scary dreams, I watched as RFS grew and grew and grew.... While the Namibian retirement funding landscape is almost unrecognisable today, it is apparent that one company and its flagship product are still the premier Namibian brands in this field. This is indeed a fitting testament to the vision, dedication and leadership of Tilman Friedrich. Over the past 20 years I have worn many hats in relation to RFS and Benchmark and am indeed privileged to walk among giants at RFS. Please join me in wishing all at RFS the happiest of 2oth birthdays and Godspeed for the next 2o years. Here's to many more *Benchtest Reviews*... I have every confidence in Marthinuz and the team.

In future we hope to be able to publish the *Benchtest Review* on a regular basis (perhaps annually) as the pool of expertise, experience and industry knowledge within RFS is unparalleled in Namibia. We are keen to respond to the needs of our readers and look forward to your feedback on this first edition. Please email us at: benchtesteditor@rfsol.com.na.

We trust that you will find the inaugural *Benchtest Review* insightful and valuable, both as an historic document and as a *vade mecum* in navigating the retirement funding landscape. May *Benchtest Review* become the definitive companion for Namibian pension practitioners!

Andreen Moncur

September 2019

TILMAN FRIEDRICH

ON FOUNDING PRINCIPLES

Tilman Friedrich

Chairman of the Board:
Retirement Fund Solutions Namibia (Pty) Ltd

To understand how we arrived at our vision as we had defined it when we established Retirement Fund Solutions Namibia (Pty) Ltd in 1999, I need to go back in history past the date the company was established.

Our founding team was the senior management team at United Pension Administrators, the Namibian subsidiary of SA based Ginsburg Malan and Carsons. UPA pioneered pension fund administration when it won its first appointment as administrator of the Ohlthaver and List pension and provident funds in 1990, the time I joined UPA, initially as finance manager but soon to be promoted to general manager. Over the years UPA became the biggest local pension fund administrator, until it was bought out by much smaller local, but much larger SA competitor, Alexander Forbes at the beginning of 1999.

Having operated totally autonomously and very successfully until the take-over, RFS senior management team realised that there was no future for an autonomous management team at the Namibian operation of Alexander Forbes and that the business model would change drastically from that promoted by the UPA team successfully with lots of conviction, dedication and commitment.

The decision to give up a cosy well-remunerated job for a jump into the cold water was not easy.

The decision to give up a cosy well-remunerated job for a jump into the cold water was not easy, but our sense of owing it to our then clients to serve their funds in the way they had become used to convinced us to start from scratch all over again as new operator, Retirement Fund Solutions Namibia (Pty) Ltd. Over the years at the helm of UPA we picked up a lot of experience and we made mistakes in the way we managed the company. Continuing what we did right as UPA and avoiding the errors we made then were key elements to what informed our business model and philosophy. The other key element to this end was our strategic positioning in the fund administration market that comprised of us as the only local operator and four SA based competitors. It obviously required of us to clearly define our differentiation vis-à-vis our foreign based competitor and to understand where we can be competitive, where we cannot be competitive and how this will impact our business model and philosophy.

We realised that we cannot compete in respect of technology, that we cannot compete on price as the result of lacking economies of scale and that we cannot compete in respect of specialist expertise. We also realised that a one-stop-shop is generally not in the interest of clients for reasons of good governance and that the consequent unbundling and outsourcing of the different service components to different service providers required a different approach to someone offering core fund management services such as fund administration and consulting. At the same time and as every coin has two sides we realised that we can offer the other side of the coin. We will offer continuity through a stable staff complement sitting in the same boat together with our staff; we will have the best expertise in day-to-day fund management based on the fact that we were the pioneers of funds administration in Namibia; our marketing efforts will be complemented and reinforced by local independent employee benefit consultants; our top management will be accessible to top management of our clients; we will not be constrained by rigid processes typically the prerogative of large multi-nationals but will be flexible and responsive to client needs.

With this background we crafted the vision, the philosophy and the business model for Retirement Fund Solutions Namibia (Pty) Ltd. Firstly, we realised that being more expensive than our competitors, not being able to compete on price, also meant that we cannot sell ourselves but have to be bought; we will not grow fast as we will have to rely on word of mouth and it meant that we will only appeal to a minority of businessmen to whom service is more important than price. As the result of this and considering that there were four competitors in the market we had to see ourselves as a niche player that should have the potential to conquer between 20% and 25% of the market covering a membership of between 20,000 and 25,000. This in turn meant that we would not employ more than 25 staff, a vision that appealed very much to everyone who had previously experienced working in a much larger team of close to 60 staff.

Anticipating the impact of Namibia's independence on the business environment in general and the pension administration industry specifically, was not difficult and it was quite clear to us that we needed to offer a package that appeals to the new environment in terms of shareholding, management and staff and that is not brought upon us through market pressure but is installed in a well-managed fashion that keeps the interests of client service at its centre. After our extensive efforts to draw in the right business partners at shareholder level proved unsuccessful, we adapted our philosophy to rather uplift the best qualified staff with the right experience and attitude to that level. In this way it was easier to align the interests of our key staff with those of the company and to attract and retain the right calibre of staff

20 Years later, Retirement Fund Solutions now looks quite different to what we had envisaged in terms of market share and staff numbers. Today our market share in the private fund segment is 57%, based on assets under management and 50% in terms of members administered. In the umbrella fund segment our market share is 25% in terms of assets under management and 12% in terms of members administered (all these figures excluding the all-dominating GIPF). Today our staff complement is 70. Evidently we had totally misjudged the premium clients are generally prepared to apply to service. In this regard we 'unfortunately' failed to stick to our vision, and in the process we lost a few founding staff members who had fully inculcated our vision and were then disenfranchised by our 'unwanted' growth. It is true though that success breeds further success and the end of growth heralds the start of demise!

Our vision of then, how to craft a business model and a philosophy that magnifies our strengths and minimises our weaknesses vis-à-vis our competitors, still remains firmly in place.

Our vision of then, how to craft a business model and a philosophy that magnifies our strengths and minimises our weaknesses vis-à-vis our competitors, still remains firmly in place. It has served us extremely well and should continue to do so as we move into the future. It is incumbent upon our senior management team to know where we came from and what defined our success, to know where they are heading!

Tilman H. Friedrich

Chairman of the Board: Retirement Fund Solutions Namibia (Pty) Ltd

A WORD FROM THE MANAGING DIRECTOR

Marthinuz Fabianus

Managing Director:
Retirement Fund Solutions Namibia (Pty) Ltd

Since the early 1990's to date, the Namibian pension funds landscape has been characterised by significant changes and a complete overhaul of the structures of pension funds, role players as well as the regulatory framework. The period from 1990-2000 heralded an era of the unbundling of pension funds from underwritten or insured funds where the insurance companies were dominant and managed employer pension funds from A-Z within a policy of insurance. During this period, the privately administered pension fund concept took hold and there was a move by many funds that unbundled their service yokes through the appointment of independently established administrators of stand-alone funds; where funds were set up as separate legal entities, operating with own bank accounts and a board of trustees with equal representation between employer (sponsor) and employees (members).

The period from 2001-2010 saw the eventual withdrawal of insurance companies from the administration of stand-alone pension funds as it was seen not to be profitable relative to the underwritten fund concept where all fund aspects (administration, investments and insurance) were locked up under a single insurer. Is it a coincidence or determining factor that from 2001, a new player on the pension funds administration scene was starting to gain momentum, namely Retirement Fund Solutions Namibia (RFS)? Sanlam was the first to give up pension fund administration in totality when their biggest client (GIPF) set up their own administration, they were followed by Metropolitan who gave up administration of stand-alone funds but still retained their underwritten funds catering to small to medium sized employer groups and then eventually Old Mutual was the last to give up administration of stand-alone funds, but also choosing to retain administration of their underwritten funds for small to medium sized employer groups. Most of the experts that were employed by the insurance companies to manage the more complex stand-alone funds repatriated to South Africa. This period also saw the evolution of pension funds as they changed in complexity with the introduction of flexible and age based investment choices by funds, as well as the move from annual bonus declarations to monthly interest declarations, also called indexation. Funds also rid themselves of pensioner liabilities by transferring pensioner assets to insurance companies.

The last 10 years since 2009 has seen the proliferation and expansion of the regulatory activities and the regulatory body NAMFISA which increased 3 fold in staff complement from 50 persons to where it today employs around 150 people. With 20 years down memory lane, 'RFS' has grown into a premium brand household name in the pension fund administration space. The name 'RFS', is no doubt synonymous with that of Tilman Friedrich.

When I hear of the coveted title of "Captain of Industry", I can think of none other in the Namibian pensions industry that is more justifiably deserving this title than Tilman Friedrich. This magazine; "The Benchtest Review", goes some way, but certainly not long enough, as tribute to the impeccable work and character of Tilman Friedrich.

Can you request that your death benefit be paid into your testamentary trust?

Where a member directs payment of death lump sum to his/her testamentary trust, the trust deed must provide for the following:

- It must make provision to receive money from a retirement fund.
- It must provide for fund benefits to be dealt with by the trustees of the trust, in the manner directed by the fund.
- Capital must be ring-fenced, capital and income must vest in the designated beneficiary and may not be redistributed.

Disposition of capital of deceased beneficiary in beneficiary trust

When disposing of the death benefit of a deceased fund member, trustees commonly direct that the capital allocated to minor beneficiaries be paid into a trust for the benefit of the minor beneficiary until the beneficiary reaches majority. Section 37C of the Pension Funds Act defines the trustees' obligation with regard to the disposition of a death benefit. It is clear from this section that the trustees are obliged to apply their discretion in allocating capital to a beneficiary[ies] who has[ve] to be [a] natural person[s].

However, under certain circumstances, a benefit can be paid to a trust. As explained above, the trust deed must provide for the capital to be ring-fenced and that capital and income must vest in the beneficiary and may not be redistributed. It follows that in the event of the death of the minor beneficiary prior to the 'expiry date' of his/her trust, any remaining capital, including interest must be paid to the deceased beneficiary's estate.

Under certain circumstances a benefit can be paid to a trust.

If a retirement fund's dependants trust deed does not make it categorically clear that a beneficiary's benefit from the fund vests in the beneficiary for his or her sole and exclusive benefit, the trustees of the fund are well advised to ascertain that the trust deed is amended accordingly. ■

Transfer of retirement capital to a member-owned annuity

NAMFISA circular 'PN25/1/1/p' an official NAMFISA states that a retiree can arrange a member-owned annuity from an insurer with his or her retirement capital in a retirement fund and that the protection of sections 37 A and B would extend to this capital once it resides in the insurance company.

Inland Revenue confirmed in writing to the Life Assurers Association of Namibia that retirement capital from a pension fund would not be taxable if it is applied to purchase an annuity in the name of the retiree, on the basis of the argument that such purchase is not a voluntary transaction but is a requirement in terms of the relevant fund's rules. This argument of course implies that only annuity purchases by members of a pension fund will be tax-free (or rather not gross income) but not those by a member of a provident fund. Inland Revenue has set conditions that have to be observed when such transactions are entered into. Firstly, the policy must mirror the extensive protection afforded to pension fund capital under sections 37 A and B of the Pension Funds Act. Secondly the rules of the purchasing fund must oblige the member to purchase an annuity and must make provision for the annuity to be purchased in the name of the member. ■

A retiree can arrange a member-owned annuity from an insurer with his or her retirement capital in a retirement fund and the protection of sections 37 A and B would extend to this capital once it resides in the insurance company.

Pension and pension preservation funds: Commutation of annuities/Lump sum benefits upon death of a pensioner

Upon a superficial study of the definitions of 'pension fund' and 'pension preservation fund' one may be forgiven for reaching the quick conclusion that these definitions are the same – not so. There is a subtle but important difference that we draw readers' attention to and that fund members may be able to exploit for their best benefit.

Upon a superficial study of the definitions of 'pension fund' and 'pension preservation fund' one may be forgiven for reaching the quick conclusion that these definitions are the same – not so.

The definition of 'preservation fund' determines in sub-section (b)(ii)(cc) that if in the case of a pension preservation fund, "(cc) a person dies after he or she has become entitled to an annuity, no further benefit other than an annuity or annuities shall be payable to such person's spouse, children, dependants or nominees;". There is no equivalent provision in the definition of 'pension fund'.

The relevance of this subtle difference is that when a pensioner passes away who retired in his former or another approved pension fund, benefits to his/her spouse, children, dependants or nominees are not restricted by the Income Tax Act to being an annuity or annuities, as is the case with a pension preservation fund. Depending on the rules of the pension fund, the beneficiaries could be entitled to a cash lump sum and/or the commutation of 1/3rd of any annuity payable to the beneficiary, which is clearly beneficial from the tax point of view.

The principle of defined contribution retirement funds is that members build up their individual retirement capital from their own contributions and from a portion of the employer's contributions, together with investment returns. In contrast with defined benefit funds where the pension benefit is pre-defined and the employer carries the risk of under contributions and poor investment returns, a member of a defined contribution fund carries these two risks and is dependent on the capital that has built up to retirement to provide income in retirement. The member is the owner of the capital and many defined contribution funds reinforce this ownership principle by offering a refund of the balance of a pensioner's retirement capital in the event of the pensioner's early death following retirement.

Two questions arise. Firstly, does the Income Tax Act make provision for this type of benefit? Secondly, what does this benefit represent and how should this type of benefit consequently be taxed?

Turning to the first question, the Income Tax Act, in the definition of preservation fund states categorically that "...if a person dies after he or she has become entitled to an annuity, no further benefit other than an annuity or annuities shall be payable to such person's spouse, children, dependants or nominees..." This does make sense as a retiree had the option of having one third of the retirement benefit paid out in cash tax-free, as a once-off concession.

Although the definition of 'pension fund' in the Income Tax Act does not contain the same provision, this is probably not the intention of the legislator. This intention is also reinforced in Practice Note 1 of 1986 that deals with flexible annuities. In this practice note it is categorically stated that no further commutation of capital may be made upon the death of the pensioner. Any remaining capital must be paid out as an annuity over a minimum term of 5 years.

Turning to the second question, it appears logical that even if the Income Tax Act does not prohibit a further commutation of any amount upon death of the pensioner for a lump sum payment, such lump sum in effect represents an accelerated payment of what would have been paid in the form of annuities had the pensioner not passed away. Such lump sum payment would thus be fully taxable. Presumably Inland Revenue would not object to receiving its tax dues immediately and calculated on a higher taxable amount as opposed to receiving its tax dues on smaller monthly annuities over a period of time. ■

20 Years of RFS

1999 - 2004

They started a company and gathered family and friends...

5 Year anniversary

19 August 1999
RFS registered by Registrar of Companies

1 September 1999
RFS appointed as broker to Westair Aviation Pension Fund

1 January 2000
Benchmark Retirement Fund launched

1 October 2000
RFS appointed as administrator of Cymot Pension Fund and Taeuber & Corssen Namibia Retirement Fund

September 2004
RFS administers 8,000 members and N$1.3 billion in assets with 15 staff members

2005 - 2009

6 Year anniversary

Staff 2007

September 2009
Benchmark Retirement Fund has 3,700 members with assets of N$212 million

20 Years of RFS

2010 - 2014

15 Year anniversary

2013
N$ 330,000 invested through directors' social responsibility projects and other sponsorships

September 2014
Benchmark Retirement fund has 9,000 members with assets of N$ 1.5 billion

September 2014
59 staff, with an average of 14 years and an aggregate of over 800 years' relevant experience

2015 - 2019

***Back**: M Fabianus (MD); F Hangula (Non-executive Director); G Pfeifer (Director); L Theron (Company Secretory)*
***Middle**: T Friedrich (Chairperson)*
***Front**: S Skoppelitus (Director); R Hangalo (Director); K Friedrich (Director)*

Staff 2018

1 July 2018
Marthinuz Fabianus appointed as MD

Other income can result in tax surprises for pensioners

As administrator of a number of pensioner payrolls, RFS is deemed by Inland Revenue to be the employer of the pensioner. For income tax purposes pensioners are treated in the same manner as employees. The employer (RFS) is required to determine the monthly income tax to be deducted, from the PAYE 10 tables issued by Inland Revenue from time to time. These tables are based on the official tax scales that require progressively higher tax percentages to be applied as the taxable income increases from one level to the next. These tables assume that the only income of the pensioner is the pension/ annuity paid by RFS to the pensioner. Very often however, pensioners earn other income that will be added to the total pensions paid by RFS, when the pensioner needs to submit his/her tax return for a tax year. RFS as pension payroll administrator is obliged by the Income Tax Act, to only take into account the pension it pays and no other income.

The social old age pension is taxable.

The social old age pension is taxable. In terms of the definition of 'gross income' in sub-section (a) of section 1 of the Income Tax Act, "any amount received or accrued by way of annuity" is gross income and anything that meets the definition of gross income is taxable in the first instance, unless the Act provides for an exemption or a deduction of an amount that is gross income in the first instance. The Act contains no provision that exempts or allows as a deduction the amount received by way of the state old age grant/pension.

The fact that no income tax is deducted and that the taxpayer is not issued a PAYE 5 certificate for the pension received in any year of assessment has no bearing on the taxability of the pension. The obligation to deduct income tax and to issue PAYE 5 certificates in respect of tax deducted is contained in Schedule 2 to the Act. Here the definition of "remuneration" is instructive as to when income tax has to be deducted, namely only in respect of "remuneration" as defined. Sub section (b) (iii) of this definition specifically excludes "any pension or allowance under the Social Pensions Act, 1973…or any grant or contribution under the provisions of section 89 of the Children's Act, 1960…"

The state old age grant/ pension should thus be reflected as income in the taxpayer's annual income tax return and will be subject to income tax provided the taxpayer's total taxable income for the year of assessment exceeds the tax threshold. Since RFS does not take this into account, a pensioner paying tax will be required to pay up an additional amount on or before 28 February of any year, if he/she wants to avoid paying interest and penalties.

Other income that may be the reason for such a 'tax surprise' at the end of a tax year is any business income, rental income or any interest earned that is not subject to withholding tax. Fortunately interest earned that is subject to withholding tax can be ignored as the withholding tax is a final tax.

Other income in the form of 'remuneration' as defined in the Income Tax Act, e.g. trustee fees or directors' fees, is subject to PAYE. However the person paying this 'remuneration' is also obliged to only deduct PAYE as if this was the pensioner's only income. When this income is added to the pension the pensioner's total income might be in a higher tax bracket and thus means that both RFS and the other person have deducted too little tax resulting in a 'tax surprise' for the pensioner at tax year end.

Any pensioner who earns other taxable income may request RFS in writing to deduct PAYE at a higher rate in order to avoid a 'tax surprise' at the end of the tax year.

Should the converse apply to a pensioner, i.e. a pensioner incurs losses in respect of another business run by him/ her, RFS will require a tax directive from Inland Revenue instructing it to deduct at a lower rate than the PAYE 10 table prescribes or to deduct no tax at all. ■

Section 14 transfers and unclaimed benefits

When a participating employer in an umbrella fund is transferred to another fund by means of a 'section 14 transfer', the question arises whether the unclaimed benefits must also be transferred. Where they are not transferred one obviously cannot state that all assets and liabilities were transferred. Does this mean that the transfer contravenes the provisions of section 14 of the Pension Funds Act?

Firstly, a participating employer in an umbrella fund is not a fund as contemplated in the Pension Funds Act. Where the employer is transferred, it will in the first instance be the active members that will have to be transferred as their contributions to the transferor fund will discontinue and will henceforth be made to the transferee fund. Section 14 states "…(2) Whenever a scheme for any transaction referred to in subsection (1) has come into force in accordance with the provisions of this section, the relevant assets and liabilities of the bodies so amalgamated shall respectively vest in and become binding upon the resultant body, or as the case may be, the relevant assets and liabilities of the body transferring its assets and liabilities or any portion thereof shall respectively vest in and become binding upon the body to which they are to be transferred."

Clearly, upon the approval of a transfer or amalgamation i.t.o. section 14 by NAMFISA, only the relevant assets and liabilities as per the supporting certificate of the actuaries and principal officers will be transferred or amalgamated.

Clearly, upon the approval of a transfer or amalgamation i.t.o. section 14 by NAMFISA, only the relevant assets and liabilities as per the supporting certificate of the actuaries and principal officers will be transferred or amalgamated. In a similar fashion if a participating employer or an operation of large group is bought out by another person, only active members would normally be transferred while unpaid benefits, unclaimed benefits and pensioners would remain in the fund of the seller. Whether or not this is what should happen depends on what the rules state. Are unpaid and unclaimed benefits and pensioners tied to the employer or to the fund? If they are tied to the employer they should be transferred to the new fund as well. This comment of course only applies to transfers of portions of a fund (participating employer or an operation of a participating employer) to another fund. If a fund is transferred/ amalgamated with another fund 'lock, stock and barrel', then all assets and liabilities must be transferred else it will mean that the transferor fund cannot be deregistered until all remaining liabilities have been disposed of. This would still not be in contravention of section 14 though. ■

PMR AWARDS

In 2018, Retirement Fund Solutions added yet another "Best Administrator" PMR Diamond Arrow to its quiver. The 2018 Diamond Arrow is a fitting companion to our three in a row for 2012, 2013 and 2014.

26 March 2013

Dear Tielman,

Congratulations on your PMR Gold Award, and also on your market share of pension fund administration. N$11b is no mean feat.

PwC partners & staff

Kind Regards
Talita

Death benefits – did you know that...

BT 02.2019

A nominated beneficiary must survive the member of the fund to qualify for the benefit payable upon the death of the member. This means that the estate of the nominated beneficiary cannot benefit anymore.

A nominated beneficiary does not acquire any right to a benefit of a member during the lifetime of a member. It is only upon the member's death that the nominated beneficiary is entitled to accept the benefit and the fund is obliged to consider the beneficiary in the distribution of a benefit. Until the death of the member, the nominee only has an expectation of claiming the benefit, but has no vested right to the benefit.

A nominated beneficiary is entitled to only such portion of the benefit as was allocated by a deceased fund member to him or her and only if there is no dependant and no shortfall in the estate of the deceased member, else the trustees must apply their discretion in the distribution of the benefit.

A beneficiary of a benefit upon death of a fund member must be a natural person.

A beneficiary of a benefit upon death of a fund member must be a natural person. A member of a fund cannot nominate his/her estate as a beneficiary (subject to a narrowly defined exception). The same applies to nominations of Companies and CC's as beneficiaries. The benefits payable by a fund upon the death of a member shall not form part of the estate of such a member, as per section 37C(1) of the Pension Fund Act. Thus a nomination of a member's estate as his/her beneficiary does not carry any weight at all in the trustee's considerations. Benefits are only payable to the estate if the deceased fund member has not nominated any beneficiary and leaves no dependant. ■

PF 01/2019 re payment of premiums by fund of separately insured benefits

BT 05.2019

Namfisa issued circular PF/01/2019 that deals with the current practice where fund contributions are transmitted to an insurer as a premium for an insurance policy taken out by an employer in respect of benefits that are not provided by the fund in its rules. The circular concludes that -

- Fund contributions must be used, in full, for the business of the fund and thus for the benefit of its members;
- Separately insured benefits, which are provided by an insurer in terms of an insurance policy entered into with an employer ... and which are not included in benefits that are provided by the fund in terms of its rules may not be paid for with fund contributions;
- The transmission of fund contributions to insurers to fund such separately insured benefits is inconsistent with the Act.

The position NAMFISA has now taken by prohibiting the practice of funds paying premiums in respect of policies not owned by the fund nor provided for in the fund's rules, is fully justified and reflects the contention that we have raised regularly in the past but that has unfortunately too often fallen on deaf ears. Members will in fact be able to challenge their fund and its trustees for compensation in respect of any premium paid for such purpose, going back as far as this was not dealt with correctly by their fund.

Again it must be emphasised that trustees can be held personally liable for such compensation. A pension fund is a trust fund to be managed strictly within the parameters of its rules by its trustees. A pension fund is not an object that is subject to the whims of its trustees as it seems some trustees sometimes believe. Pension fund moneys must be managed by the trustees with greater care and circumspection than they would apply in managing their own moneys. ■

A pension fund is not an object that is subject to the whims of its trustees as it seems some trustees sometimes believe.

Payment of pension benefits into jointly held accounts

The Pension Funds Act obliges the fund to ascertain that any benefit due to a member is paid to the member for his/her exclusive benefit. Typically the fund administrator is responsible for making payment on behalf of the fund and is well advised to ascertain that it complies with the Act by verifying the ownership of the bank account into which payment is to be made.

Payment directly into a bank account that is not subject to a person's exclusive authority and control may be regarded as being made in contravention of the Pension Funds Act.

> *Payment directly into a bank account that is not subject to a person's exclusive authority and control may be regarded as being made in contravention of the Pension Funds Act.*

The Banks Act does not prohibit the maintenance of joint bank accounts by Namibian banks. It is therefore prudent that pension funds do not allow payment of pension benefits into a joint account as this may be a contravention of section 37A of the Pension Funds Act.

An indemnity by a member issued to a fund for making payment into a joint account at the request of the member will, in our opinion, not protect the fund against a claim by the member and/or a prospective beneficiary and should not be accepted by a fund.

We recently had to deal with two interesting scenarios that no doubt occur regularly.

In the first case, a former pension fund member instructed us to pay his withdrawal benefit into an account that is held jointly by him and his wife who thus has unrestricted access to all funds in this account, including any pension fund moneys paid into the account.

In the second case, the employer of a deceased employee incurred a number of costs related to the funeral of the deceased employee and to transport deceased's family members from SA to the funeral in Namibia. The employer entered into an agreement with the family members authorizing the fund to pay such portion of the death benefit directly to the employer, as the employer had borne in connection with the funeral.

Considering the stipulations of section 37A of the Pension Funds Act, the question must be asked whether such payments would contravene the Pension Funds Act?

Section 37A deals with a "...benefit, or a right to a benefit being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under judgment or order of a court ....". The section goes on to say that "...in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate such benefit or right, the fund concerned may withhold or suspend payment thereof ...".

The desired payments must be evaluated against the provisions of section 37A. In this context the benefit must reach the member. Whether a payment into a jointly held account or to the deceased's employer in terms of an instruction by beneficiaries can be construed as having reached the member or the beneficiary is questionable, but certainly poses a risk to the fund that the fund needs to consider.

Section 37A(1) permits a fund to withhold or suspend payment of benefits should any attempt be made to transfer, cede, pledge or hypothecate the member's benefits. If our interpretation of the Act is correct, the fund is permitted to withhold or suspend payment of the benefit, which these instructions by the member and the beneficiaries of the death benefit may entail.

Before simply following the instructions of a former fund member or of the beneficiaries of a death benefit that may be in contravention of the Pension Funds Act and more specifically with regard to Section 37A(1), the trustees should consider obtaining a legal opinion in this regard although a legal opinion is also only an opinion, unless it relies on decided legal precedent that leaves no room for any interpretation. ■

Recovery of tax debt from pension benefit

As administrator of pension funds, we are obliged to obtain tax directives in respect of benefits due to be paid to former members and beneficiaries under certain circumstances. In response to the administrator's request for a tax directive, Inland Revenue regularly issues a 'Notice to Agent' to us requiring the administrator to recover tax arrears that are totally unrelated to the tax payer's pension fund benefit.

We believe the attempt by Inland Revenue to recover tax debt by way of section 91 of the Income Tax ('Notice to Agent') is ultra vires the powers of Inland Revenue. Instead Inland Revenue should apply section 83(1)(b) to recover any tax debt, effectively by way of a civil judgement. Obliging the administrator to deduct income tax debt from a members benefit contravenes the principle of administrative justice.

Section 37A of the Pension Funds Act prohibits the reduction, transfer, cession, pledging, hypothecation, attachment, execution under a judgement or order of a court of law, of any benefit, "Save to the extent permitted by…the Income Tax Act…"

It is our opinion that a tax debt is to be dealt with by Inland Revenue in accordance with section 83(1)(b), i.e. effectively by way of civil judgement, as directed in this section. It cannot be recovered in accordance with section 91 of the Income Tax Act. Consequently, the debt is not recoverable from the member's benefit in terms of section 37A of the Pension Funds Act, as the section specifically prohibits the reduction of a benefit by means of execution under a judgement or order of a court of law. The proviso in this section then clearly refers to PAYE applicable to the benefit, as an amount due under a civil judgement, and it is thus no longer an amount "… permitted by… the Income Tax Act…" as contemplated by Section 37 A of the Pension Funds Act.

Namfisa approached Inland Revenue about these topics. The following specific concerns were raised in this context:

If a member borrows for housing purposes as contemplated in section 19(5) of the Pension Funds Act, a fund may not be able to recover the loan from the member where a benefit becomes payable to the member and the member has a tax debt with Inland Revenue.

In its response Inland Revenue advises that it acts well within its powers in doing so and suggests that funds should obtain from Inland Revenue a 'goodstanding certificate' before granting a loan to a member.

Our comment here is that the member's tax status may change over time since the time the loan was granted, as a result of which this problem cannot be addressed effectively by this procedure. The current state of affairs dictates that funds should no longer grant housing loans at all, negating the intention of the legislator (with section 19(5) of the Pension Funds Act) and the undeniably positive impact on the economy that such loans have.

If a provident fund member passes away and has not submitted tax returns, his or her beneficiaries will not be paid a benefit as Inland Revenue does not issue a tax directive where any tax returns are outstanding. It was suggested that Inland Revenue should issue a directive applying the maximum tax rate.

In its response Inland Revenue is rather unsympathetic to the plight of the beneficiaries, mostly minor children and insists that it will not issue a directive and wants to also use this opportunity to collect any tax debt.

Inland Revenue does not distinguish between 'current tax' (i.e. PAYE) and tax debt, where one view is that a tax debt may not be deducted from a pension fund benefit in terms of section 37A of the Pension Funds Act.

Inland Revenue's response is that 'tax' is defined in the Income Tax Act as 'any levy or tax levied under the Act'. It is of the opinion that via the appointment of an agent in terms of section 91 of the Act it has the powers to lay its hands essentially on any moneys of a person under the control of the agent (in our case the administrator).

> *Inland Revenue's response is that 'tax' is defined in the Income Tax Act as 'any levy or tax levied under the Act'.*

With regard to tax on death benefits from a pension fund, the questions of, firstly, who is taxable on the benefit and, secondly, under what section of the definition of gross income this benefit is taxable, were raised. The latter question is very important for the purpose of establishing whether the amount is subject to the average or the marginal rate of tax of the tax payer.

Inland Revenue responded by merely expressing its surprise that this matter was unclear to the industry. It indicated that it might consider amending the Income Tax Act.

Our comment is that this matter appears to be unclear even to Inland Revenue officials as we experience totally inconsistent treatment of such benefits between different Inland Revenue offices and between different officials. Our view is that a maximum of 34% should be taxable as a cash withdrawal benefit, provided no dependants pensions' become payable in consequence of the member's death; and that the taxable benefit is taxable in the hands of the beneficiary. We have received written confirmation of this interpretation from Inland Revenue (except for our view that the taxable portion represents a cash withdrawal benefit), but this is not applied consistently. It is to be noted that this is quite different where the benefit is paid by a provident fund.

Inland Revenue appoints administrators as an agent to collect tax on tax exempt benefits e.g. retirement commutation and amounts to be transferred to another approved fund in terms of section 16(1)(z).

In response Inland Revenue states that the employer is obliged to obtain a tax directive in respect of any amount referred to in paragraph (d) of the definition of gross income but seemingly bases its argument on 'accrued' as the key word. Thus even if an amount is tax exempt in terms of this paragraph (or section 16(1)(z)) for that matter, a tax directive has to be obtained and in the event of there being a tax debt, again the appointment of an agent would give it the right to collect any tax debt.

In our opinion by including all benefits payable by a pension fund, but specifically excluding the lump sum on retirement, ill-health or death in paragraph (d) of the definition of gross income, these amounts in essence do not 'exist' for the purposes of the Income Tax Act and hence there cannot be a requirement to obtain a tax directive as contemplated in paragraph 9(3) of part II of Schedule 2 to the Act. As far as a benefit due to be transferred to another fund is concerned we would agree that the amount represents gross income in the first instance and would be exempt when transferred but it does create the opportunity for Inland Revenue to intercept these moneys at the time of issuing a tax directive that must be obtained by the fund administrator in respect of such moneys.

> *In our opinion by including all benefits payable by a pension fund, but specifically excluding the lump sum on retirement, ill-health or death in paragraph (d) of the definition of gross income, these amounts in essence do not 'exist' for the purposes of the Income Tax Act and hence there cannot be a requirement to obtain a tax directive as contemplated in paragraph 9(3) of part II of Schedule 2 to the Act.*

According to the legal department of Inland Revenue, the position regarding tax debts and the section 37A prohibition to deduct from benefits is as follows:

- The Income Tax Act overrules the Pension Funds Act as a matter of principle and not because it is a younger act;
- Despite the fact that the Income Tax Act distinguishes between a tax debt (s 83(2)) and income tax, the definition of income tax covers all taxes referred to in the Income Tax Act;
- The reference in s 37A to the prohibition to deduct any debt is to be read as being any debt other than income tax. ■

What our clients say about us

Client of the Benchmark Retirement Fund

Congratulations with the 5th birthday of Retirement Fund Solutions. Thank you for keeping your promise of "Rock Solid Fund Administration that lets you sleep in peace!" I am definitely sleeping more peacefully since you took over the administration of our Fund. I wish you many more successful years to come.

A compliment of a different nature from a client

A little side comment: You are the first organisation in my working life that has ever issued the annual PAYE5 certificate by the end of February. Congratulations!!!

A local investment analyst on the Benchtest Manager Review

First of all, I would like to let you know that I haven't worked with such accurate data before!! Thank you for making my job so much easier.

Compliment from a happy client

After our Board meeting this morning [the chairman] came to my office and had this to say about you, I quote "the service delivered by RFS is exceptional, even when Mr. Friedrich & Mr. Fabianus are not present at the meetings. R is on top of her game, she is aware of what is happening in the fund and when questions are posted she is able to answers" RFS is truly an exemplary institution that provides an excellent service to the Fund. We are pleased to be associated with such remarkable organisation.

From a Principal Officer

I have no doubt in my mind that you are indeed the best. In your newsletters you do offer much, much more than any trustee can absorb when attending meetings and training sessions or reading newspapers. You are feeding us with a golden spoon! Hence why I do encourage my trustees to read your newsletters, circulars, etc. because they will not get this concise and well thought-out information from any other source or company.

CEO of a Namibian SOE

The speed at which you respond is beyond my wildest expectations. THANK YOU VERY MUCH.

From a financial administrator

I wish other organisations were as efficient as you are!

From the pinnacle of Namibia's diplomatic protocol

Dear A,
Thank you very much for the excellent service that we have received from you. Your work was always of the highest standard and it was a pleasure to work with you. All the best with your future. I am looking forward to again work with E. RFS is lucky to have such dedicated and excellent staff members.

From a broker dated 6 November 2012

...Your entire team... offers us through your monthly letters, etc. etc. so much. You are literally feeding us with everything we need to know. If we read it, we will at least know what is going on in the industry. Your input is so valuable because by the time I think of giving feedback to my trustees, you have already put it all in writing for distribution to all your clients.

From an accountant of a municipality

Sorry, I forgot to mention that apart from all financial institutions I deal with, you have the best service and I am looking at re-invest with Benchmark Retirement Fund again, the earnings from my commercial investment in year's time or so.

From a member using the pension fund facility

Thank you very much for all the help and assistance during the year 2009. It is indeed a comforting thought that YOU are always willing and available to help with any problems or queries. You indeed walk the extra mile.

What our clients say about us

From a fund administrator

Dankie vir hierdie nuusbriewe van jou. Dit bied regtig waardevolle insigte!

From a retired senior partner of an audit firm

Dear I
Why are you working so late? Your work is highly appreciated, especially the effort that you putting into your work by going the extra mile for your clients. You will rarely find services after 5. Thanks for your excellent service, keep it up. It give me enormous pleasure working with all of you at RFS.

Compliment from an HR officer of a client

I knew that you guys were very, very good (I would not have stuck my personal neck out all those years ago if I felt differently!) but have just been shown the degree of expertise and professionalism which your team has at its disposal.

From a private fund principal officer dated 6 December 2012

I have been very happy with RFS throughout my involvement with the Fund (from its early days) and with the service provided. For these reasons I have strongly promoted and advertised RFS by word of mouth, and am delighted to see how it has grown over the years. From my experience this growth is richly deserved.

From a senior official of NAMFISA

You had me in tears! I really did not know that people like you still exist? Endangered species I'm telling you! Thank you from the bottom of my heart for listening to my plea this morning. Jy sal nooit besef hoe bly het jy iemand se hart gemaak nie. God see and God bless!

Comment from SA client

This is the most detailed and prompt response I have received in a while, thanks I really appreciate it.

Comment on the newsletters

Allow me to take this opportunity to thank you for the valuable time, the advice and learning I could take part in. It is highly appreciated and I certainly value the contribution RFS is making not only to the DHPS Retirement Fund, but to the industry as a whole.

Principal Officer of a major Namibian tertiary education institution

I compliment RFS for the pro-active actions taken to try to make the administration of your funds under administration more efficient.

Compliment from a pension fund member

Thanks I.. for the great service always. It is highly appreciated that the service we get from RFS is excellent not to mention the turnaround times. It really means a lot to us as a client. Please keep up the good work.

Compliment from an industry expert and NAMFISA 'insider'

From when I joined BenchmarkRF/RFS in 2001 with much personal assistance and guidance from Tilman Friedrich I have never felt let down. Throughout the years he and his continual growing staff members (those I came in contact with) have been prepared to guide and assist. RFS have throughout the years done much effort to keep their clientele informed through their monthly newsletters, reviews of portfolio performance, their AGM's. They come across as an organisation in which integrity appears to be one of their top aims. I have expressed similar lines of praise in the past towards management, staff, etc. – this is the first time however it is in writing.

From a Principal Officer dated 9 February 2015

Your above letter: What a breath of fresh air of honesty in the current tornado of fraud / bribery / corruption on a daily basis. Indeed gives one much needed hope that small pockets of integrity still exist in our Country.

Pension backed housing loans are risky business

BT 08.2015

Pension backed housing loans offered by commercial banks are typically based on an agreement between the bank, the fund and the employer. The main responsibilities of the parties are as follows:

The employer is required to

- assist the employee to complete the documentation required by the bank;
- ascertain that the application is consistent with section 19(5) of the Pension Funds Act;
- deduct the monthly loan repayment from the employee's salary;
- pay over to the bank its employees' monthly loan repayments;
- inform the bank of the termination of service of the employee.

The bank is required to

- ascertain the affordability of the loan to the employee;
- disburse the loan amount approved;
- account for interest and loan repayments.

The fund is required to

- ascertain that the loan applied for does not exceed the maximum loan as agreed between the parties;
- record the fact that the member has taken a loan on the member's record;
- obtain the outstanding loan balance from the bank at the member's date of exit when it is informed of the member's exit from the fund;
- pay the outstanding loan balance to the bank upon a member's exit.

Since pension funds typically outsource the administration of their fund, the fund's obligations in terms of the agreement with the bank and the employer will have to be transferred to the fund's administrator.

The meticulous reader might already have realised from the above exposition that the fund is obliged to repay the outstanding loan balance to the bank. But what if there is a shortfall between the amount repaid to the bank and the member's available capital? There are a few reasons for a possible shortfall, such as negative returns on the pension fund investment, arrears tax deducted from the benefit or the benefit having been paid out without having deducted the outstanding housing loan. This risk is borne by the fund! There can be a number of reasons for the failure to have deducted the outstanding housing loan balance from the member's benefit. The member record may not have shown this member to have had a loan. Since such entry on a member's record is not the result of a 'book entry' by the fund, it is utterly dependant on manual intervention. A member's details may have changed, either through marriage or because the member has two different identity documents, not such an unusual occurrence, or the identification number allocated by the bank was incorrectly recorded by the fund.

Another risk often overlooked in ignorance of the legal pre-requisites, is the fact that the Labour Act is pretty prescriptive and restrictive with regard to when an employer may make deductions from an employee's salary and how much it may deduct, if anything. The fund may thus have happily entered into an agreement with the bank and the employer only to find that the employer is legally prevented from making the required deductions from members' salary.

In an event where the fund incurred a loss because of a shortfall between the outstanding loan balance it was required to pay over to the bank and the available capital, the fund would have to make an attempt to recover the shortfall from the exited member. The prospect of success then depends on what agreement the fund has with the member and what recourse it offers the fund for such instance. In our experience, funds mostly do not enter into a separate agreement with their members who borrow for housing purposes and are reliant on the documents the bank has compiled in terms of the housing loan scheme. These documents are typically only concerned about the bank's interests and offer little respite to the fund. Banks have also not been accommodative at all to fund's requests for better protection of their interests.

> *"Funds that grant pension backed housing loans are advised to ascertain that repayment deductions are permissible in terms of the Labour Act."*

Funds that grant pension backed housing loans are advised to ascertain that repayment deductions are permissible in terms of the Labour Act and to consider entering into a separate agreement with borrowers that will afford funds the necessary recourse for the event of a member or former member not repaying the outstanding housing loan balance. ■

The practical consequences of tax practice note 5 of 2003

BT 03. 2017

Retirement Fund Solutions (RFS) is an employer with regard to benefits payable by an approved fund administered by RFS, per schedule 2 of the Income Tax Act (ITA). In this capacity we will deal with the income tax requirements of benefit amounts payable upon the death of members or pensioners/annuitants of pension funds as follows:

- Where a pension fund in terms of its rules provides annuities to widows and children and also lump sum benefit upon death of a member RFS will ascertain that 51% of the lump sum benefit allocated by the trustees to each beneficiary in accordance with section 37C is applied to provide annuities to the designated dependants. One-third of the annuity capital (or the full annuity capital if it is less than N$ 50,000) may be commuted for cash. Neither the commutation of annuity capital nor the remaining balance of 49% of the lump sum death benefit constitutes "gross income" as defined in Section 1 of ITA and no tax directive needs to be obtained.
- Where a pension fund in terms of its rules only provides lump sum benefit amounts upon death of a member, RFS will ascertain that 51% of the lump sum benefit allocated by the trustees to each beneficiary in accordance with section 37C is applied to provide annuities to the designated dependants. One-third of the annuity capital (or the full annuity capital if it is less than N$ 50,000) may be commuted for cash. Neither the commutation of annuity capital nor the remaining balance of 49% of the lump sum death benefit constitutes "gross income" as defined in Section 1 of ITA and no tax directive needs to be obtained.
- Where a pension fund in terms of its rules provides that upon the death of a pensioner any remaining capital in the pensioner's account is to be paid as a lump sum, this must be paid in the form of a taxable annuity for a period not less than 5 years.

Trustees are advised to ascertain that the resolutions for the disposition of lump sum benefits upon death of a member of their pension fund per Section 37 C of the Pension Funds Act are consistent with above ITA interpretations. ■

Can a death benefit be paid in instalments?

BT 12.2017

Can or must a lump sum death benefit be paid within 12 months of the death of the pension fund member?

> *A debt becomes due when the duty to pay arises.*

A debt becomes due when the duty to pay arises. Where a debtor's liability is dependent upon the performance of certain conditions, the debtor will not be in mora until a duty to pay arises, e.g. all dependants of a deceased needed to be and then have been determined.

Mora can arise where the debtor's need is urgent and the creditor's delay is unreasonable. The common belief that a fund's duty to pay is contingent upon the expiry of the 12 month period referred to in Section 37c is not correct. The duty to pay is not dependent on this but rather whether the trustees are satisfied that they have investigated and considered with due diligence and are in a position to make a decision.

Although onerous, most trustees are familiar with the process they need to follow when faced with the disposition of a benefit due in respect of a deceased member. Section 37C (2) then stipulates that "…the payment…shall be deemed to include a payment made by the fund to a trustee contemplated in the Trustee Moneys Protection Act…for the benefit of a dependant…"

Section 37C thus makes no prescription as to the manner of payment but only explicitly allows for payment to a trust. As stated above the obligation of a fund making payment arises upon the fund being 'in mora' towards a dependant. This means that either all dependants have been identified or a dependant's needs are urgent and a delay would be unreasonable.

In practice trustees often believe that they have identified all dependants, but cannot be certain. This is particularly relevant in case of a deceased male member where one can mostly not be certain. In such cases the trustees have to be cognisant that dependants can still appear to lay claim on sharing in a benefit until expiry of the 12 month period following date of death of the member. In such a case the trustees need to assess the needs of those dependants they have identified. Should there be an urgent need, mora arises and the fund is obliged to pay. Since the quantum of the benefit due to the dependant in urgent need can only be determined upon expiry of the 12 month period following date of death of the member, in my opinion the only manner in which the trustees can reasonably meet their obligation is to make one or more interim payments to the dependants of a portion of the full benefit that would be allocated to him or her in the event of no other dependants being identified subsequently and up to expiry of the 12 month period.

Corporate governance and managing trustee expenses

South Africa prides itself of being at the forefront of good corporate governance on the basis of the 16 plus one principles formulated in the King IV report.

A trustee on a pension fund's board of trustees is in no different position to a director on a company's board of directors. Trustees in SA have been held liable in their personal capacity for wrong doings on their fund and Namibian courts will undoubtedly look for SA precedents when adjudicating on any wrong doing by a board of trustees in Namibia.

The key concepts of directorship and trusteeship are:

- Duty of good faith
- Duty of care
- Duty of skill

> *Trustees are required to manage the affairs of their fund in the best interests of their members.*

Trustees are required to manage the affairs of their fund in the best interests of their members. As a trustee there are many areas one needs to consider and measure your fund to understand whether you are doing good, bad or indifferent. Commonly for example, trustees measure the performance of the investments of the fund. The investments being the biggest asset of the fund, the performance can fortunately be measured against readily available benchmarks and trustees will at all times know how they are doing and when they may expect to face head winds from their members if they are not doing that well. So that area is covered pretty well, provided trustees have applied care, skill and good faith in appointing the asset managers they did appoint.

But what about fund expenses, managed by the trustees in their absolute discretion? There are no readily available benchmarks. So one board of trustees may decide that the fund should carry the cost of each of their trustees doing an MBA or similar qualification to better qualify them in managing the affairs of the fund. Another board may decide it should be good enough to have each trustee attending a relevant training course once every second year. One board may decide trustees need international exposure to be better equipped to act in the best interests of the fund's members taking into account international developments while another fund is only prepared to support local seminars and courses.

So how does your board of trustees decide whether your policies measure up well against the duties of care, skill and good faith? This is particularly critical as far as expenses are concerned that are incurred for the direct or indirect personal benefit of trustees – an area where trustees are likely to face serious censure if they have not managed to separate personal interests from fund interests.

As far as the example of training goes, one important consideration is whether trustees are serving the fund on a full-time basis or only on a part-time basis. If one looks at this question from a company's point of view, any company would go to much further extents in training staff to run the business of the company because the benefits of such training would accrue to the company on a '24/7 basis', i.e. the dedicated employee is expected to plough back into the company everything he learnt.

Directors or trustees typically only serve the company or fund on a part time basis and are expected to have a sufficiently solid foundation to understand and to apply their obligation of duty of faith, duty of good care and duty of skill to overseeing the management of the business of the entrusted entity. So one needs to distinguish clearly between these two situations. Company's often have benchmarks for staff training and maybe the VET levy is a good starting point as this is what government effectively has resolved employers should spend on training their staff. The same principles can be applied to a pension fund where the payroll comprises of the salaries paid to full time staff plus the trustee remuneration.

What should a trustee's term of office be?

BT 04.2018

To answer this question, one needs to differentiate between a person with previous experience as a trustee and a novice. Members are required to be represented on a board of trustees in terms of the Income Tax Act and a standard requirement of NAMFISA. Member trustees are elected by the members of the fund. Often these trustees do not have any background to the management of an institution or to financial matters which is largely what pension fund business is all about. Being a financial institution established to promote government's socio-economic goals and objectives it enjoys unique tax incentives but is at the same time also subject to very stringent legal and regulatory requirements. A significant part of the business of a pension fund is therefore about compliance, i.e. meeting the requirements of the law and this places onerous demands on a trustee.

If a novice joins a board of trustees, in our experience, it takes at least a year before the person starts to participate in the discussions at trustee meetings and this presupposes that the person would have gained some confidence through a proper induction and formal trustee training. As the person starts to participate in the discussions her/she starts to apply his/her mind to the issues at hand and starts to understand the business of a pension fund ever more and better. It would normally then only be after 2 to 3 years of serving on a board that a person starts to add value to the proceedings at board meetings.

Rules should set the term of office of a trustee at 5 years.

Effectively a novice will require a learning period of around 3 years. Any term of office of less than 5 years would make the process of training up a novice as a trustee very costly and inefficient. We would therefore propagate that rules should set the term of office of a trustee at 5 years.

Can your employees deduct voluntary contributions to the fund?

BT 01.2017

The contract of employment

One principle of the Income Tax Act is that expenses can only be claimed for tax purposes if they were incurred in the production of income (refer section 17(1)(a).

In the case of employees Inland Revenue will not easily accept any claim for expenses incurred by the employee. An employee can only claim expenses that he is required to incur in terms of his employment contract. In other words the salary you earn is dependent on you incurring certain costs so these costs are incurred in the production of income.

If an employer can formulate the employment contract in such a way that a pension contribution in respect of the employee's bonus is an obligation, the employee should be able to claim that expense. If the decision is left to each employee, the employer should find that it is not possible to formulate it in the contract as an obligation. This does not mean that every employee has to have the same contract of employment. So certain employee categories or certain employees can have a special provision in their contract of employment, that others do not have, to make the contribution obligatory.

The fund rules

Most fund rules provide for voluntary contributions by members. I caution to use this clause as the heading is problematic, referring to 'voluntary'. As pointed out above, the word 'voluntary' means it cannot be an obligatory contribution by the employee and would thus not be incurred in the production of income.

It is important that the rules of the fund mirror the employee's employment contract. Thus, if a contribution calculated on a member's bonus is a condition of employment, it should not be referred to as 'voluntary contribution' in the fund's rules.

The Income Tax Act on fund contributions

The definition of 'pension fund' requires that the rules of a fund provide in (b)(i) that '…all annual contributions of a recurrent nature of the fund shall be in accordance with specified scales…'. The definition of 'provident fund' lays down the same requirement. Typically, this refers to the contribution percentages at which members contribute on a monthly basis. The definitions do not make any reference to any other contributions.

Section 17 of the IT Act deals with 'General deductions allowed in determination of taxable income'. Section 17(1)(n)(i), sets out that the employee may deduct '…by way of current contributions [which are required to be in accordance with specified scales per definition of 'pension fund' and 'provident fund'] in the year of assessment and directs that '…such contribution is a condition of employment…' The IT Act contains no other specific provision that allows any deduction for contributions to a pension fund, and here I do not refer to a transfer of accumulated contributions to another fund.

Conclusion

As set out above, the principle of the IT Act militates against an employee deducting any expense that he was not required to incur in the production of income [and that can only be achieved through the contract of employment].

This sets out the dilemma of employers wanting to allow staff to make additional contributions to their fund and indicates what route the employer and the fund should take to achieve their goal of having employees contribute to the fund in respect of their bonus.

I would caution employers though not to create an impression towards employees that voluntary contributions are tax deductible.

I would caution employers though not to create an impression towards employees that voluntary contributions are tax deductible, or worse, to offset voluntary contributions from an employee's salary in determining the taxable income unless you have obtained comfort that Inland Revenue will allow these as a deduction for tax purposes.

How does absence from work affect the employer, the fund and the member?

In the normal course of business, if often happens that an employee is absent from work for various reasons. Such absence can carry the employer's consent, e.g. maternity leave, sabbatical absence, suspension with immediate departure from office, dismissal or ill-health. In other instances it can be unauthorised absence, e.g. ill-health, disablement, absconding etc. Until such time as employment ends contractually or legally, employees are entitled to their contractually agreed remuneration and benefits. This includes employer contributions towards the member's retirement as well as death and disability benefits typically offered by pension funds. It is critical, however, that the rules of the fund and the relevant insurance policies are complied with in order to ascertain that an employee remains covered by the fund for these benefits. In this regard, the employer plays an important role and should carefully consider the following exposition.

Introduction – rules vs contract of employment

The rules of the fund typically set out the rights and obligations of the employer and the member and determine how the administrator is required to administer the fund. Since an employee's membership of the fund arises from his employment with the employer, the contract of employment may have a key bearing on the employer's and the employee's contribution obligations towards the fund.

Commencement and termination of membership

Typically rules would state that membership commences on the first day of the month coincident with or following his becoming and employee.

Membership typically ceases upon termination of service. Service can thus terminate at any time in terms of the rules. Service is usually defined as full-time permanent employment with any of the employers. One will now have to refer to the contract of employment to determine when the service of an employee actually terminates. The employer would have to advise the fund administrator of the correct date of termination of service in terms of a member's employment contract.

Commencement and termination of contributions payable

Contributions to the fund by the member and by the employer are typically payable at the specified rate of the monthly equivalent of the member's annual pensionable emoluments. Pensionable emoluments are then usually defined as the member's basic annual salary or wage and any other amounts that are regarded as pensionable by the trustees at the request of the employer. This formulation provides considerable latitude to the employer to have different classes of membership where the fund contributions are based on different proportions of the employee's cost to company.

Until such time as employment ends contractually or legally, employees are entitled to their contractually agreed remuneration and benefits. This includes employer contributions towards the member's retirement as well as death and disability benefits typically offered by pension funds.

To determine the employer's and the employee's obligation concerning the contributions to the fund, the employer would have to first calculate the annual pensionable remuneration, divide this amount by twelve and multiply the result by the relevant contribution percentage. It appears logical that the basis for determining the annual pensionable remuneration has to be the employee's current rate of pay per pay period, times number of pay periods per year. This means that if rules are formulated as set out above, they do not provide for any pro-rata payment in the last month even though the employee's service may have terminated in the course of the month.

Whether or not any contributions are payable for the last month if it was a broken period will have to be established from the contract of employment. The rules link the contribution to the member's remuneration. Again the employer would have to advise the administrator of the correct end date of the member's last monthly contribution in terms of a member's employment contract.

Commencement and termination of risk cover – what does the insurance policy say?

As far as 'risk benefits' are concerned, the reassurance policies link a member's cover to his membership in terms of the rules of the fund, which in turn, link membership of the fund to his or her service in terms of his employment contract. Typically the policy read together with the rules, would imply that cover always commences on the 1st day of a month but ceases as soon as the service of the employee ceases in terms of his contract of employment.

Temporary absence – what do the rules say?

The rules normally make provision for 'temporary absence'. Typically, this rule provides for continuation of benefits and contributions while the member is in receipt of his or her full normal remuneration. When a Member is granted leave of absence with less than full normal remuneration, the rules would typically provide that his or her member's share will be credited with any contributions actually paid by the member and/or the employer during such period of absence. Commencement and termination date for this purpose would then be irrelevant.

As far as 'risk cover' is concerned the rules typically provide that the member will continue to be covered for the insured benefits in the event of death or disability, for the period specified in the assurance policy issued to the fund by the relevant insurer (normally between 1 and 2 years). After expiry of said period, such cover shall terminate unless the member returns to active service. Any benefit that may become payable during such period of absence will be based on the member's pensionable emoluments as specified in the assurance policy issued to the fund by the relevant insurer (normally based on the employee's full normal remuneration).

Temporary absence – disability reassurance policy

Although every insurer has slightly different formulations in their insurance policies, typically, for 'leave of absence', the disability reassurance policy normally provides that no claim for the benefit is admitted if the disability arises during a period in which the member concerned is deliberately absent from the employer's service without permission, unless the fund and the insurer agree otherwise in a particular case. By implication, in the case of temporary absence approved by the employer the member will continue to be covered.

Temporary absence – death reassurance policy

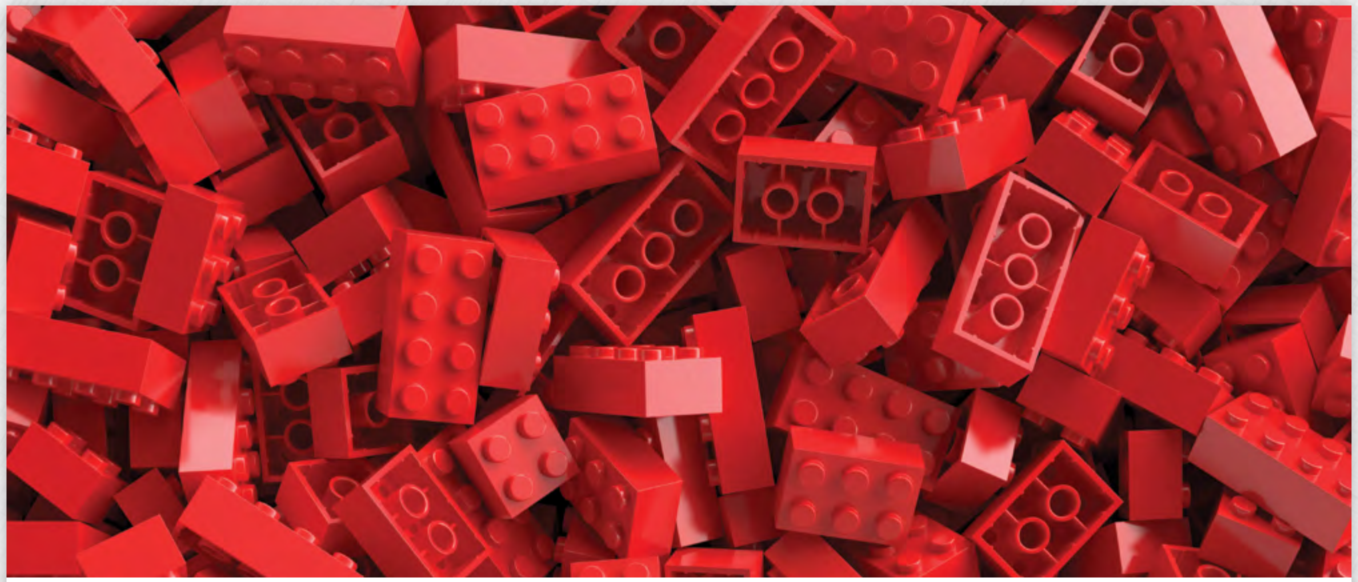
Although every insurer has slightly different formulations in their insurance policies, typically, for 'leave of absence' the group life reassurance policy normally provides that if a member is absent from the service of the employer with the employer's consent, it is deemed that the member's membership continues, subject to the following:

1. During the period of absence the member's remuneration is deemed to be equal to the remuneration he/she received immediately before the commencement of absence...."
2. For 'absence without the employer's consent', these policies typically state that a member's membership lapses and the member's service with the employer is regarded as terminated if and as soon as he/she is absent from the employer's service without the employer's consent."

Summary

The following conclusions can be drawn from the above deliberations:

- Contributions by both employer and employee have to be made for full months, except in the case of approved temporary absence.
- The date of termination of service is to be determined in accordance with the contract of employment.
- Death and disability benefits cease upon date of termination of service in accordance with the contract of employment.
- Whether or not contributions by the employee and the employer are payable for the last month in which service terminates is to be determined in accordance with the contract of employment.
- In the case of temporary absence, contributions by employer and employee are determined in the normal manner, where the employee receives his full remuneration.
- In the case of temporary absence, the rules do not detail how contributions by employer and employee are to be determined, where the employee's remuneration is less than his full remuneration and the administrator simply updates what it receives.
- In the case of approved temporary absence, the employee's death and disability benefits will continue based on the employee's remuneration prior to the approved temporary absence.
- In the case of unapproved temporary absence, the fund and the insurer can agree to keep a specific member covered for disability benefits, else cover will lapse. ■



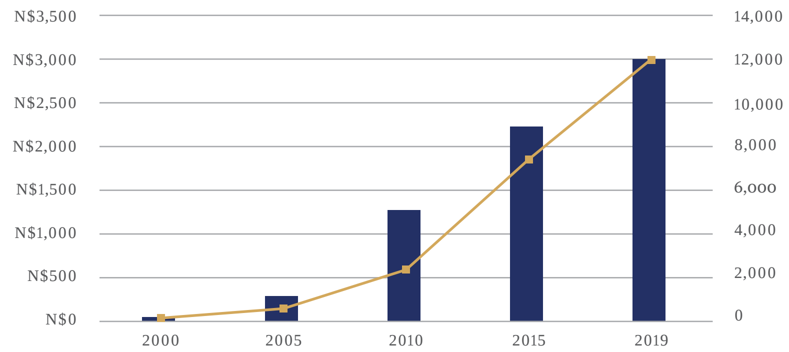
A WORD FROM BENCHMARK RETIREMENT FUND

Harald Müseler
Chair: Benchmark Retirement Fund

Founded in 2000, the Benchmark Retirement Fund ("Benchmark") was established as an umbrella pension fund by Retirement Fund Solutions as sponsor and administrator under the leadership of Tilman Friedrich. Tilman recognised that financial professionals wanted a dedicated vehicle for their retirement investments with a choice of financial strategies and investments in leading Namibian funds/asset managers.

Since it was established, Benchmark has grown year-on-year, initially making provision for small and medium-sized entities. The product range was expanded over time and now also serves large employer groups as well as numerous high net worth individuals. It currently has a membership of about 12000 and administers assets of N$3 billion.

History of Benchmark Retirement Fund growth



Benchmark caters for members who want to save for retirement while employed, who want to preserve their fund credit when changing jobs, for persons in retirement as well as for beneficiaries of deceased members. Under his stewardship Tilman and his co-trustees succeeded in upholding Benchmark's three hallmark qualities over the two decades of its existence, i.e. service efficiency, trustworthiness and to remain a home-grown, autonomous Namibian umbrella fund.

Tilman chaired the Board of Trustees during the Fund's initial years with a deep knowledge and understanding of the Namibian retirement fund industry and its statutory framework. In 2007 the Board was expanded to include not only sponsor employed Trustees but also independent Trustees in equal numbers to further enhance the Board's governance accountability. Tilman stayed on as a committed Board member to avail his expertise and experience to the Benchmark Board and the Fund's dedicated Administrators.

> *Tilman chaired the Board of Trustees during the Fund's initial years with a deep knowledge and understanding of the Namibian retirement fund industry and its statutory framework.*

The Trustees are privileged to continue to have Tilman on board to further the Fund's aim to be a professionally governed financial institution that fosters honest and sincere stakeholder relationships through dedicated commitment and maintaining a sound governance framework in the long-term interests of members of Benchmark.

What to consider and how to invest when you retire

Although every respective retiree is in a unique position as far as his retirement is concerned that should be properly analysed at retirement before taking any investment decisions, you should go through the following steps, preferably with the assistance of an expert:

1. Determine the monthly cash flow surplus or shortfall of your household, before you consider how to invest your available capital. This requires the following:
   a) Prepare a detailed monthly budget of your normal cost of living and provide for any other exceptional or irregular costs such as known repairs and maintenance to your residence, your holiday house, motor vehicles, machinery and equipment, holidays and medical expenses that you may have to carry over and above what is covered by your medical aid.
   b) Determine your expected income from your pension fund or funds, as well as your wife's pension, if relevant, after providing for income tax.
   c) The difference between 1.a) and 1.b) will reflect either a shortfall or a surplus.
   d) If the difference per 1.c) is a surplus, you will be more flexible as to how you can invest your available capital. If the difference per 1.c) is a shortfall, your focus should be how to invest your available capital so that it provides a stable and secure monthly income. It may also require you to reconsider your budget per 1.a) with the view to reduce your cost of living.
2. Having determined your household cash flow position as per 1.c) you now need to decide how to invest your available capital.
   a) In case of a surplus per 1.c) you can invest your discretionary capital (cash from pension fund, retirement annuity fund, unit trust, term deposit etc.) more aggressively in an effort to achieve higher investment returns.
   b) In case of a shortfall per 1.c) you need to invest your discretionary capital (cash from pension fund, retirement annuity fund, unit trust and term deposit) more cautiously in an effort to secure a stable and secure monthly income.
   c) Ideally you should have funds that are readily accessible (money market, savings, call deposit etc.) to cover your expenses in 1.a) for at least the next 12 months. This may require you to invest your (and your wife's, if relevant) one-third from your pension- and/or your retirement annuity fund in such a manner. Alternatively, if your mortgage bond would allow you to take up money again without major effort, in case of an emergency, your (and/or your wife's) one-third can be used to repay the outstanding balance on the mortgage bond.
3. Paying back a mortgage bond with one-third pay-out from a pension/ retirement annuity fund (untaxed) is usually a sound investment decision, provided that you can draw on that mortgage bond again in case of an emergency as per 2.c).

> *Having your full pension fund capital paid out to be invested again is usually not a sound investment decision.*

4. Having your full pension fund capital paid out to be invested again is usually not a sound investment decision, besides the fact that the rules may actually not allow this. In the first instance you will be taxed on the full benefit. You now need to invest the balance elsewhere, after tax has been deducted. It will be very difficult to achieve competitive returns on such an investment for a similarly stable income, as the pension fund would offer. You would typically incur initial and ongoing fees on such investment, or would sacrifice investment returns, that would not be the case if you retained your capital in the pension fund to receive a monthly pension, if its rules allow you to do this. ■

Why should pension funds offer dread disease?

In earlier newsletters we dwelled on what the purpose of a pension funds is, namely to provide for the needs of its members. We suggested that the most important needs of pension funds members are –

- Death;
- Disablement; and
- Retirement.

The name 'pension fund' in the first instance suggests that the fund should be about providing for a pension upon retirement. However, the other two key needs that should be considered are death and disablement. Besides the fact that members and their beneficiaries are often seriously affected as the result of death or disablement of the member, employers also have a strong moral compulsion to ensure that provision is made for such life changing events mostly by means of the company's pension fund.

Over the years, pension funds have evolved to provide for these key needs and employers who do not offer a pension fund or whose fund does not provide for these key needs are at a great disadvantage vis-à-vis those that do offer provision for these events in a competitive labour market.

What is a dread disease benefit? Essentially it provides for sickness conditions that cause the employee to be unable to follow his occupation. Conditions covered normally are stroke, heart attack, organ failure or transplant, blindness, paralysis, loss of limbs etc.

Usually the dread disease is an accelerated lump sum payment of the lump sum benefit payable in the event of death to assist the employee with the high costs typically associated with such a condition.

We believe that dread disease benefits are a key need of staff at all levels and offer an important competitive advantage to those employers whose pension fund offers these benefits to their employees. Employers whose fund does not offer the dread disease benefit should seriously consider introducing this benefit. ■

Can a fund member receive more than one disability benefit from different policies?

Most retirement funds offer disability benefits to their members. Typically this would be an income replacement benefit in the event of the member experiencing a reduction or loss of income as the result of injury or illness which will be paid for as long as the member experiences such reduction or loss of income and until the member passes away or retires, whichever occurs first. Sometimes funds also offer a once-off lump sum that will be paid when a member becomes totally and permanent incapable of pursuing any occupation for gain anymore for the remainder of his life.

Over and above the disability benefits a fund may offer its members, many members also have disability cover in their own capacity, either as an add-on to their life insurance policy or as a stand-alone policy such as PPS.

> *Do not over-insure yourself as you will not reap the 'benefit'!*

What will happen in the event of disablement – will you be able to put in a claim against each policy and if you are insured well will you be better off after disablement than you were before? One thing is for sure, if it would have been possible to ensure yourself to a level where you would be better off after disablement than before, we would see many more people claiming to be disabled. Insurance companies still experience a significant increase in claims in tough economic times and this is despite all the means at their disposal to verify the legitimacy of the claims.

(continued on page 34)

Some of our Private Fund clients

NamPower
Powering the Nation and beyond

Capricorn Group

nbc
Namibian Broadcasting Corporation

Bank of Namibia

Coca-Cola

NAMFISA

namibmills
FEEDING THE NATION

MMI HOLDINGS

NAMWATER
Namibia Water Corporation Ltd

NEDBANK

Celebrating 110 YEARS Metje & Ziegler

RFLAUN
Retirement Fund for Local Authorities and Utility Services in Namibia

PUPKEWITZ
CUSTOMER SATISFACTION
SERVICE EXCELLENCE

CYMOT
SINCE 1948

FIRSTRAND
NAMIBIA

NEDERDUITSE GEREFORMEERDE KERK NAMIBIË

NAMDEB
On Diamonds We Build

NAMCOR

NHE
Affordable and Quality Housing

N·D·C

D.H.P.S. WINDHOEK NAMIBIA

20 Retirement Fund Solutions
Managed by Namibians. Trusted by Namibians.

Some of our Benchmark clients

OHORONGO cement

SCANIA

the namibian

Transworld Cargo
realtime logistics

SCHOEMANS GROUP

PLASTIC PACKAGING (PTY) LTD
WE MANUFACTURE. WE RECYCLE.

SWACO GROUP

NQA
Namibia Qualifications Authority

WILDERNESS SAFARIS

NamPharm

Namibia Nature Foundation
Committed to conservation

TM TYREMART

KUEHNE+NAGEL

orano

NAMIBIA RED CROSS SOCIETY
NRCS

Tunacor

Meat Board of Namibia

Hollard.

AON

CRAN
Communications Regulatory Authority of Namibia

GONDWANA

hartlief

Revenue Solutions
NAMIBIA (Pty) Ltd

Medfam Holdings (Pty) Ltd.

RADIO ELECTRONIC

PathCare

Channel Kanaal 7

Benchmark Retirement Fund
Efficient. Trusted. Namibian.
Administered by Retirement Fund Solutions

Can a fund member receive more than one disability benefit from different policies? *(continued)*

Insurance companies have realised that it would be unethical to collectively insure a person to a level where a person would earn more after disablement than before disablement. A basic premise of any insurance is also that the insured must have an interest in the insured event not happening – an insurable interest. Clearly, the prospect of earning more after disablement than before disablement would be contrary to this principle.

Insurance companies therefore have a mutual arrangement that an insured cannot be better off after disablement than before disablement and for that purpose information on claims is exchanged between insurers. Where a claim for disablement arises and the disabled enjoys cover under different policies, the insurers would in aggregate never pay the claimant a benefit that exceeds his income prior to disablement. So if you have two policies both covering you against any loss of income and you experience a total loss of income, each insurance company would only pay you 50% of your loss of income.

The inference of this arrangement between insurers is – do not over-insure yourself as you will not reap the 'benefit'! ■

Pension or provident fund, lump sums or pensions – where to from here?

'Leakages' in the pensions system are an issue that policy makers, employers and fund trustees alike should be seriously concerned about, and lump sum benefits represent one of the most serious leakages in the system. After all, the purpose of a pension fund is primarily to provide for the needs of members upon retirement and for dependents of members in the event of death of a member.

> *Barring a few exceptions, the vast majority of pension fund members will not be able to purposefully apply a lump sum benefit to meet their and their dependents' needs for as long as they may live.*

Barring a few exceptions, the vast majority of pension fund members will not be able to purposefully apply a lump sum benefit to meet their and their dependents' needs for as long as they may live.

Why might my capital be insufficient to retire?

Making adequate provision to retire with dignity is not so easy to achieve in the first instance. It requires adequate funding by employer and employee throughout the employee's working life, it requires that not too much but also not too little of the contributions be diverted for other purposes and benefits, and that the capital accumulating for retirement does not experience any leakages.

The following are typical pitfalls that will prevent you from achieving this ideal:

- early withdrawal of accumulated capital,
- poor investment returns,
- high management costs,
- too low a basis for setting a contribution rate,
- too low a contribution rate,
- statutory disincentives and, importantly
- leakages in the system.

Government needs to take measures to prevent leakages

Government doesn't want end up bearing the responsibility for persons that have made inadequate provision for their retirement.

The proposed National Pension Fund is one policy measure government is considering in order to ascertain that all citizens will eventually have provided adequately to retire with dignity. Clearly there is serious and justified consideration how to go about this national objective. And it does not take much grey matter to appreciate that the approach must be two-pronged, one being to ascertain that everyone contributes adequately, the second one being to plug the holes in the system that cause leakages as we will deal with further on.

Currently, there is no legal requirement to preserve one's capital upon resignation. The Income Tax Act encourages preservation by allowing retirement capital to be transferred to another approved fund, tax free but at the same time it allows you to withdraw a portion or all your capital within the first three years of resignation. This is only one leakage. The National Pension Fund envisages compulsory preservation but it is not in force. A much more serious leakage is the provision for provident funds in the Income Tax Act. These funds cannot pay pensions but only lump sums and oblige the employee to accept cash as the default arrangement. Obviously most employees are unlikely to reinvest the cash once in their possession. We question the existence of provident funds and believe SA has taken the right decision to enforce annuitisation at retirement meaning that fund members will be obliged to convert a portion of their retirement capital to an annuity. Under the FIM Bill, RF.S.5.18 also envisages compulsory preservation of a minimum of 75% of a member's 'minimum individual reserve', often also referred to as member's fund credit or share.

Often pension funds require the retiree to purchase a pension from another fund or insurer. Such transactions not only often expose the retiree to unscrupulous operators, but the retiree has to incur substantial costs. Trustees are also often overwhelmed by consultants talking them into unnecessarily complex structures that might serve the needs of a very small minority but come at a cost. Trustees often do not grasp the complexity of such complex structures nor do they appreciate the risks. The consultants often introduce such arrangements with their own agenda, such as selling house products and services and making themselves indispensable for the fund.

There are other less serious leakages which we will not cover now. The most serious leakages can and should be addressed by government through policy measures. The thought has been raised for the Income Tax Act to do away with provident funds. With regard to the National Pension Fund, it is still being contemplated whether or not any exemption will be granted to existing funds. It would appear likely that if any exemption were to be granted, it would be on the basis that the employee and employer contribution rate towards the fund is at least equal to that of the National Pension Fund (12%-14% of payroll?) and that benefits will primarily take the form of income rather than lump sum benefits.

Employers and trustees of course are free to pre-empt legislative measures to plug these leakages that are likely to be plugged through government policy measure sooner or later. In this light here is sound advice to employers until such time as the future of the National Pension Fund and of the Income Tax Act with regard to retirement provision has been cleared:

- Rather offer a pension fund than a provident fund.
- The pension fund should offer income benefits rather than lump sums in the event of death, disablement and, as a matter of course, in the event of retirement.
- Be wary of converting your fund from pension fund to provident fund and to do away with income benefits.
- Be wary of outsourcing pensioners if your fund is large enough to carry the liability for in service spouse's and children's pensions and post retirement pensioners.
- Be wary of dissolving your investment reserve which is particularly useful for funds maintaining a pensioner pool.
- Be wary of unnecessarily complex and expensive fund structures that may serve a small group of members only.

Once abandoned, it will be extremely difficult for any fund to reintroduce the previous arrangements. ■

> *Be wary of converting your fund from pension fund to provident fund and to do away with income benefits.*

Can capital be transferred from a retirement annuity to an untied insurance product at retirement?

It seems to have become common practice in the market that members of retirement annuity funds, upon retirement, purchase an untied annuity from an insurance company. Is this practice consistent with the Pension Funds Act and the Income Tax Act?

Firstly, NAMFISA has confirmed in writing that it is comfortable for retirement capital to be moved into an untied insurance policy that then provides the annuity.

Secondly, from an Income Tax Act point of view, Inland Revenue bough the argument of insurance companies in support of being allowed to issue untied annuity policies with money derived from a retirement fund and to transfer the capital tax-free upon retirement from the fund, as this money does not constitute gross income and as the fund member is obliged to arrange an annuity. The obligation to buy an annuity can obviously only apply to a pension fund as it would always be optional in a provident fund.

But what about retirement annuity funds? The Income Tax Act in the definition of 'retirement annuity fund' sets out the benefits a retirement annuity fund may provide under various circumstances. In sub-paragraph (x) it states "that save as is contemplated in subparagraph (ii), no member's rights to benefits shall be capable of surrender, commutation or assignment or of being pledged as security for any loan." Subparagraph (ii) states "that no more than one third of the total value of any annuities to which any person becomes entitled, may be commuted for a single payment..." The crux of the matter is the word 'assignment'. The Oxford English Dictionary defines 'assign' as "to give something to somebody as a share of work to be done or of things to be used..." Another dictionary defines 'assign' as "allot, apportion, ascribe, transfer". Clearly, unless the annuity is purchased from an insurer in the name of the retirement annuity fund, it would imply that the member's retirement capital is indeed transferred or given to somebody else.

> *A retirement annuity fund cannot allow the purchase of an annuity from an untied insurance product once a member becomes entitled to a retirement benefit.*

My conclusion thus is that a retirement annuity fund cannot allow the purchase of an annuity from an untied insurance product once a member becomes entitled to a retirement benefit. ■

2018 - The Changing of the Guard

The time came for Tilman Friedrich to step down as managing director of Retirement Fund Solutions.

Marthinuz Fabianus acknowledges that Tilman Friedrich has built a team widely recognised as the benchmark in our industry.

Marthinus Fabianus accepts the "àríngo", a ceremonial axe and sceptre symbolising the transfer of power and authority.

Martinuz Fabianus reflecting on this most auspicious occasion.

Here's to leading this wonderful company from strength to strength!