

**DRAFT MEMORUNDUM**

**ON THE**

**OBJECTS OF THE DRAFT REVENUE ADMINISTRATION AND PENSION LAWS  
AMENDMENT BILL, 2023**

**9 June 2023**

[W.P. – '23]

# DRAFT MEMORANDUM ON THE OBJECTS OF THE DRAFT REVENUE ADMINISTRATION AND PENSION LAWS AMENDMENT BILL, 2023

## 1. BACKGROUND TO BILL

1.1 South Africa has different retirement fund vehicles available to individuals who wish to save for retirement, namely, pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds. Historically, these funds had differing tax treatments for contributions to the funds, as well as differing rules as relates to withdrawals from these funds. In an attempt to promote retirement savings, the retirement savings regime has, since 2012, undergone some significant reforms. These reforms include, *inter alia*, harmonising the tax treatment of contributions to the different types of funds (which came into effect from 1 March 2016) and increasing preservation at retirement by harmonising the requirement for annuitisation upon retirement across all retirement funds (which came into effect from 1 March 2021).

1.2 Government now wishes to focus on pre-retirement preservation. In accordance with the current retirement regime individuals are able to make full withdrawals from their pension or provident fund when they cease employment. Further to the above, individuals are also able to make once-off withdrawals from their pension preservation or provident preservation fund(s). What is of concern for Government is the fact that many of the above-mentioned withdrawals are taking place irrespective of the tax rates applied upon withdrawal.

*Reasons for change*

1.3 Government has two primary concerns with the design of the current retirement regime. The first is the lack of preservation pre-retirement, which Government has highlighted in previous discussion papers. The ability for pension and provident fund members to access their retirement interest when terminating employment can create the incentive for fund members to terminate employment as a means of gaining access to those funds, thus prematurely terminating the ability to preserve these funds until normal retirement age is, per the fund rules, attained.

1.4 The second concern is that some households in financial distress have assets within their retirement fund(s) that are not accessible in case of emergencies or financial hardship. This has become more prominent since the onset of the COVID-19 pandemic, with numerous calls for financially distressed individuals to be given access to their retirement funds to alleviate their financial hardship.

## **2. OBJECTIVE OF BILL**

2.1 The Revenue Laws Amendment Bill, 2023, provides for the amendments to the Income Tax Act, 1962 (Act No. 58 of 1962) (“the ITA”), which gives effect to the policy objectives noted in paragraph 1 above, and the detailed legislative proposals to give effect to the policy objectives are set out in the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2023 (“the RLAB”).

2.2 The Revenue Administration and Pension Laws Amendment Bill, 2023 (“the Bill”) provides for certain amendments to the Pension Funds Act, 1956 (Act No. 24 of 1956) (“the PFA”) which are necessary to enable retirement funds to be able to appropriately implement the amendments to the ITA which are contained in the RLAB.

### **3. STRUCTURE OF BILL**

#### *3.1 Clause 1*

This clause inserts new definitions into the PFA which are important definitions inserted into the ITA through the RLAB. These are definitions of “member’s interest in the retirement component”, “member’s interest in the savings component”, “member’s interest in the vested component”, “retirement component”, “savings component”, “savings withdrawal benefit”, and “vested component”. In addition, a definition of “pension interest” is introduced, which is important for the implementation of deductions in terms of section 37D, in alignment with the approach set out in the RLAB, and providing for a definition of “pension interest” is important for generally enhancing the implementation of section 37D.

#### *3.2 Clause 2*

This clause provides for amendments to section 14B of the PFA, in particular, to amend the definition of “OC” in subsection (1), and to insert a new subsection (2)(a)(iii) to align section 14B with the provisions of and the requirements contained in the RLAB. (“OC represents any other amounts lawfully permitted, credited to or debited from the member’s individual account”.)

### 3.3 *Clause 3*

Clause 3 amends section 19(5) of the PFA, which deals with loans and guarantees to members of retirement funds by retirement funds and employers, to align with the provisions and requirements of the RLAB. The amendments also will cap the amount of a housing loan or guarantee, or a loan or guarantee provided by an employer for the purposes of section 19(5), to a maximum of 65 percent of the member's benefit available, including the member's interest in the savings, retirement and vested components. This in line with Regulation 28, which limits housing loans granted by retirement funds to a maximum of 65 percent of a retirement fund's aggregate assets.

### 3.4 *Clause 4*

Clause 4 substitutes section 37D, to enable retirement funds to effect deductions from retirement fund benefits in accordance with the provisions and requirements of the RLAB. It also provides for other necessary refinements to the section, to enhance the appropriateness and effectiveness of the section.

### 3.5 *Clause 5*

This clause provides for the short title and commencement of the Bill.

## **4. ORGANISATIONS AND INSTITUTIONS CONSULTED**

4.1 The Bill is published for public comment.

## **5. FINANCIAL IMPLICATIONS OF BILL**

5.1 Financial implications for the State:

There are no significant financial implications envisaged for the fiscus.

5.2 Financial implications for retirement funds:

The financial implications for retirement funds would relate to adjustments to their systems in order to give effect to the requirements contained in the Revenue Laws Amendment Bill, as facilitated through the amendments to the PFA contained in this Bill, and effecting necessary amendments to their rules.

## **6. CONSTITUTIONAL IMPLICATIONS**

None.

## **7. PARLIAMENTARY PROCEDURE**

7.1 The Constitution regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment.

The national legislative process is governed by sections 73 to 77 of the Constitution.

7.2 It is necessary to consider the Administration Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

7.3 A Bill falling within a functional area listed in Schedule 4 to the Constitution must be dealt with in accordance with the procedure set out in section 76 of the Constitution. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 to the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 or Schedule 5, fall within the exclusive national legislative competence.

7.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of ***Tongoane and Others v National Minister for Agriculture and Land***

***Affairs and Others***<sup>1</sup> ("Tongaone judgment"), is that any Bill with provisions which, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule.<sup>2</sup> The Tongaone judgment therefore laid down the substantial measures test for the tagging of a Bill, which requires one to determine whether, to a substantial extent, the legislation under consideration actually regulates matters falling within Schedule 4 to the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

7.5 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 to the Constitution, section 44(1)(a)(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on "any matter".

7.6 It is therefore submitted that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

7.7 It is submitted that it is not necessary to refer the Administration Bill to the National House of Traditional Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions that directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.

7.8 It is noted that while the substitution of section 37D of the PFA applies in relation to customary marriages that are registered in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), section 37D currently applies in relation to the dissolution of those customary marriages, and the amendments do not alter the current approach in section 37D of addressing deductions on the dissolution of customary marriages as regulated in terms of section 8 of the Recognition of Customary Marriages Act in a manner consistent with other divorces and the dissolution of other unions that fall under the ambit of section 37D.