

FSCA INTERPRETATION RULING 1 OF 2020 (RF)

PENSION FUNDS ACT, 1956 (ACT NO. 24 OF 1956)

FINANCIAL SECTOR REGULATION ACT, 2017

**INTERPRETATION RULING: INTERPRETATION AND APPLICATION OF
SECTION 37C OF THE PENSION FUNDS ACT, 1956**

1. PURPOSE OF THE INTERPRETATION RULING

This Interpretation Ruling is issued in terms of section 142(1) of the FSR Act to provide clarity, consistency and certainty in the interpretation and application of section 37C of the Act.

2. DEFINITIONS

In this Interpretation Ruling “**the Act**” means the Pension Funds Act, 1956 (Act No. 24 of 1956), and any word or expression to which a meaning is assigned in the Act bears the meaning so assigned to it, and unless the context indicates otherwise-

“**Default Regulations**” means regulations 37, 38, 39 and 40 of the Regulations made in terms of section 36 of the Act as published in GN R98 in *Government Gazette* 162 of 26 January 1962, and amended on 25 August 2017 in GN 863/2017;

“**deferred retiree**” means a member who has reached retirement age and such member has not elected to withdraw their retirement benefit or a member who has reached retirement age and elected to remain in a pension fund pursuant to the pension fund rules; and

“**FSR Act**” means the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).

3. BACKGROUND

3.1 On 8 March 2010, the then Registrar of Pension Funds issued Information Circular PF No. 2 of 2010 (Information Circular) to provide clarity on the applicability and reach of section 37C of the Act insofar as it affected different categories of pension benefits such as withdrawal benefits or preserved retirement benefits which had accrued to a member of a pension fund but had not yet been paid upon the death of such a member.

3.2 The Information Circular stated that:

“The provisions of section 37C are only applicable to lump sum benefits which become payable by the fund in terms of its rules as a result of the death of a member. When a member exits a fund as a result of resignation, dismissal, retrenchment or retirement, the relevant withdrawal or retirement benefit accrues in terms of the rules of a fund. Should the member die after the date of accrual of the withdrawal or retirement benefit, but before the benefit can be paid or before the member could make an election for the benefit to be transferred to another fund, the legal nature of the benefit does not change and the provisions of section 37C of the Act is therefore not applicable.”

3.3 On 25 August 2017, the Minister of Finance published the default regulations with an effective date of 1 September 2017. All default arrangements in place on this date were required to comply with the requirements set out in the Default Regulations by 1 March 2019. In particular, regulation 38(1)(a) requires all funds to amend their rules to provide for members who leave the service of a participating employer to automatically become paid-up members until the member instructs the fund in writing to pay out or transfer the benefit pursuant to regulation 38(1)(b)(i).

3.4 The significance of regulation 38 is that it constitutes a departure from many retirement fund rules which made the benefit legally due and payable upon the termination of service by the member. Such rules will now be inconsistent with regulation 38 and must accordingly be amended.

3.5 On 12 December 2018, the Authority issued PFA Guidance Notice No. 8 of 2018 (Guidance Notice) to give guidance on the application of various requirements contained in the Default Regulations. Paragraph 4.6(e) of the Guidance Notice stated that *“[s]ection 37C of the Act is applicable to a paid-up member’s benefit, in the same manner that it would apply to any other death benefit payable by a fund.”*

3.6 Subsequent to the publication of the Guidance Notice, the Authority received numerous enquiries concerning paragraph 4.6(e) of the Guidance Notice and the applicability of section 37C to paid-up members. Concerns were raised that the paragraph was inconsistent with the Information Circular and that the discrepancy between the Information Circular and Guidance Notice results in ambiguities and uncertainty on the interpretation of section 37C of the Act.

3.7 In order to address these concerns, the Authority has taken the decision to

issue an Interpretation Ruling in terms of section 142(1) of the FSR Act in order to promote legal certainty and to ensure clear and consistent interpretation and application of section 37C of the Act.

4. INTERPRETATION AND APPLICATION OF SECTION 37C OF THE ACT

4.1 The introduction to section 37C(1) of the Act provides as follows:

“Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner...”

4.2 Section 37C provides for the manner in which the benefit payable upon the death of a member must be distributed. It does not provide for the manner in which any benefit that is payable upon the death of a member must be calculated. The calculation of such benefit must be done in accordance with the registered rules of the fund concerned.

4.3 Section 37C applies despite anything to the contrary contained in any law or the rules of a fund. Therefore, in the event that a registered rule is in conflict with section 37C, section 37C prevails.

4.4 Reference to “payable ...upon the death of a member” in section 37C means that it is the death of the member that resulted in the benefit becoming payable. If the fund received a written instruction from the member to pay out or to transfer the benefit prior to the member’s death, then it is that written instruction that caused the benefit to be payable (not the death of the member) and accordingly section 37C will not be applicable.

4.5 Regulation 38(1)(b)(i)¹ provides that if a member has not made an election to pay out or transfer his/her benefits upon leaving the service of a participating employer before retirement, such member is a paid-up member. Put differently, even when a member exits the service of their participating employer, such member will only cease to be a paid-up member once such member instructs the fund in writing to pay out or transfer the member’s benefits.

4.6 A paid-up member, a deferred retiree and a member of an unclaimed benefit fund is a ‘member’ as defined in the Act. Since section 37C is applicable to a ‘member’ under the circumstances set out in that section, it follows that section 37C is applicable to a paid-up member, a deferred retiree and a

¹ As explained in paragraph above 3.3 above.

member of an unclaimed benefit fund. That changes when a member makes an election (instructs the fund) to withdraw their benefit, because it is the election to withdraw that makes the benefit payable, not the death of the member. The same principle applies to unclaimed benefits.

4.7 Therefore, reference to “*any benefit*” in section 37C includes:

- (a) a paid-up member’s benefit;
- (b) a deferred retiree’s benefit; and
- (c) an unclaimed benefit.

5. EFFECTIVE DATE

5.1 This Interpretation Ruling takes effect on the date of publication.

5.2 Information Circular PF No. 2 of 2010 is hereby withdrawn.



CD DA SILVA
DIVISIONAL EXECUTIVE: REGULATORY POLICY
FINANCIAL SECTOR CONDUCT AUTHORITY

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