

FINANCIAL SERVICES BOARD

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Date: 8 October 1998

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CIRCULAR PF NO. 99

(To all self-administered funds, all fund administrators, and the administering insurers of funds exempted in terms of section 2(3)(a) of the Act)

REPATRIATION OF SURPLUS TO PARTICIPATING EMPLOYERS

A number of requests have been lodged with the Registrar of Pension Funds to approve amendments to the rules of pension funds which will permit the repatriation of surplus to the employer upon liquidation of the fund, despite the moratorium placed upon such repatriations by the Registrar pending passage of the Pension Funds Amendment Bill, 1998, through Parliament.

The Registrar has sought legal advice on the matter. This Circular summarises the opinion which the Registrar has received and confirms that no amendments will be approved which will enable repatriation of surplus to the employer, even on liquidation, until such time as the Act is changed to permit it.

1. Counsel's opinion on the repatriation of surplus to the employer

The opinion of Senior Counsel was requested as to whether or not a proposed amendment to the Rules of a fund which would permit repatriation of surplus upon liquidation of the fund to the employer, would be consistent with the Pension Funds Act, as the Registrar may, in terms of section 12(4), only register an amendment which, amongst other things, is not *inconsistent* with the Act.

In deciding whether or not to register a proposed amendment which is inconsistent with the Act, the advocate advised that the Registrar has no discretion; if it is inconsistent, he is precluded from registering the proposed amendment.

The advocate established three propositions:

- (a) The fund and assets of the pension fund are owned by the pension fund, a separate juristic person, to the exclusion of all others;
- (b) The object for which those funds are held is the benefit of the members of the fund and their dependants by way of lump sum benefits and annuities (pensions) on retirement or death;
- (c) The funds so held are held to the complete exclusion of the employer.

The next step was to decide whether the liquidation of the fund changes the situation. There is nothing in the Act which makes these principles subject to an exception that, on liquidation of the fund, if there is a surplus of assets over and above that which is necessary to secure to all beneficiaries the benefits to which they are entitled under the rules, the employer does, or can, acquire an interest in that surplus.

Seen from a different perspective, the question may be asked whether or not the trustees have exercised their fiduciary duties in a proper way, and avoided any conflict of interest in coming to their decision.

If, for example, it was found that the trustees were acting at the behest of the employer and with a complete disregard for the interests of the beneficiaries and the objects for which the pension fund had been established, that alone would be a proper ground for the Registrar to reject an amendment.

The proposed amendment which would allow for the repatriation of surplus to an employer was therefore not consistent with the Act and should be rejected by the Registrar. The Registrar did not have any discretion not to reject the amendment.

This opinion was consistent with that taken from another Senior Counsel. Both Counsel also advised the Registrar that the Lintas judgment by the Board of Appeal established in terms of section 26(1) of the Financial Services Board Act, 97 of 1990, should not be adopted as a precedent.

2. Response by the Registrar

The Registrar is actively facilitating amendment to the Pension Funds Act which will permit distribution of surplus between stakeholders, including repatriation to

the employer, under conditions which will prevent abuse and which will protect the interests of members and pensioners. Consultations are in progress with interested parties.

After consideration of the views of the two eminent Senior Counsel consulted, the Registrar believes that he has no power under the Pension Funds Act to permit any repatriation of surplus to the employer and that he is obliged to refuse to register any rule amendment which would permit repatriation upon liquidation.

The position will only change if Parliament passes an amendment to the Pension Funds Act clearly permitting the Registrar to register such amendments, or if an authoritative Court judgment to that effect is pronounced.

Yours faithfully

REGISTRAR OF PENSION FUNDS