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Pension funds distress rules & FSCA operations during lockdown

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On 30 March, the FSCA published a guidance note discussing the impact of the coronavirus pandemic on FSCA operations. It deals with pension funds and encourages those that have such rule in place to apply rules for distressed employers and members and those that do not have such rules in place to urgently submit rule amendments to the FSCA. It also notes that the Licensing and Business Centre will continue to operate during the lockdown but delays are to be expected.

On 15 March 2020 the President of South Africa (the "**President**") declared a National Disaster in terms of the Disaster Management Act[1] due to the rapid spread of Covid-19 in South Africa. On 24 March 2020, the President announced that the country would embark on a national lockdown from 27 March 2020 to 16 April 2020 (the "**Lockdown Period**").

The Financial Sector Conduct Authority ("**FSCA**"), as part of its efforts to reduce the harsh economic impact that Covid-19 may have on financial customers, regulated entities and the South African economy, on 30 March 2020 released communications to the financial industry dealing with what the FSCA viewed as the most pressing issues.

1. **The retirement funds industry – distress rules**
   The Pension Funds Act[2] stipulates that the full contributions payable to a pension fund by an employer are payable by no later than 7 days after the end of the month for which contributions are due and payable. Most pension funds have rules that apply when the employer and members are in financial distress. Those rules must be approved by the FSCA before they take effect. The "distress rules" normally provide for a postponement of contribution payments as well as for a temporary absence from work (with or without pay), a break in service (in instances where employees are not working) and a reduction of pensionable service (in respect of employees who are working reduced hours).

   In the 30 March communications, the FSCA has encouraged all pension funds to apply these distress rules to alleviate the financial difficulties that employers and members may be facing. Distressed employers and members would therefore be able to withhold contributions to the pension fund pending resolution of the distress situation.

   The import of the guidance note is therefore to confirm that the FSCA considers distress rules to be consistent with the Pension Funds Act and that it will interpret the Act so as to give effect to such rules.

   For those pension funds that do not have such rules in place already, the FSCA has requested that they urgently submit rule amendments to the FSCA. The proposed amendments should set out the effective date on which the amendments will come into force as agreed upon between the pension funds and employers.

   Ordinarily an amendment to a pension fund's rules would need to be stamped by the FSCA but the FSCA has made it clear that during the Lockdown Period, it will provide a letter and an unstamped version of the rule amendment with a stamped version to follow once normal business operations resume.

The FSCA has also consulted with the South African Revenue Service ("**SARS**") in respect of the tax implications for pension funds in the event of the reduction or cessation of employer and member contributions by an employer or participating employer. SARS has advised that it will not jeopardise the income tax approval status of retirement funds.

2. **Licensing and Business Centre – operational during the Lockdown Period**

   The FSCA has also advised that its Licensing and Business Centre will continue to operate. The Licensing and Business Centre deals with: (a) new licence applications; (b) variation of licences; (c) complaints; (d) general enquiries; (e) statutory returns (processing); (f) statutory returns (enquiries); and (g) unclaimed benefits enquiries / retirement funds complaints. All such processes that were instituted before the Lockdown Period will be prioritised and subsequent processes will be dealt with on a first-come-first-serve basis.

   The FSCA has, however, advised that there may be delays in the processing (capturing, verifying, assessing) of the various processes.

Werksmans is happy and ready to assist you with any amendments to your rules and processes.

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[1] Act 57 of 2002.

[2] Section 13A.



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