

**SOUTH AFRICA'S OCCUPATIONAL RETIREMENT SYSTEM: A COMPARATIVE  
SOCIAL SECURITY PERSPECTIVE**

by

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I would also like to acknowledge the support I always receive from my parents, brother, and two sisters.

Above all, I thank **THE ALMIGHTY GOD** for his unfailing love and faithfulness.

**DECLARATION**

I declare that **SOUTH AFRICA'S OCCUPATIONAL RETIREMENT SYSTEM: A COMPARATIVE SOCIAL SECURITY PERSPECTIVE** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that I have not previously submitted this work, either as a whole or in part, for a qualification at another university or at another faculty at this university.

## SUMMARY

Continuous reforms of pension systems of countries of the world remain significant considering the fact that many countries, including South Africa, face challenges of how to adequately provide for their ageing populations. South Africa's retirement system takes a formal three-pillar approach; comprising the state old-age pension, occupational funds, and private savings. Pension provision (occupational) takes the form of retirement funds which are mostly established by employers, administered by insurance companies, and regulated by the state through legislation. South Africa does not have a public fund and relies solely on the private retirement system. Many workers in South Africa retire with no income or with insufficient benefits and end up relying on the state for support. The reasons for this include a general lack of a culture of saving, the absence of a public fund, the voluntary nature of the system, leakages that exist within the system, a lack of mandatory preservation of benefits, risks with lump-sum cash payments, and the fact that the system focuses more on those in formal employment. This raises the question whether the system is in line with what is guaranteed by section 27 of the Constitution of the Republic of South Africa, 1996 that *everyone has a right to have access to social security*. The right guarantees "everyone" access to some form of income (protection) during retirement, which makes retirement provision an important social security component. Thus, pensions play an important social security role as they protect the elderly from falling into poverty. Benefits received from retirement savings serve as income replacement in retirement and should therefore receive adequate protection, and they must be able to provide adequate protection to the beneficiaries – beyond mere survival. Over the years South Africa has embarked on many reform processes to find ways to improve its retirement system. This study determines the adequacy of South Africa's occupational retirement system along social security objectives. It describes the nature of the system, considers proposals made for reform purposes, examines international law, (including systems in Belgium, the Netherlands, and the United Kingdom for a comparative study), identifies weaknesses in the system, and makes some proposals to improve coverage and protection of benefits.

**KEY WORDS**

Retirement fund, occupational, pension, provident, preservation, annuity, old-age, social security, benefit, dependants

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AIPF	Associated Institutions Pension Fund
AKW	General Child Benefit Act ( <i>Algemene Kinderbijslagwet</i> )
ANC	African National Congress
ANW	General Surviving Relatives Act ( <i>Algemene Nabestaandenwet</i> )
AOW	General Old Age Act ( <i>Algemene Ouderdomswet</i> )
AU	African Union
BCEA	Basic Conditions of Employment Act
BER	Bureau for Economic Research
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
DNB	Dutch Central Bank ( <i>De Nederlandsche Bank</i> )
FAIS	Financial Advisory and Intermediary Services Act
FANRPAN	Food Agriculture and Natural Resources Policy Analysis Network
FSB	Financial Services Board
GEP	Government Employees Pension
GEPF	Government Employees Pension Fund
ICESCR	International Covenant on Economic, Social and Cultural Rights
IES	Institute for Employment Studies
ILO	International Labour Organisation
JSA	Jobseekers' Allowance
LISV	National Institute for Social Security ( <i>Landelijk Instituut Sociale Verzekeringen</i> )
MPNP	Multi-Party Negotiating Process
NASASA	National Stokvel Association of South Africa
NEST	National Employment Savings Trust
NPO	National Pension Office
NSF	National Savings Fund
OAU	Organisation of African Unity
OCMW-CPAS	Public Welfare Centre
OECD	Organisation for Economic Cooperation and Development
OPB	Occupational Pensions Board
OPF	Dutch Association of Company Pension Funds
OP-ICESCR	Optional Protocol to the Covenant on Economic, Social and Cultural Rights
OPRA	Occupational Pensions Regulatory Authority
PAJA	Promotion of Administrative Justice Act

## LIST OF ABBREVIATIONS

PP	Private Pensions
PVK	Pension and Insurance Authority ( <i>Pensioen en Verzekeringskamer</i> )
RDP	Reconstruction and Development Programme
REBECA	Research on Social Benefits in Collective Agreements
RSA	Republic of South Africa
RSVZ-INASTI	National Institute for the Social Security for the Self-employed
RSZ-ONNS	National Office for Social Security
S2P	State Second Pension
SADC	Southern African Development Community
SARS	South African Revenue Services
SASSA	South African Social Security Agency
SERPS	State Earnings-related Pension Scheme
SMME	Small, Medium and Micro-Enterprises
TW	Supplementary Benefits Act ( <i>Toeslagenwet</i> )
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UWW	Administration of Employees' Insurance Scheme ( <i>Uitvoeringsinstituut Werknemersverzekeringen</i> )
WAO	Disablement Benefits Act ( <i>Wet op de arbeidsongeschiktheidsverzekering</i> )
WB	World Bank
WVB	Mandatory Pension Act for Professional Groups ( <i>Wet Verplichte Beroepspensioenregeling</i> )
WVPS	Equalisation of Pension Entitlements after Separation Act ( <i>Wet Verevening Pensioenrechten bij Scheiding</i> )
WW	Unemployment Benefits Act ( <i>Werkloosheidwet</i> )
WWB	Work and Social Assistance Act ( <i>Wet Werk en Bijstand</i> )
WW II	Second World War
ZW	Sickness Benefits Act ( <i>Ziektewet</i> )

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## CHAPTER 1

### INTRODUCTION

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#### 1.1 BACKGROUND

Providing retirement<sup>1</sup> or old-age income security has been and still is a huge challenge for countries of the world, and even more so for developing countries. Many countries have a high number of people who retire either without or with inadequate income support,<sup>2</sup> either due to a failure to save money or not saving enough for retirement while still working and earning a salary, or as a result of leakages that occur between joining a retirement scheme and retiring. Provision for retirement comes in different forms, which include formal and informal arrangements, but many countries, including South Africa, mainly rely on formal arrangements.

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<sup>1</sup> Section 1 of the Pension Funds Act 24 of 1956 (the Pension Funds Act of 1956) defines “retirement” as the period commencing on the member’s retirement date. This definition was inserted with effect from 1 November 2008 in terms of section (1)(g) of Act 22 of 2008. The Pension Funds Act of 1956 defines “retirement date” as the date on which a member becomes entitled in terms of the rules of the fund to the grant of an annuity or the receipt of a lump-sum payment on account of age, ill health or retrenchment of staff. In *SA Metal & Machinery Co (Pty) Ltd v Gamaroff* [2010] 2 BLLR 136 (LAC), the respondent’s services were terminated on the basis that he had reached his retirement age. He challenged the dismissal alleging he faced unfair discrimination on the basis of age. Evidence indicated that in terms of the fund rules, the retirement age was 65 (at par 11). In terms of section 187(1)(f) of the Labour Relations Act 66 of 1995, a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee directly or indirectly, on any arbitrary ground, including age. Section 187(2)(b) states that despite subsection (1)(f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity (see in this regard *Karan t/a Karan Beef Feedlot v Randall* [2012] 11 BLLR 1093 (LAC) at paras 19 and 20). The Labour Appeal Court in *Cash Paymaster Services (Pty) Ltd v Browne* (2006) 27 ILJ 281 (LAC) at par 26, held that the question of normal retirement age only applies where there is no agreed retirement age between the employer and employee. See also regarding retirement age, Adams L “Retiring beyond the Normal or Agreed Age” September 2013 *DEREBUS* at 39, where it is stated that there must be an express agreement between the employer and employee about retirement age. Where there is no agreement, the employee will retire at the company’s normal retirement age. This can be deduced from the employer’s policy or from a long-established practice that has been applied consistently over many years.

<sup>2</sup> James E “Income Security for Old Age: Conceptual Background and Major Issues” (Working Paper, Public Sector Management and Private Sector Development, Country Economics Department, The World Bank) September 1992 at 1; Olivier MP, Okpalupa MC, Smit N, Thompson M, Du Toit AM, Greyling E, Van Rensburg J, Liffmann R, Ogunronbi SO, and Porter I *Social Security: General Principles* 1999 at 104 (hereafter, Olivier et al *Social Security: General Principles*).

Informal arrangements are in the form of survival means developed by individuals or communities to provide financial and social support to one another, families, extended families, and members of the community at large.<sup>3</sup> Formal arrangements take the form of state-provided support such as social assistance measures, for example social grants funded by the government through taxes; and state-regulated social insurance measures, for example income replacement and compensation funds such as the unemployment insurance fund and retirement funds, financed through contributions made by employers and employees who are members of those funds.<sup>4</sup>

This study considers both formal and informal arrangements with special attention placed on the formal arrangements of providing for old-age income security through occupational (private) retirement schemes. The terms pension fund, pension scheme, retirement fund, or retirement scheme are used interchangeably in this study to refer to funds established with the purpose of providing a retirement benefit at retirement.

## **1.2 THE OCCUPATIONAL RETIREMENT SYSTEM IN SOUTH AFRICA FROM A SOCIAL SECURITY PERSPECTIVE**

Section 27 of the Constitution of the Republic of South Africa, 1996<sup>5</sup> (the Constitution), guarantees everyone the right to social security and social assistance. In terms of section 27(1)(c) of the Constitution, everyone has the right to have access to social security, including social assistance, if they are unable to support themselves and their dependants.

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<sup>3</sup> See generally Dekker AH *Informal Social Security: A Legal Analysis* (Doctoral Thesis) April 2005 at 6 (hereafter, Dekker *Informal Social Security*).

<sup>4</sup> Strydom EML, Le Roux PAK, Landman AA, Christianson MA, Dupper OC, Myburgh P, Barker FS, Garbers CJ, Basson AC, Dekker A and Esselaar V *Essential Social Security Law* 2006 2ed at 6-10 (hereafter, Strydom *Essential Social Security Law*).

<sup>5</sup> The Constitution of the Republic of South Africa, 1996 (hereafter, the Constitution).

On the other hand, section 27(2) gives the state the duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to social security and social assistance.<sup>6</sup>

This obligation should be understood to include extending coverage to those who are currently not covered by South Africa's retirement system and those who are not adequately covered. This would include reforming the system by, among other things, changing applicable laws and policies to create a framework for improved inclusivity and adequacy of the system.

Social security in South Africa is a guaranteed right that comprises measures aimed at providing both financial and social support to protect people from falling into the poverty trap and to lift those who are already experiencing financial hardships out of poverty. Social security is aimed at providing support to people who are confronted by social and financial hardships as a result of factors such as unemployment, sickness, disability, and old-age or retirement.<sup>7</sup> Its objectives include the promotion of social and economic equality by, among other things, redistributing available resources to those in need and by putting in place a policy framework within which people (who can) are allowed to protect themselves against certain economic and social risks by making contributions to schemes that will compensate them should a risk they are protected against occur.<sup>8</sup>

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<sup>6</sup> Section 27(1)(c) and (2) of the Constitution is discussed in more detail under paragraph (par) 5.2 in Chapter (Ch) 5.

<sup>7</sup> For example, by making regular contributions into special funds meant for those social risks. See in this regard East R *Social Security Law* 1999 at 1 (hereafter, *East Social Security Law*).

<sup>8</sup> East (ibid) at 1; Olivier et al *Social Security: General Principles* op cit note 2 at 31.

Contributory social security schemes are insurance based<sup>9</sup> and people who contribute to these schemes are entitled to receive protection in the form of benefits when they are no longer working; for example due to old-age. When employed people become old, they stop working and retire from work. They no longer earn a salary and need some form of income to replace the salary they were receiving when they were still working. In this way, retirement benefits can be considered to serve an income replacement purpose. Retirement benefits also have a broader societal function, in that they contribute towards the improvement not only of fund members' standard of living, but also that of the member's dependants (or family) and indirectly that of the community they are living in.<sup>10</sup>

The system in South Africa takes a formal three-pillar approach, comprising poverty relief, in the form of the state old-age pensions; retirement savings through occupational retirement funds in the form of either a pension or provident fund; and private savings through retirement annuity funds and individual or collective investment schemes and insurance policies.<sup>11</sup> Retirement provision for workers mostly takes the form of private retirement schemes.<sup>12</sup> As these schemes are established specifically for a particular employer's employees or for employees within a particular sector, the benefits they offer are only restricted to employee members and their dependants in certain circumstances.<sup>13</sup> Contributions to these schemes are made by both employees and employers.<sup>14</sup>

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<sup>9</sup> Contributions are generally made by the employer deducting (in terms of section 13A of the Pension Funds Act of 1956) the amount of the contribution from employees' salaries and paying it to a retirement fund (and the employer paying its own share of contribution to the fund), as a form of insurance premium to protect the employee from the risk of old-age.

<sup>10</sup> East *Social Security Law* op cit note 7 at 39-40.

<sup>11</sup> National Treasury, South Africa Retirement Fund Reform (A Discussion Paper) December 2004 (The Three Pillars of Retirement Funding System) at 1 (hereafter, South Africa Retirement Fund Reform: First Discussion Paper). Among other things, this paper proposes the introduction of a National Savings Fund (at 20) which is intended to extend coverage of retirement security systems for people who are presently excluded.

<sup>12</sup> The Pension Funds Act of 1956, in this regard.

<sup>13</sup> See generally, *Kaplan and Another NO v Professional and Executive Retirement Fund and Others* 1999 (3) SA 798 (SCA), which dealt with the distribution of death benefits (to deceased members' dependants) in terms of section 37C of the Pension Funds Act of 1956.

<sup>14</sup> Fund rules are discussed under par 6.2 in Ch 6.

It is usually compulsory for every employee in the workplace who qualifies to be a member of the fund to join where the employer or sector has established a fund.<sup>15</sup> It should, however, be noted that in South Africa it is currently by law not compulsory for employers to establish retirement funds for their employees, except in the sectors where the Minister has issued a sectoral determination for the establishment of a fund for all the employees in the sector to participate in that fund.

An employer who establishes a retirement fund is generally also at liberty to decide which categories of employees are eligible to join the fund and which are not,<sup>16</sup> as long as the employer does not unfairly differentiate or discriminate against any employee or employees on the basis of one or more of the grounds listed in section 9(3) of the Constitution. Those grounds include race, gender, sex, marital status, sexual orientation, age, and disability. Generally, where the employer has established a fund and decided on the categories of employees to join the fund, all new and future employees eligible to join must do so as a condition of employment.<sup>17</sup>

There are two types of occupational retirement funds; namely “pension” and “provident” fund.<sup>18</sup> The term “pension fund” is usually used to refer to both, even though the two do not necessarily mean the same thing.<sup>19</sup> A pension is a retirement fund in which a member may take only up to one-third of the retirement benefit as a lump-sum cash payment, with the balance having to be paid out in the form of a pension over the rest of that member’s life.<sup>20</sup> A provident fund, on the other hand, can be described as a retirement fund in which the member may take up to 100% of the retirement benefit as a lump-sum cash payment.<sup>21</sup>

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<sup>15</sup> Strydom et al *Essential Social Security* op cit note 4 at 28.

<sup>16</sup> Strydom (ibid) at 27; Olivier et al *Social Security: General Principles* op cit note 2 at 289; South Africa Retirement Funds Reform: First Discussion Paper (Access, Compulsion, and Preservation) op cit note 11 at 1.

<sup>17</sup> Strydom et al *Essential Social Security* op cit note 4 at 28.

<sup>18</sup> Discussed under par 6.4 in Ch 6.

<sup>19</sup> Discussed under par 6.4 in Ch 6.

<sup>20</sup> Sephton B, Cooper DI, and Thompson C *A Guide to Pension and Provident Funds Legal and Policy Considerations* 1990 (Glossary of Terms Used) at (x).

<sup>21</sup> Sephton (idem). Both defined-benefit and defined-contribution funds are described under paras 6.4.3 and 6.4.4 in Ch 6.

However, they can both take the form of either a “defined-benefit” or a “defined-contribution” fund.<sup>22</sup> The question with these two types of retirement funds is whether they can both be considered appropriate to achieve social security objectives. This study shows in Chapter 6 that provident funds by their nature are open to many risks and are therefore not necessarily promoting social security objectives.

### **1.3 OBJECTIVES AND OUTLINE OF THE STUDY**

#### **1.3.1 Objectives**

The study provides a critical description of South Africa’s retirement system by looking at coverage provided by the system to workers in the country, the adequacy of the benefits provided by retirement schemes, the protection of benefits before and after the retirement date, and the remedies the system offers to beneficiaries in case of disputes or complaints. It considers social and retirement security provisions in various international instruments and obligations they create on member states and the international community.<sup>23</sup> It further looks at retirement provisions in other jurisdictions; namely Belgium, the Netherlands, and the United Kingdom,<sup>24</sup> and provides an analysis of South Africa’s retirement security system in comparison to systems in these three countries. In other words, the study presents a non-critical analysis of the systems adopted and followed in these three countries in comparison to the system followed in South Africa. The approach taken by the World Bank is also considered. The origin and historical development of social and retirement security in South Africa are described to determine how the system has evolved over the years.<sup>25</sup> South Africa’s retirement security system is also analysed and its nature and content described.<sup>26</sup>

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<sup>22</sup> Discussed under par 6.4 in Ch 6.

<sup>23</sup> Discussed in Ch 2.

<sup>24</sup> Discussed in Ch 3.

<sup>25</sup> Discussed in Ch 4.

<sup>26</sup> Discussed in Ch 5.

The South African occupational retirement system<sup>27</sup> is described and shortcomings are highlighted; proposed reforms are considered; conclusions are drawn; a number of recommendations are made; and at the end, a new model is proposed.<sup>28</sup>

The following fundamental questions form the basis of this study:

- Does South Africa's current retirement system provide adequate coverage to all those who are employed in the country?
- Do the coverage and benefits offered by the system satisfy social security objectives and principles; and if not, what needs to be done?
- Does the system provide adequate remedies/dispute resolution mechanisms suitable for social security complaints?
- How can the weaknesses found in the system be addressed?

The aim of this study is to find ways in which South Africa's current retirement system can be reformed to provide adequate coverage to all the workers in the country. The study encourages the culture of saving in this country, in particular retirement saving, in response to the government's concern about the decline in the number of people who are saving. The general lack of saving has unfortunately meant an increase in state reliance by the majority of the people; including those who had the ability to save when they were still working. The study emphasises the fact that a system must be developed which is suitable to the needs of the workers in South Africa, which leans towards the approach advocated by the World Bank, and which incorporates important features from systems in other jurisdictions,<sup>29</sup> instead of following any particular system.

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<sup>27</sup> Discussed in Ch 6.

<sup>28</sup> Discussed in Ch 7.

<sup>29</sup> Discussed in Ch 3.

The scope of the study does not include the following:

- A discussion on the taxation of retirement funds
- An in-depth discussion of administration and governance of funds
- Costs
- Investment issues
- Developments which took place after October 2015

### **1.3.2 Outline**

#### **1.3.2.1 Introduction**

This chapter introduces the research subject, objectives and outline, approach, and methodology of the study.

#### **1.3.2.2 *International instruments on the right to social and retirement security***

International bodies that play a role in the development of the right to social and retirement security in the international community are considered and their functions are described. Important provisions in various international instruments and the influence they have on the development, protection, and promotion of the right to social and retirement security in the countries of the world, including South Africa, are discussed.<sup>30</sup> It should be noted that South Africa's present social security has its roots in section 27 of the Constitution – which gives everyone the right to have access to social security, comprising social assistance, for those who do not have means of support or any form of income and social insurance, by creating a framework within which those who are able to save money for their retirement can do so.<sup>31</sup>

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<sup>30</sup> Discussed in Ch 2.

<sup>31</sup> Discussed in more detail under par 5.2 in Ch 5.

The discussion also covers international standards set by the International Labour Organisation (ILO) in the area of social security, including old-age coverage and benefits. It further illustrates the fact that social and retirement security is an internationally recognised human right which needs to be realised by everyone without discrimination, through systems that provide adequate coverage and benefits at the level that meets acceptable standards.

Programmes must be modelled in such a way that they will be able to achieve comprehensive social protection and provide coverage or aim to progressively provide coverage to those not currently covered by existing schemes and to progressively increase the level of coverage to those not adequately covered.<sup>32</sup>

### ***1.3.2.3 Social and retirement security in Belgium, the Netherlands, and the United Kingdom***

Countries<sup>33</sup> of the world follow different approaches in their social security and retirement security provision; depending on factors that may include the political and socio-economic situations in those countries. The discussion illustrates the fact that providing for social security and retirement is a universal problem. The challenges are not only constant but are also unique to each country, hence there are regular reforms to systems in many countries.

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<sup>32</sup> See ILO Social Security: A New Consensus, 2001 Report, accessed from <http://www.ilo.org/public/english/protection/secsoc/downloads/353sp1.pdf>, last visited 07 May 2015.

<sup>33</sup> Systems in Belgium, the Netherlands, and the United Kingdom are discussed in Ch 3.

Even though there are countries with systems that can be regarded as being amongst the best in the world, those systems are not without shortcomings, as will be seen with the systems in Belgium, the United Kingdom, and the Netherlands, which are discussed in Chapter 3. It therefore remains the responsibility of each government to constantly work on improving their systems with the aim of providing the best possible social security and retirement coverage and benefits for all who live in those countries. The pension systems in Belgium, the Netherlands, and the United Kingdom are also different and unique.<sup>34</sup>

These three countries are found in Europe and form part of the Organisation for Economic Cooperation and Development (OECD) countries.

As it stands, Europe has no uniform social security and pension system as some of the countries follow the Beveridge approach,<sup>35</sup> while others follow the Bismarckian approach<sup>36</sup>. Most of the countries under the OECD use the three-pillar approach, even though each country has its own way of applying these pillars. The three pillars are state-provided pension, occupational plans, and voluntary individual pension schemes or private savings.<sup>37</sup>

Coverage in most of the countries which are members of the OECD is mandatory for most workers.<sup>38</sup> The question is whether there are any lessons South Africa can learn from these three countries that can help in extending retirement security provision to all the workers in South Africa.

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<sup>34</sup> Discussed in Ch 3.

<sup>35</sup> Discussed under par 3.2.2.2 in Ch 3.

<sup>36</sup> Discussed under par 3.2.2.1 in Ch 3.

<sup>37</sup> Gillion G, Turner J, Bailey C, Latulippe D *Social Security Pensions: Development* (International Labour Office Geneva) 2000 at 576-578 (hereafter, Gillion et al *Social Security Pensions*).

<sup>38</sup> *Ibid* at 582-583.

## 1.3.2.3.1 Belgium

Belgium<sup>39</sup> follows the Bismarckian approach, which makes it compulsory for all people to be insured. This applies in respect of both Belgian nationals and non-nationals. People who are working make contributions to social insurance schemes in order to qualify for benefits when they retire. Those who are not working and have no income that will enable them to contribute to the retirement schemes are afforded social assistance by the state. With this approach, everyone in Belgium is covered by some form of social security and has a basic standard of living.<sup>40</sup>

The Belgian pension system comprises three pillars; namely a guaranteed minimum old-age pension, occupational pensions, and private pension schemes.<sup>41</sup>

The country has special pension schemes for the self-employed and for private-sector employees.<sup>42</sup> Occupational-defined benefit pension plans target retirement replacement rates of between 60% and 75%. A high number of sectoral pension schemes take the form of defined-contribution schemes.<sup>43</sup> It is unfortunately difficult to determine how Belgium fares against other countries of the world as it has not been included in the list of countries considered in the 2014 Melbourne Mercer Global Pension Index, which is used to show how some of the countries of the world (both developed and developing countries) are faring in their pension provision.<sup>44</sup>

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<sup>39</sup> Discussed under par 3.3 in Ch 3.

<sup>40</sup> Social Security Benefits in Belgium accessed from <http://www.uclouvain.be/en-4976.html>, last visited on 12 November 2012; see also <http://brussels.angloinfo.com/countries/belgium/socsecurity.asp#pensions>, last visited 07 May 2015.

<sup>41</sup> De Gallatay E and Turtelboom B *Pension Reform in Belgium* (International Monetary Fund Working Paper) July 1996 at 5.

<sup>42</sup> OECD Pensions at a Glance: Pension Country Profile: Belgium (Extract from the OECD Private Pensions Outlook 2008) at 169, accessed from <http://www.oecd.org/dataoecd/63/53/42565572.pdf>, last visited on 07 May 2015.

<sup>43</sup> *Idem*.

<sup>44</sup> The Melbourne Mercer Global Pension Index is used to compare pension systems around the world. It objectively compares the retirement income systems in different countries of the world. See regarding the Melbourne Mercer Global Pension Index 2014 Report: <http://globalpensionindex.com/2014/melbourne-mercero-global-pension-index-2014-report.pdf>, last visited 07 May 2015 (hereafter, Melbourne Mercer Global Pension Index 2014 Report). Countries examined include Australia, Austria, Brazil, Canada, Chile, China, Denmark, Finland, France, Germany, India, Indonesia, Ireland, Italy, Japan, Korea (South), Mexico, Netherlands, Poland, Singapore, South Africa, Sweden, Switzerland, the United Kingdom, and the United States of America.

### 1.3.2.3.2 The Netherlands

The social security system in the Netherlands<sup>45</sup> focuses primarily on providing financial support for citizens who do not have any means of income.

The country's pension system comprises three pillars; namely the state pension scheme, which covers everyone in the Netherlands; funded occupational pension plans; and private pension insurance.<sup>46</sup>

Although there is no statutory obligation for employers to offer a pension scheme to employees, industrial relations agreements have mostly been used to extend coverage to the majority of the workers. Thus the system is quasi-mandatory in nature.<sup>47</sup> Most pensions take the form of "defined-benefit" schemes.<sup>48</sup>

Occupational retirement schemes aim to supplement the statutory old-age pension by an amount which is related to the last earned income and the duration of the employment relationship with the employer.<sup>49</sup> Supplementary occupational pensions promise to supplement the statutory old-age pension by up to 70% of the last earned wages, on condition that workers have been insured for 40 years.<sup>50</sup> According to the Mercer Global Pension Index findings of 2014, the Netherlands has a sound structure with a "B+" grade. A "B+" grade means that the system has a sound structure with many good features with areas of improvement differentiating it from an "A" grade system. An "A"-grade system is that which has a first class and robust retirement income system that delivers good benefits, is sustainable, and has a high level of integrity.<sup>51</sup>

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<sup>45</sup> Discussed under par 3.4 in Ch 3.

<sup>46</sup> Meyer T, Bridgen P, Riedmüller B *Private Pensions versus Social Inclusion – Non-State Provision for Citizens at Risk in Europe* 2007 at 79-80.

<sup>47</sup> OECD Pensions at a Glance: Public Policies across OECD Countries 2005 at 152, accessed from <http://www.oecd.org/els/soc/34816545.pdf>, last visited 07 May 2015.

<sup>48</sup> See the discussion under par 6.4 in Ch 6.

<sup>49</sup> Pennings F *Dutch Social Security Law in an International Context* 2002 at 175.

<sup>50</sup> *Ibid* at 191.

<sup>51</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 44 at 7 and 26.

### 1.3.2.3.3 The United Kingdom

The social security system in the United Kingdom<sup>52</sup> has its foundation in the Beveridge Report.<sup>53</sup> The United Kingdom's pension system is complex when compared to the systems of other countries. The system comprises three broad categories of social security provisions; namely non-contributory, contributory, and income-related; and its pension system has three pillars. The first pillar provides for a mandatory public pension. The benefits under this pillar include the Basic State Pension and the Pension Credit comprising the Guaranteed Income Top-Up and Savings Credit.

The pillar has a second tier, which is also mandatory. This tier is based on the so-called contracting-out method. It comprises occupational funds established at employer or company level and individual funds. The third pillar is managed by private insurance companies.<sup>54</sup>

Since 2002, the United Kingdom has had a statutory state pension system made up of a flat-rate Basic Pension and an Earnings-related additional pension, and the State Second Pension that reformed the previous State Earnings-related Pension Scheme (SERPS). What makes the United Kingdom pension system unique is that it allows members of funds to contract-out of the additional state pension. In order to contract-out, a person must be a member of an occupational or personal pension scheme providing equivalent or better benefits than the Earnings-related component of the statutory scheme. Occupational pension schemes in the United Kingdom take three forms; namely State Occupational Pension Schemes, Private Occupational Pension Schemes; and Personal and Stakeholder Schemes. Occupational pensions are in the form of "defined-benefit" schemes or "defined-contribution" schemes.<sup>55</sup>

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<sup>52</sup> Discussed under par 3.5 in Ch 3.

<sup>53</sup> Beveridge approach is discussed under par 3.2.2.2 in Ch 3.

<sup>54</sup> Natali D "Pensions in Europe, European Pensions: The Evolution of Pension Policy at National and Supranational Level" (P.I.E Peter Lang 2008) "Work and Society" No 64 at 134-141.

<sup>55</sup> Discussed under par 3.5.2 in Ch 3.

The Melbourne Mercer Global Pension Index of 2014 gave the United Kingdom a “B” grade, which means the system is rated just below that of the Netherlands – which received a “B+” rating.<sup>56</sup>

The United Kingdom, just like Canada, Chile, Sweden, Switzerland, Finland, and Singapore, has a system that has a sound structure with many good features, but also has some areas which need improvements.<sup>57</sup>

#### **1.3.2.4 The origin and historical development of the social and retirement security system in South Africa**

Pension provision in South Africa<sup>58</sup> has a very long history. Even though modern social security in South Africa started with the advent of colonial rule, indigenous African societies always had some kind of social security provision; in the form of informal arrangements, through which individuals, families, and communities received support.<sup>59</sup> Initially, people were to provide for themselves and their families, but over the years a system developed whereby welfare services were delivered by a combination of government bodies and the voluntary welfare sector.<sup>60</sup> When formal social security was introduced in South Africa, particularly during the apartheid period,<sup>61</sup> the services were meant for whites only, but were at a later stage also gradually extended to other racial groups even though disparities with regard to the level of benefits continued.<sup>62</sup>

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<sup>56</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 44 at 7.

<sup>57</sup> Ibid at 7 and 20.

<sup>58</sup> Discussed in Ch 4.

<sup>59</sup> Maqubela NT *The Administration of Social Welfare in South Africa: A Study of its Origins, Development and Rationalisation* (MAdmin-Thesis, Unisa) January 1997 at 10.

<sup>60</sup> Lund F “State Restructuring Welfare” *Transformation* 6 (1988) at 22-25 accessed from <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/transformation/tran006/tran006003.pdf>, last visited on 07 May 2015.

<sup>61</sup> Apartheid was a form of discrimination introduced by the Afrikaner National Party which took over control of South Africa in the 1940s.

<sup>62</sup> Van der Berg S “South African Social Security under Apartheid and Beyond” Vol 14, No 4, Dec 1997 *Development Southern Africa* at 481 (hereafter, Van der Berg “South African Social Security under Apartheid and Beyond”).

The South African social security system now has two main components; namely social insurance, which provides for private retirement schemes, and social assistance, which provides grants such as the state old-age pension.<sup>63</sup> The system developed from the country's unique history of colonialism, apartheid, and inequalities. Its evolution has in recent years been influenced by democratic values and fundamental human rights enshrined in the Constitution.<sup>64</sup>

Social security in this country is at the moment approached from a rights-based perspective. The social welfare policy framework embraces the principle of equality, which promotes equitable distribution of services and benefits to redress previous inequalities.<sup>65</sup>

While coverage by social insurance schemes is limited due to the high unemployment rate and the large informal sector; on the other hand, social assistance measures cover millions of elderly people and is generally recognised as contributing enormously to poverty alleviation in this country.<sup>66</sup>

### **1.3.2.5 South Africa's social and retirement security system**

The South African system<sup>67</sup> relies more on private arrangements than the systems applicable in many other countries, making this country's retirement system closer to that proposed by the World Bank system.<sup>68</sup> The system comprises the separation of poverty relief in the form of state old-age pension and private savings in the form of occupational retirement funds and insurance policies.<sup>69</sup> The World Bank recommends a multi-pillar system that places greater emphasis on saving and which utilises a combination of public and private management, full funding, and pay-as-

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<sup>63</sup> Ibid at 484-485.

<sup>64</sup> Patel L *Social Welfare & Social Development in South Africa* 2005 at 98.

<sup>65</sup> Ibid at 100.

<sup>66</sup> Makino K "Social Security Policy Reform in Post-Apartheid South Africa – A Focus on the Basic Income Grant" (Centre for Civil Society Research Report No.11, this paper was first presented at 19<sup>th</sup> IPSA World Congress in Durban in July 2003) January 2004 at 8.

<sup>67</sup> Discussed in Ch 5.

<sup>68</sup> The World Banks' approach is discussed under par 3.2.2.3 in Ch 3.

<sup>69</sup> South Africa Retirement Funds Reform: First Discussion Paper op cit note 11 at 1.

you-go financing. According to the World Bank, a mandatory pillar that is privately managed is ideally suited for handling people's savings, but a publicly managed tax-financed pillar is needed for redistribution, and a third pillar, which is voluntary, is needed by people who want additional old-age security.<sup>70</sup>

By moving towards the World Bank's approach, the South African government recognises the advantages of a multi-pillar approach to retirement funding, in which income protection is primarily promoted through social assistance and social security arrangements, and additional savings or insurance are encouraged through occupational and individual insurance schemes.<sup>71</sup>

In South Africa, a high number of people employed in the formal sector are members of occupational retirement funds.<sup>72</sup> South Africa has always relied on three pillars and never had a public or national scheme. Unfortunately this has resulted in the exclusion of the majority of workers who are not in formal employment. A public or national scheme is, however, proposed in the First and Second Discussion Papers for Retirement Reform.<sup>73</sup>

Coverage offered by the system is, at the moment, clearly not adequate as the majority of people are excluded and these people are as a result forced to rely on the state old-age pension for survival. The system uses social insurance primarily to protect those in formal employment, while social assistance is meant to protect the poor who are without any form of support. Social insurance is used to protect the income of people who are vulnerable to social risks that threaten their income-earning capacity, which include not being able to work and earn a salary due to old-age or retirement. Categories of workers who are not covered under the system include the self-employed, those earning low salaries, and those employed in the

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<sup>70</sup> James E "Protecting the Old and Promoting Growth: A Defence of Averting the Old Age Crisis" (World Bank Policy Research, Working Paper No: 1570) January 1996, at 3.

<sup>71</sup> National Treasury, South Africa Social Security and Retirement Reform: Second Discussion Paper (Republic of South Africa (National Treasury)) February 2007 at 7.

<sup>72</sup> Strydom et al *Essential Social Security Law* op cit note 4 at 28.

<sup>73</sup> Discussed under par 4.3.3 in Ch 4.

informal sector as the system gives priority to the formal employment sector. Private provision is mostly encouraged and common in the country.<sup>74</sup>

A more comprehensive approach needs to be developed in line with the Taylor Committee recommendations for a “comprehensive social protection” instead of a system which follows a narrow approach. The concept of “social protection” rather than social security should be embraced in developing countries such as South Africa where large numbers of people depend on the informal economy for their livelihood. A sound social and retirement security system should be able to bring all the categories of workers into the national system, covering everyone whom it could possibly cover – regardless of the type of employment sector they find themselves in.

A primary social security and retirement reform objective for this country according to the Task Team for Social and Retirement Reform is to provide basic income protection for all South Africans through a combination of social assistance and contributory savings. The aim of the reforms is to close the gap between those who have the means to provide for themselves during retirement and those who do not have the means.<sup>75</sup>

The country’s policies and national legislation should promote a progressive realisation<sup>76</sup> of universal protection for the whole society where immediate coverage is not possible for everyone. Every working individual qualifying in terms of the salary threshold to be set by the relevant Minister should be accommodated under a compulsory system which will be complemented by a social assistance system which provides a safety-net to all who qualify to receive a state pension. A universal system will provide a basis on which individuals and families can build some form of income

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<sup>74</sup> Van der Berg “South African Social Security under Apartheid and Beyond” op cit note 62 at 488-489. The nature of South Africa’s retirement security system is discussed in more detail in Ch 5.

<sup>75</sup> South Africa Retirement Funds Reform: First Discussion Paper op cit note 11 at 4.

<sup>76</sup> As required by section 27(2) of the Constitution, which obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights in section 27.

security. It can also promote equality<sup>77</sup> and human dignity<sup>78</sup> as it will promote social protection, which does not only provide for mere survival, but which also ensures social inclusion and therefore the realisation of equality and human dignity.

South Africa was included in the Melbourne Mercer Global Pension Index 2014 Report for the first time.<sup>79</sup> The South African system, which comprises a means-tested state pension and voluntary schemes, was interestingly given a “C” grade. A “C” grade is for a system that has some good features, but also has major risks or shortcomings which need attention. If these shortcomings are not addressed, they will continue to affect the efficacy and long-term sustainability of the system. South Africa is in this category with countries such as Austria, Brazil, France, Poland, and the United States of America.<sup>80</sup> The question is whether this is an indication that the system is adequate as it is, as it compares favourably with the countries of the world, including developed countries, or not.

### **1.3.2.6 South Africa’s occupational retirement system**

South Africa’s occupational retirement system<sup>81</sup> is well developed but only within the formal sector of the economy to the exclusion of the informal sector, which is a worrying factor. The system provides various benefits for those who are employed in the formal sector.<sup>82</sup>

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<sup>77</sup> Section 9 of the Constitution.

<sup>78</sup> Section 10.

<sup>79</sup> In total five new countries were included in the 2014 Report, namely Austria, Finland, Ireland, Italy, and South Africa. See the Melbourne Mercer Global Pension Index 2014 Report op cit note 44 at 16.

<sup>80</sup> Idem at 7.

<sup>81</sup> Discussed in Ch 6.

<sup>82</sup> It was reported in the South Africa Retirement Fund Reform: First Discussion Paper op cit note 11 at 5, that coverage of employees in the formal sector is 60%, which according to the Discussion Paper is comparatively high considering the fact that participation in this country is not yet compulsory. This was considered to reflect the extent to which membership of occupational funds is accepted as an obligatory condition of employment, especially to those employed in the formal sector.

The study examines South Africa's occupational pension system to determine if it is in line with internationally recognised social security principles and standards. Focus is placed on the nature of the system, the types of retirement schemes, the regulatory framework, the scope of coverage, types of benefits, protection of benefits, the duties of retirement fund trustees, the rights of members (beneficiaries) of retirement funds, and legal remedies available to members and/or beneficiaries.

Social protection in the case of retirement schemes, as with other branches of social security, has the following three aspects.<sup>83</sup>

- Range of protection provided;
- Level of protection provided; and
- Categories of people covered.

Through these three legs of social protection it should be possible to determine whether South Africa's occupational retirement system provides adequate protection to workers at the time of retirement. The majority of workers in this country belong to occupational funds, while others make supplementary retirement provision through the use of individual retirement funds called "retirement annuities", in addition to being members of employer-established retirement funds. It is estimated by South Africa's National Treasury in the First Retirement Reform Discussion Paper of 2004 that approximately 50% of the economically active population provides for their retirement through occupational and voluntary saving arrangements.<sup>84</sup>

Even though the system is voluntary, it can be considered to be quasi-mandatory as those who are employed by employers which have already established retirement funds for their employees will generally be obliged to join those funds and for the fact that there are sectors for which the Minister has issued sectoral determinations for the establishment of the funds and for compulsory participation of all the workers in those sectors. The rules of the funds provide for benefit structure and retirement

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<sup>83</sup> Gillion et al *Social Security Pensions* op cit note 37 at 193.

<sup>84</sup> South Africa Retirement Funds Reform: First Discussion Paper op cit note 11 at 7-12.

age.<sup>85</sup> Benefits that are provided include retirement benefits and other risk benefits such as death, retrenchment, and disability benefits.<sup>86</sup>

The primary challenge for the system is to provide an adequate retirement framework to accommodate those not covered and also for the system to provide adequate protection of benefits.<sup>87</sup>

### **1.3.2.7 Summary of findings, conclusions, and recommendations**

The findings of the study are summarised and an attempt is made to address the questions raised under paragraph 1.3.1 above. Recommendations are made and a new four-pillar model is proposed.

## **1.4 METHODOLOGY**

### **1.4.1 Problem statement**

South Africa has a high number of people in formal employment who are members of occupational retirement funds.<sup>88</sup> However, the majority of people in this country still reach retirement age with insufficient retirement benefits relative to what they earned when they were still employed or with no benefits at all. Workers in the informal sector are not covered under the current system and as a result remain unprotected and vulnerable. Also, not all workers in the formal sector are covered. For example, categories such as contract workers and part-time workers are not covered.<sup>89</sup> The system mainly caters for the middle and high earners, to the exclusion of the most vulnerable low-income earners.

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<sup>85</sup> International Organization of Pension Supervisors (IOPS) Country Profiles 2007: South Africa, at 3, available at [http://www.apec.org.au/docs/S3\\_Hennessy.pdf](http://www.apec.org.au/docs/S3_Hennessy.pdf), last accessed on 05 May 2015.

<sup>86</sup> Discussed under par 6.6.4 in Ch 6.

<sup>87</sup> Van Zyl E “Old age Pensions in South Africa” *International Social Security Review* Vol 56, No 3-4 July–December 2003 at 118.

<sup>88</sup> Strydom et al *Essential Social Security Law* op cit note 4 at 6-7.

<sup>89</sup> See generally, South Africa Retirement Funds Reform: First Discussion Paper op cit note 11. In terms of the changes brought about by the 2014 amendments to the Labour Relations Act 66 of 1995,

Thus, even though occupational retirement funds have existed in South Africa for many years<sup>90</sup>, there is still a problem of lack of coverage, while in cases where there is coverage; some people retire with inadequate benefits.<sup>91</sup> The fact that participation in a retirement fund is at the moment generally voluntary, also creates problems as some employers may not feel obliged to establish retirement schemes for their employees.

The majority of employees who are members of retirement funds often find that they will not be able to retire at the set age because of insufficient or inadequate benefits, hence their heavy reliance on the state's old-age pension.<sup>92</sup> The same is true about workers who belong to provident funds who receive lump-sum cash benefits when they retire, squander all the money, and are left with no income in their retirement. On the other hand, benefits are also often reduced as a result of leakages that occur prior to the actual retirement date; for example, when people change jobs or if they are retrenched.<sup>93</sup>

Even though the development of occupational pension funds in this country has been reasonably good, the system is nevertheless still characterised by many weaknesses, which include those highlighted above.

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section 198B(8)(a) of the Labour Relations (Amendment) Act 6 of 2014 now provides that an employee employed in terms of a fixed-term contract for longer than three months and earning less than the threshold determined by the Minister (in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997), which is at the moment R205 433 per annum, must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment. The same applies to part-time employees employed for more than three months and who work more than twenty-four hours a month for an employer (section 198C(2) and (3)(a)). This implies that employers will be required to provide fixed-term contract employees and part-time employees falling under the threshold and who are employed for more than three months with the same benefits afforded to permanent employees, including retirement benefits.

<sup>90</sup> The historical development of South Africa's pension system is discussed in Ch 4.

<sup>91</sup> See generally, South Africa Retirement Funds Reform: First Discussion Paper op cit note 11 at 4.

<sup>92</sup> In South Africa Retirement Fund Reform: First Discussion Paper (idem) at 12, the number of economically active population that provide for their retirement through occupational and voluntary savings arrangement was estimated to be at 50%.

<sup>93</sup> Ibid at 16.

These shortcomings have prompted the government to establish various commissions and committees<sup>94</sup> over the years, to investigate ways in which the system could be improved with the aim of extending coverage to those who are currently not covered and also to improve the benefits offered by the system. In 2004, the government started with another process that will see the whole retirement system in this country reformed.<sup>95</sup>

With this initiative, government wants to, among other things:

- Encourage individuals to provide adequately for their own retirement and the needs of their dependants; and
- Use social assistance to cater only for those elderly people who are without any form of income,<sup>96</sup> either because they were never employed or because they were not able to save enough for their retirement due to factors such as low salaries and irregular employment.

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<sup>94</sup> The commissions established by the government for this purpose include: The Mouton Committee: the Committee of Investigation into a Retirement Provision System for South Africa, was appointed in 1988 (hereafter, The Mouton Committee Report); The Katz Commission: The Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, 1994 (hereafter, The Katz Committee Report); The Smith Committee: The Committee on Strategy and Policy Review of Retirement Provision in South Africa, 1995 (hereafter, The Smith Committee Report); and The Taylor Commission: Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002 (hereafter, The Taylor Committee Report). The findings of these committees together with some of their important recommendations are discussed under par 4.3.3 in Ch 4.

<sup>95</sup> The Inter-Ministerial Committee (comprising representatives from the following national departments: National Treasury, the Department of Social Development, the Department of Labour, the Department of Transport, the Department of Health, and the Department of Public Services Administration) on social security and retirement reform was established in 2007 to implement some of the recommendations of the Taylor Commission, in establishing a comprehensive system of social security for the country.

<sup>96</sup> South Africa Retirement Funds Reform: First Discussion Paper op cit note 11 at 4.

### **1.4.2 Approach**

The study comprises a critical literature review of information on social security and retirement provision as it relates to occupational retirement funds in South Africa, Belgium, the Netherlands, and the United Kingdom.

The sources consulted include books, journals, case law, reports, legislation, papers, international instruments, and the Internet.

## **1.5 SUMMARY OF PRINCIPLES AND OBJECTIVES UNDERLYING SOCIAL SECURITY AND RETIREMENT PROVISION**

The right to social security, and in particular retirement security (provision), guarantees a person some form of income or a basic standard of living when that person is no longer able to provide for himself or herself by working and earning a salary due to old-age.

People who are working and earning a salary should protect themselves against the social risk of old-age by participating in retirement schemes which will pay out benefits to them when they retire. A benefit will come in the form of either a lump-sum cash payment or monthly pensions with the latter being more preferable for social security purposes. In other words, a retirement scheme protects people against the social risk of old-age or retirement which would otherwise have left them without any form of income.

The benefits offered serve an income-replacement role<sup>97</sup> and therefore contribute towards the reduction of poverty within the families of the retired fund members and in some cases even in the communities in which they live.<sup>98</sup> Retirement provision is an important element of every social security system as it protects elderly people against poverty and other social and economic risks. It is therefore the basis of this

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<sup>97</sup> East *Social Security Law* op cit note 7 at 15-6.

<sup>98</sup> *Ibid* at 39-40.

study that all those who are working, in both the formal and informal sector of the economy, who can afford to pay contributions for their retirement, should do so. On the other hand, it is important for these schemes to provide adequate benefits and protection to their members in order for the benefit to achieve the intended purpose in a person's life.

## CHAPTER 2

# INTERNATIONAL INSTRUMENTS ON THE RIGHT TO SOCIAL AND RETIREMENT SECURITY

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### 2.1 INTRODUCTION

In this chapter, the role played by international bodies in the development of social and retirement security in the world is described and international instruments promoting the right to social and retirement income security as a fundamental human right are analysed.

Social security is considered to be an internationally recognised human right which must be respected, protected, promoted, and fulfilled by all the governments of the world. The concept of social security is described in the International Labour Organisation's 2001 Report, entitled *Social Security: A New Consensus*, as:<sup>1</sup>

“A basic human right and a fundamental means for creating social cohesion, thereby helping to ensure social peace and social inclusion. The aim of recognising social and retirement security as fundamental human rights is to ensure that all human beings have access to the resources and services needed for an adequate standard of living when they retire from work or when they are in old age. It is an indispensable part of government social policy and an important tool to prevent and alleviate poverty. It can, through national solidarity and fair burden sharing, contribute to human dignity, equity and social justice.”

A number of international bodies contribute to the development of social security and social protection in Africa and the rest of the world.

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<sup>1</sup> See International Labour Organisation Social Security (ILO): A New Consensus, 2001 Report at 1, accessed from [http://ssreform.treasury.gov.za/Publications/Social%20Security-%20A%20New%20Consensus%20\(%20ILO,%202001\).pdf](http://ssreform.treasury.gov.za/Publications/Social%20Security-%20A%20New%20Consensus%20(%20ILO,%202001).pdf), last visited 07 May 2015.

These institutions include the former inter-governmental body for the African Continent, previously known as the Organisation of African Unity<sup>2</sup> (OAU), which was later replaced by the African Union (AU); the United Nations (UN), the operations of which are governed by the United Nations Charter;<sup>3</sup> and the International Labour Organisation<sup>4</sup> (ILO).

South Africa is a constitutional democratic country which is committed to international laws and standards. This commitment is apparent from the inclusion of the Bill of Rights in the Constitution of the Republic of South Africa, 1996, which has provisions that affirm the country's position with regard to international law. For example, section 39 of the Constitution requires the courts, tribunals, and other forums in this country to consider international law when interpreting the Bill of Rights.<sup>5</sup>

The courts are further required by section 233 of the Constitution to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law, while on the other hand, section 232 gives recognition to customary international law provided it is consistent with the Constitution or an Act of Parliament.

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<sup>2</sup> The Organisation of African Unity (the OAU) was founded in 1963 in terms of the Charter of the Organization of African Unity. The Charter affirms its commitment to the Universal Declaration of Human Rights (UDHR), which has provisions on social security and socio-economic rights (see the preamble to the OAU Charter).

<sup>3</sup> The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization. The UN Charter came into force on 24 October 1945.

<sup>4</sup> The International Labour Organization (ILO) was created by the Peace Treaty of Versailles in 1919 alongside the League of Nations. The International Labour Organization was created to promote social progress, which would in turn influence economic and social development. The ILO in Geneva is the permanent secretariat of the Organization – International Labour Office. See in this regard, *ILO and the World of Work Geneva* (ILO Publication) (1974) at 29 (hereafter, ILO and the World of Work).

<sup>5</sup> The following decisions are examples of cases where the South African Constitutional Court considered the binding effect of international law: *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46; *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC); and *Bernstein v Bester* 1996 2 SA 751 (CC).

South Africa has already ratified a number of international conventions and instruments (relevant to the right to social security) in line with the provisions of section 234 of the Constitution, which permits Parliament to adopt Charters of Rights consistent with the provisions of the Constitution to deepen the culture of democracy established by the Constitution. The instruments ratified by South Africa include, among others, the African Charter on Human and People's Rights, ratified on 9 July 1996; the United Nations' Convention of the Rights of the Child, ratified on 16 June 1995; the Convention on the Elimination of All Forms of Discrimination Against Women, ratified on 15 December 1995; and the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified on on 18 January 2015. It should be noted that South Africa is in terms of section 39(1)(b) also bound by instruments not yet ratified by Parliament.<sup>6</sup> International law is important for South Africa because most of the social security instruments are couched as standards which provide the benchmarks against which the country's policies and legislation can be measured. These benchmarks come in different forms, which include general responsibility of the state, periodicity and the type of benefits, financing of the system, basic statutory protection, equal treatment of men and women, distinguished roles of social insurance, social assistance, supplementary or voluntary schemes, and respective responsibilities of the state and other actors.<sup>7</sup>

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<sup>6</sup> In *S v Makwanyane* 1995 (3) SA 391 (CC) at par 35 (hereafter, *Makwanyane*), the Constitutional Court stated that public international law includes binding as well as non-binding law. South African courts are therefore not only confined to international instruments that are binding.

<sup>7</sup> See generally in this regard the following instruments: articles 22 and 25 of Universal Declaration of Human Rights, 1948, which provide (respectively) that everyone has a right to social security and to a standard of living adequate for the health and well-being of himself and of his family; articles 14, 15, and 17 of the Invalidity, Old-Age and Survivors' Benefits Convention, 1967, which provide (respectively) that member states must provide periodic old-age benefits to persons beyond the age of not more than 75 or higher; article 2 of the Social Security (Minimum Standards) Convention, 102 of 1952, obliges member states to cover at least three of the following contingencies: health, sickness, unemployment, family, disability, maternity, and survivors; while on the other hand articles 71 and 72 (respectively) require social security systems of member states to meet certain standards to qualify as acceptable systems for the purposes of ratifying the convention; article 11(1)(e) of the Convention on the Elimination of All forms of Discrimination against Women, 1979, obliges state parties to eliminate discrimination against women with regard to the right to social security; article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, sets out standards with regard to the protection of migrant workers' rights.

## **2.2 THE ORGANISATION OF AFRICAN UNITY AND THE AFRICAN UNION ON THE RIGHT TO SOCIAL AND RETIREMENT INCOME SECURITY**

The Organisation of African Unity (OAU), which has been replaced by the African Union,<sup>8</sup> was the principal intergovernmental body for the African continent. Thus, South Africa is a member of the African Union.

The Organisation of African Unity became the African Union in 2002.<sup>9</sup> Its aims included, among others, to coordinate and intensify cooperation among African states and efforts to achieve a better life for the people of Africa, to give due regard to the Charter of the United Nations and the Universal Declaration of Human Rights of 1948<sup>10</sup> (UDHR), and to coordinate and harmonise members' political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical, and defence policies.<sup>11</sup>

The objectives of the African Union include to:<sup>12</sup>

- Accelerate the political and socio-economic integration of the African continent;
- Promote and protect people's rights in accordance with the African Charter on Human and People's Rights and other human rights instruments; and
- Promote sustainable development at the economic, social, and cultural levels, as well as the integration of African economies.

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<sup>8</sup> The Constitutive Act of the African Union was adopted during the Lomé Summit of the OAU on 11 July 2000, but the Organization of African Unity was only disbanded on 9 July 2002 – accessed from <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm>, last visited on 07 May 2015.

<sup>9</sup> The African Union (AU) was established in terms of article 2 of the Constitutive Act of the African Union.

<sup>10</sup> The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the United Nations on 10 December 1948. See in this regard [http://everything.explained.at/Universal\\_Declaration\\_of\\_Human\\_Rights/](http://everything.explained.at/Universal_Declaration_of_Human_Rights/), last visited on 07 May 2015.

<sup>11</sup> Olivier MP, Smit N and Kalula ER (eds) *Social Security: A Legal Analysis* 1ed (2003) at 548-549 (hereafter, Olivier et al *Social Security: A Legal Analysis*).

<sup>12</sup> Organization of African Unity/African Union (History and Present Status), accessed from <http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm>, last visited on 07 May 2015.

One of the organs of the African Union is the Executive Council, which is composed of the Ministers designated by the governments of the member states. The Council decides on matters such as foreign trade, social security, food, agriculture, and communications.<sup>13</sup>

The Organisation of African Unity Charter did not have any provision directly relevant to social security. However, the Charter affirmed its commitment to the Universal Declaration of Human Rights, which contains provisions on social security and socio-economic rights.<sup>14</sup>

There is also the African Charter on Human and People's Rights, generally known as the Banjul Charter. South Africa is bound by the provisions of this Charter as it ratified the Charter on 9 July 1996.<sup>15</sup> The Banjul Charter contains several provisions on socio-economic rights. Article 16 is about health rights; and article 22 is about economic, social, and cultural development. Article 22 provides that all people shall have the right to their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.<sup>16</sup> The Charter, however, does not provide any sanctions where a state party violates its provisions. In article 47, the Charter enables state parties to police one another. Where one state has a good reason to believe that another state party has violated the provisions of the Charter, that state may draw the violating state's attention to the matter in writing and the latter must respond within a period of three months. If the issue is not settled within a period of three months, the complaining state shall have the right to refer the matter to the African Commission on Human and People's Rights in terms of article 48. Article 49, however, allows for direct referrals of violations to the Commission.

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<sup>13</sup> *Idem*.

<sup>14</sup> See the preamble to the OAU Charter.

<sup>15</sup> The African Charter of Human and People's Rights was adopted on 27 June 1981 and entered into force on 21 October 1986. See in this regard <http://www.justice.gov.za/policy/african%20charter/afr-charter03.html>, last visited 07 May 2015.

<sup>16</sup> Article 22(2) of the Charter.

The Commission shall, after considering the matter, send its report to the states concerned and also to the Assembly of Heads of State and Government. The Commission is empowered by article 52 of the Charter to make recommendations to the Assembly as it deems useful. The Charter does not specify the types of recommendations the Commission can make.

## **2.3 SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) ON THE RIGHT TO SOCIAL AND RETIREMENT SECURITY**

### **2.3.1 General**

The Southern African Development Community (SADC) was established under article 2 of the Declaration and Treaty of Southern African Development Community.<sup>17</sup> The countries that fall under the Southern African Development Community share a similar legacy in that they were all at some stage colonised. Most of these countries were, as a result of colonisation, characterised by discrimination on the basis of race and this brought about the existing social, economic, and political imbalances within the region.<sup>18</sup> Its main objectives as set out in its founding Treaty include the promotion of economic growth, the alleviation of poverty, the enhancement of the quality of life of the people of Southern Africa, and the provision of support to the socially disadvantaged, through regional integration.<sup>19</sup> The Treaty commits member states to the fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy, and the rule of law, equity, balance, and mutual benefit.<sup>20</sup>

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<sup>17</sup> Article 2 of the Universal Declaration of Human Rights the SADC Treaty.

<sup>18</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 11 at 661.

<sup>19</sup> Article 5(a) of the SADC Treaty.

<sup>20</sup> Article 4.

However, at the moment the SADC has not concluded any social security agreement,<sup>21</sup> which is quite alarming considering the levels of poverty which affect the welfare or social security provision to the majority of poor people within the region. SADC instruments on the right to social and retirement security are discussed next.

### **2.3.2 Southern African Development Community Treaty, 1992**

This Treaty is the founding document of the SADC.<sup>22</sup> Its objectives include regional integration for purposes of supporting sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of poverty eradication. The Treaty aims to enhance the standard and quality of life of the people of Southern Africa and to support the socially disadvantaged.<sup>23</sup> In terms of article 11(b), the Council of Ministers oversees the implementation of the policies of the SADC and the proper execution of its programmes. Interestingly, however, this body does not have powers to make binding decisions as all its actions must be reported to the Summit.

The Tribunal, which was suspended in 2010, was responsible for making sure that the provisions of the Treaty were adhered to and that they were well interpreted. The Tribunal had not yet been reinstated at the time this study was completed, which means no cases of violation of the Treaty could be referred to the Tribunal.<sup>24</sup>

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<sup>21</sup> Kulke U “Filling the Gap of Social Security for Migrant Workers: ILO’s Strategy” at paragraph (par) (l) (2006) accessed from <http://www.social-protection.org/gimi/gess/ShowRessource.action?ressource.ressourceId=1490>, last visited on 07 May 2015.

<sup>22</sup> The SADC Treaty was signed in Windhoek, Namibia, on 17 August 1992.

<sup>23</sup> Article 5(a) of the SADC Treaty.

<sup>24</sup> See generally in this regard Saurombe A “The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration” (2012) *PER/PELJ* Vol 15 (2) at 467 (hereafter, Saurombe “The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration”).

### **2.3.3 Charter of Fundamental Social Rights, 2003**

The Charter promotes adequate social protection in the region. It reiterates some of the objectives set out in the SADC Treaty; namely the achievement of economic growth, the alleviation of poverty, the enhancement of the standard and quality of life of the people of region, and the provision of support to the socially disadvantaged through regional integration. However, whether this is happening at the moment is debatable.

Article 10 of the Charter of Fundamental Social Rights provides as follows:

SADC member states shall create an enabling environment such that every worker in the SADC region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence, shall be able to receive sufficient resources and social assistance.

Unfortunately, this seems to have to date remained a dream as most of the countries in the region are experiencing fiscal constraints. As a result, adequate social protection for residents in this region seems unaffordable.<sup>25</sup> The Charter requires equal treatment for men and women in all the areas, including the area of social protection.<sup>26</sup> It is also important to indicate that SADC member states are undertaking through the Charter to create an enabling environment, in accordance with the arrangements applying in each country, in order to protect the elderly. Protection is both for those who are working and the unemployed.<sup>27</sup> Article 8 of the Charter stipulates that every worker in the region must, at the time of retirement, be able to enjoy resources affording him or her a decent standard of living, as well as equity in post-employment security schemes.<sup>28</sup>

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<sup>25</sup> See generally, Sibanda LM, Kureya T and Kalibwani F “Vulnerable yet, Viable: Social Protection Policies for Households Affected by HIV and AIDS” (Food Agriculture and Natural Resources Policy Analysis Network (FANRPAN)) Policy Brief Series 02/05, August 2005, accessed from [http://www.fanrpan.org/documents/d00121/Policy\\_brief\\_02-05\\_Social\\_Protection\\_Aug2005.pdf](http://www.fanrpan.org/documents/d00121/Policy_brief_02-05_Social_Protection_Aug2005.pdf), last visited 07 May 2015.

<sup>26</sup> Article 6 of the SADC Charter of Fundamental Social Rights, 2003.

<sup>27</sup> Article 8(b) of the Charter.

<sup>28</sup> Article 8(a).

The Charter further requires member states to take appropriate action to ratify and implement ILO instruments and to give priority to the ratification of the core ILO.<sup>29</sup> This is a firm indication that the SADC is committed to the promotion and respect of everyone's right to social and retirement security. However, commitment on paper without any enforcement mechanisms will not assist the poor people of this region. The responsibility for the implementation of the Charter lies with the national tripartite institutions and regional structures.

These institutions and structures<sup>30</sup> have the duty to promote social legislation and equitable growth within the SADC region and to prevent the non-implementation of the Charter. In order to monitor the progress made by member states, countries are required to submit regular progress reports to the Secretariat.<sup>31</sup> Cases of violation of human rights could be referred to the SADC Tribunal,<sup>32</sup> which is currently

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<sup>29</sup> Article 5.

<sup>30</sup> These would include the Summit, comprising, all SADC Heads of State and/or Government; Organ on politics, defence, and security; Tribunal, established in 2000 and entrusted with the responsibility to ensure adherence to, and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments, and to adjudicate upon disputes, referred to it; Council of Ministers which consists of Ministers from each member state, its functions include overseeing the functioning and development of the SADC and ensuring that policies are properly implemented; the SADC National Committees, which must comprise key stakeholders, notably government, private sector, and civil society in each member state. Their functions are to provide inputs at the national level in the formulation of regional policies, strategies, the SADC Programme of Action, as well as to coordinate and oversee the implementation of these programmes at the national level; Standing Committee of Senior Officials consisting of one Permanent/Principal Secretary or an official of equivalent rank from each member state to serve as a technical advisory committee to the Council of Ministers; the SADC Secretariat is the principal executive institution of SADC responsible for, inter alia, the strategic planning and management of SADC programmes, implementation of decisions of SADC policy organs and institutions such as the Summit, Council and the Troikas – the SADC leadership takes place in the Troika system consisting of the Chair, Incoming Chair, and Outgoing Chair. The SADC institutions were established by article 9 of the SADC Treaty (see articles 10-16, which set out the functions of the SADC institutions). See also generally on SADC institutions and their functions, Van der Vleuten A and Hulse M "Governance Transfer by the Southern African Development Community (SADC)" (SFB-Governance Working Paper Series, No 48, December 2013) at 16-20, accessed from [http://www.sfb-governance.de/publikationen/working\\_papers/wp48/SFB-Governance-Working-Paper-48.pdf](http://www.sfb-governance.de/publikationen/working_papers/wp48/SFB-Governance-Working-Paper-48.pdf), last visited on 07 May 2015 (hereafter, "Governance Transfer by the Southern African Development Community (SADC)"); Saurombe "The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration" op cit note 24 at 454-569.

<sup>31</sup> Article 16 of the SADC Charter.

<sup>32</sup> The SADC Community Tribunal was established by article 9 of the SADC Treaty in 1992 but was only inaugurated on 18 November 2005. Its functions are set out in article 16 of the SADC Treaty. The tribunal was, however, suspended since 2010. See in this regard Van der Vleuten "Governance Transfer by the Southern African Development Community (SADC)" op cit note 30 at 10 and 19.

suspended. The Tribunal had the duty to ensure that member states comply with the Southern African Development Community Treaty and subsidiary instruments.<sup>33</sup>

#### **2.3.4 Southern African Development Community Code on Social Security, 2008**

Article 4 of the SADC Code on Social Security<sup>34</sup> provides that everyone in the SADC has the right to social security. It also encourages every member state to establish and maintain a system of social security in accordance with the provisions of the Code and article 10 of the SADC Charter of Fundamental Social Rights. The Code gives member states the duty to maintain their social security systems at a satisfactory level at least equal to that required for the ratification of the International Labour Organisation Convention (No. 102) Concerning Minimum Standards of Social Security, 1952.<sup>35</sup> Every member state must progressively raise its system of social security to a higher level, which should include achieving the meaningful coverage of everyone under the system – bearing in mind the realities and level of development in the particular member state. The Code states that everyone in the SADC region who has insufficient means of subsistence to support themselves and their dependants should be entitled to social assistance, in accordance with the level of socio-economic development of the particular member state.<sup>36</sup>

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<sup>33</sup> Article 16 of the SADC Treaty.

<sup>34</sup> The SADC Code on Social Security was signed on 1 January 2008.

<sup>35</sup> See article 2 of the Social Security (Minimum Standards) Convention, 1952, which states that in order to ratify the Convention, an ILO member state is obliged to comply at the time of ratification with at least three of the following Parts of the Convention: medical care, sickness benefits, unemployment benefits, old-age benefits, workers' compensation, family, disability, maternity, and survivors' benefits. From the risks mentioned, at least one provision concerning unemployment, old-age, workers' compensation, disability or survivors' benefits must be accepted.

<sup>36</sup> Article 5 of the SADC Code on Social Security.

It further provides that each member state should establish social insurance schemes and should progressively expand the coverage and impact of these schemes. Social insurance should extend coverage to the entire working population. Member states are expected to provide and regulate social insurance mechanisms for the informal sector and to encourage and regulate private and public sector participation, with the private sector participation being either occupational based or of an individual or group nature.<sup>37</sup>

In terms of article 10, dealing with retirement and old-age, member states should aim to create an enabling environment that provides universal coverage for old people, through social assistance, social insurance, or social allowances. Member states are further urged to work towards the establishment of a minimum and maximum retirement age that takes into account the need to ensure an appropriate retirement benefits, as well as country-specific considerations such as life expectancy, the HIV/Aids pandemic, and economic development. In affording their citizens social security and social assistance, member states are required to aim to achieve equality of access to all.<sup>38</sup>

However, the Code does not provide any formal enforcement mechanisms of its provisions. In terms of the Code, member states and the relevant SADC structures should establish mechanisms both at the national and regional levels to monitor progressive compliance with the provisions of the Code. The Integrated Committee of Ministers of Member States should establish an Independent Committee of Experts that will monitor compliance with the Code.<sup>39</sup>

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<sup>37</sup> Article 6.

<sup>38</sup> Article 10.

<sup>39</sup> Article 21.

## **2.4 UNITED NATIONS (UN) ON SOCIAL AND RETIREMENT SECURITY**

The United Nations (UN) was officially established on 24 October 1945.<sup>40</sup> The United Nation's interest in the economic and social rights protection comes from its interest in the relationship between protecting rights and maintaining world peace.<sup>41</sup> Its instruments are discussed next.

### **2.4.1 United Nations Charter, 1945**

The preamble of the Charter<sup>42</sup> has the following as one of its objectives:

“To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom.”<sup>43</sup>

The Charter also aims to promote social progress and better standards of living. It is further committed to achieving international cooperation in solving international problems of an economic, social, cultural, or humanitarian nature, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction on the basis of race, sex, language, or religion.<sup>44</sup>

### **2.4.2 Universal Declaration of Human Rights, 1948**

The Universal Declaration of Human Rights<sup>45</sup> (UDHR) was adopted by the United Nations General Assembly in 1948.

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<sup>40</sup> South Africa was one of the founding members of the United Nations. However, the United Nations Security Council instituted sanctions against South Africa in the late seventies in protest against the then apartheid policies – accessed from [http://www.sahistory.org.za/pages/library-resources/articles\\_papers/south-africa-un.htm](http://www.sahistory.org.za/pages/library-resources/articles_papers/south-africa-un.htm), last visited on 07 May 2015.

<sup>41</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 11 at 534-535.

<sup>42</sup> The Charter was signed on 26 June 1945 in San Francisco.

<sup>43</sup> See the preamble to the UN Charter.

<sup>44</sup> Article 1(3) of the UN Charter.

<sup>45</sup> The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly Resolution 217 A (III) of 10 December 1948.

South Africa was one of the eight countries that abstained from voting at the time when the Declaration was adopted; the other seven countries were Byelorussian SSR, Czechoslovakia, Poland, Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, Yugoslavia, and Saudi Arabia.<sup>46</sup> The Universal Declaration of Human Rights recognises socio-economic rights as human rights.<sup>47</sup>

In terms of the Declaration, everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organisation and resources of each state, of the economic, social, and cultural rights indispensable for his or her dignity and the free development of his or her personality.<sup>48</sup> The Declaration further affords everyone the right to a standard of living adequate for the health and well-being of himself or herself and of his or her family.

The relevant provision of article 25 provides as follows:

- (1) Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and the necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond control.

This article, among other things, refers specifically to everyone's right to security in the event of old-age, unemployment, sickness, disability, and widowhood.

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<sup>46</sup>Information accessed from <http://www.milestonedocuments.com/documents/view/universal-declaration-of-human-rights/>, last visited on 07 May 2015.

<sup>47</sup> Article 22 of the Universal Declaration of Human Rights.

<sup>48</sup> Article 22 states that "everyone", as a member of society, has the right to social security.

### **2.4.3 International Covenant on Economic, Social and Cultural Rights, 1966**

The International Covenant on Economic, Social and Cultural Rights<sup>49</sup> (ICESCR) is a multilateral Treaty adopted by the United Nations General Assembly on 16 December 1966, but it only came into force on 3 January 1976. South Africa has, after a very long time, ratified this Treaty on 18 January 2015 with the enforcement date being 12 April 2015.

The Treaty will have a significant effect on the country's national laws and policies. South Africa has, however, not yet ratified the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (OP-ICESCR),<sup>50</sup> which was adopted in December 2008 and came into force on 5 May 2013. The Protocol protects international human rights and gives victims of violations of economic, social, and cultural rights access to justice and appropriate redress. Victims of violations of international human rights can bring their complaints to the Protocol when domestic procedures are not effective. Complaints can only be lodged with the Protocol against states which are parties to the Protocol.<sup>51</sup> At the moment the Protocol cannot deal with any complaints against South Africa, as it has not yet ratified the Protocol. The discussion of the ICESCR is, however, very important as it provides details on what is promised by the Convention and also on what is required by the Convention from member states.

Article 9 of the Convention contains provisions on the right to social security. This article recognises both the public and private components of the right to social security. It enjoins state parties to recognise the right of everyone to social security,

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<sup>49</sup> The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

<sup>50</sup> See generally on Optional Protocol to the Covenant on Economic, Social and Cultural Rights, Biglino I, Golay Christophe "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" Academy in-Brief No.2 (Geneva Academy of International Humanitarian Law and Human Rights) July 2013, at 55, accessed from <http://www.geneva-academy.ch/docs/publications/The%20optional%20protocol%20In%20brief%202.pdf>, last visited on 07 September 2015. See also on South Africa's ratification of the International Covenant on Economic, Social and Cultural Rights, <https://www.escr-net.org/node/365752>, last visited on 07 September 2015.

<sup>51</sup> Idem.

including social insurance. According to the Committee on Economic, Social and Cultural Rights, the concept of “social security” implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control.<sup>52</sup> The Convention obliges state parties to undertake to ensure equal enjoyment of the right to social security by both men and women.<sup>53</sup>

In addition to article 9, article 11 requires member states to guarantee an adequate standard of living to everyone. According to Lamarche,<sup>54</sup> the right in article 11 may be interpreted to mean that a state must at the very least provide social assistance and other needs-based forms of social benefits in cash or in kind to anyone without adequate resources. The rights in articles 9 and 11 are similar to the other rights in the ICESCR qualified by article 2(1), which provides that these rights are to be implemented only progressively and to the maximum of available resources.<sup>55</sup>

Article 2(1) of the ICESCR provides as follows:

Each State Party to the present Convention undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

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<sup>52</sup> The Committee on Economic, Social and Cultural Rights General Comment 6 – The Economic, Social and Cultural Rights of Older Persons (Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights) 13<sup>th</sup> Session, 1995, at par 26.

<sup>53</sup> Article 3 of the ICESCR.

<sup>54</sup> Lamarche L (Social Security as a Human Right) in Brand D and Russell S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* 2002 at 126-127 (hereafter, Brand *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*).

<sup>55</sup> Similar to the provisions of section 27(2) of the Constitution, which provide that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Section 27(2) provisions are discussed under par 5.2.1 in Ch 5.

The provisions of this article are almost similar to the provisions of section 27(2) of the Constitution of the Republic of South Africa, which provides as follows:

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

It can be accepted that the provisions of section 27(2) of the Constitution of the Republic of South Africa, 1996 have their roots in article 2(1) of the Convention; even though section 27(2) in addition also mentions that the legislation and measures must be reasonable.

The rights in the Convention are enforced through the reporting system which requires state parties to the Convention to report to the United Nations Committee on Economic, Social and Cultural Rights<sup>56</sup> on a regular basis.<sup>57</sup>

This Committee is more in favour of the minimum state obligation formulation than the core-content of the right approach.<sup>58</sup> The purpose of the minimum state obligations approach is to ensure that states do what the Convention requires them to do. In this way countries are allowed to make use of available resources and where they are not in a position to provide the necessary protection, states are required to show the extent to which they are able to provide such protection or relevant programmes. In other words, the ICESCR does not require member states to fund all the programmes at once where resources do not allow for that.

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<sup>56</sup> The Committee on Economic, Social and Cultural Rights is the body of independent experts that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by its state parties. This Committee was established under the Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations' Economic and Social Council in Part IV of the Covenant, accessed from <http://www2.ohchr.org/english/bodies/cescr/>, last visited on 07 May 2015.

<sup>57</sup> *Idem*.

<sup>58</sup> United Nations Office of the High Commissioner for Human Rights "General Comment 3: The Nature of States Parties Obligations" (1990) ICESCR 5<sup>th</sup> Session 1990, accessed from [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument), last visited on 07 May 2015.

The Convention considers resources available within a particular society, coming from both the private sector as well as the public sector. However, it remains every member state's responsibility to ensure that resources are made available even though those resources do not come directly from state revenue. In terms of the ICESCR, states have the obligation to respect, protect, and fulfil the rights in this Covenant.<sup>59</sup> This is the approach that was also adopted by the Constitution of the Republic of South Africa, in section 7(2) of the Bill of Rights.<sup>60</sup>

The obligation to respect requires states to refrain from interfering with the enjoyment of economic, social, and cultural rights.

Providing for these rights is cost-free because they merely require the state not to take any action. On the other hand, the state may not act in a way that will violate these rights.<sup>61</sup> This obligation further requires the state to respect existing public and private social security arrangements.<sup>62</sup>

The obligation to protect also requires states to prevent violations of social security rights by third parties. This obligation can sometimes be cost-free because it is a negative obligation which does not allow third parties to violate rights. States meet their obligations by creating and implementing the necessary policy, legislative, regulatory, judicial, inspection, and enforcement frameworks. In order to create and operate these systems, human, financial, and other resources are required. Therefore, they are not entirely cost-free.<sup>63</sup>

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<sup>59</sup> Article 1(3) of International Covenant on Economic, Social and Cultural Rights of 1996.

<sup>60</sup> Section 7(2) of the Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights.

<sup>61</sup> Brand *Exploring the Core Content of Socio-Economic Right* op cit note 54 at 14.

<sup>62</sup> Langford M (Social Security and Implications for Law, Policy and Practice) in Riedel E *Social Security as a Human Right* 2006 at 36 (hereafter, *Riedel Social Security as a Human Right*).

<sup>63</sup> Brand *Exploring the Core Content of Socio-Economic Rights* op cit note 54 at 14.

## ***INTERNATIONAL INSTRUMENTS ON THE RIGHT TO SOCIAL AND RETIREMENT SECURITY***

The state must make sure that existing social security arrangements are not interfered with by third parties and must make it possible for individuals to organise themselves in finding ways to provide for themselves using alternative arrangements.<sup>64</sup>

The obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realisation of such rights. The obligation can also encompass the duties to facilitate, promote, and provide, or to create appropriate legislative, administrative, judicial, and other measures.<sup>65</sup>

According to Malcolm Langford, this would include the following:<sup>66</sup>

- Reviewing legislation and policy to ensure consistency with the right to social security;
- Adopting and implementing appropriate measures, including legislation, to ensure the provision of social security with effective participation of potential and current beneficiaries;
- Ensuring progressive realisation of the right to social security over time as resources permit; and
- Ensuring a minimum essential level of social security immediately.

These activities form part of states' minimum obligation under the ICESCR. The obligation to fulfil is seen as a positive obligation requiring a state to ensure that the essence of the right is provided to its people. People can pay the cost themselves, either directly or through taxes. A state can also require private sector actors to pay the costs, if and when necessary. It therefore follows from states' obligation to respect, protect, and fulfil the right to social security, that there is a great deal that can be considered part of a state party's minimum obligations under the ICESCR.<sup>67</sup>

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<sup>64</sup> Riedel *Social Security as a Human Right* op cit note 62 at 36.

<sup>65</sup> Brand *Exploring the Core Content of Socio-Economic Rights* op cit note 54 at 118.

<sup>66</sup> Riedel *Social Security as a Human Right* op cit note 62 at 59.

<sup>67</sup> Brand *Exploring the Core Content of Socio-Economic Rights* op cit note 54 at 14-20.

## **2.5 THE INTERNATIONAL LABOUR ORGANISATION (ILO) ON THE RIGHT TO SOCIAL AND RETIREMENT SECURITY**

### **2.5.1 General**

The International Labour Organisation (ILO) is the tripartite United Nations' agency that brings together governments, employers, and workers of its member states in common action to promote, among other things, employment creation, rights at work, social protection, and social dialogue. It was created to promote social progress which would bring about economic or social development.<sup>68</sup>

The Organisation has played an important role in relation to social security development. Its prime concern is the formulation of international policies and programmes to improve working and living conditions.<sup>69</sup>

The ILO uses the following complementary methods to do its work:

- Sets international standards and supervise their observance;
- Extends technical cooperation in the field to member states; and
- Conducts research, and collects and disseminates information.

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<sup>68</sup> ILO and the World of Work op cit note 4 at 9.

<sup>69</sup> Idem. One of the principal ways in which the ILO does this is through International Labour Conventions, the drafting of which involves the ILO secretariat in extensive studies and discussions, and in the examination of existing laws and practices throughout the world. A Convention is conceived as a set of firm criteria for preparing national legislation. When a Convention has been adopted by the annual International Labour Conference, member states of the ILO are required by the Constitution to bring the Convention to the notice of their legislative authorities. In due course, if the standards which have been set are embodied in national laws, the states concerned will be in a position to ratify the Convention. Not every state which follows the Convention necessarily ends up ratifying it, but the influence of the ILO setting standards is effective regardless of the formal procedures involved.

The standards set by the Organisation take the form of Conventions and Recommendations, which are adopted by the Conference.<sup>70</sup> When a member state ratifies a Convention, it commits itself to apply its terms and provisions. Once member states have ratified a Convention, their governments are expected to make regular reports to the ILO on its application.<sup>71</sup>

### **2.5.2 The nature of ILO instruments**

The ILO, through its International Labour Conference, has been able to adopt over 200 Conventions and Recommendations.<sup>72</sup> However, one of the criticisms concerning the ILO Conventions, according to Frans Pennings, is that they do not provide any definition for the concept “social security”.<sup>73</sup>

This is indeed a problem as each member state may have its own interpretation, approach, and definition of social security and this will not be proper as countries will not have anything to measure their systems against. There is therefore a need for a comprehensive definition of social security with clear obligations to the member states. The definition should also have an enforceable legal meaning with reasonable levels or standards of protection which member states must meet.

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<sup>70</sup> Idem at 12. The member states of the ILO meet at the International Labour Conference in June of each year in Geneva. Two government delegates, an employer delegate, and a worker delegate represent each member state. The Conference establishes and adopts International Labour Standards and is a forum for the discussion of key social and labour questions.

<sup>71</sup> ILO and the World of Work op cit note 4 at 16.

<sup>72</sup> Pennings F *Between Soft and Hard Law – The Impact of International Social Security Standards on National Social Security Law* 2006 at 1-2 (hereafter, Pennings *Between Soft and Hard Law*).

<sup>73</sup> Ibid at 43.

### **2.5.3 The purpose of setting minimum core-content of the international instruments**

The minimum core-content refers to the nature or essence of a right. It is an *essentialia* of a right without which a right loses its substantive importance as a human right and in the absence of which the state party should be considered to be in violation of its international obligations. It is also described as a floor below which conditions should not be permitted to fall.<sup>74</sup>

The approach that seems to be favoured is the minimum state obligations as it manages to avoid or at least reduce some problems with the minimum core-content approach. However, many human rights activists are not in favour of defining minimum core-content, fearing that many countries will strive to do as little as possible. The fear is that if state parties realise how little they are required to do in order to comply with their obligations, they will do that minimum and nothing more.<sup>75</sup>

### **2.5.4 The ILO Conventions' basic principles and general requirements**

The ILO Conventions have a considerable influence on the development of social security throughout the world. As a result, social security schemes comprising all nine branches covered in the Social Security (Minimum Standard) Convention 102<sup>76</sup> are now found in almost all of the developed countries and in the Constitutions of some of the developing countries, even though most social security schemes established in the developing countries have limited scope and do not provide universal coverage.

The Conventions established by the Organisation set out basic principles and requirements that must be followed by different countries when making national laws for purposes of consistency.

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<sup>74</sup> Brand *Exploring the Core Content of Socio-Economic Rights* op cit note 54 at 15.

<sup>75</sup> *Ibid* at 14-20.

<sup>76</sup> These branches are medical care, sickness benefits, unemployment benefits, old-age benefits, workers' compensation, family, disability, maternity, and survivors' benefits.

Pennings and Schulte<sup>77</sup> have summarised these basic principles and requirements as follows.<sup>78</sup>

- Any benefit in cash should be a periodical payment provided “throughout the contingency”;
- The benefit should be a prescribed benefit replacing previous income to a certain extent or establishing a guaranteed minimum;
- The costs of the benefits and administration should be borne collectively by way of insurance contributions or taxation, which excludes schemes based simply on employers’ liability with an exception of Convention 121 concerning employment injury benefits and Convention 183 concerning maternity protection;
- The insurance contributions payable by employees should not exceed 50% of the total costs of the scheme, except for those schemes financed entirely by employees;
- The state has to assume at least general responsibility for the due provision of the benefits and for the proper administration of the social security institutions; and
- Representatives of the persons protected have to participate in the management of a scheme, or at least be associated with it in a consultative capacity in all cases in which the administration is not entrusted to an institution regulated by public authorities or a government department.

Member states are required to adhere to these requirements and anything above these will depend on each individual country. The aim of setting the minimum level is to ensure minimum coverage.

Even though the Conventions allow for a wide variety of methods of calculating benefits, they do not allow for methods that are unable to ensure, for example, that

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<sup>77</sup> Pennings F (ed) and Schulte B (Chapter 1: International Social Security Standards: An Overview) in Pennings *Between Soft and Hard Law* op cit note 72.

<sup>78</sup> Ibid at 13-14.

persons protected by a scheme receive adequate replacement income in the event of loss of earnings due to specific contingencies.<sup>79</sup>

## **2.5.5 ILO Conventions and Recommendations on the right to social and retirement security**

### **2.5.5.1 Social Security (Minimum Standard) Convention, 1952**

The Social Security (Minimum Standard) Convention 102 was adopted in 1952. In order to ratify the Convention, a member state is obliged to comply at the time of ratification with at least three of the following Parts of the Convention: medical care, sickness benefits, unemployment benefits, old-age benefits, workers' compensation, and family, disability, maternity, and survivors' benefits.<sup>80</sup> From the risks mentioned, at least one provision concerning unemployment, old-age, workers' compensation, disability, or survivors' benefits must be accepted.<sup>81</sup> Each Part of the Convention provides specific standards aimed at guaranteeing the benefit of social protection to protected classes of persons, as well as a certain level of benefits.<sup>82</sup>

In all instances, a ratifying member state must comply with certain general parts of the Convention, including Part XI, which provides for periodic payments of social security.<sup>83</sup>

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<sup>79</sup> *Idem* at 14-15.

<sup>80</sup> Article 2 of Social Security (Minimum Standards) Convention, 1952.

<sup>81</sup> Article 2(1)(ii).

<sup>82</sup> See Parts II, III, IV, V, VI, VII, VII, IX and X.

<sup>83</sup> Pennings *Between Soft and Hard Law* op cit note 72 at 14-15.

In the case of old-age benefits, the Convention requires that persons covered shall comprise prescribed classes of employees:<sup>84</sup>

- Constituting not less than 50% of all employees; or
- Prescribed classes of the economically active population, constituting not less than 20% of all residents; or
- All residents whose means during the contingency do not exceed prescribed limits.

These alternatives are intended to facilitate the ratification of the Convention by member states, regardless of the type of social security system they may have. The level of benefits is dependent on the category of the population covered. For example, article 29 which deals with old-age benefits provides for a benefit based on certain conditions of contributing periods that provide the right to the benefit, of 40%, either of previous wages or of the average wages of skilled or unskilled workers, depending on how the protected classes of persons are determined.<sup>85</sup>

Articles 71 and 72 of Convention 102 list the conditions a national social security scheme must meet in order to qualify as an acceptable system for the purpose of ratifying the Convention. Article 71(1) requires that the costs of benefits and administration be borne collectively through insurance contributions or taxation in a manner that avoids hardship to persons of limited means. Article 71(2) provides that the total of insurance contributions borne by employees must not exceed 50% of the total of a protected employee's financial resources. Article 71(3) requires member states to accept general responsibility for the due provision of benefits, while article 76 requires all member states to include in their annual report full information concerning the laws and regulations by which effect is given to the provisions of this Convention.

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<sup>84</sup> Article 27 of Social Security (Minimum Standards) Convention, 1952.

<sup>85</sup> Brand *Exploring the Core Content of Socio-Economic Rights* op cit note 54 at 116.

Member states are required to provide information on social security based on all nine of the categories of benefits used in ILO Convention 102.<sup>86</sup> According to Frans Pennings,<sup>87</sup> member states are responsible for the proper functioning of their social security systems. This entails the provision of an appropriate legal framework for the social security system, as well as the proper administration of the resulting institutions – whatever system is chosen – in order to guarantee the protection envisaged by the Conventions.

The responsibility of the member state also covers the provision of benefits. Irrespective of the method of financing adopted, the competent authorities are under an obligation to take all necessary measures to ensure that benefits are duly provided – whatever the system.<sup>88</sup>

#### **2.5.5.2 *Invalidity, Old-Age and Survivors' Benefits Convention, 1967***

In terms of article 14 of the Invalidity, Old-Age and Survivors' Benefits Convention 128 of 1967, each member for which Part III (old-age benefit) of the Convention is in force, shall secure to the persons protected the provision of old-age benefits in accordance with the following: the contingency covered shall be survival beyond a prescribed age; the prescribed age shall not be more than 65 years or such higher age as may be fixed by the competent authority with due regard to demographic, economic, and social criteria, which shall be demonstrated statistically;<sup>89</sup> if the prescribed age is 65 years or higher, the age shall be lowered, under prescribed conditions, in respect of persons who have been engaged in occupations that are deemed by national legislation, for the purpose of old-age benefit, to be arduous or unhealthy;<sup>90</sup> and lastly, the old-age benefit shall be a periodical payment.<sup>91</sup>

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<sup>86</sup> Article 76(1)(a) of Social Security (Minimum Standards) Convention, 1952.

<sup>87</sup> Pennings *Between Soft and Hard Law* op cit note 72 at 29.

<sup>88</sup> *Idem*.

<sup>89</sup> Article 15 of the Invalidity, Old-Age and Survivors' Benefits Convention 128 of 1967.

<sup>90</sup> Article 16.

<sup>91</sup> Article 17.

### **2.5.5.3 *Convention on the Elimination of All Forms of Discrimination against Women, 1979***

The Convention obliges states parties to eliminate discrimination against women in the field of employment, and to ensure equal rights between men and women; in particular the right to social security, more especially in cases of retirement, unemployment, sickness, invalidity, and old-age and other incapacity to work, as well as the right to paid leave.<sup>92</sup>

### **2.5.5.4 *Income Security Recommendation, 1944***

One of the principles of social security emanating from Income Security Recommendation 67 is that of universal coverage through social assistance.<sup>93</sup> It provides that social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants.<sup>94</sup> In terms of Recommendation 67, the income security schemes should relieve want and prevent destitution by restoring, up to a reasonable level, income that is lost by reason of inability to work or to obtain remunerative work by reason of the death of a breadwinner.<sup>95</sup>

### **2.5.6 *Enforcement of ILO standards***

After adopting a Convention, the ILO Conference must present it to the authorities of member states for the enactment of implementing legislation within one year.<sup>96</sup> Member states must report to the Director-General of the Organisation on whether or not they are going to ratify the Convention.

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<sup>92</sup> Article 11(1)(e) of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

<sup>93</sup> See paras 28-30 of the Income Security Recommendation 67 of 1944.

<sup>94</sup> See par 17.

<sup>95</sup> See par 1.

<sup>96</sup> Article 19(5) of the Constitution of the International Labour Organisation (ILO Constitution).

The report has to show the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreements or otherwise, and state the difficulties which prevent or delay the ratification of such a Convention.<sup>97</sup>

Article 19(5) of the ILO Constitution empowers the Governing Body to request reports from member states on the position both of their law and legal practice with regard to matters dealt with in non-ratified conventions; while, on the other hand, article 19(6)(d) requires member states to report on their law and practice relating to ratified Conventions.

Periodical reporting is required from member states after a Convention has been ratified.<sup>98</sup> However, time periods on which reports are required are not the same for all the Conventions.<sup>99</sup> In terms of article 23(2) of the ILO Constitution, member states are required to communicate to representative organisations of employers and workers the reports they send to the Director-General and comments made by those organisations must be taken into consideration by the Organisation's supervisory bodies in their evaluation of government reports. The report by member states on their compliance with the Conventions is presented to the Committee of Experts on the Application of International Organisation Conventions and Recommendations. The drafting of the reports gives member states an opportunity to check the consistency of their national law and legal practice with the contents of the Convention concerned. The thinking behind the reporting duties is that, in addition to the possible direct effect of comments made by the experts, the discussion of these comments by the national actors may put additional pressure on member states that do not abide by their international obligations.<sup>100</sup> Every member state has the right to file a complaint if it is not satisfied that another member state is effectively complying with any Convention which they have both ratified.<sup>101</sup>

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<sup>97</sup> Article 19(5)(e).

<sup>98</sup> Article 22.

<sup>99</sup> Pennings *Between Hard and Soft Law* op cit note 72 at 17.

<sup>100</sup> Ibid at 17-18.

<sup>101</sup> Article 26(1) of the ILO Constitution.

The ILO Governing Body may appoint a Commission of Inquiry to consider the complaint and if the member state which lodged the complaint is not satisfied with recommendations made by the Commission, it may refer the matter to the International Court of Justice.<sup>102</sup> Employers and employees' organisations can also file a complaint with the ILO Governing body, if they are not satisfied that a member state is securing the effective observance of any Convention which both have ratified. The Governing body will then refer the complaint to a Commission of Inquiry.<sup>103</sup> The ILO Constitution is, however, silent with regard to the type of sanctions that may be imposed against the member states which fail to comply.

## **2.6 SUMMARY AND EVALUATION**

The right to social security is an internationally recognised human right, as it has been seen from the international instruments mentioned and discussed in this chapter. Thus, international instruments play an important role in the development of social security systems of the countries of the world. Countries measure the progress they have made in providing social security to their citizens against what is stipulated in international instruments such as treaties and conventions they are parties to. For example, the Universal Declaration of Human Rights, the African Charter on Human and People's Rights, together with the United Nations Charter, all provide for social security and socio-economic rights, social progress, and the standard of living adequate for the well-being of individuals and their families.<sup>104</sup> These instruments, however, do not have specific provisions on what would constitute adequate levels or standards. This makes it difficult to use them in determining whether individual countries have systems that meet acceptable levels. They also mainly focus on social insurance and not on the combination of social insurance and social assistance.

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<sup>102</sup> Article 29(2).

<sup>103</sup> Article 26.

<sup>104</sup> Article 22 and 25 Universal Declaration of Human Rights; articles 16 and 22 (respectively) of the African Charter on Human and People's Rights; the preamble to the UN Charter.

Within the SADC region, the right to social security is recognised in the SADC Charter of Fundamental Social Rights and the SADC Code on Social Security. The latter recognises every worker's right to social protection when they retire,<sup>105</sup> while the former recognises everyone's right to social security and social assistance and obliges member states to progressively raise the levels of cover to everyone.<sup>106</sup> As good as this may sound, it remains a challenge to measure the progress made by member states as there is no instrument availed by both the Charter and the Code to determine compliance or adequacy. There are no direct sanctions that defaulting countries receive and this can result in member states not taking their provisions seriously. It is, however, good that the Charter encourages member states to progressively raise the levels of cover to everyone.

The ICESCR recognises everyone's right to social security and it requires member states to guarantee an adequate standard of living to all.<sup>107</sup> ILO Social Security Convention 102 provides a list of contingencies which must be covered by every social security system and it also requires all member states to cover at least three of them in order to ratify the Convention.<sup>108</sup> The Convention further lists the conditions a national social security scheme must meet in order to qualify as an acceptable system for purposes of ratifying the Convention.<sup>109</sup> In terms of this provision, coverage for old-age benefits must not be less than 50% of all employees of that member state. Clearly the Convention sets the targets of coverage very low. A target for coverage of three contingencies out of nine is quite low and not encouraging at all. It is submitted that the target should have at least been placed at not less than six risks considering the number and nature of risks recognised.

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<sup>105</sup> Articles 8 and 10 of the SADC Charter of Fundamental Social Rights.

<sup>106</sup> Articles 4 and 5 of the SADC Code on Social Security.

<sup>107</sup> Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights, 1966.

<sup>108</sup> Article 2 of Social Security (Minimum Standard) Convention, 1952.

<sup>109</sup> Articles 71 and 72.

One other disappointing observation is the fact that the Convention is aiming for coverage of at least half of the working force, considering the fact that not half but almost each and every worker would need some form of income security in his or her old-age.

The Invalidity, Old-Age and Survivors' Benefits Convention 128 requires each member state for which Part III (old-age benefit) of the Convention is in force, to secure to the persons protected the provision of old-age benefit, which covers the contingency for survival beyond a prescribed age – which shall not be more than 65 years or such higher age as may be fixed by the competent authority with due regard to certain factors.<sup>110</sup> The Convention requires the benefit to be in the form of periodical payments.<sup>111</sup> This Convention is in favour of employees receiving retirement benefits in the form of regular pensions instead of lump-sum cash payments. This is a positive indicator because a person who receives periodical payments is better off than one who receives a lump-sum payment.

Such a person faces the risk of squandering the money and could be left with nothing to support himself or herself in retirement. Periodical pension payments promote social security objectives as the receiver receives income for the rest of his or her life in retirement. The person who receives a lump-sum cash payment might be tempted to use the benefit on other things, for example to go on a long holiday or buy expensive items such as cars and jewellery – only to be left with nothing for the remaining years of his or her life.

The Convention on the Elimination of All Forms of Discrimination against Women, 1979, requires state parties to eliminate discrimination against women with regard to the right to social security.<sup>112</sup>

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<sup>110</sup> Article 14 and 15 of Invalidity, Old-Age and Survivors' Benefits Convention, 1967.

<sup>111</sup> Article 17.

<sup>112</sup> Article 11(1)(e) of Convention on the Elimination of All Forms of Discrimination against Women, 1979.

The Convention is against differentiating women from men in social security provision. Social security should be afforded to both men and women equally. For example, providing social security for men and women at different ages would amount to unfair discrimination on the basis of gender and age.<sup>113</sup>

ILO Recommendation 67 promotes universal coverage through social assistance,<sup>114</sup> and further provides that social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants.<sup>115</sup> Income security schemes should relieve want and prevent destitution by restoring, up to a reasonable level, income which is lost by reason of inability to work or to obtain remunerative work because of the death of a breadwinner.<sup>116</sup> However, the question is what would qualify as a reasonable level. It could assist member states if the Recommendation stipulates the benefit level considered to be reasonable.

The nature and extent of a state's obligations in respecting, promoting, protecting, and fulfilling the right to social security depends on the international instrument that is binding on that state as the extent of state parties' obligations varies from one instrument to another.<sup>117</sup> For example, the ICESCR requires state parties to take steps to the maximum of their available resources, with a view to achieving progressively the full realisation of the rights recognised in them by all appropriate means – including adoption of legislative measures.<sup>118</sup>

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<sup>113</sup> Section 9(3) of the Constitution prohibits discrimination on the basis of a number of grounds including sex, gender, and age.

<sup>114</sup> See paras 28-30 of Recommendation 67.

<sup>115</sup> See par 17.

<sup>116</sup> See par 1.

<sup>117</sup> Human Rights Resource Centre of the University of Minnesota "Circle of Rights: Economic and Cultural Rights Activism: A Training Resource, Module 11, Social Security as a Human Right", 2000 (contents of section 5) accessed from <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module11.htm>, last visited on 07 May 2015 (hereafter, University of Minnesota "Circle of Rights: Economic and Cultural Rights Activism").

<sup>118</sup> Article 2 of the International Convention on Economic, Social and Cultural Rights, 1966.

This provision acknowledges and appreciates the fact that some of the rights in this Convention may be difficult to achieve in a short period of time due to states' resources constraints, but at the same time the provision requires states to do their best within available means.

Thus, although article 2 of the ICESCR affords the state some latitude in achieving full realisation of the right, each state should nonetheless be in a position to demonstrate its willingness to achieve full realisation of the right by putting in place measures that will assist it to achieve that goal.<sup>119</sup>

International instruments play a vital role in shaping countries' social security systems. In South Africa the courts, tribunals, and forums are encouraged to consider foreign law when interpreting the Bill of Rights.<sup>120</sup> The courts are also required when interpreting any legislation to prefer interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>121</sup> Customary international law is also regarded as law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>122</sup> South Africa has already indicated its willingness to be party to and to be legally bound by the obligations imposed by international agreements by ratifying some of the international conventions pertaining to social security.<sup>123</sup> International instruments, and in particular the ILO Conventions and Recommendations on social security, provide a measure against which the systems of the countries of the world can be compared.

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<sup>119</sup> See generally, University of Minnesota: "Circle of Rights: Economic and Cultural Rights Activism" *op cit* note 117.

<sup>120</sup> Section 39(1) of the Constitution. See also the following Constitutional Court decisions: *Grootboom*; *Coetzee*; *Williams*; *Ferreira*; and *Bernstein* (*supra* note 5).

<sup>121</sup> Section 233 of the Constitution.

<sup>122</sup> Section 232.

<sup>123</sup> See international treaties applicable to social security rights that have been ratified by South Africa included in footnote 7 (*op cit*).

Even in those instances where South Africa has not yet signed or ratified certain treaties, the South African courts and other bodies entrusted with the duty of interpreting the fundamental rights will be compelled by section 39(1)(b) of the Constitution to consider international law when interpreting the Bill of Rights.<sup>124</sup> International supervisory bodies also play an important role in assisting countries such as South Africa to implement international socio-economic rights, including the rights related to retirement security.<sup>125</sup>

It is worrying, however, to notice that international instruments generally do not have enforcement mechanisms, or where such mechanisms exist they have no serious sanctions that can be imposed against defaulting member states.

The next chapter considers social and retirement security provision in Belgium, the Netherlands, and the United Kingdom. The systems in these three countries are used to present a picture of how other countries of the world approach retirement provision.

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<sup>124</sup> See the case of *Makwanyane* supra note 6 at par 35.

<sup>125</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 11 at 649.

## **CHAPTER 3**

# **SOCIAL SECURITY AND PENSION SYSTEMS IN BELGIUM, THE NETHERLANDS, AND THE UNITED KINGDOM**

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### **3.1 INTRODUCTION**

This chapter examines social security and pension provision in three European countries; namely Belgium, the Netherlands, and the United Kingdom.<sup>1</sup> The systems in these countries are described to see how far they have advanced and to determine the adequacy of the South African system in relation to the developments in these countries. The systems in these countries are regarded as some of the good examples of countries with well-developed retirement security systems and further-

- Belgium had a number of collaborations with South Africa on a number of social security projects and it will be interesting to see what influence, if any has Belgium had in the development of South Africa's retirement security provision.
- The Netherlands is regarded as a country with one of the best pension systems in the world,<sup>2</sup> and therefore serves as the best example when coming to retirement security provision.

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<sup>1</sup> The United Kingdom consists of four semi-autonomous regions; namely England, Northern Ireland, Scotland, and Wales. However, the discussion in this Chapter reviews the law that applies in the whole United Kingdom. See in this regard [http://www.cilex.org.uk/about\\_cilex\\_lawyers/the\\_uk\\_legal\\_system.aspx](http://www.cilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx), last visited on 12 May 2015. Pension Credit in Great Britain is administered by the Department of Works and Pensions (England, Wales, and Scotland) and the Department for Social Development (Northern Ireland), accessed from [http://www.ehow.com/how\\_6900179\\_apply-pension-credit.html#ixzz2KluHE093](http://www.ehow.com/how_6900179_apply-pension-credit.html#ixzz2KluHE093), last visited on 12 May 2015.

<sup>2</sup> It has been found that in the Netherlands, many retirees are able to replace close to 100% of their pre-retirement income through earnings-related defined-benefit plans, which cover more than nine in ten workers, plus the country's flat-rate public scheme, which covers all residents. Most of the employer-sponsored defined-benefit plans replace 75% of a workers' final pay, meanwhile public-pension plan replaces 30% of a worker's average pay. See Powell R and Jones D "Retiring:

- The United Kingdom offers an advanced system with some unique features. It should also be noted that the development of social security provision in South Africa has to a certain extent followed developments in the United Kingdom.<sup>3</sup> For example, before the introduction of the regulatory system in South Africa, through among other things the introduction of the Pension Funds Act 24 of 1956, pension funds in this country took the form of trusts (as it is still the case in the United Kingdom) and further the functions of the office of the Pension Funds Adjudicator (South Africa) are similar to those of the United Kingdom's Pensions Ombudsman.
- Interestingly, South Africa was for many years colonised by both the Netherlands and the United Kingdom. The Netherlands colonised South Africa from the mid-17<sup>th</sup> century to the early 18<sup>th</sup> century, and the British took over the Cape colony in 1814 during the Napoleonic Wars.<sup>4</sup> South Africa was first colonised by white settlers under the Dutch East India Company in 1652. Domination by the English over the Dutch brought about the establishment of the new colonies of the Orange Free State and the Transvaal by the Dutch.<sup>5</sup>
- It is also generally accepted that most African countries' approaches to social security have been largely influenced by the Western systems,<sup>6</sup> as Africa was under the control of some of the Western countries for many years.<sup>7</sup>

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Netherlands, Australia Offer Better Pension Benefits" September 23, 2009, accessed from <http://www.globalaging.org/pension/world/2009/retiring-aus.htm>, last visited on 12 May 2015 (hereafter, Powell "Retiring: Netherlands, Australia Offer Better Pension Benefits"). Netherlands has also been rated as one of the countries which have one of the best pension systems in the world by the Melbourne Mercer Global Pension Index 2014 Report using the adequacy, sustainability, and integrity index. See in this regard <http://www.mercer.com/referencecontent.htm?idContent=1359260> at 72-74, last accessed on 12 May 2015 (hereafter, Melbourne Mercer Global Pension Index 2014 Report).

<sup>3</sup> Marx GL, Hanekom K *The Manual on South African Retirement Funds and Other Employee Benefits* 2009 Vol 1 at 2.

<sup>4</sup>The Napoleonic Wars took place between 1799 and 1815. See in this regard [http://www.historyofwar.org/articles/wars\\_napoleonic.html](http://www.historyofwar.org/articles/wars_napoleonic.html), last visited on 12 May 2015.

<sup>5</sup>The History of Apartheid in South Africa, accessed from [http://www-cs-students.stanford.edu/~cale/cs\\_201/apartheid.hist.html](http://www-cs-students.stanford.edu/~cale/cs_201/apartheid.hist.html), last visited on 12 May 2015.

<sup>6</sup>Kaseke E "The Challenges of Extending Social Security to the Poor: An African Perspective" (Paper delivered at the Global Conference on Poverty, Social Welfare and Social Development Challenges for 21<sup>st</sup> Century, 29<sup>th</sup> ICSW – International Conference on Social Welfare, Cape Town, South Africa, 23-27 October 2000), accessed from <http://www.icsw.org/global-conferences/challenges-extending.htm>, last visited on 12 May 2015.

## **3.2 BACKGROUND TO THE DEVELOPMENT OF SOCIAL AND RETIREMENT SECURITY SYSTEMS IN BELGIUM, THE NETHERLANDS, AND THE UNITED KINGDOM**

### **3.2.1 Introduction**

It is believed that social security was introduced to the world for the first time by Bismarck and that it was later given a new look by the Beveridge social security plan in 1942.<sup>8</sup> It should, however, be noted that the countries of the world today follow different approaches in their social security provision. Thus, even though these three countries are all European, each one has a different system and follow a different approach.

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<sup>7</sup>For example, South Africa received its independence from Britain in 1910, Botswana in 1966, the Democratic Republic of Congo was colonised by Belgium until 1960, Lesotho was colonised by Britain until 1966, and Namibia was under South African control until 1990. See in this regard Chronological List of African Independence, accessed from <http://africanhistory.about.com/library/timelines/blIndependenceTime.htm>, last visited on 12 May 2015.

<sup>8</sup> Jehoma S “Social Security and Retirement Reform” (Presentation made at Pension Lawyers’ Association 2012 Conference), February 2012 (unpublished), accessed from <http://www.pensionlawyers.co.za/resources/downloads/2012-downloads/>, last visited 12 May 2015.

Most of the countries in the centre of Europe, which include Germany, Italy, France, and Belgium, follow the Bismarckian approach,<sup>9</sup> even though the Belgian social security system has some elements of the Beveridge approach and has progressively become more and more redistributive in nature.<sup>10</sup> Countries towards the north, such as Ireland, Denmark, and the United Kingdom, follow the Beveridge approach.<sup>11</sup> Countries towards the east follow the World Bank's approach, and these countries include, among others, Slovakia, the Czech Republic, and Hungary. The Netherlands also follows the World Bank's approach,<sup>12</sup> albeit with Beveridgean and Bismarckian elements.<sup>13</sup>

This is an indication that countries take different approaches to social security provisions which are influenced by different factors. It is for this reason that South Africa should also follow its own approach based on the country's unique history and the socio-economic needs of its people, and only follow other countries where necessary.<sup>14</sup>

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<sup>9</sup> See generally, Crankshaw E *Bismarck* 1981 and Ludwig E *Bismarck: The Story of a Fighter 1881-1948* (first printed in English in 1927) regarding who Bismarck was and his rise to prominence. Otto von Bismarck, also known as the Iron Chancellor, was born in 1815. He was the chancellor of Germany from the 1860s to 1890. He was the founder of the German Empire (accessed from <http://www.firstworldwar.com/bio/bismarck.htm>, last visited on 12 May 2015). The Bismarckian approach is discussed in paragraph (par) 3.2.2.1.

<sup>10</sup> Jousten A, Lefévre M, Perelman S, Pestieau P "Social Security in Belgium: Distributive Outcomes" (Discussion Paper No. 1486, Institute for the Study of Labor) February 2005, at 1, accessed from <http://ftp.iza.org/dp1486.pdf>, last visited on 12 May 2015.

<sup>11</sup> Beveridge W *Social Security and Allied Services*, (Report by Sir William Beveridge: Presented to Parliament by Command of his Majesty) November 1942) (hereafter, Beveridge *The Beveridge Report*). The Beveridge approach is discussed in par 3.2.2.2. William Henry Beveridge was a British economist and social reformer. He was the founder of Britain's welfare state.

<sup>12</sup> The World Bank is a vital source of financial and technical assistance to developing countries around the world. See the role the World Bank plays in pension reform in Independent Evaluation Group (IEG) "Pension Reform and the Development of Pension Systems: An Evaluation of World Bank Assistance" (The World Bank) 2006 (hereafter, Independent Evaluation Group "An Evaluation of World Bank Assistance").

<sup>13</sup> Guardiancich I "The Netherlands Current Pension System: First Assessment of Reform Outcomes and Output" (Research Project "Assurer Une Pension Adéquate Dans Un Contexte Européen", Supported by the Belgian Federal Public Service Social Security) May 2010, accessed from [http://www.ose.be/files/publication/2010/country\\_reports\\_pension/OSE\\_2010\\_CRpension\\_TheNetherlands.pdf](http://www.ose.be/files/publication/2010/country_reports_pension/OSE_2010_CRpension_TheNetherlands.pdf), last visited on 12 May 2015 (hereafter, Guardiancich "The Netherlands Current Pension System").

<sup>14</sup> The history of South Africa's social security provision is discussed in Ch 4.

These countries are also members of the European Union<sup>15</sup> and of the Organisation for Economic Co-operation and Development<sup>16</sup> (OECD) countries respectively. Social protection in the European Union is a national benefit, which means that citizens are provided for by their own countries which follow their own individual approaches. Therefore, the European Union has little influence on social policy and welfare provision. Member states are free to decide on the type and level of social protection they deem affordable and adequate<sup>17</sup> for their citizens.

The OECD assists governments to fight poverty through economic growth and financial stability.<sup>18</sup> Countries falling under the Organisation provide a safety-net aimed at alleviating poverty for the elderly,<sup>19</sup> and most of the countries use a three-pillar approach even though their application might differ.<sup>20</sup> The OECD offers what is called “derived pension rights” as a pension policy issue. The benefits include spousal benefits, benefits for divorced spouses, and survivor’s benefits for widow(er)s and orphans. These benefits are normally calculated as a percentage of the participating worker’s rights and it is only in rare occasions, for example, that a widow is entitled to the full benefit of her deceased husband.<sup>21</sup>

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<sup>15</sup> The following countries make up the European Union: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

<sup>16</sup> The following countries make up the Organisation for Economic Co-operation and Development (OECD): Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The membership of the OECD is currently 24. OECD is a forum where governments of member countries work together to address the economic, social and environmental challenges of globalisation. See in this regard <http://www.oecd.org/about/>, last visited 12 May 2015.

<sup>17</sup> Kvist J and Saari J *The Europeanisation of Social Protection* 2007 at 1 (hereafter, Kvist *The Europeanisation of Social Protection*).

<sup>18</sup> See generally on the OECD: <http://www.oecd.org/about/whatwedoandhow/>, last visited on 12 May 2015.

<sup>19</sup> OECD Pensions at a Glance: Public Policies across OECD Countries 2005 at 22.

<sup>20</sup> Gillion C, Turner J, Bailey C, Latulippe D *Social Security Pensions: Development* (International Labour Office Geneva) 2000 at 576-578.

<sup>21</sup> Choi J “The Role of Derived Rights for Old-age Income Security of Women”, at 6 (OECD Social, Employment and Migration Working Papers, No. 43, OECD Publishing), accessed from <http://dx.doi.org/10.1787/350882777255>, last visited on 07 September 2015.

### **3.2.2 Bismarckian, Beveridge, and the World Bank approaches to pension provision**

#### **3.2.2.1 *The Bismarckian approach***

The Bismarckian approach was introduced in the 1880s by Bismarck to the German Empire. In terms of this approach, eligibility for state-provided social protection is based more directly on those who are in employment; hence provision and entitlement to benefits are determined by contributions paid during the period a person is still working. Eligibility for benefits depends on whether the person has worked or is presently working, with the objective being to maintain an individual's income levels over a period of time. In this regard, the role of the state as a social security provider is limited. People are expected to rely on private social security provisions and other voluntary savings arrangements for support when they retire.<sup>22</sup> The problem with this system is that it does not provide for universal coverage. The system can also exclude those members of the community who are not employed and are without a salary.<sup>23</sup> Thus, the system is very limited and exclusionary in nature and overlooks the poor and the unemployed who are in fact the most vulnerable members of society.

#### **3.2.2.2 *The Beveridge system***

The Beveridge system resulted from an inquiry led by Sir William Beveridge and set up by the British Government to examine the country's social insurance and allied services in June 1941. The Beveridge Report was issued in 1942.<sup>24</sup> Its proposals formed the basis of the 1945-1951 Labour Government's radical reforms, which created the social security framework adopted after the Second World War.<sup>25</sup>

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<sup>22</sup> East R *Social Security Law* 1999 at 51 (hereafter, *East Social Security Law*).

<sup>23</sup> *Ibid* at 42-43.

<sup>24</sup> Beveridge *The Beveridge Report* op cit note 11.

<sup>25</sup> *East Social Security Law* op cit note 22 at 22-43.

The Report recommended the adoption of a contributory social security system which would protect all citizens against sickness, unemployment, and old-age. The system would require employees, employers, and the state to make contributions to social insurance schemes. Where necessary, benefits would be unlimited in duration but they would be subject to certain conditions. The system would cover all social risks until a person dies. Beveridge identified the following, which he called the five “Giant Evils”: want, disease, ignorance, squalor, and idleness – which could, according to him, only be cured by the general reform to the system of welfare in the United Kingdom.<sup>26</sup>

The Report further identified the following six categories of persons as those in actual or potential need: employees, the self-employed, housewives, aged people not gainfully occupied (including the unemployed), the sick and the disabled, and those below working age and those retired due to old-age.<sup>27</sup> The Report suggested the following seven different kinds of cash benefits to cover the identified groups: unemployment and sickness benefits, the self-employed who suffered a threat of bankruptcy, special provision for the needs of married women, disability benefits which would embrace industrial injuries, funeral benefits, family allowances, and old-age pensions.<sup>28</sup>

All these benefits would be flat-rate and would not depend on income when a person is employed as they would be calculated on the basis of subsistence. The schemes would be contributory at a flat-rate irrespective of means and based on the principle of insurance. Thus, the eligibility for benefits would be based on contributions paid when a person is working.<sup>29</sup> However, there would be provision for a means-tested benefit for those people who are not covered by contributory schemes.<sup>30</sup>

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<sup>26</sup> Beveridge *The Beveridge Report* op cit note 11 at 6.

<sup>27</sup> Ibid at 10, 122, and 124-127.

<sup>28</sup> Idem.

<sup>29</sup> Idem at 11.

<sup>30</sup> Idem at 141.

The system would provide for a fixed and minimum universal pension which may not provide a pension comparable to the standard of living the majority of people enjoyed during their working life;<sup>31</sup> hence supplementary schemes were later developed to deal with this shortcoming.<sup>32</sup>

What is commendable about this approach is that, unlike the Bismarckian approach, the system caters for all the people – including those working, the unemployed, the self-employed, poor members of society, and children – against numerous social risks. The system provides for supplementary schemes which can be used as top-ups by those who have joined employer-established schemes but who would like to add on to what they already have in order to increase their benefits.

### **3.2.2.3 The World Bank**

The World Bank (WB) has over the years supported a wide range of pension reforms.<sup>33</sup> Between 1984 and 2004, the Bank had already assisted 68 countries with reforms to their pension systems through more than 200 loans and credits. In addition, the Bank has issued many papers and publications on pension reform,<sup>34</sup> which can be used as a point of reference by the countries of the world.

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<sup>31</sup> *Idem* at 121-122.

<sup>32</sup> East *Social Security Law* op cit note 22 at 43-44.

<sup>33</sup> It does this through analytical and advisory services, and lending operations. See in this regard, An Independent Evaluation Group: An Evaluation of World Bank Assistance op cit note 12 at ix.

<sup>34</sup> *Ibid* at xv.

The World Bank promotes self-sufficiency,<sup>35</sup> and advocates for a multi-pillar system for the provision of old-age income security.<sup>36</sup> The first pillar comprises a mandatory publicly managed pillar that aims to be redistributive in nature,<sup>37</sup> the second pillar is a mandatory privately managed pillar focused on saving<sup>38</sup> (here, self-sufficiency is again encouraged and may even be forced upon citizens); and the third pillar is a voluntary pillar also aimed at savings, and personal and occupational plans that are fully funded.<sup>39</sup> The system places greater emphasis on saving and the utilisation of both public and private arrangements, full funding, and pay-as-you-go financing.<sup>40</sup>

The World Bank’s recommended multi-pillar system can be summarised as follows:<sup>41</sup>

<b>The World Bank’s Multi-pillars</b>	
<b>1<sup>st</sup> Pillar</b>	A public pillar, backed by government through tax revenue, with a limited objective of reducing poverty in old-age and co-insuring against a multitude of risks.
<b>2<sup>nd</sup> Pillar</b>	A mandatory pillar comprising personal saving accounts or, in some cases, occupational plans. It is fully funded and privately managed, but publicly regulated, and it links benefits closely to costs because it carries out the income-smoothing or saving function.
<b>3<sup>rd</sup> Pillar</b>	A voluntary pillar which can take the form of either occupational or personal saving plans which provide additional protection for people who want more protection or benefits.

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<sup>35</sup> Ibid at ix (foreword).

<sup>36</sup> World Bank: *Averting the Old Age Crisis – Policies to Protect the Old and Promote Growth* (A World Bank Policy Research Report) (Oxford University Press) 1994 at xiii (hereafter, World Bank: *Averting the Old Age Crisis*).

<sup>37</sup> World Bank: *Averting the Old Age Crisis* (ibid) at 10.

<sup>38</sup> World Bank (idem). It involves income smoothing over a person’s lifetime: people postpone some consumption when they are young and their earnings are high so that they can consume more in their old-age than their reduced earnings would permit. It takes the form of social insurance.

<sup>39</sup> World Bank (idem). These arrangements take an insurance form.

<sup>40</sup> James E “Protecting the Old and Promoting Growth: A Defence of Averting the Old Age Crisis” (World Bank Policy Research, Working Paper No: 1570) January 1996 at 3 (hereafter James “Protecting the Old and Promoting Growth”).

<sup>41</sup> World Bank: *Averting the Old Age Crisis* op cit note 36 at 238-239.

The World Bank is in favour of a mandatory pillar that is privately managed as ideally suited for handling people's savings, a publicly managed tax-financed pillar for redistribution, and a third pillar, which is voluntary, for people who want additional old-age security.<sup>42</sup> The Bank's desired goal is to see each country's old-age security system providing for all the three pillars; with the state playing a different role in each one of them.<sup>43</sup>

It is further recommended by the Bank that any approach chosen by a particular country should have basic goals of helping the old and helping the broader economy; that old-age programmes should be both a social safety-net and an instrument for growth.<sup>44</sup> The Bank's approach is generally followed in most countries of the world, including South Africa, even though South Africa does not follow it in its totality. Another important factor with the World Bank's approach is the fact that it advocates for a mandatory second pillar (occupational pensions).

It should be noted here that even though South Africa follows the World Bank's approach (to a great extent), the country has still yet made participation compulsory, except in the sectors where the Minister has issued a sectoral determination to that effect. Unfortunately this has created a system which is exclusionary in nature.<sup>45</sup>

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<sup>42</sup> James "Protecting the Old and Promoting Growth" op cit note 40 at 3.

<sup>43</sup> World Bank: Averting the Old-Age Crisis op cit note 36 at 10.

<sup>44</sup> Ibid at 233.

<sup>45</sup> See the discussion of the World Bank's approach to pension provision under par 3.2.2.3 and a discussion on the nature of South Africa's pension system in Ch 5.

### **3.3 SOCIAL SECURITY AND PENSION PROVISION IN BELGIUM**

#### **3.3.1 General**

Belgium is a federal state which consists of three geographical regions comprising three communities, namely Flemish, French, and German-speaking communities – each with its own regional authorities established in terms of articles 1-3 of the Belgian Constitution, 1994. However, social security in Belgium is organised at a national level;<sup>46</sup> meaning that all the three Belgian communities follow the same social security system with the same rules and regulations.<sup>47</sup> Its pension system is that of a unitary state. However, there have been conflicts among the different regions with regard to the provision of social security, mostly as a result of the different socio-economic conditions in the three communities. They include the complaint by the Flemish community that they were paying more contributions to support the people of Wallonia (French-speaking southern region of Belgium) that were considered to be lazy and wasteful. This perception was, however, clarified by subsequent studies which showed that the causes of the inequalities and imbalances that characterise the Belgian communities emanated from, among other things, the past experiences of heavy industries in the southern region, the fact that the Wallonian population is old, less healthy, and has low employment; while on the other hand, the Flemish community has a high employment rate.<sup>48</sup>

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<sup>46</sup> Van Vugt PA, Peet JM (eds) *Social Security and Solidarity in the European Union: Facts, Evaluations, and Perspectives* 2000 at 15 (hereafter, Van Vugt *Social Security and Solidarity in the European Union*).

<sup>47</sup> Pieters D *Introduction into the Social Security Law of the Member States of the European Community* 1990 at 21 (hereafter, Pieters *Introduction into the Social Security Law of the Member States of the European Community*).

<sup>48</sup> See in this regard Marier P *Institutional Structure and Policy Change: Pension Reforms in Belgium, France, Sweden, and the United Kingdom* (Doctoral Thesis: Submitted to the Graduate Faculty of Arts and Sciences in partial fulfilment of the Requirements for the Degree of Doctor of Philosophy: University of Pittsburgh 2002) at 151 (hereafter, Marier P *Institutional Structure and Policy Change: Pension Reforms in Belgium, France, Sweden, and the United Kingdom*). See also footnote 160 in which the author states the views of Vaes B's article "Un divorce de la sécurité sociale?" *Où va la Belgique?* Ed. Marco Martiniello and Marc Swyngedouw. Paris: Editions L'Harmattan, 1998 at 174. The thesis was accessed from <http://d-scholarship.pitt.edu/10309/1/MarierDiss.pdf>, last visited on 10 September 2015.

Social security legislation and social services were introduced in Belgium at the end of the 19<sup>th</sup> century. However, it was only in 1903 that the country saw the introduction of the first compulsory insurance, which evolved from a basic insurance to a guarantee for subsistence security for everyone in Belgium by 1974.<sup>49</sup> Pension legislation was only introduced in 1924.<sup>50</sup>

It is compulsory for everyone living in Belgium to be insured and entitlement to benefits depends on contributions made to social security funds. The system provides a number of social security arrangements, which include assistance to the unemployed, and social security for employees, civil servants, and the self-employed.<sup>51</sup>

The Belgian system is mostly influenced by the Bismarckian social insurance approach, but also has elements of the Beveridge approach.<sup>52</sup> Belgium is also said to have been greatly influenced by the French pension system<sup>53</sup> as it was at some stage occupied by the French prior to its independence. As a result, the two systems share many similarities.<sup>54</sup>

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<sup>49</sup> Van Massenhove F (Chief Publisher) "Social Security: Everything you have Always Wanted to Know" (Federal Public Service Social Security), February 2012 at 8, accessed from [http://www.socialsecurity.fgov.be/docs/en/alwa2012\\_en.pdf](http://www.socialsecurity.fgov.be/docs/en/alwa2012_en.pdf), last visited on 12 May 2015 (hereafter Van Massenhove "Social Security: Everything you have Always Wanted to Know").

<sup>50</sup> Marier P *Institutional Structure and Policy Change: Pension Reforms in Belgium, France, Sweden, and the United Kingdom* op cit note 48 at 136.

<sup>51</sup> Pieters *Introduction into the Social Security Law of the Member States of the European Community* op cit note 47 at 21.

<sup>52</sup> Van Massenhove "Social Security: Everything you have always Wanted to Know" op cit note 49 at 8-9.

<sup>53</sup> The French pension system is a government mandatory system that covers all private sector workers by providing a means-tested minimum pension and work-related pensions as defined benefits. Mandatory work-related supplementary plans provide about one-third of the pension benefits received by an average retiree. See in this regard Muir DM and Turner JA (eds) *Imagining the Ideal Pension System: International Perspectives* 2011 at 8.

<sup>54</sup> Marier P *Institutional Structure and Policy Change: Pension Reforms in Belgium, France, Sweden, and the United Kingdom* op cit note 48 at 132.

Employers and employees pay contributions to the National Social Security Office to finance social security. It is the employers' duty to ensure that their employees are covered by the national social security system, regardless of whether the person is a Belgian citizen or not. This is good as coverage is extended to every person residing and working in Belgium. The social security fund provides for, among other benefits, the following: family benefits, unemployment benefits, incapacity benefits, accidents in the workplace, occupational illness, pensions, and annual paid holidays.<sup>55</sup> The benefits are determined according to the cost of living and the financial situation of the beneficiary at that particular time.<sup>56</sup>

Social security benefits in Belgium are provided through national institutions with a small number of private institutions administering certain benefits; for example, unemployment benefits are administered by unions.<sup>57</sup>

The Belgian system caters for salaried persons, self-employed persons, and civil servants. Provision for salaried persons is the largest of the three. The National Office for Social Security (RSZ – ONSS) is responsible for collecting both the employers' and employees' social security contributions. However, payments of benefits are made by institutions called semi-public institutions or parastatals. Self-employed persons join and pay social contributions to a social insurance fund for self-employed people or to the National Auxiliary Fund for Social Insurance of the Self-Employed, which is controlled by the National Institute for the Social Security for the Self-employed (RSVZ-INASTI). Civil servants are divided into local and provincial authorities and that of other administrators.<sup>58</sup> Social assistance is administered by the Public Welfare Centre (OCMW-CPAS) found in every municipality.<sup>59</sup>

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<sup>55</sup> Social Security in Belgium, accessed from [http://www.belgium.be/en/family/social\\_security\\_in\\_belgium/](http://www.belgium.be/en/family/social_security_in_belgium/), last visited on 12 May 2015.

<sup>56</sup> Jousten "Social Security in Belgium: Distributive Outcomes" op cit note 10 at 3.

<sup>57</sup> Van Vugt "Social Security and Solidarity in the European Union" op cit note 46 at 15-16.

<sup>58</sup> Van Massenhove "Social Security: Everything you have Always Wanted to Know" op cit note 49 at 9.

<sup>59</sup> Idem.

Belgium has a legal structure called the Organization for Financing Pensions which offers pension funds at a very flexible management structure. All existing pension funds had to switch to this structure by January 1, 2012. Pension funds receive tax advantages when they change to the Organization for Financing Pensions. The main aim of this organisation is to create a prudent and coherent management model in which investments are aligned with the characteristics of the plan.<sup>60</sup>

The Belgian Constitution protects the right to lead a life in conformity with human dignity. This right encompasses, among other rights, the right to social security.<sup>61</sup> The Constitution further provides that the rights and freedoms recognised for Belgian people should be ensured without discrimination.<sup>62</sup>

Belgium also has the Charter of the Socially Insured, which came into force on January 1, 1997. The Charter contains the rights and obligations of the socially insured (the population of Belgium) in their dealings with the social security institutions. The aim of the Charter is to protect the population through a set of rules which regulate social security institutions.<sup>63</sup> Belgium's social security schemes are regulated in terms of statutory law. Social security for employees is founded on the Social Security Act of 1944, which was replaced by the Social Security Act of 27 June 1969. Social security for the self-employed is regulated under the Social Security Act of 1967.<sup>64</sup>

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<sup>60</sup> Perrin T "Belgium: New Law on the Supervision of Pension Funds" (Global Benefits and Compensation Issues) May 2007 (Towers Perrin, HR Services), accessed from [http://www.towersperrin.com/tp/getwebcachedoc?webc=HRS/USA/2007/200705/gist\\_belgium\\_5172007.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=HRS/USA/2007/200705/gist_belgium_5172007.pdf), last visited on 20 November 2014.

<sup>61</sup> Article 23(2) of Title II (titled "the Belgians and their Rights") of the Belgian Constitution. See also Crabb JH *The Constitution of Belgium and the Belgian Civil Code* (as amended to September 1, 1982) 1982 at 4.

<sup>62</sup> Article 11 of the Belgian Constitution.

<sup>63</sup> Van Massenhove "Social Security: Everything you have Always Wanted to Know" op cit note 49 at 9.

<sup>64</sup> Van Vugt "Social Security and Solidarity in the European Union" op cit note 46 at 14.

The Supervision of Occupational Retirement Institutions Act, 2006 (*La loi relative au contrôle des institutions de retraite professionnelle*) regulates pension funds and the Complementary Pensions Act, 2003 (*La loi sur les retraites complémentaires*), sets out a framework for occupational pension provision. The Self-Employed Complementary Pensions Act, 2003 (*La loi sur les pensions complémentaires des travailleurs indépendants*), regulates supplementary pension provision for the self-employed.<sup>65</sup>

### **3.3.2 The Belgian pension system**

Pension provision in Belgium is determined on the basis of the following three elements: profession, salary, and family circumstances.<sup>66</sup> All Belgian pensioners receive their benefits on a pay-as-you-go basis. In terms of this approach, contributions of people who are currently employed are used to pay for the pensions of current beneficiaries. This approach is problematic and unsustainable in countries which are experiencing high levels of unemployment as the pool from which benefits should be paid depends on contributions made by those who are working and earning a salary. Such an approach will also experience challenges in situations where systems are often called upon to pay lots of death benefits resulting from deaths emanating from sicknesses and diseases such as HIV/Aids. In such cases, the number of those working and paying contributions will be reduced by the levels of deaths resulting from a pandemic.

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<sup>65</sup> OECD Pensions at a Glance: Country Profile: Belgium (Extract from the OECD Private Pensions Outlook 2008) (OECD 2009) at 171, accessed from <http://www.oecd.org/finance/private-pensions/42565572.pdf>, last visited on 12 May 2015 (hereafter, OECD Pensions at a Glance: Country Profile: Belgium).

<sup>66</sup> European Commission: Adequate and Sustainable Pensions – A Synthesis Report 2006 (August) (European Commission – Directorate-General for Employment, Social Affairs and Equal Opportunities (Unit E.4)) at 151, accessed from [http://www.gender.sachsen-anhalt.de/uploads/tx\\_nwcitavilist/files/European%20Commission\\_\(2006\)\\_Adequate%20and%20sustainable%20pensions.pdf](http://www.gender.sachsen-anhalt.de/uploads/tx_nwcitavilist/files/European%20Commission_(2006)_Adequate%20and%20sustainable%20pensions.pdf), last visited on 12 May 2015 (hereafter, European Commission *Adequate and Sustainable Pensions*).

Thus, the smaller the number of people who are paying contributions, the smaller the amount that will be available in the pool.

Belgium has private retirement schemes which are limited in size,<sup>67</sup> and a welfare scheme providing for a minimum old-age pension.

The old-age pension is used to supplement the social insurance schemes available to employees.<sup>68</sup> Thus the Belgian pension system comprises three pillars, namely a guaranteed minimum old-age pension; occupational pensions; and private pension schemes. These pillars are individually discussed below.

### **3.3.2.1 Guaranteed Minimum Old-Age Income**

Social assistance is regarded as a relatively minor part of social security. However, the number of people receiving social assistance has increased over the last two decades.<sup>69</sup> Social assistance is aimed at ensuring that people's right to a minimum income and to access basic social services are realised, and that everyone has a dignified life.<sup>70</sup> The Guaranteed Minimum Old-Age Income was introduced in 1946 and was extended to take its current form in 1969.<sup>71</sup>

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<sup>67</sup> De Gallatay E and Turtelboom B "Pension Reform in Belgium" (International Monetary Fund Working Paper) July 1996 at 5.

<sup>68</sup> De Gallatay (idem). Similar to South Africa's state old-age pension.

<sup>69</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 25. In 2005, the number of people of Belgian descent who had a poverty risk, was estimated at 12% (See De Witte L and Vanassche S "The Effectiveness of Social Assistance Benefits among Elderly Immigrants in Belgium-Draft" at 1, accessed from <http://epc2014.princeton.edu/papers/140828>, last visited on 12 May 2015).

<sup>70</sup> Criel B, Van Damme W, Meessen B and Por I "A Comparative Analysis of Public Social Assistance Systems in Belgium and Health Equity Funds in Cambodia: An Overview of Lessons Learned" (Studies in HSO&P), 23, 2008 at 348, accessed from <http://www.itg.be/itg/Uploads/Volksgezondheid/povill/A%20comparative%20analysis%20of%20public%20social%20assistance%20systems%20in%20Belgium%20and%20health%20equity%20funds%20in%20Cambodia%20-%20an%20overview%20of%20lessons%20learned.pdf>, last visited on 12 May 2015. According to Kazepov Y and Sabatinelli S "Minimum Income and Social Integration: Institutional Arrangements in Europe" (Working Paper, Geneva, International Labour Office, 2006) at 2-3 (accessed from [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---soc\\_sec/documents/publication/wcms\\_sec\\_soc\\_8916.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_sec_soc_8916.pdf), last visited on 12 May 2015), social assistance arrangements (provision) have become very important in all European countries due to the growth of unemployment and the

The fund is fully financed by the state through tax revenue. The benefit is means-tested.<sup>72</sup> It serves as a subsistence minimum granted to the elderly.<sup>73</sup> Elderly people receive a guaranteed income if they have reached the required pension age.<sup>74</sup>

Men received the pension benefit at the age of 60, while women were eligible for the grant at the age of 62.<sup>75</sup> The eligibility age for men and women has since been equalled at 65 from 2009 in order to bring parity to the rules governing men's and women's retirement age and to remove unequal treatment of men and women.<sup>76</sup> In principle, social assistance is available to any qualifying person residing in Belgium.<sup>77</sup>

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weakening of family ties. The high rate of unemployment after the end of the seventies and long-term unemployment forced many people to resort to social assistance schemes when their insurance benefits were depleted. The high rate of divorce, single households, and single parents reduced reliance on relational resources in developing strategies to cope with economic breakdowns.

<sup>71</sup> Pieters *Introduction into the Social Security Law of the Member States of the European Community* op cit note 47 at 51. Becquaert H (Expert and Advisor to the Belgian Minister of Social Affairs and Pensions) "Social Security and Pension Reform: the Belgian Pension System" (Washington, DC, 07/27/2001) at 4 (hereafter, Becquaert "Social Security and Pension Reform: the Belgian Pension System"); Pestreau P, Stijns J "Social Security and Retirement in Belgium" Working Paper 6169 (National Bureau of Economic Research) September 1997 at 11. The publication can also be accessed from <http://www.nber.org/papers/w6169>, last visited on 12 May 2015 (hereafter, Pestreau "Social Security and Retirement in Belgium").

<sup>72</sup> Pieters *Introduction into the Social Security Law of the Member States of the European Community* op cit note 47 at 51.

<sup>73</sup> Becquaert "Social Security and Pension Reform: the Belgian Pension System" op cit note 71 at 4; Pestreau "Social Security and Retirement in Belgium" op cit note 66 at 11.

<sup>74</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 26; Becquaert (idem); Eardley T, Bradshaw J, Ditch J, Gough I and Whiteford P "Social Assistance in OECD Countries: Country Reports" (Department of Social Security Research Report No. 47) 1996 at 58-60 (hereafter, Eardley et al "Social Assistance in OECD Countries"); see also generally, Lewis DK (International Staff, Office of Research and Statistics) "Social Security Abroad: Guaranteed Income for the Aged in Belgium" *Bulletin*, September 1969, at 30-32, accessed from <http://ssa.gov/policy/docs/ssb/v32n9/v32n9p30.pdf>, last visited on 12 May 2015.

<sup>75</sup> Eardley et al "Social Assistance in OECD Countries" (ibid) at 58.

<sup>76</sup> Pestreau P and Stijns J "Social Security and Retirement in Belgium" in Gruber J and Wise DA (eds) *Social Security and Retirement Around the World* (National Bureau of Economic Research\_University of Chicago Press) January 1999 at 40, chapter accessed from <http://www.nber.org/chapters/c7248.pdf>, last visited on 12 May 2015 (URL (for the book): <http://www.nber.org/books/grub99-1> (hereafter Gruber *Social Security and Retirement Around the World*)).

<sup>77</sup> Eardley et al "Social Assistance in OECD Countries: Country Reports" op cit note 74 at 58-60.

Belgium has no official poverty line.<sup>78</sup> The amount of the benefit is determined according to the applicant's personal situation; for example, occupational status, gross salary, number of years worked, and family circumstances.<sup>79</sup> The amount payable varies depending on the type of pension; namely household retirement pension, single retirement pension, survival pension, or the combination of retirement pension with a survival pension.<sup>80</sup> The state pension is there to ensure that every needy person living in Belgium receives a minimum income.<sup>81</sup> This is similar to South Africa's state old-age pension offered to both men and women from the age of 60 after passing the means-test. South Africa, just like Belgium, used to provide old-age pension to men and women at different ages, but this has since been corrected.<sup>82</sup> The state old-age pension is primarily meant for the poor.

### **3.3.2.2 Occupational pensions**

Belgium has three types of occupational pension plans; namely company schemes, sectoral plans (industry-wide), and individual pension schemes. Occupational pensions can be provided for by a pension fund, a group pension insurance policy administered through a life insurance company, or a collective pension savings account administered by a collective investment institution. Company pension plans cover all or specific categories of company employees. The terms for the sectoral pension plans are laid down in the collective bargaining agreement for the sector. Employers in the sector concerned are obliged to join the plan unless the agreement allows them to opt-out. Those who decide to opt-out are obliged to put in place a plan providing benefits at least similar or equal to those of the sectoral plan.<sup>83</sup>

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<sup>78</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 25.

<sup>79</sup> Becquaert "Social Security and Pension Reform: the Belgian Pension System" op cit note 71 at 4.

<sup>80</sup> Consolidating the Future of Pensions (Extract of the Green Paper: National Conference on Pensions) at 3, accessed from [http://socialsecurity.fgov.be/eu/docs/agenda/06-08\\_09\\_10\\_extract\\_GP\\_pensions\\_BE\\_en.pdf](http://socialsecurity.fgov.be/eu/docs/agenda/06-08_09_10_extract_GP_pensions_BE_en.pdf), last visited on 12 May 2015.

<sup>81</sup> Becquaert "Social Security and Pension Reform: the Belgian Pension System" op cit note 71 at 4.

<sup>82</sup> See the discussion under par 5.4 in Ch 5.

<sup>83</sup> OECD Pensions at a Glance: Country Profile: Belgium op cit note 65 at 168.

The Belgian system has historically used both the defined-benefit plans and the defined-contribution plans; with defined-contribution plans becoming more popular in recent times. Pension funds take either the form of a special purpose entity with legal personality, for example a foundation, trust or corporate entity or a legally separated fund managed by a pension management company or other financial institution.<sup>84</sup> Private-sector employees represent by far the most important category in terms of the overall benefits and the number of pensioners.<sup>85</sup> In Belgium, disability benefits are paid to a maximum age of 65 – in line with the normal retirement age in the country.<sup>86</sup>

In 2013, it was estimated that 2.8 million people were covered under this pillar, with 2.5 million employees covered by pension plans established by employers or sectors, and another 307 000 self-employed people covered under supplementary pension plans. Employers and employees contribute to the scheme.<sup>87</sup>

Occupational funds can be instituted by collective agreement or by other special procedures. In the case of collective agreement, all workers covered by the agreement must benefit from the plan. Employers may offer their employees, individual pension savings plans to supplement a collective pension savings plan. Such plans can be put in place at any time up to three years before a beneficiary's retirement. However, there may not be different pension schemes for workers falling under one category. Where an employee changes his or her job within the same sector, the employee may choose either to transfer the benefit to the new employer or leave it in the former fund.<sup>88</sup>

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<sup>84</sup> *Idem* at 168 and 307.

<sup>85</sup> Gruber *Social Security and Retirement Around the World* op cit note 76 at 46.

<sup>86</sup> See in this regard Jousten A, Lefebvre M, Perelman S "Disability in Belgium: There is More than Meets the Eye" (Working Paper 17114, National Bureau of Economic Research) 2011, available at <http://www.nber.org/papers/w17114>, last visited on 07 September 2015.

<sup>87</sup> Berthon J, Davydoff D, Gabaut L, Klages M, Prache G, Rossi M, Rutecka J, Struwe K and Viver JM "Pension Savings: The Real Return" 2014 edition (A Research Report by Better Finance for all) at 37-38.

<sup>88</sup> See in this regard OECD *Pensions at a Glance: Country Profile: Belgium* op cit note 65 at 169-170 and Trampusch C, Eichenberger P, de Roo M, Bartlett RR, Bieri I, Schmid L, Steimlin S (eds) "Pension in Belgium" REBECA (Research on Social Benefits in Collective Agreements). Database, Part 2

Occupational retirement schemes in South Africa are also generally established by employers for their employees. Participation in these schemes is not compulsory *per se* but can be considered to be quasi-mandatory in that employers who establish retirement funds also make participation in the fund part of the employment contract.<sup>89</sup> South Africa also has funds for different economic sectors in which employees in those sectors must participate.<sup>90</sup>

In Belgium, pensions for public sector employees, which previously covered civil and ecclesiastical pensions, now cover civil servants in the federal government and in the regional and local authorities, as well as employees in certain public enterprises.<sup>91</sup> Pensions for public-sector employees are paid from the general federal budget.

These pensions are considered to be deferred income and not as insurance for old-age or retirement.<sup>92</sup> The mandatory retirement age is 65 for both men and women. However, it is possible to take an early retirement for an incomplete career and retire at the age of 60. Public-sector pensions are automatically indexed to salaries.<sup>93</sup> This scheme is similar to South Africa's Government Employees Pension Fund (GEPF), in which all government employees participate.<sup>94</sup>

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'Social Benefits in Collective Agreements'. SNF-Project No.100012-119898. (Institute of Political Science, University of Berne) at 6-7, available at <http://www.rebeca.ipw.unibe.ch.>, last visited 12 May 2015.

<sup>89</sup> Discussed under par 6.2 in Ch 6.

<sup>90</sup> Discussed under par 6.3.2 in Ch 6.

<sup>91</sup> Gruber *Social Security and Retirement around the World* op cit note 76 at 48.

<sup>92</sup> *Ibid* at 47.

<sup>93</sup> *Ibid* at 48.

<sup>94</sup> The Government Employees Pension Fund (GEPF) is discussed under par 6.4.6.3 in Ch 6.

There is also pension for the self-employed<sup>95</sup> in Belgium. This is in the form of a compulsory insurance system which requires proportional contributions, which give the right to a fixed pension based on the number of years worked. This pension, which was introduced in 1956, was replaced in 1984 by one calculated proportionally on actual earnings.<sup>96</sup> The pension regime for the self-employed occupies a special position within the Bismarckian system. Contributions are regressive and benefits are usually at a flat rate.<sup>97</sup> Full benefits are payable at the age of 65. If the self-employed want to retire early, they are required to exit through some private retirement-income arrangement, which can either be a formal pension scheme or a savings plan.<sup>98</sup> South Africa does not have a fund specifically established for this category of workers. The self-employed in South Africa have the option to either use retirement annuity funds or make use of other forms of savings vehicles offered by insurance companies or other financial institutions such as banks.<sup>99</sup>

In Belgium, employee pensions were organised in the private sector much later than in the public sector, with a compulsory funded scheme for the private sector only being introduced in 1926. This system was replaced after World War II, first by a mixed system, then by an exclusively pay-as-you-go system in 1967. Private-sector pensions are financed mainly by payroll taxes and marginally by government transfers. There is no limit on contributions. The pension is based on the salary earned during the entire career, the length of the career, and an accrual factor that depends on one's marital status when retired.<sup>100</sup>

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<sup>95</sup> The Royal Decree No. 38 of July 1967 defines a "self-employed worker" and "assistant" as follows: A "self-employed worker" is a natural person who exercises professional activity in Belgium under which they are not committed to an employment contract or status and, "assistant" is any person who assists or replaces a self-employed worker in the exercise of his/her profession in Belgium without being bound to the worker by an employment contract.

<sup>96</sup> Gruber *Social Security and Retirement around the World* op cit note 76 at 48.

<sup>97</sup> Overbye E, Kemp PA *Pensions: Challenges and Reforms* (International Studies on Social Security) Vol 9 2004 at 134 and 142 (hereafter, *Overbye Pensions: Challenges and Reforms*).

<sup>98</sup> Gruber *Social Security and Retirement around the World* op cit note 76 at 48-48.

<sup>99</sup> Discussed under par 5.6 in Ch 5.

<sup>100</sup> Gruber *Social Security and Retirement around the World* op cit note 76 at 47. See also OECD and G20 Indicators: Pensions at a Glance 2013 at 218, accessed from <http://www.oecd.org/pensions/public-pensions/OECDPensionsAtAGlance2013.pdf>, last visited 12 May 2015 (hereafter, OECD and G20 Indicators: Pensions at a Glance 2013).

Even though not compulsory at the moment, in South Africa those who work in the private sector belong to retirement funds which are mostly established by the employers and can also make additional savings by joining retirement annuity funds and other available savings vehicles.<sup>101</sup>

In Belgium, both men and women have to prove at least 30 years out of the standard 45 years of salaried service for a full career.<sup>102</sup> The 30 years are not limited only to time spent as a Belgian resident, as the time spent in different countries will also be taken into account when pension is calculated. Pension accumulated outside Belgium will be calculated according to the regulations in that particular country and forwarded to the National Pension Office (*Office National des Pensions/Rijksdienst voor Pensioenen/Landespensionsamt*, NPO).<sup>103</sup>

A person may not combine a pension with a professional activity, but a person may combine a pension with an activity as long as the prescribed financial limit is not exceeded.<sup>104</sup> Pensions are calculated differently for salaried employees, public sector employees, and for self-employed persons. It is also possible for a person's pension to be composed of pensions from different sectors, if one has worked in several sectors during one's career.<sup>105</sup> A person may also receive pension from two different countries if he or she worked in more than one country.<sup>106</sup>

Pension benefits are subject to tax. However, retirees qualify for tax rebates. Flat-rate tax is used for lump-sum payments.<sup>107</sup> In order to qualify for a survivors'

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<sup>101</sup> Discussed under par 6.4 in Ch 6.

<sup>102</sup> Becquaert "Social Security and Pension Reform: the Belgian Pension System" op cit note 71 at 4.

<sup>103</sup> The National Pension Office (*Office National des Pensions/Rijksdienst voor Pensioenen/Landespensionsamt*, NPO) is responsible for administration of pensions in Belgium; and see generally, Van Massenhove "Social Security: Everything you have Always Wanted to Know" op cit note 49 at 9.

<sup>104</sup> Becquaert "Social Security and Pension Reform: the Belgian Pension System" op cit note 71 in Part I.

<sup>105</sup> *Idem*.

<sup>106</sup> See in this regard the Belgian case of *Rijksdienst voor Pensioenen and Robert Engelbrecht* 26.9.2000-Case C-262/97, where Mr Engelbrecht had worked in Belgium and the Netherlands and was entitled to pension from the two countries.

<sup>107</sup> OECD Pensions at a Glance: Pension Country Profile: Belgium (Extract from the OECD Private Pensions Outlook 2008) op cit note 65 at 169-170.

pension, a person must have reached the age of 45, must have been married to the deceased, and the marriage should have lasted for at least one year or a child should have been born in the marriage (this, however, is not compulsory in the case where the spouse died as a result of an accident or an occupational disease that took place after the marriage).<sup>108</sup>

There is also a benefit for childcare, where a person spends a period of three years caring for children. It is called “tijdskrediet”, a right for employees in the private sector which allows them to suspend their labour activities or half-time reduction of labour if the person has worked over three-quarters of full time for 12 months (before the start of “tijdskrediet”). A person must have worked for the same employer for over a year, 15 months prior to the application for the “tijdskrediet”. Where a person is unemployed, the periods on unemployment insurance benefits are credited under the pension system. There is no restriction on the number of years to be credited, even though a smaller number of years would lead to a lower pension benefit. However, note should be taken that unemployment above the age of 62 or after 42 years of a career does not qualify for the pension bonus.

Those pensioners with low earnings or part-time work receive a minimum annual credit aimed at improving the benefits. A person needs at least 15 years’ insurance for an equivalent of at least one-third of a full-time employment to qualify for the minimum credits. Pensioners who meet the full contribution of 45 years qualify for a minimum earnings-related pension.<sup>109</sup>

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<sup>108</sup> Van Massenhove “Social Security: Everything you have Always Wanted to Know” op cit note 49 at 38.

<sup>109</sup> See generally De La Puente M (Associate Commissioner for Research, Evaluation and Statistics) “Social Security Programs Through-out the World\_ Belgium” September 2014 at 50, accessed from <http://www.ssa.gov/policy/docs/progdesc/ssptw/2014-2015/europe/ssptw14europe.pdf>, last visited on 12 May 2015, and OECD and G20 Indicators: Pensions at a Glance 2013 op cit note 100 at 220-221.

The retirement replacement rate of occupational defined-benefit pension plans, including state-pension benefits, is targeted between 60% and 70%. The benefit paid can either take the form of lump-sum payment or annuities.<sup>110</sup>

In order to guard against declining worker-to-retiree ratios, the effects of early retirement and income adequacy issues, the Belgian government set the following three priorities for reform:<sup>111</sup>

- The modernisation of the financial safety-net for the elderly and elimination of poverty among the elderly;
- The creation of a demographic reserve called the “Silver Fund” to safeguard the financing of the pay-as-you-go system; and
- Universal access to employer-sponsored private pension plans (these pension plans have to meet social criteria and transparency in investment practices in order to qualify for tax relief).<sup>112</sup>

These will go a long way in assisting Belgium to provide for its elderly citizens. For example, if everyone in the country participates in some form of retirement savings schemes, all the people will have an income when they retire, even though the adequacy thereof will still depend on the levels of contributions made and the period for which those contributions have been paid. Universal access to employer-established retirement schemes will also ensure that no one working in Belgium is left without protection.

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<sup>110</sup> OECD Pensions at a Glance: Pension Country Profile: Belgium (Extract from the OECD Private Pensions Outlook 2008) op cit note 65 at 169.

<sup>111</sup> Miranda E, Rudolph GP and Steuerle CE *Social Security in Nine European Countries: A Portrait of Reform*, February 2002 at 8, accessed from <http://www.urban.org/UploadedPDF/310424.pdf>, last visited on 12 May 2015.

<sup>112</sup> Idem.

### **3.3.2.3 Private pension/individual insurance plans**

Personal-pension saving schemes are in the form of pension insurance and pension-savings fund or may even take the form of life insurance. These schemes enable people to build up capital in a fiscally advantageous manner by the time they retire. The savings vehicles are available to people between 18 and 64 years of age. The saver and scheme provider must agree on the contribution level. Benefits are paid from the age of 60, but the saver can access the funds earlier with the payment of a penalty.<sup>113</sup> These savings vehicles are similar to retirement annuity funds and other savings schemes available that people who would like to save for their retirement can use in South Africa. People who have joined employer-established funds can also use these schemes to supplement the benefits they will receive from the funds when they retire. Self-employed employees also generally use them. Retirement-annuity benefits are payable at the age of 55 and not at the age of 60 as it is the case in Belgium.<sup>114</sup>

### **3.3.2.4 Dispute resolution**

Any disputes arising from social security benefits fall within the jurisdiction of the Labour Court, in which labour unions, employers, and the government are represented.<sup>115</sup> There is also the Office of the Federal Ombudsman, which deals with complaints concerning social security institutions – except for pensions which are handled by the Pension Ombudsman.<sup>116</sup>

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<sup>113</sup> OECD Pensions at a Glance: Pension Country Profile: Belgium (Extract from the OECD Private Pensions Outlook 2008) op cit note 65 at 170.

<sup>114</sup> Discussed under par 5.5.2 Ch 5.

<sup>115</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 24-25.

<sup>116</sup> Van Massenhove "Social Security: Everything you have Always Wanted to Know" op cit note 49 at 83.

The Federal Ombudsman investigates complaints where the federal administration has acted incorrectly and to the complainant's disadvantage, or where the complainant has waited for a long time to receive a response from the administration and has sent several reminders without receiving any help, or where an official of the administration has treated the complainant in an unprofessional manner.<sup>117</sup> Complaints about statutory pensions are handled by the Pension Ombudsman. The complaints must be about maladministration or the quality of services provided by pension offices.<sup>118</sup> The Ombudsman deals with complaints relating to pensions for salaried persons, self-employed persons, and civil servants.<sup>119</sup> Pension disputes in South Africa are dealt with by the Office of the Pension Funds Adjudicator. Some of the characteristics of the Belgian Pension Ombudsman can be found in South Africa's Pension Funds Adjudicator. However, the Adjudicator does not have jurisdiction over social security matters.<sup>120</sup>

### **3.4 SOCIAL SECURITY AND PENSION PROVISION IN THE NETHERLANDS**

#### **3.4.1 General**

The Kingdom of the Netherlands dates back to 1813. The country's first written Constitution was introduced in 1814.<sup>121</sup> The Constitution introduced the monarchy and established the States General, consisting of one Chamber, which exercised legislative power together with the monarch. Ministerial responsibility was only introduced in 1848.<sup>122</sup>

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<sup>117</sup> Information about the Federal Ombudsman accessed from <http://www.federalombudsman.be/how-to-introduce-complaints>, last visited on 12 May 2015.

<sup>118</sup> The Pensions Ombudsman: <http://www.ombudsmanpensioenen.be/en/which/which.htm>, last visited on 27 July 2015.

<sup>119</sup> Information about Pensions Ombudsman accessed from <http://www.ombudsmanpensions.be/en/missions/missions.htm>; <http://www.ombudsmanpensions.be/>, last visited on 12 May 2015.

<sup>120</sup> Discussed under par 6.10.2 in Ch 6.

<sup>121</sup> Even though there was a complete revision of the Constitution in 1983, not much has changed in the content of the Constitution since 1948. See in this regard, Constantijn AJM, Kortmann and P, Bovend'Eert PT *Dutch Constitutional Law 2000* (Kluwer Law and Taxation Publishers) at 17-19 (hereafter, Constantijn *Dutch Constitutional Law*).

<sup>122</sup> *Idem*.

The National government comprises the Monarch, the Council of Ministers, and the States General. The Council of Ministers is responsible for planning and implementation of government policy.<sup>123</sup>

The country's social security system focuses more on providing income for citizens who do not have any means of income due to risks that include, among others, sickness, disability, unemployment or old-age. Citizens may also claim a supplementary income if their income, either from work or from social insurance benefits, is insufficient to meet the general costs of living, or in the event of exceptional costs. Thus, the system is aimed at preventing people from becoming destitute as a result of the hardships that come either through disability, unemployment, and/or old-age.<sup>124</sup>

The main responsibility for decision making on social security in the Netherlands rests with the legislature, which determines the extent of social security, financial resources involved, and the way in which it is financed. The Ministry of Social Affairs and Employment governs social security in the country.<sup>125</sup> The government previously regulated occupational schemes through the Pension and Insurance Authority (*Pensioen en Verzekeringskamer*, PVK) and the Dutch Central Bank (*De Nederlandsche Bank*, DNB). In 2004, the Pension and Insurance Authority merged with the Central Bank and the new body is called the Pension Chamber (*Pensionkamer*).<sup>126</sup> Social partners that include employees and employers' organisations take part in preparing, formulating, and implementing social policy. Some of these responsibilities have increasingly been shifted towards employers.<sup>127</sup>

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<sup>123</sup> Information about the Kingdom of the Netherlands accessed from <http://www.state.gov/r/pa/ei/bgn/3204.htm>, last visited on 12 May 2015.

<sup>124</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 143.

<sup>125</sup> Blommesteijn M and Mallee L "The Netherlands, Minimum Income Scheme: Work and Social Assistance Act" (Regionplan Policy Research: on behalf of the European Commission, DG Employment, Social Affairs and Equal Opportunities) April 2009 at 5 (hereafter, Blommesteijn "The Netherlands, Minimum Income Scheme").

<sup>126</sup> Guardiancich "The Netherlands Current Pension System" op cit note 13.

<sup>127</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 143-144.

The National Institute for Social Security (*Landelijk Instituut Sociale Verzekeringen* (LISV)) was responsible for employed persons' insurance. This changed in 2002 when the Administration of Employees' Insurance Scheme was introduced (*Uitvoeringsinstituut Werknemersverzekeringen*, UWV). This body makes decisions on the right to benefits, payment of benefits, collection of contributions, and administration of the benefit funds.<sup>128</sup> The Social Security Agencies are responsible for the self-employed persons insurance.<sup>129</sup>

The first Chapter of the Constitution is devoted to fundamental rights.<sup>130</sup> Section 20 of the Constitution recognises the population's right to social security and through this provision the authorities are given the duty to secure the means of subsistence to the population and to enact the law that will regulate benefit entitlements.

The Netherlands did not have a statutory social security system prior to the Second World War, as Parliament was of the view that the country had no legal basis for a compulsory insurance scheme. Most communities were organised on a religious basis and were taken care of by religious groups. Although the Netherlands was a member of the International Labour Organisation (ILO) from its establishment, the conventions adopted by this organisation did not change its approach towards social security.<sup>131</sup> A change of attitude towards social security only came after the Second World War. This change of attitude could be attributed to the influence of the Beveridge Report.<sup>132</sup> The Netherlands established a legal basis in terms of which the state was responsible for social security and freedom from want for all its citizens, provided that they take reasonable steps to be responsible for their own income.<sup>133</sup>

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<sup>128</sup> Pennings F *Dutch Social Security Law in an International Context* 2002 at 19-20 (hereafter, Pennings *Dutch Social Security Law*).

<sup>129</sup> *Social Security in the Netherlands*, accessed from <http://www.erva.nl/dutch-security.htm>, last visited on 12 May 2015 (hereafter, *Social Security in the Netherlands*).

<sup>130</sup> Constantijn et al *Dutch Constitutional Law* op cit note 114 at 27-29.

<sup>131</sup> Pennings *Dutch Social Security Law in an International Context* op cit 128 at 86.

<sup>132</sup> See the discussion of the Beveridge approach under par 3.2.2.2.

<sup>133</sup> Pennings F *Between Soft and Hard Law – The Impact of International Social Security Standards on National Social Security Law* 2006 at 86 (hereafter, Pennings *Between Soft and Hard Law*).

Social security in the Netherlands is now embodied in a number of statutes. The statutes include the Disablement Benefits Act (*Wet op de arbeidsongeschiktheidsverzekering*, WAO); the Unemployment Benefits Act (*Werkloosheidwet*, WW); the General Old Age Act of 1957 (*Algemene Ouderdomswet*, AOW); the General Surviving Relatives Act (*Algemene Nabestaandenwet*, ANW); the General Child Benefit Act (*Algemene Kinderbijslagwet*, AKW);<sup>134</sup> the Pensions and Savings Funds Act of 1952, which has since been replaced by the Dutch Pension Act of 2007; the Mandatory Pension Act for Professional Groups (*Wet Verplichte Beroepspensioenregeling*, WVB); the Equalisation of Pension Entitlements after Separation Act of 1994 (*Wet Verevening Pensioenrechten bij Scheiding*, WVPS); Sickness Benefits Act (*Ziektewet*, ZW); National Assistance Act (*Algemene bijstandswet*, ABW); Supplementary Benefits Act (*Toeslagenwet*, TW); and the Work and Social Assistance Act of 2004 (*Wet Werk en Bijstand*, WWB).

### **3.4.2 The Netherlands (Dutch) pension system**

The pension system comprises three pillars; namely the state pension scheme (AOW), which covers everyone starting from the age of 65;<sup>135</sup> funded occupational pension plans; and private individual pension plans.<sup>136</sup>

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<sup>134</sup> *Social Security in the Netherlands* op cit note 129.

<sup>135</sup> In 2012, Parliament passed a Bill (The Bill was approved on 26 March 2015 by the Dutch House of Representatives, but it has not yet been passed into law by the Dutch Senate as at June 2015) that will raise the age of eligibility as follows: 65 to 66 by 2020 and then to 67 by 2021; after that the retirement age will be linked to life expectancy. This is to ensure the financial sustainability of public pensions. See in this regard Guardancich "The Netherlands Current Pension System" op cit note 13.

<sup>136</sup> Reichert SJM *The Dutch Pension System: An Overview of the Key Aspects* (Dutch Association of Company Pension Funds (OPF)) at 9, accessed from [http://www.pensioenfederatie.nl/Document/Publicaties/English%20publications/Nederlandse\\_pensioensysteem\\_Engelstalige\\_versie.pdf](http://www.pensioenfederatie.nl/Document/Publicaties/English%20publications/Nederlandse_pensioensysteem_Engelstalige_versie.pdf), last visited on 12 May 2015 (hereafter, Reichert *The Dutch Pension System*); Van der Simitte J *The Right to Retirement Pension Information*, prepared for Peer Review in Social Protection and Social Inclusion programme coordinated by ÖSB Consulting, the Institute for Employment Studies (IES) and Applica, and funded by the European Commission (Ministry of Social Affairs and Employment) Madrid, 02-03 July 2013 at 1-2. See also generally Pension Country Profile: Netherlands (Extract from the OECD *Private Pensions Outlook 2008*) at 243-246, accessed from <http://www.oecd.org/finance/private-pensions/42574973.pdf>, last visited on 12 May 2015; Meyer T,

All these pillars are considered when determining the amount of pension benefit a person must receive at the time of retirement.<sup>137</sup> The system also has what is known as the Minimum Income Scheme (social assistance allowance), which is regulated by Work and Social Assistance Act. The Act grants a minimum income to anyone legally residing in the Netherlands and who has insufficient means to support himself or herself. The income assistance plays a top-up role where a person is receiving benefits or income from paid work. It does not look at the work history, but it is related to minimum wage. People who apply for assistance must be registered as job seekers; do the utmost to support themselves; apply for all kinds of generally acceptable labour; accept generally acceptable labour; cooperate with any support the municipality offers, for example job application training; cooperate with home visits and psychological and medical examinations where necessary; and provide the municipality with correct information, such as when a recipient start living together with another person or other people.<sup>138</sup>

The benefit is stopped if the person refuses to cooperate in finding a job. Thus, this is a form of a social assistance measure. It is financed from tax revenue.<sup>139</sup> People aged 65 and above who have not been able to build a full state old-age pension (AOW) can receive a supplement under the Work and Social Assistance Act of 2004, but only up to the level of the net AOW pension.<sup>140</sup> The Netherland's three pillars are discussed below.

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Bridgen P, Riedmüller B *Private Pensions versus Social Inclusion – Non-State Provision for Citizens at Risk in Europe* 2007 at 79-80 (hereafter, Meyer *Private Pensions versus Social Inclusion*).

<sup>137</sup> Reichert *The Dutch Pension System* (ibid) at 7-8; Meyer *Private Pensions versus Social Inclusion* (idem).

<sup>138</sup> Reichert *The Dutch Pension System* (idem) at 7.

<sup>139</sup> See generally on the minimum income scheme, Blommesteijn "The Netherlands, Minimum Income Scheme" op cit note 125.

<sup>140</sup> Reichert *The Dutch Pension System* op cit note 136 at 9.

### **3.4.2.1 The state pension**

The public old-age pension was established by the General Old Age Law of 1957 (*Algemene Ouderdomswet*, AOW) which came into force on 1 January 1957. The introduction of the AOW saw the means-test which formed part of the original old-age pension decree of 1947 being done away with as it was suspected of discouraging private savings.<sup>141</sup> Its objective was to guarantee adequate income (basic income) to all persons aged 65 and above. Since 1980, the level of social security benefits has been linked to the statutory minimum wage. A person can receive a benefit from the first pillar, or both the first and second pillar, or from the first and third pillar, or from all three pillars – depending on that person's personal situation. It is estimated that 2.7 million people were receiving the state pension by the end of 2007.<sup>142</sup> Its main objective is to lift all those in old-age above social assistance level. It is available to everyone who is of old-age without means-testing.<sup>143</sup> The pension has to be claimed in writing from the Social Insurance Bank, which has regional offices throughout the country. A benefit is payable on a monthly basis and almost all the beneficiaries have their pensions paid into their bank accounts.<sup>144</sup>

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<sup>141</sup> Ministry of Social Affairs and Employment *Social Security in the Netherlands* 1990 at 20-21 (hereafter, Ministry of Social Affairs and Employment *Social Security in the Netherlands*). See also Va Riel B *Is There a Dutch Way to Pension Reform?* Working Paper Number WP202 (Oxford Institute of Ageing Working Papers), August 2002 at 5, available at <http://www.ageing.ox.ac.uk>, last accessed 07 September 2015.

<sup>142</sup> See in this regard Gruber *Social Security and Retirement around the World* op cit note 76 at 276; Reichert *The Dutch Pension System* op cit note 136 at 9. See also generally, Mahieu RLP *The Changing Role of Premiums in the Dutch First Pillar Pension, AOW-A Theory of Economic Equivalence Tested* (Master Thesis: VU Amsterdam) at 42-43, accessed from <https://www.svb.nl/Images/2008-07-04thesis%20The%20changing%20role%20of%20premiums.pdf>, last visited on 12 May 2015.

<sup>143</sup> Meyer et al *Private Pensions versus Social Inclusion* op cit note 136 at 81.

<sup>144</sup> Pennings *Dutch Social Security Law* op cit note 128 at 190.

The state pension covers, in principle, the entire population of the Netherlands, irrespective of nationality.<sup>145</sup> Eligibility to this pension is based on a period of 50 years of residency, from age 15 to 65. Thus, a person will only receive a full pension after having been covered for 50 years.<sup>146</sup> In order to qualify for this pension, the claimant must have been insured before the qualifying age.<sup>147</sup> The state pension is funded by contributions paid by people younger than 65 and additional funding comes from government public funds. It is therefore a pay-as-you-go system. This is a problem taking into account the fact that a declining working force has to cater for the ever-increasing aging population.<sup>148</sup>

If a person is receiving any other social security benefits, then the benefits end at the first day of the month in which the person turns 65. If a person is late in claiming the old-age pension, the pension can be paid retrospectively with the maximum effect of one year. For example, a person who continues to work until he is 68 can only receive a back payment of one year and not three years. Only in exceptional circumstances can a person be paid for a longer period. These may include where a person cannot be blamed for the late application; for example because of mental defects the person was not able to apply for the benefit in time. However, the period that is paid for in special situations is usually not more than three years; the statutory maximum period is five years. The Social Insurance Bank has discretionary powers in deciding whether or not to pay a benefit retroactively and for how long.<sup>149</sup>

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<sup>145</sup> Ministry of Social Affairs and Employment *Social Security in the Netherlands* op cit note 141 at 21.

<sup>146</sup> *Idem*.

<sup>147</sup> Article 7 of Algemene Ouderdomswet (General Old-Age Pension Law).

<sup>148</sup> Reichert *The Dutch Pension System* op cit note 136 at 7 and 9.

<sup>149</sup> Pennings *Dutch Social Security Law* op cit note 128 at 178-180.

People residing illegally in the Netherlands are excluded from benefiting. If a pensioner resides or stays for more than three months outside the Netherlands, he or she receives a pension at the rate of a married person, which is 50% of the statutory minimum wage. This means that a single person or single parent residing outside the country receives a lower rate than single persons residing in the Netherlands. The rule applies unless an international convention provides otherwise.<sup>150</sup> An individual accumulates 2% of the pension benefit every year. Likewise, 2% of the pension benefit is lost for every year an individual lives and works outside the country. Those who have not reached the social minimum age of 65 may claim means-tested General Social Assistance.<sup>151</sup>

The benefit and the supplement are reduced for the years during which the claimant was not insured or deliberately failed to pay the required contributions for the old-age pension, except where a person was exempted from paying contributions as his or her income was below the contribution level. A person who falls short of the required years of contribution has to apply for a social assistance benefit to reach a social minimum income.<sup>152</sup> The level of the public pension is politically defined as the social minimum.<sup>153</sup> According to Bannink,<sup>154</sup> the first pillar (the state pension: AOW) of the Dutch system provides sound protection to its beneficiaries and also plays a huge complementary role to the second pillar (occupational pensions), which has weaknesses in that it still excludes categories such as the unemployed and those employed in the informal sector.<sup>155</sup>

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<sup>150</sup> Ibid at 180-181.

<sup>151</sup> Idem.

<sup>152</sup> Idem at 183-184.

<sup>153</sup> Meyer et al *Private Pensions versus Social Inclusion* op cit note 136 at 81.

<sup>154</sup> Bannink D and De Vroom B (Chapter 3: The Dutch Pension System and Social Inclusion) in Meyer *Private Pensions versus Social Inclusion* op cit note 136 at 96-97.

<sup>155</sup> Idem.

The Netherlands' state pension is different from South Africa's state old-age pension in that the former is in the form of an insurance scheme or a public fund. South Africa does not have a public fund, but provides for a means-tested state old-age social assistance pension. The Netherlands' public fund is insurance-based and the level of benefit depends on a number of factors; including the length of the period the person was insured. The benefit is used to assist those who fall short of the required years of contribution and those who have not yet reached the age of 65. It is not means-tested while South Africa's social assistance state old-age pension is means-tested.<sup>156</sup> South Africa needs a public fund which will fill the gap that exists whereby those with low earnings do not have a fund that suits their pockets and circumstances.

### **3.4.2.2 Occupational pensions**

The history of old-age insurance in the Netherlands dates back to 1889. However, it was the introduction of the 1913 Invalidity Act which marked the beginning of compulsory old-age insurance in this country. Pension funds were established even before the Second World War to cover certain sectors of the industry; for example, the coal mining industry and the printing trades. The government appointed a Commission chaired by Van Rhijn in 1943. In its 1945 Report, the Commission was of the view that social insurance legislation should provide the entire population with social security and freedom from want. In 1948, a second Van Rhijn Commission Report was issued in favour of extending compulsory insurance to the self-employed.<sup>157</sup>

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<sup>156</sup> South Africa's social assistance state old-age pension is discussed under par 5.4 in Ch 5.

<sup>157</sup> Ministry of Social Affairs and Employment *Social Security in the Netherlands* op cit note 141 at 20-21.

Starting from 1945, it was possible to have agreements on pay and conditions of employment declared legally binding and this led to the introduction of legally binding pension schemes in several industries. The Netherlands saw an increasing number of company pension schemes immediately after the post-war period. Pension funds were generally invested in companies, and this brought about serious problems of companies failing to pay out if they ran into financial difficulties. As a result, the Pension and Savings Funds Act was introduced.<sup>158</sup> A number of amendments were made to the Act over the years and this resulted in the introduction of the Dutch Pension Act 2007 as the former was no longer providing adequate regulation of pension schemes.<sup>159</sup>

The occupational pillar consists of supplementary occupational pensions.<sup>160</sup> Pension funds operate as the provider for collective pension schemes which find their source in insurance and investment instruments. Employers and employees pay contributions intended for their pensions to a pension fund. Pension saving is promoted by providing the maximum tax relief specified in the Wages and Salaries Taxes Act of 1964 (*Wet op de Loonbelasting*, 1964). Risks are shared among the generations.<sup>161</sup> Similar to South Africa, pension funds in the Netherlands generally take the legal form<sup>162</sup> of a foundation, managed by a governing board. Thus, pension funds are legally separate from companies. The board that governs the fund consists of representatives of employers and employees or employee organisations.<sup>163</sup> Occupational pensions take three forms; namely corporate arrangements (for a single company or a corporation); industry-wide pensions for sectors such as construction, civil service, hotel, catering or retail; and pension funds for independent professionals such as doctors.<sup>164</sup> The pension for public servants is the largest.

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<sup>158</sup> Ibid at 107-108.

<sup>159</sup> Idem. See also the Dutch Pension Act 2007.

<sup>160</sup> Pennings *Dutch Social Security Law* op cit note 128 at 175.

<sup>161</sup> Maatman R "Dutch Pension Funds: Fiduciary Duties and Investing" *Law of Business and Finance* Vol 7, 2004 at 4 and 15 (hereafter, *Maatman Dutch Pension Funds*).

<sup>162</sup> Article 4 of the Pension and Savings Funds Act provides that only legal entities with full legal capacity may operate as pension or savings funds.

<sup>163</sup> Maatman *Dutch Pension Funds* op cit note 161 at 49.

<sup>164</sup> Reichert *The Dutch Pension System* op cit note 136 at 10.

In 2008 the country had more than 700 pension funds.<sup>165</sup> Most of the pension funds take the form of defined-benefit schemes; the schemes are not necessarily 100% defined-benefit schemes, but rather hybrid schemes. Should a fund find itself in financial difficulties, all stakeholders (for example, employers, employees, pensioners) will contribute towards saving the fund.<sup>166</sup>

In the Netherlands, just like in the South African retirement system, people are not legally bound to belong to a pension fund. However, the social partners of each sector are free to choose whether they want to make pension arrangements or not. Once the first employer in a sector enters an agreement, it is assessed for extension by the Minister of Social Affairs, and if approval is granted, all workers and employers in that sector are legally obliged to participate in the scheme as well. The government can also make participation in a pension scheme mandatory for the whole profession or sector,<sup>167</sup> as it is the case in South Africa in instances where the Minister has issued a sectoral determination to that effect.

Employers which do not participate in the mandatory schemes can either participate in a corporate pension fund or use an insurance company to manage their pension plans. The employer can opt-out of a sector fund if it starts a company fund which offers similar or better benefits than a sector fund. This framework offers extensive coverage.<sup>168</sup> Only the self-employed generally do not participate in this pillar. In order to prevent a large-scale exclusion of women in particular, schemes are required to lower the level of the franchise for part-time workers.<sup>169</sup>

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<sup>165</sup> Pension Country Profile: Netherlands (Extract from the OECD *Private Pensions Outlook 2008*) op cit note 123 at 243.

<sup>166</sup> Reichert *The Dutch Pension System* op cit note 136 at 19.

<sup>167</sup> Permitted by the Law on Mandatory Participation in Sectoral Pension Fund (*Wet Betreffende de Verplichte Deelneming in een Bedrijfspensionfonds*).

<sup>168</sup> Reichert *The Dutch Pension System* op cit note 136 at 11-12.

<sup>169</sup> Maatman *Dutch Pension Funds* op cit note 161 at 81-83.

By the end of 2008, more than 90% of the working population was covered by occupational pension schemes.<sup>170</sup> About 9% did not participate in the scheme and of that group, 2% were employed by employers that did not offer such schemes either because they were very small companies or were new companies in unorganised sectors. Seven per cent of the 9% were not eligible as they held small and/or temporary part-time jobs.<sup>171</sup>

Occupational pension schemes often promise to supplement the statutory old-age pension by an amount which is related to the last earned income and the duration of the employment relationship with the employer.<sup>172</sup> On the other hand, supplementary occupational pensions promise to supplement old-age pension by up to 70% of the last earned wages, usually on condition that the workers have been insured for 40 years. In the Netherlands, the majority of retirees are able to replace almost 100% of what they were earning prior to retirement through defined-benefit plans. This is an example of a good system which offers beneficiaries adequate protection. Generally, the employer-established funds are able to replace 70% of the retiree's final earnings, while the public-pension plan can replace up to 30% of a person's average pay.<sup>173</sup> Pension rights are transferred in full when a person changes jobs. Even though there is no compulsory retirement age, one can only claim the pension benefit at the age of 65. There are penalties if a person wants to take early retirement. People can work longer and retire after the age of 65.<sup>174</sup>

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<sup>170</sup> Reichert *The Dutch Pension System* 136 at 7 and 9.

<sup>171</sup> Feldstein M and Siebert H (eds) *Social Security Pension Reform in Europe* (a selection from a published volume from the National Bureau of Economic Research - Conference Date: March 20-21, 2000), publication date January 2002 at 298, accessed from <http://www.nber.org/chapters/c10676>, last visited on 12 May 2015 (hereafter, Feldstein *Social Security Pension Reform in Europe*).

<sup>172</sup> Pennings *Dutch Social Security Law* op cit note 128 at 175.

<sup>173</sup> Powell R and Jones D "Retiring: Netherlands, Australia Offer Better Pension Benefits" op cit note 2.

<sup>174</sup> Pennings *Dutch Social Security Law* op cit note 128 at 191. See also OECD and G20 Indicators: Pensions at a Glance 2013 op cit note 100 at 306-307. See also Reichert *The Dutch Pension System* op cit note 136 at 27-28.

Occupational pension schemes offer a number of benefits, which include old-age pension, widows' and widowers' pension, partners' pension (in case of enduring cohabitation), orphans' pension, invalidity pension, bachelors' pension (if the pensioner is single), temporary old-age pension (from the retiring age until the statutory age of 65), temporary survivors' pension (until the age of 65 of the survivor), and a lump-sum disbursement.<sup>175</sup>

Commutation of pensions or what is known as lump-sum payments is not allowed unless the annual amount is very small (€417.74 gross per annum in 2009). It is compulsory for defined-contribution scheme members to buy an annuity when they reach the age of 65. This is what is presently lacking in South Africa's retirement system. This is an important element for every system that wants to make sure that people save money when they are working so that they can receive regular income when they are no longer working. In the Netherlands, people are allowed to transfer their pension from the previous employer to the new employer when they change jobs, or to leave the pension with the previous employer.<sup>176</sup> The same applies in South Africa, even though it is not compulsory for people to transfer the pension from one employer to another, hence the majority of people take the pension benefit and use it for other needs.

According to the Melbourne Mercer Global Pension Index 2014 Report, the Netherlands' retirement income system comprises a flat-rate public pension, which is a quasi-mandatory earnings-related occupational pension established through industrial agreements. The majority of employees in the Netherlands are members of occupational schemes, which take the form of defined-benefit schemes.<sup>177</sup> The Netherlands is said to have a system that has a sound structure, with many good features. However, the system has some areas that need improvement.<sup>178</sup>

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<sup>175</sup> Feldstein *Social Security Pension Reform in Europe* op cit note 171 at 298.

<sup>176</sup> Reichert *The Dutch Pension System* op cit note 136 at 29.

<sup>177</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 2 at 35.

<sup>178</sup> *Ibid* at 7.

The Melbourne Mercer Global Pension Index 2014 Report rated the adequacy sub-index<sup>179</sup> for the Netherlands at 75% (Australia comes first with 81%), the sustainability sub-index at 76% (Denmark comes first with 86%), and the integrity sub-index at 90% (Finland is first with 97%).<sup>180</sup>

The following recommendations were made by the Melbourne Mercer Global Pension Index towards the improvement of the country's system:<sup>181</sup>

- Introducing a minimum access age so that it is clear that benefits are preserved for retirement purposes;
- Raising the level of household saving;
- Increasing the labour force participation rate amongst older workers; and
- Providing greater protection of members' accrued benefits in the case of fraud, mismanagement, or employer insolvency.

### **3.4.2.3 Private pension/individual pension plans**

The third pillar is made up of individual pension schemes. Similar to South Africa, private savings are generally used by the self-employed and by employees who do not have a collective pension scheme within their sectors. Any taxpayer who can prove that they are confronted with a pension deficiency can make tax-deductible contributions to this third-pillar pension.<sup>182</sup>

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<sup>179</sup> Melbourne Mercer Global Pension Index 2014 Report (ibid) at 72. The adequacy sub-index is determined by considering the base level of income provided, as well as the net replacement rate for a median-income earner; the sustainability sub-index is determined by considering several measures that affect the sustainability of current programs; and the integrity sub-index is determined by considering the integrity of the overall pension system, but focuses more on the private sector system. It considers the role of regulation and governance, the protection provided to participants from a range of risks, and level of communication provided to members (at 13-14).

<sup>180</sup> Ibid at 72-74.

<sup>181</sup> Ibid at 35.

<sup>182</sup> See Meyer et al *Private Pensions versus Social Inclusion* op cit note 136 at 84-85 and Reichert *The Dutch Pension System* op cit note 136 at 13.

Article 45 of General Old Age Act gives those who have non-insured years the opportunity of voluntary insurance. A person can join a voluntary insurance plan after the termination of the compulsory insurance scheme; for example when a person starts to work or resides abroad. People who are insured may also buy years-preceding compulsory insurance. For persons residing abroad, voluntary insurance is limited to a maximum period of ten continuous years. Long-term insurance is not possible for a person who does not reside in the Netherlands.<sup>183</sup>

#### **3.4.2.4 Dispute resolution**

People who are not happy with the decisions taken by a social security benefit administrator or where the benefit administrator fails to make a decision at all, must first request reconsideration from the issuing body. If the person is still not satisfied with the decision of that body, he or she can appeal to the District Court.<sup>184</sup> Decisions of the District Courts can be taken to the Central Appeals Court on appeal.<sup>185</sup>

A complaint must first go through a review procedure before it can be followed by an appeal to a court of law. Only interested parties have the right to apply for a review or an appeal. The dispute resolution process is regulated by *Algemene Wet Bestuursrecht* (AWB, General Law on Administrative Law). Social security complaints are dealt with in the same manner as other administrative law complaints.<sup>186</sup>

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<sup>183</sup> Pennings *Dutch Social Security Law* op cit note 128 at 190.

<sup>184</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 152; see also generally Pennings *Between Soft and Hard Law* op cit note 133 at 50-56.

<sup>185</sup> Pennings (idem).

<sup>186</sup> Idem at 50.

In South Africa, disputes relating to pension matters are dealt with by courts of law and by various bodies, including the Office of the Pension Funds Adjudicator. The Adjudicator has similar powers as the civil court, and once he or she has made a determination on the dispute, the determination is forwarded to the High Court which has the jurisdiction to enforce the determination. However, the Adjudicator does not handle matters that are purely social-security related.<sup>187</sup>

### **3.5 SOCIAL SECURITY AND PENSION PROVISION IN THE UNITED KINGDOM**

#### **3.5.1 General**

The United Kingdom of Great Britain and Northern Ireland is commonly referred to as the United Kingdom (UK), and it is a sovereign island country comprising England, Wales, Scotland, and Northern Ireland all under one social security system.<sup>188</sup> It has a constitutional monarch and a parliamentary democracy. However, the legislative power is vested in Parliament, while the executive power lies with the Cabinet, headed by the prime minister.<sup>189</sup> The United Kingdom has been closely associated with the International Labour Organisation since its creation in 1919.

The first draft of the ILO Constitution was written in London as part of a joint French-British initiative, and the United Kingdom is one of the countries with a permanent seat in the International Labour Organisation's Governing Body.<sup>190</sup> The United Kingdom has three broad categories of social security benefits; namely contributory, a public pension aimed at poverty prevention, and income-related.<sup>191</sup>

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<sup>187</sup> Discussed under par 6.10.2 in Ch 6.

<sup>188</sup> Leyland P *The Constitution of the United Kingdom: A Contextual Analysis* (Constitutional Systems of the World: Volume 1 (2007) (Hart Publishing) at 13 (hereafter, Leyland *The Constitution of the United Kingdom*).

<sup>189</sup> *Ibid* at 65, 81, 118-119.

<sup>190</sup> Pennings *Between Soft and Hard Law* op cit note 133 at 53-54.

<sup>191</sup> East *Social Security Law* op cit note 22 at 15.

A contributory scheme is based on the principle of social insurance financed by contributions made when people are working for later in their life when they are no longer working, due to a number of factors, including unemployment, sickness, and old-age. Non-contributory schemes are funded out of general tax revenue with eligibility depending on a means-test.<sup>192</sup> Their main objective is poverty alleviation as they provide a basic income or a top-up for low wages.<sup>193</sup>

The publication of the Beveridge Report in 1942 constituted a major turn-around in the development of the United Kingdom's social security system. The recommendations made in this Report formed the basis of radical reforms that created the framework for the country's social security system after the Second World War. The Report had, among other things, recommended the adoption of a contributory social security system which was aimed at improving the system by protecting all citizens against risks that included sickness, unemployment, and old-age. This proposed system would take the form of a social insurance scheme. Beveridge also investigated how a unified, universal insurance system could be established to cover all groups in actual or potential need. The scheme would be contributory – based on the insurance system. However, the Labour Government only started with the implementation of the recommendations of the Beveridge Report in July 1945.<sup>194</sup> The principal features of the United Kingdom's social model are summarised by Kvist as follows:<sup>195</sup>

- It is based on individual responsibility and choice;
- It provides flexible, competitive markets, through which social objectives can be achieved;
- It protects the vulnerable; and
- It assists individuals in need with their transition into active members of the economy.

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<sup>192</sup> Ibid at 15-16.

<sup>193</sup> Ibid at 20.

<sup>194</sup> East *Social Security Law* op cit note 22 at 42-45.

<sup>195</sup> Kvist *The Europeanisation of Social Protection* op cit note 17 at 44.

The responsibility of the development of social security policy rests with the Department of Social Security. From the 1980s, the system was administered by six “New Steps” agencies. One of the reasons for the creation of these agencies was to improve the efficiency with which public services were provided. The principal agencies included the Benefits Agency, which administers benefits payments; the War Pensions Agency; the Child Support Agency; and the Contributions Agency, which was responsible for the National Insurance Scheme. In April 1999, the Contributions Agency and responsibility for National Insurance policy was transferred to the Department of Inland Revenue.<sup>196</sup>

The United Kingdom does not have a single Constitutional document providing social security rights. Courts in the United Kingdom recognise Acts of Parliament as the highest source of law. Therefore, all statutes passed by Parliament are regarded as part of the Constitution.<sup>197</sup> The nature of the United Kingdom’s constitutional statutes was described as follows in *Thoburn v Sunderland City Council*:<sup>198</sup>

“Constitutional statutes are pieces of legislation which condition the legal relationship between citizen and state in some regard, an overarching manner, or which enlarge or diminish the scope of what might be regarded as fundamental constitutional rights.”

The United Kingdom’s law has the following as its sources: common law, European Union law, the European Convention on Human Rights, legal treaties, law and customs of Parliament, the royal prerogative, and case law.<sup>199</sup> The hereditary monarch is the head of state. However, the monarch has to act on the advice of the ministers.<sup>200</sup> The legislative power is vested in Parliament. However, in order for legislation to be approved by Parliament to become law, royal assent is required.<sup>201</sup>

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<sup>196</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 186-187.

<sup>197</sup> Leyland *The Constitution of the United Kingdom* op cit note 188 at 19-20.

<sup>198</sup> [2003] 3 WLR 247.

<sup>199</sup> Leyland *The Constitution of the United Kingdom* op cit note 188 at 21-24.

<sup>200</sup> *Ibid* at 65-70.

<sup>201</sup> *Ibid* at 81.

The law on social security consists of a complex network of interrelated statutes and secondary legislation.<sup>202</sup> The Old-Age Pension Act of 1908 was passed to give those over 70 years of age a non-contributory means-tested pension. Then there was the Finance Act of 1921, which provided a statutory right to tax relief on contributions made to pension funds by employers and employees. The Finance Act of 1970 established a new system of approval for occupational pension schemes. This Act was later consolidated and amended by the Income and Corporation Taxes Act of 1988. The Social Security Act of 1973 was followed by the Pension Act of 1975, the Social Security Act of 1975, and the Pension Schemes Act of 1993. The Pensions Act of 1995 came into operation on 6 April 1997. Two other statutes, namely the Welfare Reform and Pensions Act of 1999 and the Pensions and Social Security Act of 2000, were introduced.

In 2004, two new statutes were introduced; namely the Finance Act of 2004, and the Pensions Act of 2004. These two pieces of legislation were followed by the Pensions Act of 2007,<sup>203</sup> which was followed by the Pensions Act of 2008 – which introduced automatic enrolment of workers to certain funds – and the Pensions Act of 2014.

### **3.5.2 The United Kingdom pension system**

The system comprises three pillars. The first pillar provides for a mandatory public pension aimed at poverty prevention. The benefits under this pillar include the Basic State Pension and the Pension Credit comprising the Guaranteed Income Top-Up and the Savings Credit, which replaced the Minimum Income Guarantee. The Minimum Income Guarantee was a typical means-tested scheme providing higher protection than the Basic Income Pension. The first pillar is publicly provided and it is paid on a pay-as-you-go basis.<sup>204</sup>

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<sup>202</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 186.

<sup>203</sup> Bell J and Sleziaak D (eds) *Pension Law Handbook* 8ed (2008) at 2-3 (hereafter, *Bell Pension Law Handbook*).

<sup>204</sup> Emmerson C “Pension Reform in the United Kingdom: Increasing the Role of Private Provision?” (Working Paper Number WP 402-Paper presented at the Oxford Institute of Ageing Conference

This pillar has a second tier which is also mandatory. This tier is based on the so-called contracting-out method. In terms of this second tier, employees have a choice to join a pension scheme into which they want to make contributions.<sup>205</sup> The second pillar comprises occupational funds organised at company level or individual funds. The third pillar is managed by private insurance companies. In 2002, the government introduced a new private Stakeholder Pension, similar to a personal pension plan. The employer is not compelled to contribute to this plan. The Stakeholder Pension is targeted at middle and low-income earners. It is fully funded, with low management charges and no taxes. In 2003, the government introduced the new Pension Credit, which is an income-related benefit for people aged 60 or over, targeted at low-income pensioners. It provides more help to workers with low contribution records, and is aimed at avoiding inactivity traps.<sup>206</sup> The United Kingdom has a very complex system which aims to provide coverage to everyone taking into account the circumstances or situation a person finds himself or herself in. These three pillars are discussed below.

### **3.5.2.1 State pensions**

The United Kingdom started looking after its needy citizens as early as 1597 with the introduction of the Poor Laws of 1597 and 1601. However, during the Victorian Age, government policy was influenced by the belief that poverty was a result of idleness. Poverty was regarded as a moral failing to be despised and condemned. This influenced government policy for most of the 19<sup>th</sup> century. For instance, the Poor Law Reforms of 1834 were designed to relieve temporary distress but not to end poverty. In 1885, the government appointed a committee to suggest the best system of national provident insurance against pauperism.

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'Pension Security in the 21<sup>st</sup> Century: Redrawing the public-private divide', Rothmere American Institute, March 2002) at 7, accessed from [http://www.ageing.ox.ac.uk/files/workingpaper\\_402.pdf](http://www.ageing.ox.ac.uk/files/workingpaper_402.pdf), last visited on 12 May 2015.

<sup>205</sup> Natali D "Pensions in Europe, European Pensions: The Evolution of Pension Policy at National and Supranational Level" (P.I.E Peter Lang 2008) "Work and Society" No 64 at 134-141 (hereafter, Natali *Pensions in Europe*).

<sup>206</sup> Idem.

In 1893, the Royal Commission on Poor Law Relief and People Destitute from Old Age was appointed to consider whether any alterations in the system of poor-law relief are desirable in the case of persons whose destitution is occasioned by incapacity for work resulting from old-age or whether assistance could otherwise be afforded in those cases. Another committee under the chairmanship of Lord Rothschild was appointed in 1899. The committee had the task of finding the best means of improving the conditions of the aged deserving poor. The committee recommended that a non-contributory system of old-age pensions should be established. The introduction of state pensions eventually came when the Old-Age Pensions Act was passed in 1908. The Act provided financial aid to those who were already old and unable to support themselves.<sup>207</sup>

In 1925, the Conservative Government, being no longer prepared to finance a non-contributory pension scheme, passed the Widows', Orphans', and Old-Age Contributory Pensions Act. The Act was to apply to all people over the age of 65 years. In 1942, the Beveridge Report, among other things, recommended that social benefits should not only be provided universally, but also that they should be sufficient without further resources to provide the minimum income needed for subsistence in all normal cases. The Beveridge Report had a very limited role for a non-contributory, means-tested benefit.<sup>208</sup>

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<sup>207</sup> *Idem.*

<sup>208</sup> East *Social Security Law* op cit note 22 at 89-90.

The Basic State Pension, which took the form of a means-tested benefit, was introduced by the National Assistance Act of 1948. This benefit came to play a central role in social security, providing the necessary financial support to those who were not eligible for any national insurance benefit. By 1950 Britain had a unified and coordinated system providing for state pensions at the subsistence level along the lines of the Beveridge Report. The national assistance was replaced with supplementary benefit during the Labour Government's tenure in 1964 to 1970, and was regulated under the Supplementary Benefit Act 1966. The Social Security Pensions Act of 1975 introduced a supplementary state pension scheme called the State Earnings-Related Pension Scheme (SERPS).

A general pension was established consisting of a basic pension and an additional pension related to a person's earnings. The Social Security Act of 1979 made amendments to certain sections of the Social Security Act of 1975. The Conservative Government's Social Security Act of 1980 made further miscellaneous amendments to the existing law on social security. The Supplementary Benefit Act was later replaced by Social Security Act of 1986, which replaced the supplementary benefit with income support.<sup>209</sup>

Income support was a non-contributory, means-tested benefit paid to those who were not employed full time and who were not required to register for work. The role of income support was substantially reduced by the introduction of the jobseeker's allowance (JSA) in October 1996, since all those who were required to register for work no longer benefited from it.<sup>210</sup> The income support was renamed the Minimum Income Guarantee in 1999, and was replaced by the Pension Credit as from October 2003. Pension Credit has two parts; namely the Guaranteed Income Top-Up and the Savings Credit.<sup>211</sup>

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<sup>209</sup> *Idem.*

<sup>210</sup> *Idem* at 89.

<sup>211</sup> Thurley D *Pension Credit*, accessed from <http://researchbriefings.files.parliament.uk/documents/SN01439/SN01439.pdf>, last visited on 12 May 2015.

#### 3.5.2.1.1 Pension Credit (Guaranteed Income Top-Up and Savings Credit)

Guaranteed Income Top-Up is for those who have reached the minimum qualifying age, while the Savings Credit is for those aged 65 and above. The age from which one can receive Guaranteed Credit is gradually increasing from 60 to 65 and will then increase to 66 years between 2010 and 2020. It guarantees a minimum income by topping up a person's weekly income. The amounts will increase if the person is disabled have caring responsibilities, or certain housing costs, such as mortgage interest payments. The age from which a person qualifies for the Savings Credit is 65 or above and that person must have made savings towards his or her retirement.<sup>212</sup>

#### 3.5.2.1.2 Basic State Pension

The major part of state provision for pensioners in the United Kingdom is the Basic State Pension, which was also introduced in 1948.<sup>213</sup> The Basic State Pension was intended to provide a basic subsistence level of income for those in retirement.<sup>214</sup> Contributions go into the National Insurance Fund, from which current benefits are paid. The pension scheme is financed on a pay-as-you-go basis.<sup>215</sup>

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<sup>212</sup> East *Social Security Law* op cit note 22 at 5. See also OECD and G20 Indicators: Pensions at a Glance 2013 op cit note 100 at 357.

<sup>213</sup> Blake D *Pension Schemes and Pension Funds in the United Kingdom* 2ed (2003) at 3 (hereafter, *Blake Pension Schemes and Pension Funds in the United Kingdom*).

<sup>214</sup> *Ibid* at 3 and 14.

<sup>215</sup> At 13-14.

The Basic State Pension is a contribution-based benefit which is payable to all individuals who have reached state pension age and have made sufficient National Insurance Contributions.<sup>216</sup> Membership of the Basic State Pension is compulsory for both employees and self-employed workers.<sup>217</sup> In 2000, around ten million pensioners were in receipt of the Basic State Pension.<sup>218</sup> The state pension age was, up to 5 April 2010, 60 for women and 65 for men. However, after this date, women's qualifying age will gradually rise until it reaches 65 to be the same as that of men. The qualifying age will be increased from 65 to 66 for both men and women between 2018 and 2020 and will again be increased to 67 by 2028.<sup>219</sup> The National Insurance Contributions are paid by individuals and their employers, and are calculated on the basis of a formula dependent on weekly earnings. The periods during which a person is unemployed are credited to that person's National Insurance Contributions record for the Basic State Pension.<sup>220</sup>

This is similar to the National Savings Fund<sup>221</sup> proposed by the two Discussion Papers on Social Security and Retirements Funds Reform in South Africa. The proposed public fund will accommodate all workers regardless of the sector in which they work. The self-employed will also be able to join and make contributions to this fund.

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<sup>216</sup> Bell *Pensions Law Handbook* op cit note 203 at 7.

<sup>217</sup> *Ibid* at 10.

<sup>218</sup> *Idem*.

<sup>219</sup> Pensions Act of 2007.

<sup>220</sup> Disney R, Johnson J (eds) *Pension Systems and Retirement Incomes Across OECD Countries* (2001) at 299-301 (hereafter, *Disney Pension Systems and Retirement Incomes Across OECD Countries*). See also OECD and G20 Indicators: Pensions at a Glance 2013 op cit note 100 at 360.

<sup>221</sup> Discussed under par 5.3 in Ch 5.

### 3.5.2.1.3 The State Earnings-related Pension Scheme

The State Earnings-Related Pension Scheme (SERPS) was introduced by the Labour Government following the Social Security Act of 1975. It replaced what was known as the “Graduated Pension”. It was introduced to pave the way from a flat rate to an earnings-related contributory system.<sup>222</sup> The employer was free to choose whether to set up an occupational scheme and also whether this was intended to replace the State Earnings-Related Pension Scheme.<sup>223</sup> The SERPS was primarily designed to provide earnings-related pensions for workers who were not in an occupational scheme.<sup>224</sup> From 2002, no further pension rights accrued under the State Earnings-Related Pension Scheme as it was replaced by the State Second Pension.<sup>225</sup>

### 3.5.2.1.4 The State Second Pension

Even though the State Second Pension (S2P) was introduced by the Child Support, Pensions and Social Security Act of 2000, it was only effective from 2002.<sup>226</sup> The State Second Pension is paid by the government in addition to the Basic State Pension.

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<sup>222</sup> Under the original Beveridge scheme not only benefits, but also all contributions, were paid on a flat-rate basis.

<sup>223</sup> Johnson P “The Reform of Pensions in the UK: Annals of Public and Cooperative Economics” (Institute for Fiscal Studies) (December 1998) Vol. 69 (4) at 10-11.

<sup>224</sup> Ibid at 2-3.

<sup>225</sup> Disney *Pension Systems and Retirement Incomes across OECD Countries* op cit note 220 at 302-303.

<sup>226</sup> Information on State Second Pension accessed from <http://www.scottishlife.co.uk/scottishlife/Web/Site/Adviser/TechnicalCentralArea/InformationGuidance/General/TheStateSecondPensionExplainedPage.asp> (published 5 April 2013 and updated on 7 April 2011), last visited on 12 May 2015 (hereafter, Information on State Second Pension).

It takes into account one's earnings and considers time spent out of work for legitimate reasons such as sickness. It helps both those in employment and those who are unable to work either because they are currently incapable or because they are currently caring for others.<sup>227</sup>

A person can contract-out of State Second Pension using a final salary. It is, however, no longer possible, as from 6 April 2012, to use a money purchase, appropriate personal pension, or stakeholder plan to contract-out of State Second Pension. It should also be noted that it will no longer be allowed to contract-out of State Second Pension using a final salary scheme starting from April 2016. Employers can opt-out of the State Second Pension and establish occupational pension schemes for their employees.<sup>228</sup>

The State Second Pension protects people not in paid employment, and people who earn below the lower earnings limit and do not make any contributions to the system for periods of child care.<sup>229</sup>

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<sup>227</sup> Information about State Second Pension accessed from <http://www.monetos.co.uk/pensions/state-pensions/state-second/entitlement/>, last visited on 12 May 2015.

<sup>228</sup> Pension Country Profile: United Kingdom (Extract from the OECD Private Pensions Outlook 2008) at 293, accessed from <http://www.oecd.org/finance/private-pensions/42566007.pdf>, last visited 12 May 2015.

<sup>229</sup> Information on State Second Pension op cit note 226. See also OECD and G20 Indicators: Pensions at a Glance 2013 op cit note 100 at 359.

### **3.5.2.2 Occupational pensions**

#### **3.5.2.2.1 Background**

The first recorded occupational pension was given to a retired abbot of St Augustine's, Canterbury, in 1294. He was given an *ex gratia* pension of ten marks (former monetary unit in England, Scotland, and Germany) per year for life after working for the monastery. The earliest recorded private occupational pension schemes were organised by the medieval guilds of artisans in order to provide for the old-age of members whose income ceased when they retired.<sup>230</sup>

The first funded pensions to be established in the world are believed to be to wounded seamen of the Royal Navy of the Kingdom of England by the Chatham Chest in 1590.<sup>231</sup> Private occupational schemes saw a major development in 1762, due to the growth of life-assurance companies. The earliest private-sector schemes to be based on life-assurance principles were those of the East India Company and the Bank of England.<sup>232</sup>

Most occupational pension schemes in the United Kingdom have been set up as pension trust funds under the Superannuation and Other Trust Funds (Validation) Act of 1927. The first company to assure pension funds in Britain was the Metropolitan Life Insurance Company of New York, which in the 1920s began to organise the funds of British subsidiaries of American companies such as Woolworths and General Motors, which had similar schemes for their employees in the United States of America. The leading life companies involved in providing group pensions were Prudential, Legal and General, Eagle Star, Friends' Provident, and Standard Life. By 1934, these five companies had sold group life pension schemes covering 120 000 workers. By 1956, when the Government Actuary undertook his

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<sup>230</sup> Blake *Pension Schemes and Pension Funds in the United Kingdom* op cit note 213 at 28-32.

<sup>231</sup> Information about the history of occupational pensions in the United Kingdom, accessed from <http://www.pensionsarchive.org>, last visited on 12 May 2015; see also Blake (ibid) at 22-24.

<sup>232</sup> Blake (ibid) at 28-32.

first survey of occupational pension schemes, there were about four million members in the private sector and 300 000 pensioners.<sup>233</sup>

Various pieces of social security legislation affecting pension schemes were passed during the 1970s. They included the Social Security Act of 1973, which introduced provisions to protect members who left the service or opted out of the scheme before retirement. The Social Security Pensions Act was introduced in 1975. The Social Security Acts of 1985 and 1986 respectively, extended protection offered to early leavers and gave them the right to transfer their benefits to another pension scheme.

The Acts that were passed in the 1970s and 1980s, together with the relevant provisions of the Social Security Act of 1990, were later consolidated into one statute called the Pension Schemes Act (1993). The Pensions Act of 1995, which came into force on 6 April 1997, was introduced to provide greater protection for employees. The 1995 Act was followed by the Welfare Reform and Pensions Act of 1999 and the Pensions and Social Security Act of 2000.<sup>234</sup>

The Pensions Act of 2004 introduced the Pensions Regulator, which replaced the Occupational Pensions Regulatory Authority.<sup>235</sup> The Act also introduced the Board of the Pension Protection Fund<sup>236</sup>, which is responsible for holding, managing, and applying the Pension Protection Fund. This Fund is designed to give members of defined-benefit schemes a measure of protection when their employers are in financial difficulty or who have insufficient benefits and whose employers are insolvent. This arrangement is funded through levies (risk-based) paid to defined-benefit schemes.<sup>237</sup> Entitlement to state retirement provision is principally governed by the Social Security Contributions and Benefits Act of 1992.<sup>238</sup> Many public sector schemes, including the Local Government Pension Scheme and the National Health

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<sup>233</sup> Idem.

<sup>234</sup> Bell *Pension Law Handbook* op cit note 203 at 2-3.

<sup>235</sup> Part 1 of the Pensions Act of 2004.

<sup>236</sup> Part 2 of the Act.

<sup>237</sup> Sections 259 and 261.

<sup>238</sup> Bell *Pension Law Handbook* op cit note 203 at 7.

Service Pension Scheme, are governed and administered almost exclusively by statutory instruments and are, to a certain degree, unaffected by other legislation.<sup>239</sup>

In May and December 2006, the government proposed two White Papers which culminated in the Pensions Act of 2007 – which was later followed by the second Pensions Bill.<sup>240</sup>

### 3.5.2.2.2 The nature of occupational pensions in the United Kingdom

Occupational pension schemes in the United Kingdom take three forms; namely State Occupational Pension Schemes, which comprise schemes for civil servants, schemes for local government officers, and schemes for other public-sector employees; Private Occupational Pension Schemes; and Personal and Stakeholder schemes.<sup>241</sup>

Occupational pensions take the form of defined-benefit schemes or defined-contribution schemes. Most schemes provide for a pension to members payable from the scheme's normal retirement age, for the pension to be paid earlier or later than that age in certain circumstances, for a proportion of the pension due to be commuted into a lump-sum paid on retirement if the member so requests, for benefits to be paid if the member dies before the normal retirement age, and for a pension to be paid to a surviving spouse or other dependants.<sup>242</sup>

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<sup>239</sup> Ibid at 1.

<sup>240</sup> Natali "Pensions in Europe" op cit note 205 at 134-141.

<sup>241</sup> Ibid (at 22).

<sup>242</sup> Pension Law Reform: The Report of the Pension Law Review Committee, established on 08 June 1992 (Chairman: Professor Roy Goode) Vol. 1 at 85, accessed from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272069/2342\\_ii.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272069/2342_ii.pdf), last visited on 12 May 2015.

Pension plans are established by employers and operate as trusts under the general provisions of trust law, which lays the responsibility for good conduct of the trust on the trustees. This is different from South Africa where a pension fund acquires legal personality as soon as it is registered in terms of the Pension Funds Act 24 of 1956. Such a fund owns the assets of the fund.<sup>243</sup>

In the United Kingdom there are no legal requirements regarding the composition of the trustees. In practice about 60% of the members of private sector plans are in plans where at least some of the trustees are elected or nominated as representatives of the members. The employer usually has the power to appoint the trustees. Trustees do not have the power to change the pension plan rules. However, their consent is usually required by the employer – who has such powers.<sup>244</sup>

Trustees can be held liable where the fund suffers losses resulting from their negligent management decisions.<sup>245</sup> Trustees have a duty to act with due care, diligence, and good faith, they must also avoid conflict of interests<sup>246</sup>, and they must act in the best interests of the beneficiaries<sup>247</sup>.

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<sup>243</sup> See in this regard section 5(1) and (2) of the Pension Funds Act, 24 of 1956 (South Africa).

<sup>244</sup> Bodie Z, Mitchell OS, and Turner JA *Securing Employer-Based Pensions: An International Perspective (Christopher D Daykin Occupation Pension Provision in the UK)* Pension Research Council – The Wharton School of the University of Pennsylvania and University of Pennsylvania Press 1996, at 41-44.

<sup>245</sup> See in this regard *Nestle v National Westminster Bank plc* [1994] 1 All ER 118; *Cowan v Scargill* [1984] 2 All ER 750 at 766, [1985] Ch 270 (hereafter, *Cowan*); *Re Pauling's Settlement, Younghusband v Coutts & Co (No 2)* [1963] 1 All ER 857 at 862.

<sup>246</sup> See *Manning v Drexel Burnham Lambert* [1995] 1 WLR 32, [1994] PLR 75; *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546; *British Coal Corporation v British Coal Staff Superannuation Scheme Trustees Ltd* [1995] 1 All ER 912; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597.

<sup>247</sup> See in this regard the case of *Cowan* supra note 245, where it was said that the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust and not differentiating between classes of beneficiaries, should the starting point.

Membership of an occupational pension scheme can be regarded as voluntary.<sup>248</sup> However, in practice it is permissible for employees to be included automatically as members of their employer's scheme, unless they specifically request to opt-out. Until 6 April 2006, membership of an occupational pension scheme was confined to the employees of employers participating in a scheme in order to obtain exempt approved status. As from this date, an occupational pension scheme need not restrict membership to its own employees, although it need not be open to all employees, or to any particular category of them.<sup>249</sup>

Benefits are payable either on the death of a member or on the member's retirement, whichever comes first. Benefits are usually calculated on the basis of the member's normal retirement date under the scheme, which will generally be between age 60 and 65. Benefits may not be paid before a member reaches normal minimum pension age, which was increased from age 50 to 55 as from 6 April 2010. The exception only applies in case of ill health.<sup>250</sup>

In most schemes, the primary benefit provided is a pension payable at retirement age. There are two ways in which scheme trustees can provide a pension; either they can pay the amount due directly from the resources of the scheme, or an annuity can be purchased for the member in the name either of the trustees or of the member, which matches the scheme's obligation to that member.<sup>251</sup>

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<sup>248</sup> Section 160 of the Pensions Act of 1993. See also Bell *Pension Law Handbook* op cit note 203 at 22.

<sup>249</sup> Bell (ibid) at 22-23.

<sup>250</sup> Ibid at 32.

<sup>251</sup> At 85-86.

Most schemes allow a proportion of the pension entitlement to be commuted into a lump-sum. Benefits of various kinds may be payable when the member dies before reaching retirement age. A lump-sum is payable on the death of a member. This lump-sum is invariably paid at the discretion of the trustees, rather than to the member's estate as of right, since this allows the payment to be made promptly after the death of the member, and avoids any liability for inheritance tax on the payment. The payment of death benefits at the discretion of trustees is similar to the position in South Africa, where trustees are given powers by section 37C of the Pension Funds Act of 1956 to use their discretion in distributing death benefits. The provisions of this section are discussed in greater detail in Chapter 6 of this study. In the United Kingdom, a pension may also be payable for a child either under 18, or in full-time education, or to any other person financially dependent on the member – subject to an overriding limit that such pension should not exceed two-thirds of the member's maximum prospective pension and the total should not exceed the amount of that maximum pension.<sup>252</sup> A member's entitlement or accrued right to a pension under an occupational pension scheme cannot be assigned, commuted, surrendered, charged, or set off. This is similar to section 37A of the Pension Funds Act 24 of 1956. In terms of section 37A, pension benefits are not reducible, transferable, or executable. This is to protect pension benefits from creditors and to guard against the benefit being depleted prior to a member's retirement. However, there are exceptions to this general rule – namely where the rules of the scheme allow that.<sup>253</sup>

All members of pension schemes who have completed more than two years' service and who leave the scheme; are entitled to a preserved pension payable from the scheme's normal retirement age, or to transfer their accrued rights to another form of pension provision. Thus, preservation is mandatory except where membership has only been for two years or less when the person leaves his or her job. The value of accrued rights may be transferred from one occupational scheme to another, including from an earnings-related scheme to a money-purchase scheme or vice

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<sup>252</sup> At 90-91.

<sup>253</sup> Ibid at 43-46. Also see the discussion under par 6.7.1 in Ch 6.

versa, or from an occupational scheme to a personal pension, or to a special insurance policy.<sup>254</sup>

Supplementary occupational pensions have been an important part of the United Kingdom's pension system for a long time. This type of cover originated in the public sector, and grew in coverage during the 1950s and 1960s. Membership of an employer's scheme had been voluntary since 1988. Employees had a choice between joining their employer's scheme, joining the State Earnings-Related Pension Scheme, or joining the other major component of the United Kingdom private sector, or a personal pension. The option to opt-out of the State Earnings-Related Pension Scheme into Private Pensions (PP) revolutionised private pension provision in the United Kingdom.<sup>255</sup>

The Occupational Pensions Regulatory Authority (OPRA) was set up in 1997 with wide-ranging powers to intervene in the running of occupational pension schemes.<sup>256</sup>

The United Kingdom has since introduced other schemes through which people are encouraged to save for their retirement. After the introduction of the Pension Act of 2008, employers now have a duty to provide their workers with access to workplace pension schemes that meet certain minimum requirements. The government introduced the National Employment Savings Trust (NEST) in 2012, which is run by the government through the National Employment Savings Corporation. It takes the form of a defined-contribution scheme. This pension scheme was established by law to introduce the automatic enrolment of workers in the country. Any employer in the United Kingdom, regardless of the size, can use NEST for their workers. Employers can use NEST as the only scheme or use it along other existing schemes. Those who join NEST can manage their own savings, switch funds, and can even decide when to increase contribution levels or they can leave it to NEST to manage their

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<sup>254</sup> Pension Law Reform: The Report of the Pension Law Review Committee op cit note 242 at 122.

<sup>255</sup> Disney *Pension Systems and Retirement Incomes across OECD Countries* op cit note 220 at 310-312.

<sup>256</sup> *Ibid* at 55-56.

savings. A person who participates in NEST has one retirement account which he or she can use even if he or she changes jobs, becomes self-employed, or stops working. The charges are low, which means more money goes to the pension benefit. The National Employment Savings Trust provides online tools that can be used by savers or employers to enrol workers and to make contributions.<sup>257</sup> Employees from the age of 22 and above should be enrolled into the scheme. A new employee is automatically enrolled three months after commencing with his or her job, but they can ask to join earlier than that.<sup>258</sup>

The scheme allows employees to opt-out. Employers should pay a minimum of 1% of the salary of every worker into this scheme. This contribution will increase to 3% by 2017. Workers pay 1% of their salary, which has to be at 4% by 2017. The intention with this scheme is to increase the number of people who save for retirement in the United Kingdom. The retirement age of 65 will be raised to 67 by 2028.<sup>259</sup> This scheme, however, does not cover the self-employed. Also, those who are already participating in a workplace pension fund will not be required to join.<sup>260</sup>

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<sup>257</sup> Information about National Employment Savings Trust, accessed from: <http://www.nestpensions.org.uk/schemeweb/NestWeb/public/whatIsNEST/contents/introducing-nest.html>, last visited 12 May 2015.

<sup>258</sup> Not all workers will be automatically enrolled at the same time. The biggest employers (with more than 120 000 workers) were required to enrol first. Employers with more than 250 workers were expected to auto-enrol their workers between October 2013 and February 2014, and those who employ 50 to 89 employees had until 2014. Those employers with a smaller number of workers have from April 2014 to February 2018 to do likewise.

<sup>259</sup> The increase in pensionable age to 67 is dealt with under section 26 of the Pensions Act of 2014.

<sup>260</sup> See regarding automatic enrolment: <http://www.theguardian.com/money/2010/oct/27/private-pensions-compulsory-all-workers>; <http://www.telegraph.co.uk/finance/personalfinance/pensions/9855592/Why-compulsory-pension-saving-may-be-four-years-away.html>; <http://www.pensionfundsonline.co.uk/content/country-profiles/uk/106>; <http://www.bbc.com/news/business-19589265>; <http://www.independent.co.uk/money/pensions/get-ready-for-compulsory-pensions-7984624.html>, last visited on 12 May 2015.

### **3.5.2.3 Private pension/individual insurance plans**

Personal pension schemes are available on a voluntary basis to the following people:

- The self-employed;
- Employees who are not members of an occupational scheme;
- Employees who are members of an occupational scheme; and
- Employees who are members of a scheme which only provides benefits on death in service.

Employees could also, on a voluntary basis, join free-standing additional voluntary contributions schemes, in addition to occupational schemes, or pay into an additional voluntary contribution scheme under their occupational scheme – subject to the overall contribution limits for tax purposes.<sup>261</sup>

### **3.5.3 Dispute resolution**

The United Kingdom's social security system has an extensive system of adjudication of claims, which is done through specialised tribunals, with rights of review and appeal to the general courts. Tribunals are capable of hearing a wide range of appeals from decisions of local benefit officers, also known as adjudication officers.

Separate processes of appeal and review apply to decisions concerning the incidence of social insurance contributions. The Social Security Act of 1998 simplified and streamlined the way decisions and appeals are handled and maintained rights of appeal to an independent tribunal.<sup>262</sup>

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<sup>261</sup> Disney *Pension Systems and Retirement Incomes across OECD Countries* op cit note 220 at 11.

<sup>262</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 211.

However, in the United Kingdom pension disputes are dealt with by the Office of the Pensions Ombudsman<sup>263</sup>, which has the power to investigate and determine any complaints made in connection with any act or omission of trustees or managers of pension schemes.<sup>264</sup> The Ombudsman investigates and makes rulings on complaints from pension scheme members, beneficiaries, employers, trustees, managers, and administrators.<sup>265</sup>

The services of the Ombudsman are free.<sup>266</sup> The Ombudsman does not have unfettered discretion to impose remedies which the court of law cannot impose, and an appeal to his or her decision is allowed only on a point of law.<sup>267</sup>

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<sup>263</sup> The Office of the Pensions Ombudsman was established by the Social Security Act of 1990 by inserting new provisions into the Social Security Act of 1975 (section 59B). The Pensions Ombudsman was introduced following the 1989 Report of the (now defunct) Occupational Pensions Board (OPB): *Protecting Pensions: Safeguarding Benefits in Changing Environment*.

<sup>264</sup> In terms of sections 146(1) and (2) of the Pension Schemes Act of 1993, the complaint must relate to an injustice that the complainant has suffered as a result of maladministration of the fund or it must be a dispute of fact or law. In *Wild v Smith* [1996] O.P.L.R 129 where the Ombudsman concluded that on the evidence before the trustees, the woman (whom the trustees awarded half the pension of the deceased just because she was living with the deceased, in ignorance of the deceased's nomination form) was not a 'dependant' for purposes of the scheme rules and therefore could not receive any part of the lump-sum, but did not specifically separate his consideration of the question of law from the question of maladministration. The court acknowledged that the Ombudsman could have spelled out in more detail the reasoning behind his conclusion that the trustees exercised their discretion wholly unreasonably and that this amounted to maladministration.

<sup>265</sup> The objectives and functions of the Ombudsman were detailed in section 59C of the Social Security Act of 1975. The functions of the Ombudsman are not contained in section 146 of the Pension Scheme Act of 1993. The exceptions to the Ombudsman's jurisdiction are contained in the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (S.I. No. 2475).

<sup>266</sup> Sections 145 and 152 of the Pension Schemes Act of 1993 (as amended) outline the powers and functions of the Pensions Ombudsman. See also generally on the Office of the Pensions Ombudsman, <http://www.pensions-ombudsman.org.uk/>, last visited on 12 May 2015.

<sup>267</sup> Sections 151(2) and (4) respectively. See also *Wakelin v Read* [2000] EWCA Civ 82.

The complainant must lodge a complaint in writing with the Office of the Ombudsman within a period of three years from the date the dispute or course of action arose.<sup>268</sup> The Ombudsman does not deal with complaints about the marketing or selling of personal pension.<sup>269</sup> The Pension Ombudsman operates in a similar way as the South African Pension Funds' Adjudicator.<sup>270</sup>

### **3.6 SUMMARY AND EVALUATION**

Social security and pension provision remains a challenge to all the countries of the world, including developed countries. The challenges are not only constant but are also unique for each country, hence there are continuous reforms to existing systems. It is clear that even the systems that are considered to be among the best in the world, have some shortcomings. All three countries considered follow a three-pillar approach, even though the countries differ in how they apply these pillars; with the United Kingdom using a very complex system.

#### **3.6.1 Belgium**

The Belgian system aims to cover everyone. Almost everyone has some form of insurance cover. Separate pension schemes exist for public employees, private employees, and the self-employed. All Belgian pensioners receive their benefits on a pay-as-you-go basis. The contributions of people who are currently employed are used to pay for the pensions of current beneficiaries. This approach is problematic and unsustainable in countries which have high levels of unemployment, like South Africa. The pool from which benefits should be paid depends on contributions made by those who are working and earning a salary, and if the number of people who are working is small – what is deposited into the pool will also be small. The Belgian

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<sup>268</sup> Regulation 5 of Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations, 1996.

<sup>269</sup> Grant M *The Pensions Ombudsman: Powers, Procedures and Decisions* 1998 at 25.

<sup>270</sup> See the discussion of the powers and functions of South Africa's Pension Funds Adjudicator under par 6.10.2 in Ch 6.

system caters for those who are unemployed, those with low earnings, or in part-time employment. Belgium has separate pension provisions specifically for the self-employed people. The country has, with this approach, managed to cover the majority of the workers in the country.

Weaknesses<sup>271</sup> in the systems include the fact that the system is based on pillars that are very unequal; where the first pillar covers the majority of the people. The second pillar is considered to play a very small role as a source of income especially for the average Belgian worker as it is limited more to higher-income earners from the private sector.<sup>272</sup> On the other, pensions for the self-employed are considered to be very low. Benefits for high income earners are also considered to be insufficient to maintain their former standard of living.<sup>273</sup> Belgium's income replacement target for occupational-defined benefit plans is between 60% and 70%.<sup>274</sup>

It can be accepted, however, that the fact that Belgium is not included in the group of countries which the Melbourne Mercer Global Pension Index considered, makes it difficult to see how the country's retirement system fares in the international community. Belgium's retirement security system affords everyone legal protection against contingencies such as job loss and old-age. Social protection in Belgium plays a major role in preventing people from falling into poverty. The country may be considered to be doing very well with its social security provision as only 6% of the population could be considered poor in 2000.<sup>275</sup> It has, however, been established that high-income earners' pensions are generally insufficient to maintain their former standard of living.<sup>276</sup>

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<sup>271</sup> Gruber *Social Security and Retirement around the World* op cit note 76 at 43.

<sup>272</sup> Idem.

<sup>273</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46.

<sup>274</sup> Overbye et al *Pensions: Challenges and Reforms* op cit note 97 at 142.

<sup>275</sup> Van Vugt *Social Security and Solidarity in the European Union* op cit note 46 at 33.

<sup>276</sup> Idem.

Another worrying factor is that the administration and payment of social security benefits is not centralised, hence the country has various bodies or institutions responsible for different schemes and benefits. Pension-related disputes are dealt with by the Office of the Pensions Ombudsman, which is a specialised body.<sup>277</sup>

### **3.6.2 The Netherlands**

The social security system in the Netherlands focuses primarily on providing income to citizens who do not have any means of income. The Netherlands, just like South Africa, has not made it compulsory for workers to belong to retirement schemes except in limited circumstances. Almost every worker is covered under an occupational plan in the Netherlands system, which can be considered to be quasi-mandatory. The protection offered by the system is considered to be among the best in the world.<sup>278</sup>

The Netherlands follows a three-pillar approach. All these pillars are taken into account when determining the amount of pension benefit a person must receive. The state pension is available to everyone who is in old-age without means-testing, but it is based on 50 years of residency. The level of benefits is very high as the majority of retirees are able to replace almost 100% of their last earnings through defined-benefit plans. On the other hand, employer-established funds promise to replace at least 70% of the retiree's final earnings. Members are able to transfer full benefits when they change jobs. Pension benefits can only be claimed at the age of 65; excluding cases where a member wants to go on early retirement.

The system offers other benefits in addition to retirement benefits. Lump-sum cash payments are not allowed unless the benefit amount is very small. Members of defined-contribution plans are obliged to buy an annuity when they reach the age of 65. The system does not have a specialised tribunal or forum that specifically deals

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<sup>277</sup> Pension matters dispute resolution is discussed in par 3.3.2.4.

<sup>278</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 2 at 35.

with pension or social security-related complaints or disputes. These disputes are handled by districts courts. This is one thing that the Netherlands has to reconsider, as the nature of the industry and the objectives thereof call for a specialised body to deal with such matters. The Netherlands has one of the best systems in the world as it was given a “B+” grading in the Melbourne Mercer Global Pension Index 2014 Report. A “B+” depicts a system which has many good features. However, according to Guardiancich<sup>279</sup>, the weaknesses in the system include the following: inadequate protection of the self-employed, people employed in the informal sector, and people employed in other non-covered sectors.<sup>280</sup>

### **3.6.3 The United Kingdom**

The United Kingdom’s pension system follows a very complex three-pillar approach. Pension plans in the United Kingdom operate as trusts and are regulated by trust law. The system offers other benefits in addition to retirement benefits. Benefits can take the form of lump-sum cash payments or an annuity can be purchased for the member. A lump-sum can be paid at the member’s death, but this is at the discretion of the trustees. Almost all the plans have an opt-out option as long as a person can produce evidence that he or she has transferred to another suitable plan that offers similar or better benefits than the one he or she was participating in. The option to opt-out is what makes the United Kingdom pension system different from systems of other countries of the world. Workers have a choice to join alternative pension schemes organised at company level or even individual funds<sup>281</sup>, as long the scheme provides equivalent or better benefits than the former.<sup>282</sup> All members of pension schemes who have completed more than two years’ service and who leave the scheme are entitled to a preserved pension payable from the scheme’s normal retirement age, or to transfer their accrued rights to another form of pension provision. Thus, preservation is mandatory except where membership has only been

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<sup>279</sup> Guardiancich “The Netherlands Current Pension System” op cit note 13.

<sup>280</sup> Idem.

<sup>281</sup> Natali “Pensions in Europe” op cit note 205 at 134-141.

<sup>282</sup> European Commission “Adequate and sustainable pensions” op cit note 66 at 257.

for two years or less when the person leaves his or her job. However, investigations<sup>283</sup> have found the system to be unable to deliver retirement free from social exclusion for most citizens.

The state provision is considered to have failed to lift all individuals out of poverty because not all were protected by the first pillar against periods of out of paid work, where entitlement was secured pensions were too low, the self-employed and those in informal employment are not adequately covered, and private savings are unaffordable for some, while for others it was not clear that they offered a good investment.<sup>284</sup>

Since 2012, the United Kingdom has introduced the National Employment Savings Trust (NEST), which has introduced an automatic enrolment of workers to the plan. The scheme is targeted mainly at employees on low to moderate incomes and who had no access to workplace pension schemes. The government is also planning to introduce automatic enrolment into workplace pension schemes.<sup>285</sup> Pension disputes are handled by the Office of the Pensions Ombudsman, which functions in the same way as South Africa's Office of the Pension Funds Adjudicator<sup>286</sup>. The system, although complex, is considered to be among the best in the world as it was given a "B"-rating by the Melbourne Mercer Global Pension Index 2014 Report. Its adequacy sub-index has been scored at almost 70%, the sustainability sub-index at 52%, and the integrity sub-index at 80%.<sup>287</sup> The United Kingdom is categorised under the countries which have systems that have some good features, but also have some

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<sup>283</sup> Meyer et al *Private Pensions versus Social Inclusion* op cit note 136 at 65.

<sup>284</sup> Idem.

<sup>285</sup> Information about National Employment Savings Trust, accessed from <http://www.dwp.gov.uk/policy/pensions-reform/the-pensions-act-2008/>, last visited on 12 may 2015; see also OECD and G20 Indicators: Pensions at a Glance 2013 op cit note 100 at 359. See also generally on the United Kingdom's pension system and previous reform initiatives, Blake D *The UK Pension System: Key Issues* (Discussion Paper PI-0107) (Pension Institute, Cass Business School, City University, London, United Kingdom), June 2002.

<sup>286</sup> Discussed under par 6.10.2 in Ch 6.

<sup>287</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 2 at 72-74.

shortcomings which should be addressed. Without these improvements, its efficacy and long-term sustainability can be questioned.<sup>288</sup>

According to the Melbourne Mercer Global Pension Index Report, the overall index value for the United Kingdom's system could be increased by implementing the following.<sup>289</sup>

- Raising the minimum pension for low-income pensioners;
- Increasing the coverage of employees in occupational pension schemes;
- Increasing the level of contributions to occupational pension schemes;
- Raising the level of house-hold saving; and
- Increasing the labour force participation rate at older ages.

The next chapter considers the historical development of retirement provision in South Africa.

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<sup>288</sup> Ibid at 7.

<sup>289</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 2 at 38.

## CHAPTER 4

### HISTORICAL DEVELOPMENT OF SOUTH AFRICA'S RETIREMENT SECURITY SYSTEM (STATE AND OCCUPATIONAL PENSIONS)

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#### 4.1 INTRODUCTION

This chapter considers the origins and historical development of social and retirement security<sup>1</sup> in South Africa. The development of modern social and retirement security in South Africa before colonisation, during the colonial period, to the apartheid era<sup>2</sup> and up to and beyond 1994,<sup>3</sup> is described. The discussion also examines how old-age is and has been provided for in this country through formal arrangements influenced mostly by the Western European social security systems.<sup>4</sup>

Even though the development of South Africa's modern day social security started during colonisation, it should be clear that African families, societies, and communities have long had their own ways of support.<sup>5</sup>

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<sup>1</sup> Social security focuses on, among other things, income security (for example, the provision of income during retirement), attaining minimum living standards, and meeting the needs of the vulnerable members of the society – Patel L *Social Welfare & Social Development in South Africa* 2005 at 20 (hereafter, Patel *Social Welfare & Social Development in South Africa*). Retirement security aims to protect employees against the risk of old-age, which would have otherwise left them without any source of income when they retire. Retirement benefits serve an income replacement role when a person is in retirement. See East R *Social Security Law* 1999 at 15-16.

<sup>2</sup> "Apartheid" means separateness in Afrikaans. It was a system of racial discrimination under the Nationalist Party. This system was done away with when democracy was introduced after the first democratic elections of 1994. See <http://southafricaunderapartheid.blogspot.com/2009/03/homeland-system.html>, last visited on 29 July 2015.

<sup>3</sup> The introduction of democracy brought with it a right-based approach which has since abolished the racial and discriminatory welfare system. The right to social security is now entrenched in section 27 of the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (the Constitution).

<sup>4</sup> See generally, Dekker AH *Informal Social Security: A Legal Analysis* (Doctoral Thesis), April 2005, at 20-49 (hereafter, Dekker *Informal Social Security*).

<sup>5</sup> Maqubela NT *The Administration of Social Welfare in South Africa: A Study of its Origins, Development and Rationalisation* (MAdmin. Thesis, Unisa) January 1997 at 10 (hereafter, Maqubela *The Administration of Social Welfare in South Africa*).

**HISTORICAL DEVELOPMENT OF SOUTH AFRICA'S RETIREMENT SECURITY SYSTEM (STATE AND OCCUPATIONAL PENSIONS)**

Initially, African people relied on kinship support but later on a system developed through which welfare services were delivered by government bodies and voluntary welfare groups such as religious groups and churches.<sup>6</sup> When formal social security was introduced in South Africa, particularly during the apartheid period,<sup>7</sup> support was unfortunately only meant for white people, but was later also gradually extended to the other race groups.

Social security in the form of social assistance benefits is now available to all those who qualify to receive it in terms of the requirements set out in the Social Assistance Act 13 of 2004, and social insurance has also been extended to most of the workers in the formal sector – without looking at race or colour.<sup>8</sup> Thus, South Africa's social security system has mainly taken the form of both formal arrangements comprising two main components; namely social assistance and social insurance.

Social assistance includes in-kind assistance or cash benefits which come in the form of social grants. Social grants payable in this county at the moment include the child support grant, foster child grant, care dependency grant, disability grant, war veterans' grant, and the state old-age pension, also known as the older persons' grant, while social insurance includes contributory employment-based schemes such as retirement funds, compensation funds, and a scheme for the unemployed.<sup>9</sup>

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<sup>6</sup> See generally, Lund F "State Restructuring Welfare" *Transformation* 6 (1988) at 22-25 accessed at <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/transformation/tran006/tran006003.pdf>, last visited on 07 May 2015.

<sup>7</sup> The Nationalist Party took control of South Africa in the 1940s. The National Party government introduced what is known as apartheid aimed at oppressing black people and taking control of both the social and economic system in the country. It fought for white domination. For example, the Population Act of 1950 required that all South Africans be racially classified into one of three categories: white, black, and coloured (included major subgroups of Indians and Asians), (see the History of Apartheid in South Africa, accessed from <http://www-cs-students.stanford.edu/cale/cs201/apartheid.hist.html>; last visited on 29 July 2015).

<sup>8</sup> Van der Berg S "South African Social Security under Apartheid and Beyond" Vol 14, No 4, Dec 1997 *Development Southern Africa* at 481 (hereafter, Van der Berg "South African Social Security under Apartheid and Beyond").

<sup>9</sup> *Ibid* at 484-485.

## **4.2 DEVELOPMENTAL PERIODS FOR SOUTH AFRICA'S SOCIAL SECURITY SYSTEM**

### **4.2.1 Pre-colonial period**

During the pre-colonial period, people and families received support through the kinship systems. Families were responsible for the economic and social support of individual members of the families. Those who could not participate in the activities such as farming and hunting, for example children, women, elderly people, the disabled, and the sick, received support within the family. This form of support also extended to the clan at large.<sup>10</sup> In certain instances the source of support came not only from families, but also from the wider society. However, these methods of support were at a later stage, to a larger extent, affected and influenced by Western civilisation, which was brought about by colonisation.<sup>11</sup>

### **4.2.2 Colonial period**

South Africa was colonised by the Dutch from the mid-17<sup>th</sup> century until 1806, when the British took over the Cape Colony. The country was first invaded in 1652 by White settlers under the Dutch East India Company led by Jan van Riebeeck. Jan van Riebeeck arrived in South Africa in 1652 to build a fort and he developed a vegetable garden for the ships on the Eastern trade route.<sup>12</sup> The Colony of Natal was officially taken by Britain in 1843.<sup>13</sup>

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<sup>10</sup> Midgely J *Social Security Inequality and the Third World* 1984 at 103 (hereafter, Midgely *Social Security Inequality*). See also generally, on the kinship system, Ayisi EO *An Introduction to the Study of African Culture* 1979 at 36-45; Dekker *Informal Social Security* op cit note 4 at 139-140.

<sup>11</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 66.

<sup>12</sup> Thompson L A *Short History of South Africa* 3ed 2001 at 10-12.

<sup>13</sup> See generally on the colonisation of Natal, Mahoney MR "How the British Stayed in Power in Early Colonial Natal" (Paper presented before the University of Natal, Durban, African Studies Seminar), 13 June 2001 at 1-32 (Paper accessed from <http://www.kznass-history.net/files/seminars/Mahoney.pdf>, last visited on 29 July 2015).

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The English domination of the Dutch descendants resulted in the Dutch establishing the new colonies of Orange Free State, which is in the present day South Africa named the Free State province; and Transvaal, which today consists of Gauteng, Limpopo, Mpumalanga, and the North West provinces.<sup>14</sup> The Dutch who settled in South Africa believed in predestination and were Calvinists<sup>15</sup>.

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<sup>14</sup> The Bantu Authority Act, 68 of 1951, provided for the creation of homelands and regional authorities; the Promotion of Bantu Self-Government Act, 46 of 1959, separated black people into different ethnic groups; the Black Homelands Citizenship Act, 26 of 1970 (renamed the Black States Citizenship Act of 1970 and the National States Citizenship of 1970), forced South African black people to live in homelands created for each ethnic group and the Natives Land Act, 27 of 1913, brought about black reserves and the idea of homelands. See about the legacy of the Natives Land Act of 1913, Hall R "The Legacies of the Natives Land Act of 1913" *Scriptura* 113 (1) 2014 at 1-13. The homelands were abolished when the new democratic government came into power in 1994 and new provinces were established by section 124 of the interim Constitution, the Constitution of the Republic of South Africa Act, 200 of 1993.

<sup>15</sup> The Calvinists are those who follow the theological beliefs and practices of John Calvin. The Dutch were the first people from Europe to settle in South Africa permanently. These people brought with them the Christian faith developed by Calvin. The gospel reached other races, which also converted to Christianity. Because of factors such as language and social differences, eventually separate churches (Dutch Reformed Church/es) based on race were established. The union of South Africa was formed in 1910 and was followed by the National Party government in 1948, which strengthened racial segregation. These unfortunate practices were sadly based on the Christian theology called Calvinism (see in this regard, Naudé P "The Two faces of Calvin in South Africa: In Honour of the 500<sup>th</sup> Commemoration of John Calvin's birth" Part I *Dutch Reformed Theological Journal* 2009 Vol 50 at 606-607). See also Naudé (ibid) at 614-619, where the author describes another legacy of Calvin's theology which puts across the view that Calvin was against the theology that made separateness a God-willed principle of creation. It is indicated in Loader JA "Calvin's Election Mix in Small-Scale Theology" *HTS Teologiese Studies/Theological Studies* 2009 at 3-4 that Calvin believed in predestination and that all had not been created equal; that there are some people who were pre-ordained to live forever, while others were predestined for everlasting damnation. According to Calvin's theology, the whites, just as the Israelites of old, were the chosen people and they were meant to bring the heathen Africa to Christianity. Thus, according to the Calvinists whites, just like Israel of old, they set themselves apart, separate from other races or ethnic groups. See generally on Calvinism, Calvin J *Institutes of the Christian Religion* (A New Translation by Beveridge H) Vol One 1949; Calvin J *Institutes of the Christian Religion* (A New Translation by Beveridge H) Vol Two 1949; Shepherd VA *The Nature and function of Faith in the Theology of John Calvin* (Dissertation Series Number 2) 1983; Dakin A *Calvinism* 1949. In this book, Dakin provides an exposition of the system of Calvinism and a critical analysis of certain respects. See also on Calvinism, Bouwsma WJ "Explaining John Calvin" *The Wilson Quarterly* (1976-) Vol 3 (1) at 68-75; De Gruchy JW "John Calvin, Karl Barth and Christian Humanism" *Dutch Reformed Theological Journal* 2010 Vol 51 at 370-378; Hoek J "Towards a Revitalisation of Calvinistic Eschatology" *In die Skriflig* 37(1) 2003 at 95-113; Raath AWG "Law, Religion and the Covenanted Community: The Impact of the Zurich Reformation on the Early Cape Settlement, 1652-1708" *Acta Theologica* 2003 (1) at 150-174.

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They regarded themselves as the “chosen people” and often used religion to support their racial conduct. They looked down upon African people and their attitude towards them was racist and discriminatory. The Dutch brought their own Western ways of support, which negatively affected the kinship system that was used by the African people. The colonial administrators changed the kinship system to their Western system to sustain conditions they deemed necessary for their economic activities. The African people had to compromise their traditional system of support to accommodate the interests of their colonisers.<sup>16</sup> This unfortunately brought about a social welfare system characterised by racial discrimination and welfare policies that favoured only the whites. As a result thereof, South Africa today has a system that reflects elements of Western cultures and their social values.

Many people left their homes in the villages and moved to urban areas in search of jobs after the discovery of minerals in 1860. The majority of black people left their homes in rural areas to become labourers in the mines. This, among other things, gave rise to inequalities that characterise the present day South Africa. Discrimination and unequal treatment by whites against blacks was enforced in the industrial sector through laws mainly after the establishment of Union of South Africa in 1910. Industrialisation further strengthened racial differentiation in the provision of social services. Thus, both industrialisation and urbanisation contributed to high levels of poverty in the rural areas where the kinship system was badly affected when people, especially strong, young men, left their homes and moved to cities in search for jobs<sup>17</sup> in the mines and factories that were opened at that time. Discrimination in the provision of social security services was entrenched after the National Party took control in 1948.<sup>18</sup>

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<sup>16</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 66.

<sup>17</sup> Ibid at 67-68.

<sup>18</sup> ILO: *Apartheid and Labour* (International Labour Office, Geneva) *A Critical Review of the Effects of Apartheid on Labour Matters in South Africa* (1983) at 8-9.

### **4.2.3 The apartheid period**

Apartheid arose from a history of Dutch (the Netherlands) and British (the United Kingdom) colonialism. The apartheid regime took over from the colonisers and adopted their laws and policies. The legacy of apartheid has left devastating results especially on black communities due to the unequal distribution of wealth and income which were more in favour of the whites. The provision of social services also favoured white people, with black people receiving lower benefits. The majority of black people lived in rural areas where there was no development due to a lack of adequate funding and resources.<sup>19</sup> Apartheid was enforced through discriminatory laws, which included the Population Registration Act of 1950.<sup>20</sup>

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<sup>19</sup> See the National Report on the Status of Older People: Report on the Second World Assembly on Aging (1994-2002), Madrid, Spain (April 2002) at 9 (hereafter, National Report on the Status of Older People); and see generally on the effects resulting from the creation of homelands McAllister PA "Reversing the Effects of "Betterment Planning" in South Africa's Black Rural Areas" *Africa Insight* Vol 21(2) 1991 at 116-119, Leistner GME "Homeland Development: A Critical Assessment" *Africa Insight* Vol 10 (3 & 4) 1980 at 109-115.

<sup>20</sup> Other apartheid laws included the following: The Prohibition of Mixed Marriages Act, 55 of 1949, which prohibited marriages between whites and people of other races; the Immorality Amendment Act, 21 of 1950, which prohibited sexual relations between whites and blacks, the Prevention of Illegal Squatting Act, 52 of 1951, which prevented swamping or squatting by blacks and migrants in towns, the Group Areas Act, 41 of 1950, which created residential segregation with blacks and whites living in separate areas, the Bantu Education Act, 47 of 1953, which made sure that blacks received more inferior education than their white counterparts, the Reservation of Separation Amenities Act, 49 of 1953, which prohibited blacks from using the same facilities as whites, such as public toilets, parks, beaches and other public facilities/buildings; the Natives Abolition of Passes and Co-ordination of Documents Act of 1952, which restricted the movement of blacks into white areas through pass laws (all African men (and women starting from 1956) had to carry a reference book called a "dompas"). See also generally on apartheid and its effects, Hutt WH *The Economics of Colour Bar* (Andre Deutsch, London) 1964 at 30, 44 and 81, who suggested that apartheid policies were the outcome of colour prejudice derived from a historical heritage in which blacks were viewed as more primitive than whites and perpetuated by Afrikaner and particularly Calvinist social psychology, which was based on a fatalistic respect for the heaven-ordained race and class structures and which was inherently opposed to what he called the capitalist spirit. On the other hand, Rhoadie NJ and Venter HJ *Apartheid: A Socio-Historical Exposition of the Origin and Development of the Apartheid Idea* (HAUM, Cape Town) 1960 at 180, are of the view that colour was the criterion with which the standard of cultural and social development of an individual was judged. See on the effects of apartheid Lowenberg AD "An Economic Model of the apartheid State" *Economic History of Developing Regions* Vol. 29(2) 2014 at 146-169; Mariotti M and Fourie J "The economics of apartheid: An introduction" *Economic History of Developing Regions* Vol. 29(2) 2014 at 113-125; Lundahl M "Some Stepping Stones in the Economic Modelling of Apartheid" *Economic History of Developing Regions* Vol. 29(2) 2014 at 126-145; Shefer T "Narrating Gender and Sex in and through Apartheid Divides" *South African Journal of Psychology*, 40(4) 2010 at 882-395; Donaldson R and Van der Merwe I "Apartheid Urban Development and Transitional Restructuring in Pietersburg and Environs" *Historia* 45(1) May 2000 at 118-134. The International Convention on the Suppression and Punishment of the Crime of

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This Act classified people into four racial categories; namely whites, Africans (blacks), coloureds, and Indians. Race was mostly used in the allocation of welfare resources and social welfare policies were created to protect the whites from social and economic distress.<sup>21</sup>

It was towards the end of 1950 that separate departments were established to serve the four different racial groups. This was followed by the creation of six homelands (self-governing territories)<sup>22</sup>; namely KwaZulu, Lebowa, QwaQwa, Gazankulu, KaNgwane, and Kwandebele, as well as four homelands (independent republics) with independence; namely Bophuthatswana, Ciskei, Transkei, and Venda in 1959.<sup>23</sup>

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Apartheid, 1973, provides in its article 1 that state parties declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of racial segregation and discrimination, as defined in article 2 of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security. In terms of article 2(c), the term "crime of apartheid" in article 1 includes "human acts such as legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying them basic human rights and freedoms, including the right to work... (d) measures designed to divide the population along racial lines by creating separate reserves and ghettos for the members of a racial group or groups...."

<sup>21</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 70-71.

<sup>22</sup> The following pieces of legislation were responsible for the creation of black reserves and eventually, separate homelands: The Bantu Authorities Act of 1951 established tribal, regional and territorial authorities which had advisory functions in the black reserves; The Promotion of Bantu Self-Government Act, 46 of 1959; The Natives Land Act, 27 of 1913, which set aside black reserves as scheduled areas reserved for black ownership and occupation and prohibited blacks from buying land outside them. The apportionment of land to blacks was later increased by the Natives Trust and Land Act, 18 of 1936. The creation of homelands came from the recommendations of the Tomlinson Commission: Commission for the Socio-Economic Development of Bantu Areas within the Union of South Africa, 1955 (see in this regard: The Tomlinson Report, April 1956, accessed from <http://www.patontrust.co.za/sites/default/files/CtApr56.2.pdf>, last visited 29 July 2015). The Commission's recommendations were, however, criticised by, among others, the Liberal Party, which challenged the impartiality of the Commission because it did not have a single African even though it was to report on the Native Areas. The Liberal Party did not agree with the recommendation that total separation was the solution. According to the Liberal Party, there was no urgent need for the implementation of the Commission's recommendations of separating racial groups from one another. See also generally on homelands, Ntuli SH *The Transformation of KwaZulu Homeland from a Primary Agrarian to a More Integrated Political and Socio-Economic Entity, 1972-1994* (Thesis: University of Zululand) 2006. The black people were put into homelands which were like countries. Homelands were created for every black tribe, for example, North-Sotho, South-Sotho, Tswana, Zulu, Swazi, Xhosa, Tsonga, and Venda.

<sup>23</sup> See Geldenhuys D *South Africa's Black Homelands: Past Objectives, Present Realities and Future Developments* (Paper (Special study), written for the South African Institute of International Relations Affairs) August 1981, (accessed from <http://dSPACE.africaportal.org/jspui/bitstream/123456789/29893/1/South%20Africa's%20black%20homelands.pdf?1>, last visited on 29 July 2015). Geldenhuys lists the objectives of the homelands policy as advocated by those who were in support of the policy as follows: to safe-guard white rule (they claimed that it was to give the white man full control in his areas

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Each of the ten homelands had its own Department of Social Welfare. However, in some instances, such a department would form part of the larger combined South African Department of Health and Welfare. This led to a situation whereby the country had a total of 17 governmental Departments of Welfare.<sup>24</sup>

As a result of the discriminatory set-up, social security in South Africa has always been characterised by elements of discrimination, and fragmented and complicated administrative arrangements. The coloureds, Indians, and whites had "Own Affairs" Departments through their Houses of Representatives, Delegates and Assembly, respectively. Blacks in the common area of South Africa, on the other hand, were provided for through the Cape, Natal, Orange Free State, and the Transvaal provincial administrations. The blacks had to queue for their small pensions, while whites, coloureds, and Indians received social welfare benefits through the commercial banks.<sup>25</sup>

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and to give the Bantu every opportunity to develop in their own areas); accommodate black nationalism (they claimed that it was to give the non-whites self-governance); to take cognisance of foreign pressure (the homelands were, among other things, created to blunt international criticisms of South Africa's racial policies, but failed to receive any recognition or legitimacy from the international community and therefore failed to produce desired results); to conform to international norms (it was to give an impression that blacks would be able to enjoy their rights as they would have self-rule, but this also failed to impress the international community due to, among other reasons, that the policy was unilaterally introduced by the white minority, it denied blacks their political and civil rights in the country as a whole, the homelands comprised only 13.7% of South Africa's land area, and the homelands' territories were fragmented and generally under-developed); to reduce blacks' numerical preponderance in white South Africa (to avoid the dominance of blacks in white areas); to pave the way to an eventual community of co-operating states (the idea was that the homelands would develop (constitutional development) and that there would be a relationship between the homelands and South Africa, which was similar to those in the Commonwealth (Britain) (at 7-24).

<sup>24</sup> Lund F "State Social Benefits in South Africa" *International Social Security Review* (1993) at 6 (hereafter, Lund "State Social Benefits in South Africa").

<sup>25</sup> Nicholson CR, Lyster RM and Keely AM "A Manual on Social Pensions in South Africa" (Legal Resources Centre (Durban)) 1987 at 12, accessed from <http://www.amazon.com/manual-social-pensions-South-Africa/dp/B0006EQ708>, last visited 18 May 2015; Maqubela *The Administration of Social Welfare in South Africa* op cit note 5 (Chapter 1: Summary); Lund "State Social Benefits in South Africa" (idem).

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Many of the working people relied mostly on mutual-aid schemes and self-help groups such as burial societies and stokvels<sup>26</sup> which provided them with social and economic support.

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<sup>26</sup> The South African Reserve Bank describes a "stokvel" as "a formal or informal rotating credit scheme with entertainment, social, and economic functions which (i) fundamentally consists of members who have pledged mutual support to each other towards the attainment of specific objectives, (ii) establishes a continuous pool of capital by raising funds by means of the subscriptions of members, (iii) grants credit to and on behalf of members, (iv) provides for members to share in profits and to nominate management, and (v) relies on self-imposed regulations to protect the interest of its members." See also Lukhele AK *Stokvels in South Africa – Informal Savings Schemes by Blacks for the Black Community* (1990) at 1-5, who describes a "stokvel" as "a type of credit union in which a group of people enter into an agreement to contribute a fixed amount of money to a common pool weekly, fortnightly or monthly", (see also National Stokvel Association of South Africa: Corporate Information Brochure (1995) at 14 and par 1(b)(i)-(vi) of GN 2173 in GG 16167 of 14 December 1994 for a definition of *stokvel*). This money or a portion of it may be drawn by members either in rotation or in a time of need depending on the rules governing a particular *stokvel*. *Stokvels* provide mutual financial assistance as their main purpose but can also have a social and entertainment functions. According to Lukhele, the term "stokvel" was derived from rotating cattle auctions or "stock fairs" of the English settlers in the Eastern Cape during the early 19<sup>th</sup> century. The stock fairs were attended by black farmers and labourers who used these functions as economic and social get-togethers to exchange products and ideas. Gradually these get-togethers were organised on a regular basis, independently from cattle auctions. The concept was brought to the Transvaal by Cape blacks as they came to look for jobs in the mines after the discovery of the Main Reef in 1884 (See also generally Schulze WG "The Origin and Legal Nature of the Stokvel (Part 1) *SA Merc Law Journal* 18 (1997) at 20-24). In Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 80, "stokvel" is defined as an informal group savings scheme whereby the members agree to contribute a fixed amount of money to a common pool on a regular basis. This money, or some of it, may be drawn by the members on a rotation basis or as needed. It is a member-driven association. Members set their own rules and define their purpose. Besides providing mutual financial assistance, they also provide valuable social networks, support, and recreation. According to Scott-Wilson (see Scott-Wilson P "Stokvel Power" May 1990 *Market Mix* at 11), *stokvels* originally took the form of tea parties attended by women with each member taking a turn to host the party. Other members who attended the party brought gifts for the hostess. Later, *stokvels* developed to serve as a vehicle for saving clubs, buy-aids, burial societies, and money-lending organisations (See Thomas E "Rotating Credit Associations in Cape Town" in Preston-Whyte E & Rogerson C (eds) *South Africa's Informal Economy* (1991) at 292-293). A *stokvel* creates rights and duties for its members. It has to be registered as a company or friendly society for it to have legal personality. Thus, any action against the *stokvel* is against the members themselves (see Collair A *A Review of the Stokvels Movement in Some RSA Townships with Reference to Financial Management Techniques Used in Them* (unpublished Bcom (Hons) Report, University of Cape Town (1992) at 8). *Stokvels* have an element of solidarity in them. In the study by Moodley L "Three Stokvel Clubs in Urban Black Township of KwaNdangezi, Natal" (Department of Economics, University of Durban-Westville), 27 Feb 2008, accessed from <http://dx.doi.org/10.1080/03768359508439821>, last visited on 29 July 2015, it was discovered that deposits were made to meet specific future needs of the participants. The most important reasons mentioned for saving in a sample of 50 members were the following: to meet precautionary needs, to provide for unforeseen circumstances and sudden emergencies, and to meet specific large consumption needs at a regular time, such as Christmas expenses and school fees. One other reason for the formation of *stokvels* is the high transaction cost of depositing money in banks as *stokvels* split the costs among the members by pooling their savings and depositing their collective funds with banks. The *stokvels* studied fell into three groups: a rotating savings club and two fixed-fund clubs; one of which also lent money at interest to members (at 362-363). According to Akwasi Arko-Achemfuor in the article "Financing Small, Medium and Micro-Enterprises (SMMEs) in Rural

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The names of the mutual-aid and self-help groups reflected the spirit of solidarity, togetherness, group identity, and cooperation.<sup>27</sup> There were also many protests during the early 1980s in demand of a better living wage and other employee benefits such as maternity benefits, pensions, provident funds, and medical aid.<sup>28</sup>

Thus, the anti-apartheid campaigns and protests played a huge role in ensuring that eventually all people, regardless of race or colour, received equal treatment and benefits.<sup>29</sup>

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South Africa: An Exploratory Study of Stokvels in the Naledi Local Municipality, North West Province" (Naledi Local Municipality) *J Sociology Soc Anth*, 3(2) (2012), the *stokvel* system became a major source of saving for the majority of black people, especially women, as a result of the apartheid system which restricted blacks from doing legitimate business. The *stokvel* system is also used by people who operate in the informal sector who do not have access to credit and financial services (at 129-130). The savings were mostly used for food, household equipment and consumer durables, paying school fees and debt, and various occasions and ceremonies. Most of the members of one *stokvel* indicated that they belonged to more than one *stokvel* (at 129-132). All *stokvels* are required in terms of the Banks Act, 94 of 1990, to register with the National Stokvel Association of South Africa (NASASA) or a similar body approved by the Registrar of Banks in writing. NASASA provides *stokvels* with a template of a Constitution (see <http://www.nasa.co.za>, last visited on 29 July 2015). NASASA is a self-regulatory body recognised by the South African Reserve Bank (in terms of Government Notice 404 GG 35368 25 May 2012). See Calvin B and Coetzee G (eds) "A review of the South African Microfinance Sector" Vol II-Background Papers: section IV-Special Products (University of Pretoria: Centre for Microfinance) March 2010, accessed from <http://www.up.ac.za/media/shared/Legacy/sitefiles/file/1/3841/volumeii-sectioniv-specialproducts.pdf>, last visited on 29 July 2015) at 1, record that in 2009 NASASA represented 150 000 individual members from 11 000 groups nationwide.

<sup>27</sup> For example, *Thushanang* Club, which means "helping one another"; *Tshwarishanang* Club, which means "holding hands together" or "to help one another to carry the load"; and *Ratanang* Club which means "love one another".

<sup>28</sup> See generally on the industrial unrest resulting from demands for better lives for workers by the unions: Friedman S "Political Implications of Industrial Unrest in SA" (African Studies Seminar paper presented at Seminar at University of Witwatersrand in RW 319 on 14 September 1981) at 19-24; Friedman S *Building Tomorrow Today: African Workers in Trade Unions, 1970-1984* (1987) at 210-229.

<sup>29</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 81.

#### **4.2.4 The early 1990s**

In the early 1990s things had still not changed that much. During that period, the South African society was characterised by unequal wealth distribution, poor human development, and a high level of unemployment. The challenge for the future democratic government was to develop laws and policies that would give everyone the same social services and benefits without considering colour or race. In its manifesto, prior to South Africa's first democratic elections in 1994, the African National Congress (ANC) introduced a programme called the Reconstruction and Development Programme (RDP) which, among other things, advocated a developmental approach to social security and social welfare. The aims of the RDP included, among others giving all the people of South Africa social welfare rights, reviewing policy and legislation that existed, and creating a single national social welfare system of which the objective was to create a safety-net for all vulnerable groups.<sup>30</sup>

#### **4.2.5 Democratic period**

The first South African democratic elections, which took place on 27 April 1994, marked the end of apartheid and the beginning of a democratic South Africa. This also brought about considerable changes to how social security was provided in this country, which culminated in the recognition of everyone's right to have access to social security in the Constitution of the Republic of South Africa.<sup>31</sup>

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<sup>30</sup> Ibid at 85-87.

<sup>31</sup> Section 27 of the Constitution.

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South Africa's (final) Constitution followed the interim Constitution<sup>32</sup>, which was a product of the Multi-Party Negotiating Process (MPNP).<sup>33</sup> The interim Constitution was adopted in 1993, but only came into force on 27 April 1994. It introduced, among other things, the following two important fundamental changes:<sup>34</sup>

- For the first time in South African history, all citizens were given political and civil rights without considering race or colour.
- Constitutional supremacy was introduced in the place of parliamentary sovereignty and a Bill of Rights was introduced to protect human rights.

The interim Constitution was there to pave way for the final Constitution.<sup>35</sup> The final Constitution was adopted in December 1996. In its founding provision, the Constitution recognises a common South African citizenship, universal adult suffrage, a multi-party democracy, and a free judicial review of government and legislation to ensure that the government operates within the framework of the Constitution and the Bill of Rights.<sup>36</sup>

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<sup>32</sup> The (interim) Constitution of the Republic of South Africa Act, 200 of 1993.

<sup>33</sup> The Multi-Party Negotiating Process (MPNP) commenced work in March 1993 at the World Trade Centre. It convened 26 participating parties comprising political groupings, national and homeland government representatives, and traditional leaders.

<sup>34</sup> De Waal J and Currie I *The Bill of Rights Handbook* 6ed 2013 at 2 (hereafter, De Waal *The Bill of Rights Handbook*).

<sup>35</sup> *Ibid* at 5.

<sup>36</sup> Section 1 of the Constitution.

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It further recognises South Africa as one, sovereign, democratic state founded on human dignity,<sup>37</sup> the achievement of equality<sup>38</sup>, and advancement of human rights and freedoms.<sup>39</sup> The Bill of Rights guarantees everyone certain rights, including the right of access to social security<sup>40</sup> and other socio-economic rights.<sup>41</sup> The Constitution also recognises international human rights in its Bill of Rights.<sup>42</sup>

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<sup>37</sup> The right to human dignity is entrenched in section 10 of the Bill of Rights. The section provides that everyone has inherent dignity and the right to have their dignity respected and protected. In *S v Makwanyane* 1995 (3) SA 391 (CC), O' Regan J said the following about the right to human dignity: "Recognising a right to dignity is acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights" (at par 328). The Constitutional Court in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at par 31 stated that in its view, unfair discrimination mainly means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Thus, treating every person with dignity is an important element towards achieving equality and eradicating unfair discrimination. This view was supported in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at par 41, where the court stated that "the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups lies at the heart of the prohibition of unfair discrimination".

<sup>38</sup> The right to equality is entrenched in section 9 of the Bill of Rights. The section gives everyone the right to equality before the law and the right to equal protection and benefit of the law. The right to equality is based on the idea that persons possess equal human dignity (see De Waal J, Currie I, Erasmus G *The Bill of Rights Handbook* 6<sup>th</sup> impression 2004 at 232). The apartheid social and legal system was based on inequality and discrimination. In order to address imbalances of the past, the "equality clause" was entrenched in the Bill of Rights. The Constitutional Court has already heard a number of cases dealing with equality and the cases include, among others: in *Harsken v Lane NO* 1998 (1) SA 300 (CC) the Constitutional Court outlined the stages of an enquiry into a violation of the equality clause the courts have to follow in order to determine whether a provision discriminates against people (at par 53); in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par 62, it was held that one of the most important indications that the substantive conception of equality as envisaged by the Constitution is the declaration in section 9(2) that "equality" includes the full and equal enjoyment of all rights and freedoms; in *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) at par 20, the Court remarked that equality lies at the heart of the Constitution. In *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC), the applicant claimed that he was discriminated against as he was denied emergency medical treatment. The court held that no discrimination occurred as the duty put on the state to give everyone access to social security was dependent upon resources available for such purpose (at par 11).

<sup>39</sup> With these provisions together with the wording of the preamble, the Constitution explicitly recognises the injustices of the past, which are now addressed through the recognition of everyone's fundamental (human) rights in the Bill of Rights of the Constitution of the Republic of South Africa, 1996.

<sup>40</sup> Section 27 of the Constitution.

<sup>41</sup> For example, sections 26, 27, 28, and 29 of the Constitution.

<sup>42</sup> Some of the international instruments that were particularly pertinent to Constitution-making in South Africa were the Universal Declaration of Human Rights (1950); the United Nations Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Racial Discrimination against Women (1979); and the African Charter on Human and People's Rights (1981).

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Provision was also made for the Constitutional Court to interpret and protect the Constitution.<sup>43</sup>

The Ministry for Social Welfare and Population Development was established in 1994 to separate social services from the Health Ministry. In doing so, the government demonstrated its commitment to give the social well-being of its citizens some serious attention.<sup>44</sup> Later on, other programmes were launched to strengthen the fight against poverty and to remove racial inequalities in social security legislation.<sup>45</sup> The first step towards the reform of the apartheid welfare system saw the publication of the Welfare White Paper in 1997.<sup>46</sup> The Taylor Committee<sup>47</sup> was also appointed to look at ways in which a comprehensive social security system could be developed to extend social security protection to all who live in this country. The findings and recommendations of these initiatives, together with those of other Committees which were established to look at social security reform over the years, are discussed in more detail below.<sup>48</sup>

The fundamental principles of the White Paper for Social Welfare, which was adopted in 1997<sup>49</sup>, reaffirmed the government's commitment to securing the welfare of the people of this country. The Paper describes the relationship between economic and social development, and further reveals how the development and welfare of people can depend on social investments.<sup>50</sup>

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<sup>43</sup> Section 167(7) of the Constitution provides that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

<sup>44</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 94-95.

<sup>45</sup> The first Social Assistance Act (Act 59 of 1992) in a democratic South Africa was introduced in 1992 and was repealed by the Social Assistance Act, 13 of 2004. The Social Assistance Act of 2004 affords everyone who qualifies in terms of the Act, social assistance.

<sup>46</sup> The White Paper for Social Welfare (GN 1108 in GG 18166 of 8 August 1997 (Chapter 7)).

<sup>47</sup> The Taylor Commission: Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002 (hereafter, The Taylor Committee Report). However, the discussion is only limited to Chapter 9 of the Report.

<sup>48</sup> Discussed in par 4.3.3.

<sup>49</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 96.

<sup>50</sup> Ibid at 99-103.

The Taylor Committee reported to Cabinet in March 2002.<sup>51</sup> Its investigation covered all forms of social assistance, social insurance, and health insurance. Chapter Nine of the Report focuses on “retirement and insurance”. The objective of the investigation was to make sure that social policies relating to the provision of retirement and insurance benefits provide people with adequate protection in their old-age and other risks and contingencies that may befall them during their financial life cycle.<sup>52</sup>

### **4.3 THE NATURE OF RETIREMENT SECURITY IN SOUTH AFRICA**

#### **4.3.1 General**

The system is made up of the state old-age pension, occupational retirement funds, and privately arranged savings. South Africa has never had a public or national retirement fund. However, the country always had a well-developed private sector-based occupational system.<sup>53</sup> A South African Pension Fund, which would have been a national contributions scheme, was recommended by the Department of Social Welfare and Pensions in 1976, but never took off as it faced serious opposition. This would have had automatic enrolment for workers who did not belong to any other fund or who belonged to funds which offered inadequate benefits.<sup>54</sup>

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<sup>51</sup> Ibid at 93.

<sup>52</sup> Idem.

<sup>53</sup> The Mouton Committee Report: the Committee of Investigation into a Retirement Provision System for South Africa (1988) at 568-569, (hereafter, The Mouton Committee Report). The Committee rejected a contributory national scheme for the following reasons: the only people who could be effectively drawn into such a scheme were those who were in formal employment (the collection of contributions from the other sectors could be problematic); benefits for an individual seldom depend fully on the contributions paid by him, therefore there is scope for evading contributions without reducing the benefits; and in newly introduced contributory national schemes, the benefits are related to the number of contributions made, and during the period immediately following the introduction of the scheme, the benefits emerging are extremely low, meaning that the need for old-age assistance continues – not only for those who did not contribute to it, but also for those who have only contributed for a short period.

<sup>54</sup> Human Awareness Programme (South Africa) *State Pension Schemes and Private Pension Funds – How they Affect Black People in South Africa* (Special Report - Pensions: An Assessment) No 4, June 1983 at 5-6.

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The reasons why the government decided against introducing this Fund included, among others, resistance from the business community – which was of the view that it would remove investable income from the private sector; the method of funding was not clear; workers would frequently change jobs as there would be no long-term maximum pension holding them to their jobs; and there was a strong view that employers and workers should control pensions and not the state.<sup>55</sup> As a result of the failure to introduce a public fund, the state old-age pension has become the primary form of income to many South Africans who are in old-age and who would have otherwise had no form of income.<sup>56</sup> Thus, the old-age pension plays a much bigger role than merely serving as a safety-net as it is very often their only means of survival that is also shared by other members of the household.<sup>57</sup>

### **4.3.2 The state old-age pension**

South Africa's modern day social assistance dates back from the period 1910 to 1933. Many new changes, which were foreign to South Africa in the area of social security provision, were introduced during that period.<sup>58</sup> For example: the state old-age pension was first introduced in 1928 after the recommendations of the Pienaar Committee in 1926. The pension was initially only meant for the white and coloured population to the exclusion of blacks and Indians. In terms of the Old-Age Pensions Act of 1928, all coloured and white males and females over 65 years of age were entitled to receive the pension.

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<sup>55</sup> Ibid at 5.

<sup>56</sup> In the National Report on the Status of Older People op cit note 19 at par 3.1, the number of old people who rely on the old-age grant was estimated to be at 68%. The following Committees that were given the task of investigating how the system in South Africa could be improved recommended that the old-age assistance be retained to serve as a safety net for the elderly: The Joint Committee on Pension Benefits (1985) (hereafter The Joint Committee on Pension Benefits); The Mouton Committee Report op cit note 53; The Smith Committee: The Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa (1995) (hereafter The Smith Committee Report); The Taylor Committee Report op cit note 47.

<sup>57</sup> Olivier MP, Smit N and Kalula ER (eds) *Social Security: A Legal Analysis* 1 ed (2003) at 235.

<sup>58</sup> Kruger JJ *State Provision of Social Security: Some Theoretical, Comparative and Historical Perspective with Reference to South Africa* (Master's Thesis), University of Stellenbosch (1992) at 159; Van der Berg "South African Social Security under Apartheid and beyond" op cit note 8 at 486.

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In 1937, the age of eligibility was lowered to 60 for women but remained at 65 for men. The reason for the exclusion of rural Africans was that they could rely on kinship arrangements for support, and urban Africans were excluded because it was said that it would be difficult to differentiate them from those in rural areas.<sup>59</sup> The War Veterans Pension Act was passed in 1941, but Africans who served in the Native Military Corps during the First World War were excluded. A Social Security Committee was appointed in 1943 to investigate the possibility of introducing pensions for black people.<sup>60</sup> In 1944 the Committee proposed the following three-tier system for the black population:

- Rural or Reserve Natives could receive a pension but could also apply for rural relief;
- Native farm workers and Natives who lived in the Reserves but were under the contract of service (for example clerks, teachers) and had no option on land could be granted an option for pensions; and
- Urbanised Natives who had passed a test of urbanisation would receive a pension.

The following would be taken into account for purposes of conducting a “permanent urbanisation” test:

- A person must have stayed in an urban area for more than five years (if a man had a wife in the urban area, the wife should have stayed there for not less than three years);
- Whether the applicant was “allotted in a Native area or not”; and
- Where the applicant’s family lived.

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<sup>59</sup> Borat H “The South African Social Safety Net: Past, Present and Future” Vol. 12, No. 4 *Development Southern Africa* 1995 at 595-596 (hereafter, Borat “The South African Social Safety Net”); Kruger *State Provision of Social Security* (idem); Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 127-129.

<sup>60</sup> Van der Berg “South African Social Security under Apartheid and Beyond” op cit note 8 at 487.

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These tests were designed to stop blacks from moving to urban areas to receive a pension. Pensions for Africans were administered by the Native Affairs Department. These pensions were financed under the Native Trust which failed to pay out the whole amount allocated to blacks.<sup>61</sup> When the Disability Grants Act of 1947 was introduced, it extended disability grants to all racial groups. The year 1947 also saw the means-tested pension received by whites being five times what was paid to Africans, with coloureds and Indians receiving half of what whites were getting.<sup>62</sup> In 1955, nine areas were classified as cities, towns, and rural areas, and pensions were paid according to this categorisation; with those in rural areas receiving the lowest pension rate. In 1965, 70% of African pensioners living in the rural areas received the pension, and the distinction between city, town, and rural pensions was done away with to stop African people from moving to towns and cities in search of pensions.<sup>63</sup>

In the early 1980s, eligibility for state pension was determined based on three basic criteria; namely age, citizenship, and income or assets. All men received the pension when they were 65 years and older, and women at 60 years and above. Persons receiving a state pension had to be resident in South Africa or South-West Africa (the modern-day Namibia, at the time it was colonised by the German Empire and later by South Africa); be a South African citizen or a citizen of independent or self-governing homelands; had to have been resident in South Africa for five years; and must have been a tax payer or be exempted from paying tax in terms of section 13(3)(a) of the Bantu Taxation Act of 1969.<sup>64</sup>

A person qualifying for a state pension had to be indigent;<sup>65</sup> and had to qualify on application for a means-test, which was not the same for different race groups. The following persons could not receive a pension from the state: those receiving a grant

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<sup>61</sup> Bhorat "The South African Social Safety Net" op cit note 59 at 598.

<sup>62</sup> Ibid at 597.

<sup>63</sup> Idem.

<sup>64</sup> Act 92 of 1969.

<sup>65</sup> The person's ability to support himself or herself, and the ability of the person's spouse to support him or her were some of the factors considered.

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under the Occupational Diseases in Mines and Works Act of 1973,<sup>66</sup> Workman's Compensation Act of 1941,<sup>67</sup> and Military Pensions Act of 1976,<sup>68</sup> those persons or dependants of those persons who were receiving treatment in any state-run or state-aided institution; and the dependants of a beneficiary on his or her death. Where there was insufficient proof of the date of birth, the person had to name a historical event<sup>69</sup> which he or she remembered. His or her birth date was estimated from that by the pension officer. Even though the budget allocation to blacks (in the homelands/Bantustans) was improved between 1981 and 1991, the different government departments and administrators continued to deliver poor services to the poor African people. Equal treatment between blacks and non-blacks was only established in the true sense in 1993, when African social pensions increased to 85% of what their white counterparts received.<sup>70</sup>

The democratically elected government, which took over in 1994, was faced with a number of challenges, which included a fragmented social security system, and inequalities and discrimination in the provision of welfare services and benefits. Prior to 1994, the country had 17 departments for different population groups and homelands which administered the welfare system. Each of these departments had their own procedures, priorities, and systems of operation. This resulted in fragmentation, duplication, inefficiency, and ineffectiveness in providing adequate welfare services to the population of this country. There were also inconsistencies in the social welfare legislation.<sup>71</sup>

The introduction of the new (final) Constitution in South Africa saw the entrenchment of the right to have access to social security in section 27 of the Bill of Rights. In terms of this section, the right to have access to social security and social assistance

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<sup>66</sup> Act 78 of 1973.

<sup>67</sup> Act 30 of 1941.

<sup>68</sup> Act 84 of 1976.

<sup>69</sup> For example, the Anglo-Boer War (1899/1903); Bambata Rebellion (1906); Great War (1914/1918); and Swarms of Locusts (1932).

<sup>70</sup> See generally, Borat "The South African Social Safety Net" op cit note 59 at 600.

<sup>71</sup> Item 15 of the White Paper for Social Welfare (1997).

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is constitutionally guaranteed in situations where people are unable to support themselves and their dependants.<sup>72</sup> Previously, men received the pension when they reached the age of 65 and women at the age of 60. This was unconstitutional as men and women were treated differently. However, the position was correctly challenged in the case of *Christian Roberts v The Minister of Social Development*,<sup>73</sup> where section 10 of the Social Assistance Act of 2004<sup>74</sup> and Regulation 2(2) of the Regulations<sup>75</sup> made in terms of section 32 of the Act faced constitutional scrutiny. The role played by the pension was considered and it was found that the pension has a two-fold effect in addressing poverty; namely that it reduces poverty and vulnerability among older persons as individuals, and that it also has an effect on the aggregate poverty because of the relationship between poverty and households with older people.<sup>76</sup> The court held that there was no acceptable justification for the exclusion of eligible men between the ages of 60 and 64 from receiving the pension.<sup>77</sup> Interestingly, the state did not even have any progressive plans to address the needs of vulnerable men in that age band and it could not even raise the lack of resources as its defence in unfairly differentiating between men and women in this regard.<sup>78</sup>

The court found the differentiation to be a violation of section 27(1)(c) of the Constitution as the state has a duty not to create any situation in terms of which men falling within that age band would not be able to enjoy their right to have access to social assistance. This was further found to be a violation of section 9(3) of the Constitution, which prohibits any direct or indirect unfair discrimination by the state against anyone on one or more grounds that include age, sex, and gender. The court also found the differentiation to be in violation of the "human dignity" of eligible men

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<sup>72</sup> Section 27(1)(c) of the Constitution.

<sup>73</sup> *Christian Roberts v The Minister of Social Development* (Case No: 32838/05) (TPD), 17 March 2010 (unreported).

<sup>74</sup> Act 13 of 2004.

<sup>75</sup> Published in the GG No. 27316 of 2 February 2005.

<sup>76</sup> See the case of *Christian Roberts* supra note 73 at par 7.

<sup>77</sup> Supra at par 21.

<sup>78</sup> At paras 27-28.

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who were excluded from benefiting.<sup>79</sup> Even though the court in this case did not grant the applicants the relief they wanted (because they would have soon qualified for the state pension as they would have reached the age of 65 by the time the relief or order of the court was confirmed) the decision, as well as the reasoning of the court, is welcome as the previous position was indeed unconstitutional and unwarranted considering that South Africa is a constitutional and democratic state which should be seen to uphold the values of equality and human dignity. Presently, the state old-age pension is paid to the majority of qualifying persons, subject to a means-test, to both men and women of all races from the age of 60.<sup>80</sup> The means-test is applied to determine if the applicant qualifies to receive the pension. Thus, not all older persons of 60 years and above are eligible to receive the pension.

A person is eligible to receive the pension if, in addition to satisfying the set age and means-test, he or she meets the following requirements:

- Is a South African citizen or is permanently resident in the Republic;<sup>81</sup>
- Has a valid identity document;
- Is not a beneficiary of another social grant; and
- Is not maintained in any one of the following state institutions or institutions funded by the state (e.g. a prison, state psychiatric hospital, state home for older persons, care treatment centre, or a treatment centre for drug dependants).

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<sup>79</sup> At paras 41-52.

<sup>80</sup> The age of eligibility for men and women differed for many years. This was corrected and now both men and women receive the state old-age pension at the age of 60. This change is in line with the "equality clause" under section 9 of the Constitution. Section 9(1) of the Constitution guarantees everyone equality before the law and equal protection and benefit of the law. On the other hand, section 9(2) provides that equality includes the full and equal enjoyment of all rights and freedoms. The position prior to this change was clearly discriminatory against men on the basis of gender, sex, and age, and was therefore a contravention of section 9 of the Bill of Rights as it could not be justified.

<sup>81</sup> It was decided in the case of *Khosa* supra note 39, that people with permanent resident status should be treated the same way as citizens of the country for purposes of qualifying for social security benefits.

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The state old-age pension is provided for under the Social Assistance Act 13 of 2004, which repealed the old Social Assistance Act, 59 of 1992, and it is regulated by the Regulations promulgated under the Act. A person in need of social assistance must apply in the prescribed manner<sup>82</sup> and present himself or herself at the Social Security Agency<sup>83</sup> office or designated place of the area in which he or she resides.

The main objective of the state old-age pension is poverty relief and not the provision of income after retirement; hence the pension is means-tested. The pension is essentially meant to be redistributive in nature.<sup>84</sup>

### **4.3.3 Occupational retirement funds**

Before the industrial revolution of the 18<sup>th</sup> and 19<sup>th</sup> centuries, the work environment was different to what it is today. Employees then received care from their employers as businesses were not as big as they are now. Businesses mostly employed family members who were supported within the family. However, later on, the nature of employment changed and there came a need for other alternatives to support people who were no longer working; for example, due to old-age.

Employers carried the burden of supporting former workers in their old-age until a time arrived when competition amongst businesses was high and employers were no longer able to do that due to a high desire to make profit. As a result, the majority of old people had to come up with alternative ways of support. Even though there were some sympathetic employers who were prepared to support their retired employees out of company profits, this was not always possible – especially at the time businesses were not doing well.

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<sup>82</sup> Section 11(3)-(4) of the South African Social Security Agency Act, 9 of 2004.

<sup>83</sup> The South African Social Security Agency (SASSA) was introduced by Chapter 2 of the Social Security Agency Act, 9 of 2004. The Agency was set up by the government to root out fraud and improve efficiency in the administration of the country's social grants. The objectives of SASSA are discussed under par 5.4 in Chapter (Ch) 5.

<sup>84</sup> The Smith Committee Report op cit note 56 at 31.

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There was a serious need for some form of provision that could provide guaranteed support to retired employees. Company retirement plans became an obvious solution to the problem. In terms of these company plans, employers would contribute a certain percentage to retirement funds to build up sufficient reserves over a period of time. The reserves would then be paid out to the employee in the form of pension benefits when the employee retired. The government also introduced tax concessions to encourage people to save for their retirement.<sup>85</sup>

Even though the South African government started to formally recognise retirement funds in the early 1920s, history records that the first pension fund was established in 1882. This pension was not necessarily in the form of social insurance as we know it today and it was also not established or regulated by any legislation. The first formal regulation of pension funds in South Africa was in 1958 with the introduction of the Pension Funds Act of 1956,<sup>86</sup> which came into effect on 1 January 1958. Initially, occupational pension funds were in the form of trusts or *universitas personae* and were not regulated by any legislation.<sup>87</sup> Therefore the introduction of the Pension Funds Act of 1956, which has since seen many amendments, has also brought about the codification of the occupational retirement funding system in South Africa.<sup>88</sup>

The Pension Funds Act of 1956 was, among other things, introduced to protect members of the funds who had paid contributions to their employers with the expectation of receiving benefits on retirement. The Act is there to ensure that the business of retirement funds is conducted in a way that funds would be sustainable.

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<sup>85</sup> Downie JAB *Essentials of Retirement Fund Management in Southern Africa* 2005 at 3-4 (hereafter, Downie *Essentials of Retirement Fund Management in Southern Africa*).

<sup>86</sup> Pension Funds Act of 1956.

<sup>87</sup> The trusts deeds, which were entered into and exist separate from the pension fund, are required by PF Circular 79 of 1993 to be registered with the Financial Services Board and to form part of the rules of the fund. The Office of the Masters of the High Court still has founding trusts deeds of many pension funds. See with regard to pension funds as *universitas personae* (a voluntary association with corporate personality) *Venter v Protektor Pension Fund* [2000] 3 BPLR 340 (PFA) at 345, where the Pension Funds Adjudicator stated that common law pension funds are regarded as *universitas personae*.

<sup>88</sup> Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 85 at 4.

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South Africa was the first country to have a comprehensive legislation in the form of the Pension Funds Act to regulate retirement funds as in other countries retirement funds were regulated through a number of laws and legal principles, such as the law of trusts, and not by any specific piece of legislation.<sup>89</sup>

The provision of occupational pensions was unfortunately also initially racially biased towards the whites as black workers were excluded. Some employers started including certain categories of black workers, mainly skilled to semi-skilled coloured and Indian workers, during the early 1960s. Most African workers, who were at the time less skilled, were excluded from coverage and as such were without income in their retirement and had to depend on informal kinship arrangements when they were no longer working. Industrialisation, which took place between 1960 and 1970, saw more African people being covered, which led to the expansion of occupational retirement funds in South Africa. However, the inclusion of African people at that time did not necessarily mean that black people received the same level of coverage and benefits as their white counterparts. The system also did not include any provision for people working in the informal sector (such as farm (agricultural) workers, informal traders, the self-employed, domestic workers, and informal traders), the majority who were, and still are, blacks who mostly worked as farm and domestic workers. These people were and are still without any means of support in their retirement, except for the state old-age pension. This category of workers often earn too little to be able to make any contributions to formal insurance schemes, which generally require monthly contributions over a person's work life.<sup>90</sup>

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<sup>89</sup> Idem.

<sup>90</sup> Social grants have proved to be very effective in alleviating poverty in this country. See in this regard Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 136–137; National Treasury Committee Report No.7: Retirement and Old Age at 237, par 7.4.2, accessed from <http://www.treasury.gov.za/publications/other/ssrr/General%20Papers/Taylor%20Report%20%20Chapter%207.pdf>, last visited 29 July 2015. See Lund F "Social Security and the Changing Labour Market: Access for Non-standard and Informal Workers in South Africa" *Social Dynamics* 28(2) (2002) at 200, which mentions the fact that diversity that exists within the informal sector makes it difficult to work out appropriate measures that will accommodate everyone in the sector. See also Armstrong P and Burger C *Poverty, Inequality and the Role of Social Grants: An Analysis Using Decomposition Techniques* (A working paper of the Department of Economics and the Bureau for Economic Research (BER) at the University of Stellenbosch: Stellenbosch Economic Working Papers: 15/09) 2009 at 1, accessed from <http://www.ekon.sun.ac.za/wpapers/2009>, last visited on 18 May 2015; Van

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By the mid-1970s, the majority of black employees, comprising migrant and contract workers, were still not covered by the pension system; which at the time excluded hourly or weekly paid and lower paid employees. Those blacks who belonged to retirement funds did not fully benefit from the pension scheme because fixed-benefit schemes established long-term liabilities and required long-term investment and were therefore inappropriate for contract workers. Migrant workers only benefited after ten years of service, and although the number of racially exclusive schemes had diminished, migrant and contract workers were still subjected to discrimination by pension schemes. As a result, more black people had to rely on state old-age pensions for survival in their old-age.<sup>91</sup>

Over the years South Africa has gone through a number of retirement reform processes with the objective of improving the country's retirement system. Various Committees<sup>92</sup> were established to investigate ways in which the retirement system could be improved. Some of the Committees' recommendations were implemented and some were never implemented.

The following are some of the Committees and their recommendations:

- In 1976, the Minister of Social Welfare and pensions presented a report prepared by a departmental committee in which findings about an investigation into the possible institution of a national contributory pension scheme were published. The report also proposed that the preservation of pension rights be made compulsory. However, the proposals were never implemented. In 1978, an interdepartmental committee, the Louw Committee,

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der Berg S, Siebrits K and Lekezwa B *Efficiency and Equity Effects of Social Grants in South Africa* (A working paper of the Department of Economics and the Bureau for Economic Research (BER) at the University of Stellenbosch: Stellenbosch Working Papers 15/10) 2010 at 4, accessed from <http://www.ekon.sun.ac.za/wpapers/2010>, last visited on 18 May 2015.

<sup>91</sup> Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 136-137.

<sup>92</sup> For example, The Mouton Committee Report op cit note 53; The Katz Commission: The Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, 1994 (hereafter, The Katz Committee Report); The Smith Committee Report op cit note 56; and The Taylor Committee Report op cit note 47.

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was established to address similar pension-related problems – the recommendations of which were also never implemented.

- In 1986, the Select Committee was appointed to form part of the Joint Committee on Pension Benefits.<sup>93</sup> The Committee was to enquire into the manner in which satisfactory pension benefits could be provided for or assistance could be given to that section of the public which had no or insufficient pension cover, the compulsory preservation of pension rights through transfers or other means, the commutation of a part of lump-sum benefits into annuities, and matters relating thereto. The recommendations were never implemented.
  
- The Mouton Committee: the Committee of Investigation into a Retirement Provision System for South Africa was appointed in 1988 with a broad mandate to review the effectiveness of the retirement provision systems in South Africa and to propose guidelines for any changes that it would deem necessary to move towards the goal of providing all South Africans with adequate income in their old-age. The points of departure for the Committee included the eradication of discrimination in retirement provision based on race, colour, creed, or gender, that the state shall assist individuals to meet their basic subsistence needs in retirement or old-age, individuals shall have the responsibility to provide for their needs and those of their dependent spouses in retirement (if they wish to have more resources in old-age than can be provided by the state), the state shall encourage individuals by tax laws and other incentives to make provision for their own retirement needs, employers (including the state) shall be expected to facilitate and participate in retirement plans for their employees, and retirement provision system shall be adequately integrated with, and there shall be a good fit between, private

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<sup>93</sup> The Joint Committee on Pension Benefits op cit note 56.

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provision, state-provided old-age assistance, and other social assistance systems.<sup>94</sup>

The Committee put forward guidelines which would be used for a proposed new dispensation of retirement provision for all people in the Republic of South Africa. The guidelines would provide guidance to those who had the responsibility for managing retirement funds. Among other things, the Committee proposed that each fund should have a board of trustees and a set of rules governing the functions of the board and the duties and responsibilities of the board, investment guidelines, guidelines on the use of funds to finance development and social projects, guidelines on benefits, member communication, and retirement provisioning systems (a four-tier system comprising social assistance and national schemes, occupational and employer-sponsored schemes, voluntary individual schemes, and other provision for retirement).<sup>95</sup> Most of the recommendations of the Committee have been implemented. For example, the Pension Funds Act of 1956 has provisions on a number of issues highlighted by the Committee; including on investment of assets of the funds, constitution of boards of trustees, their duties and responsibilities, etc. South Africa, however, still has a three-tier system (comprising state social assistance, occupational retirement funds, and private savings) and it is also still without a national or public fund.

Most of the recommendations of the Committee, even though couched differently, can be seen in the two published Discussion Papers for Social Security and Retirement Reform in South Africa, and it will be interesting to see if they are eventually implemented. These, among others, include the proposed National Savings Fund.

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<sup>94</sup> The Mouton Committee Report op cit note 53 at 430-431 (Volume 2: Annexures).

<sup>95</sup> Ibid at Annexures C2-E5.

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- The Katz Commission: the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa was appointed on 22 June 1994. The Commission was to investigate the possibility of a comprehensive and systematic framework for tax reform in South Africa; which included, among others, retirement fund taxation. It completed its first Interim Report on 18 November 1994. This Interim Report was followed by other Interim Reports, which were published in different years.<sup>96</sup> Some of the recommendations of this committee have been implemented over the years, and it should be noted that retirement fund taxation reforms continue to form part of tax reform processes in this country.
  
- The formation of the Smith Committee: the Committee on Strategy and Policy Review of Retirement Provision in South Africa was announced in 1995. This Committee was introduced after the democratisation of South Africa during the time transformation was affecting almost all aspects of society, and was to inquire into the efficiency of the then retirement arrangements and to make recommendations for improvements.<sup>97</sup> The Committee was tasked with, among other things, assessing the appropriateness of the Mouton Committee Report and Recommendations in a changed or changing environment, the adaptation and improvement of the structure of the retirement system with a view of reducing the financial burden of the state regarding social pensions and of increasing pension coverage for those engaged in the informal sector and of modest means, and of how to achieve among the broad population a better understanding of pensions and the need for providing for old-age.<sup>98</sup>

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<sup>96</sup> The Katz Committee Report op cit note 92.

<sup>97</sup> The Smith Committee Report op cit note 56 at 3.

<sup>98</sup> Idem.

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Among other things, the Committee recommended the following: that the old-age pension be retained as an unfunded redistributive system of poverty relief for the aged; that urgent steps be taken to improve the effectiveness of management, administration, and payment systems of old-age pensions; that the long-term cost of old-age assistance be investigated; occupational retirement provision coverage be extended to all formal employment without requiring compulsory provision; preservation of personal provision be extended; people be encouraged to make personal provision of pension income in their retirement; and that retirement funds be permitted to provide loans for lifetime needs.<sup>99</sup> The recommendations of the Committee can be seen in the present system and they also form part of the important features of the system. Clearly the implementation of the Committee's recommendations has not brought much improvement to the system as there are still workers who are not covered, there is still poor preservation of retirement benefits as withdrawals are allowed prior to the retirement date, and the majority of people are still not saving for their retirement.

- In 2000, The Taylor Committee: Transforming the Present – Protecting the Future was appointed to review a broad number of elements relating to social security. The Committee reported in March 2002. It recommended, among other things, the following in respect of retirement provision in South Africa: that all people employed in the formal sector must contribute a prescribed minimum percentage of their income for retirement saving, there must be compulsory preservation of benefits when people exit funds, there must be compulsory survivors' and disability cover, that the principle of lay trustees with democratic accountability to the members be encouraged, the process of allocating benefits to dependants on death and divorce must receive high priority from the Financial Services Board to do away with problems that exist, the fiduciary duties of the trustees be monitored on a regular basis, that the tax structure be retained but that it be simplified, that the FSB must coordinate

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<sup>99</sup> Idem at 4-6.

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a national initiative to find missing beneficiaries, and that the means-test applied for state old-age pension be done away with and the costs of paying the pension be recouped via the income tax system.<sup>100</sup> Most of the recommendations of this Committee have not been implemented and they form part of the proposals made in the two Discussion Papers on Social Security and Retirement Fund Reforms. For example: not all workers in the formal sector are covered, there is still no complete compulsory preservation of benefits when members exit the funds prior to their actual retirement time, and distribution of death benefits in terms of section 37C is still problematic.

- South Africa's National Treasury Task Team<sup>101</sup> was appointed in 2004 to investigate how coverage and benefits provided by the system can be improved. This reform process has already seen the publication of two Discussion Papers which put forward proposals aimed at improving retirement provision to the old in this country. The First Discussion Paper was published in 2004 and the Second Discussion Paper in 2007.

The two Papers proposed a number of things which are captured in the Second Discussion Paper, which include a multi-pillar system comprising social assistance grants, funded from general government revenue, with a means-test reviewed, and providing a safety-net against poverty in old-age; mandatory participation in a national social security system, up to an agreed earnings threshold, providing basic retirement benefits, the aim being to close the gap between social assistance grants and private section retirement provision; additional mandatory participation in private occupational or individual retirement funds, for individuals with earnings above the threshold to ensure that individuals have adequate income replacement in their retirement; and supplementary voluntary savings.<sup>102</sup>

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<sup>100</sup> The Taylor Committee Report (Chapter 9: Retirement and Insurance) op cit note 47 at 93-98.

<sup>101</sup> Discussed under par 6.5 in Ch 6.

<sup>102</sup> National Treasury South Africa's Social Security and Retirement Reform: Second Discussion Paper (Republic of South Africa (National Treasury)) February 2007, at 3-4.

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The government is still working on the recommendations made by the Treasury in these Papers. Most of them, if implemented, will see South Africa's retirement security system improving in coverage and benefit adequacy.

### **4.4 SUMMARY AND EVALUATION**

Social security in South Africa has a very long history dating back to the pre-colonial period, where people mostly relied on the kinship system for support; while retirement security can be traced back to 1837, even though it was then not well structured and regulated. The process to formalise pension provision only started in the 1920s, although at that time it was generally biased towards whites. However, the actual formalisation and regulation of pension schemes only started in 1958 after the enactment of the Pension Funds Act of 1956.

South Africa's developmental approach to social security evolved from the country's unique history of inequality and the violation of human rights as a result of colonisation and the apartheid system which continued the discriminatory and oppressive policies of the colonisers.

The system was influenced by the social, cultural, economic, and political factors of the country. Consequently, social welfare reform in a constitutional dispensation was approached along the principles of equality, reconciliation, and healing the divisions of the past and promoting democratic values, social justice, and human rights. All these ideas are enshrined in the Constitution of the Republic of South Africa, 1996.<sup>103</sup>

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<sup>103</sup> See the preamble to the Constitution of the Republic of South Africa (1996) and sections 1, 7, 8, 9, 10, 26, and 27 of the Constitution; see also Patel *Social Welfare & Social Development in South Africa* op cit note 1 at 98.

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Social welfare provision in this country is now approached from a rights based approach in terms of which everyone is guaranteed access to social security and appropriate social assistance in cases where people are not able to support themselves or their dependants. The social security policy framework also embraces the principle of equity, which encompasses equal distribution of resources, services, and benefits to redress previous inequalities on the basis of race, gender, geographical areas, and sectors.<sup>104</sup>

Social insurance is generally meant for employed people and mainly for those employed in the formal sector of the economy, to the exclusion of the majority of workers employed in the informal sector. On the other hand, social assistance in the form of state old-age pension covers millions of people and it has largely contributed and it is still contributing to poverty alleviation in this country.<sup>105</sup>

The next chapter examines South Africa's social and retirement security framework, which comprises state social assistance arrangements, occupational arrangements, and private savings plans.

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<sup>104</sup> Ibid at 100.

<sup>105</sup> Makino K "Social Security Policy Reform in Post-Apartheid South Africa – A Focus on the Basic Income Grant" (Centre for Civil Society Research Report No.11. This paper was first presented at the 19<sup>th</sup> IPSA World Congress in Durban in July 2003) January 2004 at 8 (hereafter, Makino "Social Security Policy Reform in Post-Apartheid South Africa").

## CHAPTER 5

# SOUTH AFRICA'S SOCIAL AND RETIREMENT SECURITY FRAMEWORK

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### 5.1 INTRODUCTION

This chapter examines the nature of South Africa's social and retirement income security. The contents of this chapter are premised on the understanding that when people who are employed stop working due to old-age, most of them face the future with no stable income or no income at all and will therefore need some form of income security to sustain them and their dependants.

Societies and governments have developed mechanisms to provide income security for their elderly citizens as part of the social safety-net.<sup>1</sup> These mechanisms are aimed at redistributing resources to those with low income or those who are without any means of income and to reduce poverty within the society. It is also generally accepted in today's life that every state has the responsibility to introduce a social security system<sup>2</sup> in order to protect its population against certain social risks. People who are vulnerable to consequences of poverty would, for example, need state support,<sup>3</sup> in the form of social assistance<sup>4</sup> measures.

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<sup>1</sup> World Bank: *Averting the Old Age Crisis – Policies to Protect the Old and Promote Growth* (A World Bank Policy Research Report) (Oxford University Press) 1994 at 1. This study contains a global examination of financial security for old-age. In the study, redistribution, saving, and insurance are identified as the three functions of old-age financial security systems.

<sup>2</sup> The International Labour Organisation (ILO): *Introduction to Social Security* (ILO Publication) (1996) at 3.

<sup>3</sup> International Labour Organisation: *ILO and the World of Work* (ILO Publication) (1974) at 29.

<sup>4</sup> Social assistance provision in South Africa is regulated by the Social Assistance Act, 13 of 2004. Assistance is mainly in the form of monthly social grants (for example, the old-age grant (pension), disability grant, child support grant, and care dependency grant) and social relief. See in this regard Kaseke E "Social Security and Older People: An African Perspective" *International Social Work* 48(1), January 2005 at 92. According to the Minister of Finance (South African government) in his 2015 budget speech, spending on social assistance has risen from R75 billion in 2008/2009 to R118 billion in 2014. The number of people receiving grants has increased from 13.1 million in 2009 to 16.4 in December 2014, <http://www.treasury.gov.za/documents/national%20budget/2015/speech/speech.pdf>,

On the other hand, those who have means of support or a stable source of income and are able to make contributions to social insurance schemes will need an enabling environment to do that.<sup>5</sup> The Constitution of the Republic of South Africa, 1996 (the Constitution), guarantees everyone the right to have access to social security and/or appropriate social assistance and on the other hand, the state and private institutions (to the extent that it is applicable) are required to promote, respect, protect, and fulfil this right.<sup>6</sup>

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last visited 21 May 2015, (see also the Minister's 2014 budget speech on budget speech accessed from: <http://www.treasury.gov.za/documents/national%20budget/2014/speech/speech.pdf>, last visited 21 May 2015).

<sup>5</sup> Examples of social insurance schemes in South Africa are the following: the Unemployment Insurance Fund, regulated under the Unemployment Insurance Act, 63 of 2001 (UIA); the Occupational Diseases and Injuries Fund, regulated under the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA); and retirement funds, regulated under the Pension Funds Act, 24 of 1956.

<sup>6</sup> Section 8(2) (read with section 7(2)) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that a provision of the Bill of Rights binds a natural or juristic person if and to the extent that it is applicable; taking into account the nature of the right and the nature of any duty imposed by the right. The case of *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 53-56 (hereafter, *Certification* case) highlights the objections made against the inclusion of the provisions of section 8(2) in the final Constitution and counters arguments to those objections. Objections included the following: that it would impose obligations on persons other than organs of state; that it will have a "horizontal application", the horizontal application (this is the manner in which the Bill of Rights engages or applies to natural and juristic persons) of fundamental rights is not universally accepted; that in rendering the Bill of Rights binding on private persons, the new text (provision) was inconsistent with Constitutional Principle VI, which requires that there should be a separation of powers between the legislature, the executive and the judiciary; that horizontal application will allow the courts to tamper with the role of the legislature, as it would give them the power to change legislation and the common law; that section 8(2) would give the courts the duty of balancing competing rights and that this is not a proper judicial role; and that imposing obligations on individuals was a breach of Constitutional Principle II, which contemplates that individuals should be beneficiaries only of universally accepted fundamental rights and freedoms. These objections were countered as follows: that the latter argument fails to acknowledge the fact that courts have always had the role of developing the common law, that the courts have no power to change legislation, the courts' role is to determine if legislation is inconsistent with the new text (provisions) or not and not to change it, that the argument that a "horizontal" application of the Bill of Rights will give the courts the powers to interfere with the responsibilities of the legislature was misconceived, that the fact that section 8(2) would give the courts the task of balancing competing rights failed to acknowledge the fact that even where organs of state are bound by the Bill of Rights, courts will still be required to balance competing rights; and lastly, that as long as the Bill of Rights binds the legislature, legislation regulating the relationships between private individuals will be subject to constitutional scrutiny. In *Modder East Squatters v Modderklip Boerdery; President of the Republic of South Africa v Modderklip Boedery* 2004 8 BCLR 821 (SCA), 2004 6 SA 40 (SCA) at par 31, the court held that there will be circumstances where it can be expected that the right would be enforceable horizontally. In such cases, what will be important to consider is the context in which the breach of the said right occurred and the nature of the relationship affected parties are involved. Thus, it should be accepted that there might be instances where individuals or juristic persons through their conduct pose a threat in the exercise of power (in their private capacity). Also see in this regard generally, Rautenbach I

It can also be deduced from section 27(1) of the Constitution that South Africa's social security system has both social assistance and social insurance components.

Even though South Africa has a well-developed retirement system by developing countries' standards, the system provides for a limited coverage as it mainly caters for those who are employed in the formal sector of the economy, to the exclusion of the masses of other people employed in the informal sector.<sup>7</sup> The system has so far failed to provide comprehensive coverage and those who are not well covered or not covered at all are forced to rely heavily on the state old-age pension for survival. Previously, that is before formalised welfare support was introduced in South Africa, old-age support was provided through family support, mutual-aid societies, and other informal mechanisms. These arrangements were eroded by factors such as urbanisation and industrialisation as most people had to leave their homes (mostly in rural areas) to move to the cities in search of employment and a better life. Presently old-age support is more formalised and provided for in different ways and forms. However, the problem with the existing arrangements is that they do not always provide adequate protection and benefits. They are also not always sustainable, hence the need for regular reforms.<sup>8</sup>

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"Constitution and Contract: The Application of the Bill of Rights to Contractual Clauses and their Enforcement *Bredenkamp v Standard Bank of SA Ltd*" (2011) *THRHR* at 510-520.

<sup>7</sup> The sector is not fully regulated, not taxed; and includes farm workers, the self-employed, and domestic workers.

<sup>8</sup> South Africa's pension system has over the years gone through several reforms, some of which were undertaken by the following Committees: the Mouton Committee: the Committee of Investigation into a Retirement Provision System for South Africa (1988) (hereafter The Mouton Committee Report); the Smith Committee: The Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa (1995) (hereafter, the Smith Committee Report); and the Taylor Committee: Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002 (hereafter, the Taylor Committee Report). At the moment, there is a new retirement fund reform process underway. A number of Discussion Papers, namely the National Treasury South Africa Retirement Fund Reform (A Discussion Paper) December 2004 (The Three Pillars of Retirement Funding System) at 1 (hereafter, Retirement Fund Reform: First Discussion Paper) and National Treasury South Africa's Social Security and Retirement Reform: Second Discussion Paper (Republic of South Africa (National Treasury)) February 2007, at 7 (hereafter, South Africa's Social Security and Retirement Reform: The Second Discussion Paper) refer. See also generally on retirement reforms James E "Protecting the Old and Promoting Growth: A Defence of Averting the Old-Age Crisis" (World Bank Policy Research, Working Paper No: 1570) January 1996 at 1-2 (James "Protecting the Old and Promoting Growth").

The discussion that follows reviews the traditional retirement security provision considered to be based on the following three pillars: state-provided pensions, employment-based retirement schemes, and privately arranged savings. The other component, which is not formally recognised in South Africa, but which plays a supplementary role in addition to the other three pillars, is in the form of informal means of support.<sup>9</sup> It is submitted that this form of support plays an important role both socially and economically as most people and families from the black communities rely on the support received from these arrangements. The discussion will start by laying a foundation from a social security rights perspective. This will be followed by a discussion of various forms of retirement security provision offered by the system.

## **5.2 A CONSTITUTIONAL FRAMEWORK**

### **5.2.1 The right to have access to social security**

The Constitution makes provision for the right to have access to social security in section 27 of the Bill of Rights. This right is an internationally recognised human right as seen in Chapter 2<sup>10</sup> of this study. The section gives everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.<sup>11</sup> Thus the section covers both social insurance and social assistance. Beneficiaries of social assistance are those who qualify in terms of policy and beneficiaries of social insurance are those who are insured in terms of legislation that establishes the scheme. Beneficiaries of social insurance schemes may also be chosen in terms of the rules of a particular scheme and are required to make regular contributions to the scheme.

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<sup>9</sup> The Mouton Committee Report (ibid) at 538-539. See also Olivier MP, Smit N and Kalula ER (eds) *Social Security: A Legal Analysis* 1 ed (2003) at 231 (hereafter, Olivier et al *Social Security: A Legal Analysis*).

<sup>10</sup> Among international instruments that recognise the right to social security are the following: the Universal Declaration of Human Rights; UN General Assembly Resolution 217(III) of 10 December 1948; the International Covenant on Economic, Social and Cultural Rights, adopted by UN in 1966; the Social Security (Minimum Standards) ILO Convention 102 of 1952; the Equality of Treatment (Social Security) Convention 118 of 1962; the Maintenance of Social Security Rights Convention 157 of 1982; and the Social Security (Seafarers) Convention 165 of 1987.

<sup>11</sup> Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

For example, the rules of a retirement fund will specify categories of employees who are eligible to join the fund and would normally make it compulsory for these categories to join the employer established fund. According to Pieters, the constitutional provisions on social security can take either of the following forms:<sup>12</sup> very general provisions proclaiming the state as a “social state”; or provisions merely confirming the existence of social security, social insurance, or social assistance; or fundamental social rights.

### **5.2.1.1 Very general provisions proclaiming the state as a “social state”**

This is where the constitution contains provisions, often found at the beginning, which describe the fundamental character of a state. These provisions would stipulate, among other things, that the state is a “social state”. Great importance is attached to such a constitutional “social-state-principle” by the country’s legal doctrine and jurisprudence.<sup>13</sup> South Africa can be regarded as a “social state”. This can be deduced from the wording of the preamble to the Constitution of the Republic of South Africa, 1996.

The preamble states, among other things, that the Constitution is adopted as the supreme law of the Republic with the aim of healing the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights, and of improving the quality of life of all citizens and freeing the potential of each person. This, according to Olivier et al, means that the state wants to create a comprehensive social security system.<sup>14</sup>

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<sup>12</sup> Pieters D *Social Security: An Introduction into the Basic Principles* 2006 at 9-11 (hereafter Pieters *Social Security: An Introduction into the Basic Principles*).

<sup>13</sup> Idem.

<sup>14</sup> Olivier MP, Smit N, Kalula ER, Mhone GCZ *Introduction to Social Security* 2004 at 121. See also with regard to South Africa being a “social state”, De Wet E “Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?” (1995) 11 *SAJHR* 36, and De Villiers B “Human Rights in Developing Countries: Some Crucial Issues” (1996) *TSAR* 694. The social injustices of the apartheid system were articulated in the *Certification* case supra 6 note at par 5, as follows: “South Africa’s past has been aptly described as ‘a deeply divided society characterised by strife, conflict, untold suffering and injustice’ which “generated gross violations of human rights ... From the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males and a rigid system of economic and social segregation was enforced.” It was stated at par 7 that

Thus, the provision of social security to all who live in South Africa not only ensures social justice for all, but also improves the quality of life of the people of this country and in particular those who were previously denied access to social security by the discriminatory laws and policies of the apartheid government.<sup>15</sup> In ensuring that the aims set out in the preamble to the Constitution are realised, section 39(1)(a) of the Constitution requires courts, tribunals, and forums in this country to promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. In section 39(2), the Constitution further compels these institutions to promote the spirit, purport, and objectives of the Bill of Rights when interpreting any legislation and when developing the common law or customary law.

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fundamental to the apartheid system “was a denial of socio-political and economic rights to the majority of people in most parts of the country ... Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.”

<sup>15</sup> According to Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 53, social security reform in South Africa should aim to redress injustices of the past and in particular poverty and inequality. This intention can be seen in the provisions of section 27(2) of the Constitution, which requires the state to ensure “progressive realisation” of the right to have access to social security. As stated by Olivier et al at 58, the duty to take reasonable legislative and other measures, within the state’s available resources, to achieve progressive realisation of the right to have access to social security “constitutes a clear and unambiguous undertaking by the drafters of the Constitution to develop a comprehensive social security system, based on, among others, the right of access to social security for everyone, and financial viability”. While on one hand the state is given the duty to provide “universal access” to social security, on the other hand, the same state is given some latitude in that it should realise the right to have access to social security, progressively and must take reasonable measures according to available resources. This duty is placed upon all spheres of the state by section 8(1) of the Constitution. On the other hand, section 7(2) compels the state to respect, protect, promote and fulfil the right to have access to social security as it does with any other right in the Bill of Rights.

**5.2.1.2 Provisions merely confirming the existence of social security, social insurance, or social assistance**

This is where the Constitution explicitly confirms the existence of social security, social insurance, and social assistance, without mentioning the contents for each one of them.<sup>16</sup> The Constitution of the Republic of South Africa, provides in section 27(1)(c) that everyone has the right to have access to social security, including if they are unable to support themselves and their dependants, and appropriate social assistance. This provision does not provide for anything more than access to social security and appropriate social assistance. The section does not specify what social security and social assistance mean and neither does it detail their content.

**5.2.1.3 Fundamental social rights**

Fundamental rights to benefits go a step further as they also promise beneficiaries that they can claim social protection. They warrant a certain social minimum. They are supported by a complete network of other constitutional arrangements. Provisions proclaiming basic social rights can often also be interpreted as institutional guarantees.<sup>17</sup> For example, the Constitution of the Republic of South Africa, follows the “fundamental rights approach”. The right to have access to social security and to social assistance for those who are unable to support themselves<sup>18</sup> encompasses within it what may be called the right to “income security in old-age”. This section does more than just confirm the existence of the social insurance and social assistance. Section 27(1)((a)-(b)) mentions the contents of social security and in subsection 1(c), social assistance is provided to those who are unable to support themselves and their dependants.

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<sup>16</sup> Pieters *Social Security: An Introduction into the Basic Principle* op cit note 12 at 9-11.

<sup>17</sup> *Idem*.

<sup>18</sup> Section 27(1)(c) of the Constitution.

Even though the section does not guarantee a certain social minimum, section 27(2) obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights in section 27. It is important to note that the right to have access to social security and other socio-economic rights are justiciable and enforceable and can therefore be enforced by the courts of law.<sup>19</sup>

Countries provide the legislative power with a central role in the shaping of their social security systems. The constitutional system of many countries will often require a social security scheme to be based on an Act of Parliament.<sup>20</sup> In South Africa there are a number of statutes that provide both administrative and regulatory frameworks for different social security schemes and social assistance arrangements to give effect to section 27(2) of the Constitution, which requires the state to take reasonable legislative and other measures to achieve the progressive realisation of the right to have access to social security. For example, social assistance benefits are provided for in terms of the Social Assistance Act of 2004<sup>21</sup> and the Regulations thereto; unemployment benefits are provided for in terms of the Unemployment Insurance Act of 2001<sup>22</sup>; retirement benefits are provided for and regulated in terms of the Pension Funds Act of 1956<sup>23</sup>, and Regulations thereto and retirement funds rules; benefits and injuries suffered and diseases contracted at work are provided for in terms of the Compensation for Occupational Injuries and Diseases Act of 1993<sup>24</sup>.

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<sup>19</sup> See *Certification* case supra note 6 at paras 77-78. The fact that socio-economic rights are justiciable was reaffirmed in the following decisions: *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 at 60-61 (CC) at par 20 (hereafter *Grootboom*); and *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (5) SA 721 (CC) at par 23-25 (hereafter *TAC (2)*). This can also be assumed from the provisions of section 2 of the Constitution, which provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled. On the other hand, section 7(2) requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. This can imply that socio-economic rights are enforceable.

<sup>20</sup> Pieters *Social Security: An Introduction into Basic Principles* op cit note 12 at 11.

<sup>21</sup> Social Assistance Act, 13 of 2004.

<sup>22</sup> Unemployment Insurance Act, 63 of 2001.

<sup>23</sup> Pension Funds Act, 24 of 1956.

<sup>24</sup> Compensation for Occupational Injuries and Diseases Act, 130 of 1993.

Some constitutions deal with social security to provide parliament with some guidelines which are in principle not meant to be legally enforceable and, as such, the impact of such provisions on social security is very limited, except in those cases where legal doctrine or jurisprudence have interpreted them as containing institutional guarantees or even fundamental social rights. It even happens sometimes that one and the same constitution contains several of these kinds of constitutional provisions.<sup>25</sup> However, this is not the case with the Constitution of the Republic of South Africa. The Constitution of the Republic of South Africa binds the executive; the judiciary and all organs of state, as well as natural or juristic persons, provided certain conditions have been met.<sup>26</sup>

What this means is that the right to have access to social security, as well as other relevant rights such as the right to equality,<sup>27</sup> human dignity,<sup>28</sup> protection against arbitrary deprivation of property,<sup>29</sup> and the right to just administrative action,<sup>30</sup> among others, have to be realised and applied by private entities and all the functionaries mentioned in section 8 of the Constitution. This would include an institution regarded as private but which conforms to the definition of an organ of state and which acts as a functionary of the state;<sup>31</sup> for example the Financial Services Board (FSB), which is the regulatory body for financial institutions and retirement funds.

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<sup>25</sup> Pieters *Social Security: An Introduction into Basic Principles* op cit note 12 at 11.

<sup>26</sup> Section 8(2) of the Constitution. See also Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 52-53.

<sup>27</sup> Section 9 of the Constitution contains what is generally known as the "equality clause".

<sup>28</sup> Section 10 of the Constitution.

<sup>29</sup> Section 25.

<sup>30</sup> Section 33.

<sup>31</sup> In terms of section 239(b)(ii) of the Constitution, "organ of state" means any other functionary or institution exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

Section 27 of the Constitution refers to the right to have “access to” social security. This wording means that the right to social security and other socio-economic rights are not items that must be handed out free of charge by the government to the people. The state’s role is to create an “enabling environment”, which makes it possible for people to gain access to these rights, remove obstacles in the way of people gaining access to the rights, and adopt measures to assist those without access to gain such access.<sup>32</sup> The right to have access to social security is called a second-generation right.<sup>33</sup>

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<sup>32</sup> Liebenberg S and Pillay K *A Resource Book: Socio-Economic Rights in South Africa* October 2000 at 27.

<sup>33</sup> Second-generation rights include socio-economic and cultural rights. These rights are also referred to as the “red” rights. They are recognised in international law as they are embodied in articles 22-28 of the Universal Declaration of Human Rights, 1948, and the International Covenant on Economic, Social and Cultural Rights, 1966, respectively. The second-generation rights require the state to respect, protect, promote, and fulfil them depending on the availability of resources. This is the reason why, for example, the Constitution of the Republic of South Africa, 1996, guarantees everyone the right to access to adequate housing (section 26) and the right to have access to social security (section 27), and not a direct right to housing or social security. Both sections 26(2) and 27(2) on access to adequate housing and social security respectively confirm that the right to access in these instances is to be realised progressively and not immediately. Thus, the obligation upon the state is not an absolute one. See in this regard the case of *Grootboom* supra note 19 at paras 38, 45 and 46. According to the court in *Grootboom* supra (at par 94), despite the qualifications in section 26(2) (including available resources) of the Constitution, the state is obliged to give effect to the right to have access to adequate housing as obliged by the Constitution and this is an obligation that the courts can in appropriate circumstances, enforce (see also *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); 1997 (12) BCLR 1696 (CC) at par 36). In the *Certification* case supra note 6 at par 77, the Court held that the implications of the enforcement of socio-economic rights (second-generation rights) is the same as for first-generation rights (for example, rights to life, equality before the law, privacy, prohibition of inhuman or degrading punishments, freedom of speech, prohibition of slavery, forced labour, etc.). While the first-generation rights can be exercised independently and individually, second-generation rights such as the rights to social security, education, and freedom of association require institutional support and would require legislative intervention from the state to create institutional systems to give people access to, for example, education or retirement savings arrangements (see in this regard Cornescu AV *The Generations of Human Rights* (Bny Práva-2009-Days of Law: the Conference Proceedings, 1 edition. Brno: Masaryk University), accessed from [https://www.law.muni.cz/sborniky/dny\\_prava\\_2009/files/prispevky/tvorba\\_prava/Cornescu\\_Adrian\\_Vasile.pdf](https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/tvorba_prava/Cornescu_Adrian_Vasile.pdf), last visited on 21 May 2015).

It is a positive right which imposes obligations on the state to do or not to do something.<sup>34</sup> In terms of section 7(2) of the Constitution, the state has the duty to *respect, protect, promote* and *fulfil* everyone's rights. This duty gives the beneficiaries the right to require positive assistance or a benefit or service from the state.<sup>35</sup> The duty to *protect, promote, and fulfil* places a positive duty on the state, and requires positive action from the courts. On the other hand, all fundamental rights require the state to protect citizens from political, economic, and social interference with their rights.<sup>36</sup> The duty *to respect* requires the state to refrain from interfering with the enjoyment of the rights. In other words, the state must not limit or take away people's existing access to social security, without good reason and without following proper legal procedures.<sup>37</sup> This duty also prohibits the state from acting in a manner that undermines the right to have access to social security and any other rights in the Bill of Rights.

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<sup>34</sup> De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 6<sup>th</sup> impression 2004 at 432 (hereafter, De Waal *The Bill of Rights Handbook*).

<sup>35</sup> See the cases of *Grootboom* supra note 19 at par 20; *TAC (2)* supra note 19 at par 39.

<sup>36</sup> De Vos P "Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67 at 83 (hereafter, De Vos "Pious Wishes or Directly Enforceable Human Rights").

<sup>37</sup> See for example *Ngxuza and Others v The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2001 (2) SA 609 (E); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (hereafter, *Ngxuza*); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) (hereafter, *Mululeke*); *Mbanga v MEC, Health and Welfare, Eastern Cape and Another* 2002 (1) SA 359 (SE), 2001 (8) BCLR 821 (SE) (hereafter, *Mbanga*); *Mahambehala v MEC, Health and Welfare, Eastern Cape and Another* 2002 (1) SA 342 (SE), [2001] JOL 8191 (SE) (hereafter, *Mahambehala*).

The state can undermine people's right to have access to social security in the following manner:

- By arbitrarily or unreasonably denying people access to social security;<sup>38</sup>
- By introducing legislation or policy which is a barrier for people to access social security;<sup>39</sup> and
- By introducing legislation or policy which promotes unfair discrimination towards certain sections of the society in accessing social security.<sup>40</sup>

The duty to *respect* does not necessarily require the state to distribute money or resources to individuals, but requires a framework wherein individuals can realise these rights without undue influence from the state. In terms of this duty, the state is required to provide effective legal remedies to protect people against violations of their rights by other individuals or groups in society.<sup>41</sup> The duty to *protect* requires the state to protect the existing enjoyment of rights, and the capacity of people to enhance their enjoyment of rights against third-party interference. For example, the state must regulate private retirement provision to protect people against exploitation by private institutions and must, through such regulation, provide effective legal remedies where such exploitation or other forms of interference occur.<sup>42</sup>

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<sup>38</sup> See the cases of *Ngxuza*; *Maluleke*; *Mbanga* and *Mahambehhlala* (supra).

<sup>39</sup> See in this regard *Khosa & Others v Minister of Social Development & Others: Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC) at par 98 (hereafter, *Khosa*), where the omission of words "or permanent resident" after the word "citizen" in sections 3(c) and 4(b)(ii) of the Social Assistance Act, 59 of 1992, was found to be inconsistent with the Constitution as the sections made it difficult for foreigners with permanent residence status to qualify for social assistance benefits in South Africa.

<sup>40</sup> For example, the exclusion of men from the age of 60 from receiving the state old-age pension was unfair and discriminatory. This has, however, since been changed and now both men and women receive the state old-age pension at the age of 60 years.

<sup>41</sup> For example, the law must effectively prevent and prohibit unfair discrimination on the grounds of race, gender, sexual orientation, and on any other ground in the private insurance industry. See Brand D and Heyns C *Socio-Economic Rights in South Africa* 2005 at 9 (hereafter, *Brand Socio Economic Rights in South Africa*).

<sup>42</sup> In *Head of Department, Department of Education, Free State Province v Welkom High School and Another*; *Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at par 84 the court stated that the obligation to protect the rights in the Bill of Rights goes beyond a mere negative obligation not to act in a manner that would infringe or restrict the right. The court had previously held that there are instances where the Constitution imposes a positive obligation on the state and state organs to provide appropriate protection to everyone through laws and structures designed to afford such

The state must also develop the common law through the courts of law to strengthen existing remedies or develop new remedies for protection against private interference in the enjoyment of rights.<sup>43</sup>

The duty to *promote* has been described as being inclusive of the duty to raise awareness of rights; that is, to bring rights and the methods of accessing and enforcing them to the attention of right holders and to *promote* the most effective use of existing access to rights.<sup>44</sup> The beneficiary of social security benefits has the right to require positive assistance, or a benefit or service from the state. Section 27(2) qualifies the positive obligation of the state to realise the right to have access to social security by obliging it to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right to have access to social security.<sup>45</sup> The duty to *fulfil* requires the state to act; to adopt appropriate legislative, administrative, budgetary, judicial, promotional, and other measures so that those who do not currently enjoy access to these rights can gain access and so that existing enjoyment of rights is protected.

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protection. See also in this regard *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 at par 105; *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at par 44; *Minister of Safety and security v Van Duivenboden* 2002 (6) SA (SCA) at par 20 where the court stated as follows: "While private citizens might be entitled to remain passive when constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country the state has a positive constitutional duty to act in the protection of the rights in the Bill of Rights." It was held in the case of *Glenister* supra at par 107 that there many ways in which the state can protect the rights in the Bill of Rights. According to the court in *casu*, the Constitution gives the state freedom as to how to achieve this – depending on the nature of the right involved and the availability of resources. The obligation of the state with regard to socio-economic rights in sections 26 and 27 respectively, is to take reasonable legislative and other measures, within its available resources, in order to achieve the progressive realisation of those rights (as required by sections 26(2) and 27(2) of the Constitution, respectively. Those who are aggrieved by the decisions of boards of pension funds may approach the courts of law or the Office of the Pension Funds Adjudicator created specifically to deal with complaints against pension funds. Alternatively, they can approach the Financial Services Board, a regulatory body for financial institutions, including pension funds. The Pension Funds Adjudicator is appointed to this office by the Minister of Finance in terms of section 30C of the Pension Funds of 1956.

<sup>43</sup> Brand *Socio-economic Rights in South Africa* op cit note 41 at 9.

<sup>44</sup> Liebenberg S (The interpretation of socio-economic rights) in Chaskalson M et al *Constitutional law of South Africa* 2ed 2003 (Chapter 33) at 5.

<sup>45</sup> It was held in the case of *TAC (2)* supra note 17 at par 28 that section 27(1) is not a self-standing right independent of section 27(2) which . See also Brand *Socio-economic Rights in South Africa* op cit note 41 at 239.

The duty to *respect* can be enforced through adjudication, while on the other hand, the positive duties to *protect*, *promote*, and *fulfil* would require the courts of law to interfere with decisions to budget allocations by the executive.<sup>46</sup> The state's duty to take reasonable legislative and other measures to achieve the progressive realisation of the right to have access to social security<sup>47</sup> includes the adoption of enabling strategies to assist people to gain access to the rights through their own endeavours and initiatives, as well as more direct forms of assistance to groups in particularly disadvantageous or vulnerable circumstances.<sup>48</sup> The state needs to take reasonable legislative measures together with well-directed policies and programmes; for example by making policies and law that would allow people to establish or participate in retirement schemes. These policies and programmes must be reasonable both in their conception and in their implementation.<sup>49</sup> This would, for example, mean that retirement security legislation and policy should be construed and applied in such a manner that they sufficiently protect individuals against discrimination in acquiring membership and benefits. Social security objectives are also giving effect to the aims of the Constitution, healing injustices of the past, ensuring social justice, improving the quality of life, and freeing the potential of all citizens.<sup>50</sup>

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<sup>46</sup> In the *Certification* case supra note 6 at par 77, the court accepted the fact that the inclusion of socio-economic rights in the Bill of Rights may call upon the courts to make orders that have direct implications for budgetary matters. The court stated that there could be instances where it is called upon to order the extension of state benefits to a class of people who were previously not beneficiaries of such benefits. However, in the case of *Soobramoney* supra note 33 at par 29, the court held that it will be slow to interfere with rational decisions taken in good faith by the political organ. This is an indication of the court's reluctance to interfere with budgetary decisions of the executive. In the case of *TAC (2)* supra note 19 at paras 35 and 44, the court emphasised the fact that a purposive reading of the socio-economic rights in section 26 and 27 of the Constitution respectively, tells that those rights should not be interpreted to mean that everyone can demand a minimum core content, but that it is only required that the state must act reasonably in providing access to these rights on a progressive basis as required by subsections (2) of these rights. The reasonableness of government programmes was emphasised in the case of *Grootboom* supra note 19 at par 35. See also generally the discussion of this issue in Brand *Socio-economic Rights in South Africa* (ibid) at 9-10.

<sup>47</sup> Section 27(2) of the Constitution. See also The Taylor Committee Report op cit note 8 at 49.

<sup>48</sup> De Vos "Pious Wishes or Directly Enforceable Human Rights" op cit note 36 at 93-4; Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 35.

<sup>49</sup> See the case of *Grootboom* supra note 19 at par 42; see also Strydom EML, Le Roux PAK, Landman AA, Christianson MA, Dupper OC, Myburgh P, Barker FS, Garbers CJ, Basson AC, Dekker A and Esselaar *V Essential Social Security Law* 2006 2ed 131-132 (hereafter, Strydom *Essential Social Security Law*).

<sup>50</sup> See the preamble to the Constitution of the Republic of South Africa, 1996.

The right to have access to social security also protects and promotes an individual's right to human dignity,<sup>51</sup> which is also one of the founding values of the Constitution.<sup>52</sup>

In promoting values underpinning the rights in the Bill of Rights, the Constitutional Court held in the case of *Grootboom* that:<sup>53</sup>

“Those who do not have food, clothing or shelter are denied human dignity, freedom and equality. Giving people socio-economic rights will enable them to enjoy other constitutional rights enshrined in the Bill of Rights. Affording people these rights assist in achieving race and gender equality and will ensure that men and women equally achieve their full potential.”

In other words, social security rights are there to protect human dignity and to promote the freedom and equality of the people in a society. Without human dignity, a person is excluded from society.

The right to have access to social security is there to make sure that an individual is included in society through support measures, such as access to retirement funds and adequate benefits. Thus, social exclusion is prevented by giving people access to social security measures; the enjoyment of which maintains a person's dignity or restores the dignity that would have been lost due to factors such as poverty or lack of income.<sup>54</sup>

In this way, society is in “solidarity” to ensure the social protection of every member of the society.

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<sup>51</sup> The right to human dignity is entrenched in section 10 of the Constitution.

<sup>52</sup> Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, the achievement of equality, and advancement of human rights and freedoms, and non-racialism and non-sexism.

<sup>53</sup> See the case of *Grootboom* supra note 19 at par 23.

<sup>54</sup> Brand *Socio-economic Rights in South Africa* op cit note 41 at 235.

The White Paper for Social Welfare<sup>55</sup> describes the importance of “solidarity” or what is in isiZulu<sup>56</sup> called *Ubuntu*,<sup>57</sup> as follows:

“Each individual’s humanity is ideally expressed through his or her relationship with others and theirs in turn through the recognition of the individual’s humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and societal well-being.”

The respect for and promotion of the principle of *Ubuntu* can guarantee the success of a comprehensive social security system,<sup>58</sup> as proposed in the Taylor Committee Report.<sup>59</sup> Social security is seen as a means of reducing inequality and promoting human dignity. The principle of solidarity promotes the nature of sharing and the element of mutual support or interdependence. Social security systems are based on the principle of solidarity and *Ubuntu*, with the aim of providing support to those members of the society who are not able to support themselves and would as a result have their human dignity negatively affected.<sup>60</sup>

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<sup>55</sup> The White Paper for Social Welfare, General Notice 1108 Government Gazette 18166 of 8 August 1997 at item 24.

<sup>56</sup> IsiZulu is recognised in section 6 of the Constitution of the Republic of South as one of the official languages.

<sup>57</sup> *Ubuntu* means “human kindness”. The term *Ubuntu* is expressed in the isiZulu saying “*umuntu ngumuntu ngabantu*”, which means that “a person is a person through other people”. This concept was given direct application for the first time in *S v Makwanyane* 1995 (6) BCLR 665 (CC) (hereafter, *Makwanyane*). At par 308 of the judgment, the court stated as follows: “Generally, *Ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing its significance of group solidarity on survival issues so central to the survival of communities. While it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms, and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity....” See also generally on the concept of *Ubuntu*: *Afri-Forum and Another v Malema and Others* 2011 (12) BCLR 1289 at paras 18, 108 and 111; Metz T “Ubuntu as a moral theory and human rights in South Africa” (2011) Vol 11, No 2, *AHRLJ* at 532-559; Mokgoro Y “Ubuntu and the law in South Africa” (1998) *PER/PELJ* Vol 1, No 1 at 16-32; Cornell JD and Van Marle K “Exploring Ubuntu: Tentative Reflections” (2005) Vol 5, No 2, *AHRLJ* at 195-220; Bennet TW “Ubuntu: An African equity” (2011) *PER/PELJ* Vol 14, No 4 at 30-61; Scott CD “Beyond Racism: Ubuntu and the Other” *Skills@work, Theory and Practice* (2010) Vol 3 at 71-79; Le Granje L “Ubuntu as an Architectonic Capability” *Indilinga-African Journal of Indigenous Knowledge Systems* (2012) Vol 11(2) at 139-145; Dolamo R “Botho/Ubuntu: the Heart of African Ethics” *Scriptura* 112 (2013:1) at 1-10; Ngoenha SE “Ubuntu: New Model of Global Justice?” *Indilinga-African Journal of Indigenous Knowledge Systems* (2006) Vol 5(2) at 125-134; and Xulu M “Towards an Ubuntu Pedagogy through Cultural Expressions, Symbolism and Performance” (2010) *Skills@work, Theory and Practice* Vol 3 at 81-87.

<sup>58</sup> Brand *Socio-economic rights in South Africa* op cit note 41 at 235-236.

<sup>59</sup> The Taylor Committee Report op cit note 8 at 15-47.

<sup>60</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 603. According to Olivier et al (at 62), the connection between human dignity and equality is in accordance with the objectives of social

### 5.2.2 Enforcement of the right to social security

The state's duty to *respect, protect, promote, and fulfil* the right to have access to social security can be interpreted to mean that the courts can enforce social security rights and order state organs and private institutions to act positively with regard to this right.<sup>61</sup> The courts, tribunals, and forums<sup>62</sup> are also enjoined by the Constitution to promote the spirit, purport, and objects of the Bill of Rights when interpreting any legislation and when developing the common law.<sup>63</sup> As the supreme law of the country, the Constitution specifically grants the power to the courts to adjudicate on and review laws or conduct for constitutional consistency.<sup>64</sup> The courts have the power with regard to the Bill of Rights to grant appropriate relief to rectify violations of the Bill of Rights.<sup>65</sup> In this regard, the courts have not hesitated to enforce the supremacy of the Constitution in the area of social security, in circumstances where its principles have not been adhered to.<sup>66</sup> The courts also play a supervisory role. This role involves the courts giving orders; directing the legislative and executive branches of government to bring about reforms, defined in terms of their objectives; and retain supervisory jurisdiction over the implementation of these reforms.<sup>67</sup>

security rights, in that social security places more emphasis on the eradication of poverty and inequalities and on the protection of those who are most vulnerable.

<sup>61</sup> See the case of *Grootboom* supra note 19 at par 24.

<sup>62</sup> This would include the Office of the Pension Funds Adjudicator established in terms of Chapter VA of the Pension Funds Act of 1956.

<sup>63</sup> Section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objectives of the Bill of Rights. According to the court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) at par 30, section 39(2) issues an injunction to all the courts to interpret legislation in manner that will promote the spirit, purport, and objectives of the Bill of Rights.

<sup>64</sup> Section 172(1)(a) of the Constitution states that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, while section 165(1) gives the courts independency – except for the provisions of the Constitution.

<sup>65</sup> Section 38 of the Constitution.

<sup>66</sup> See *Certification* case, supra note 6 at par 78; and the case of *TAC (2)* supra note 19 at paras 98-101, 104, 106 and 113.

<sup>67</sup> See the cases of *Grootboom* supra note 19 at par 97; *TAC (2)* supra note 19 at par 129. However, the court has shown reluctance to interfere with executive decisions as it was held in the case of *Soobramoney* supra note 33 at par 29. In this case, the applicant, Mr Soobramoney, an unemployed diabetic who was in the final stages of chronic renal failure, launched an application with the Constitutional Court for an order to force the hospital to give him ongoing treatment. His life could only be prolonged by means of regular renal dialysis, but the hospital could not help him due to limited

In terms of section 38 of the Constitution, anyone listed under the section<sup>68</sup> has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief – including a declaration of rights.

Appropriate relief was described in *Fose v Minister of Safety and Security*<sup>69</sup> to mean:

“... relief that is required to protect and enforce the Constitution. The relief may take the form of declaration of rights, a mandamus or such other relief as may be required to ensure that constitutional rights are protected and enforced, but this will depend on the circumstances of each particular case. The courts may even have to create new remedies in ensuring that rights are protected and enforced.”

The courts of law are empowered by section 38 of the Constitution to intervene and assist social security beneficiaries where statutory entitlements to social security rights have not been recognised, or where administrative law principles of constitutional prerequisites have not been adhered to. For example, the courts have already ruled against the Provincial Departments of Social Development in instances where the grants were unilaterally suspended or stopped,<sup>70</sup> and where there have been unwarranted delays in considering applications for social grants.<sup>71</sup>

The Constitution also gives everyone the right to just administrative action<sup>72</sup> and the right of access to courts.<sup>73</sup> Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

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facilities for kidney dialysis. His application was dismissed and the court held that indeed the obligations imposed upon the state by sections 26 and 27 of the Constitution with regard to access to adequate housing, health care, social security, etc. are dependent upon the availability of resources (at par 11). The court held with regard to whether it could interfere with executive decisions that “a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters” (at par 29).

<sup>68</sup> In terms of section 38(a)-(e) of the Constitution, these include anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interests of its members.

<sup>69</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at par 19.

<sup>70</sup> See generally, *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* 1998 1 All SA 525 (E); *Ngxuzo* supra note 37; and *Bushula & Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another* 2000 7 BCLR 728 (E) (hereafter, *Bushula*).

<sup>71</sup> See the cases of *Mbanga*; and *Mahambehlala*, respectively supra note 37.

<sup>72</sup> Section 33 of the Constitution.

The function of this right was held in *President of the Republic of South Africa v South African Rugby Football Union*<sup>74</sup> as being to regulate the conduct of the public administration and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. Decisions made by the executive and other functionaries in relation to social security rights and benefits must be rational and should not be arbitrary.<sup>75</sup>

The Promotion of Administrative Justice Act of 2000<sup>76</sup> (PAJA) was enacted to give effect to the provisions of section 33 of the Constitution. This Act gives expression to the requirement of section 33(3) that national legislation be enacted to set out details of the broad framework of administrative law rights enshrined in the Bill of Rights. The Act lays down guidelines and benchmarks for administrative action and decisions, and requires a fair procedure to be followed in the event of administrative action materially and adversely affecting the rights or legitimate expectations of any person.<sup>77</sup> The Promotion of Access to Information Act of 2000<sup>78</sup> also plays an important role in assisting people in enforcing their constitutional rights.

People who approach different forums with complaints regarding government's interference with their right to have access to social security can also invoke section 32 of the Constitution; which gives everyone the right of access to any information held by the state or by another person which is required for the exercise or protection of any rights.

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<sup>73</sup> Section 34.

<sup>74</sup> *President of the Republic of South Africa v South African Rugby Football Union* 1999 10 BCLR 1059 (CC) at 1117E-F.

<sup>75</sup> See in this regard, *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte Application of the President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) at par 89.

<sup>76</sup> The Promotion of Administrative Justice Act 3 of 2000 (PAJA).

<sup>77</sup> Section 3(1) of PAJA.

<sup>78</sup> The Promotion of Access to Information Act, 2 of 2000 (PAIA).

### **5.2.3 International obligations**

The birth of democracy and the introduction of the final Constitution<sup>79</sup> in South Africa have not only resurrected this country's ties with the international community, but have also confirmed South Africa's commitment to comply with international standards. The Constitution provides that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law and may consider foreign law.<sup>80</sup> It also provides that when interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>81</sup> The Constitution further provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>82</sup>

South Africa has already indicated its intention to be party to and to be legally bound by the obligations imposed by international agreements by ratifying some of the international conventions pertaining to social security.<sup>83</sup>

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<sup>79</sup> South Africa had an interim Constitution in 1993 and the final (new) Constitution was introduced in 1996. The interim Constitution was formally adopted as an Act for the pre-democratic, tri-cameral parliament, ensuring the continuity of the South African state. After the 1994 elections, the new Parliament and Government of National Unity were established and began to function in accordance with the interim Constitution, which came into force on 27 April 1994. The new and final Constitution was drafted and adopted by an elected Constitutional Assembly (parliament elected in 1994) and was adopted on 8 May 1996, but was only signed into law by President Nelson Mandela on 4 February 1997 – see De Waal et al *The Bill of Rights Handbook* op cit note 34 at 5.

<sup>80</sup> Section 39(1) of the Constitution. The following decisions are examples of cases where the South African Constitutional Court considered the binding effect of international law: *Grootboom* case supra note 19; *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC); and *Bernstein v Bester* 1996 2 SA 751 (CC).

<sup>81</sup> Section 233 of the Constitution.

<sup>82</sup> Section 232 of the Constitution.

<sup>83</sup> The international treaties applicable to social security rights that have been ratified by South Africa include the African Charter on Human and People's Rights, adopted on 27 June 1981 and entered into force on 21 October 1986 – South Africa acceded on 9 July 1996; the United Nations Convention on the Rights of the Child, adopted on 20 November 1989, entered into force on 2 September 1990, South Africa signed the document on 29 January 1993 and ratified it on December 15, 1995; and the Convention on the Elimination of All Forms of Discrimination Against Women, entered into force on 18 December 1979 and South Africa signed the document on 29 January 1993 and ratified it on 16 December 1995. South Africa signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 October 1994.

The following factors are among the most important in the relationship between social security law in South Africa and international law.<sup>84</sup>

- International instruments contain social security provisions; and
- Most international social security provisions are structured as standards against which national legislation and policies are measured.

In this regard, international instruments, especially the International Labour Organisation's Conventions and Recommendations on social security, together with the systems in other countries, provide a measure against which South Africa's social and retirement security systems may be compared. The benchmark may include, among others, the following:<sup>85</sup>

- State responsibility;
- Types of benefits and protection offered;
- Level of protection; and
- Equality between men and women.

Even in those instances where South Africa has not yet signed or ratified certain treaties, the courts of law and other bodies entrusted with the duty of interpreting the fundamental rights will be compelled by section 39(1) of the Constitution to consider international law when interpreting the Bill of Rights. The courts may also consider foreign law.<sup>86</sup> International supervisory bodies also play an important role in assisting countries such as South Africa to implement international socio-economic rights; including the rights relating to retirement security.<sup>87</sup>

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<sup>84</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 528-533.

<sup>85</sup> Ibid at 623.

<sup>86</sup> In the *Makwanyane* supra note 57 at par 35, the Constitutional Court stated that public international law includes binding as well as non-binding law. South African courts are therefore not only confined to international instruments that are binding.

<sup>87</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 649.

### **5.3 SOUTH AFRICA'S RETIREMENT SECURITY FRAMEWORK**

South Africa's retirement security system does not have a public or national retirement fund. The absence of a public fund has unfortunately created a gap in the system as those workers whose employers have not established retirement funds for them, the self-employed, and those employed in the informal sector of the economy are excluded by the system, which accommodates mainly those in the formal sector of the economy. The situation is that not every worker in this country is covered by the system, which means that access to social security as guaranteed by section 27 of the Constitution is not afforded to everyone. This is a point of concern considering the fact that the majority of people who are not covered will rely on the state for support. The Mouton Committee<sup>88</sup> rejected a contributory national scheme for reasons that included the following:

- It would have mainly catered only for people in formal employment;
- It would not have been easy to make sure that contributions are paid;
- There would be a chance for evade paying contributions; and
- The benefits would have been very low – forcing people to rely on the state old-age pension.<sup>89</sup>

However, the National Treasury of South Africa has proposed the introduction of a National Savings Fund (NSF) in its First and Second Discussion Papers for Social Security and Retirement Fund Reform.<sup>90</sup> The National Savings Fund is aimed at extending coverage to those who are not presently covered. This will see the introduction of mandatory participation in the national social security system, up to agreed earnings, and providing basic retirement, unemployment, and death and disability benefits.<sup>91</sup>

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<sup>88</sup> The Mouton Committee Report op cit note 8 at 568-569.

<sup>89</sup> Idem.

<sup>90</sup> South African Social Security and Retirement Reform: First Discussion Paper (op cit note 8) and South African Social Security and Retirement Reform: Second Discussion Papers (op cit note 8)).

<sup>91</sup> First Discussion Paper (ibid) at 2 and Second Discussion Paper (ibid) at 3.

The system is made up of the non-contributory state old-age pension, under pillar 1; contributory-occupational retirement schemes, under pillar 2 and privately arranged savings, under pillar 3; and in certain instances other forms of informal support. The system separates poverty relief from retirement savings made in occupational retirement funds by those who are employed, and private savings made by people using available savings vehicles offered by different financial institutions.<sup>92</sup> These components are discussed below.

## **5.4 NON-CONTRIBUTORY STATE PENSIONS**

### **5.4.1 Description**

Non-contributory social assistance is provided for under the Social Assistance Act of 2004,<sup>93</sup> which repealed the old Social Assistance Act of 1992.<sup>94</sup> It is regulated by the Regulations promulgated under the Act.<sup>95</sup> The Social Assistance Act of 2004 gives effect to the provisions of section 27(1)(c) of the Constitution, which extends social assistance to those who are unable to support themselves and their dependants. Social assistance measures are a form of social protection in terms of which vulnerable individuals or groups receive need-based assistance from public funds.<sup>96</sup>

In South Africa, state-provided old-age pension serves as the primary source of income for the majority of the aged population. It was estimated in 2002 that about

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<sup>92</sup> South African Social Security and Retirement Reform: First Discussion Paper op cit note 8 at 12.

<sup>93</sup> Act 13 of 2004.

<sup>94</sup> Act 24 of 1992 rationalised the previously fragmented social assistance system in South Africa. It created a single social assistance delivery system that does not discriminate against people on the basis of colour or race and a system that protects and promotes human dignity.

<sup>95</sup> Section 10 of the Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected. It was held in the case of *Grootboom* supra note 19 at par 44 that society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom, and equality. This follows from section 1(a) of the Constitution, which provides that the Republic of South Africa is one, sovereign, democratic state founded on human dignity, the achievement of equality, and the advancement of human rights and freedom.

<sup>96</sup> Brand *Socio-economic Rights in South Africa* op cit note 41 at 211.

68% of old people relied on the state old-age pension.<sup>97</sup> In the First Discussion Paper, the number was estimated to be over 70% of people in old-age.<sup>98</sup>

The number of people eligible for the state old-age pension has seen an increase after the announcement by the Minister of Finance during his 2008-2009 Budget Speech that there would be a gradual decrease of men's qualifying age from 65 to 60 to be the same as that of women. Indeed, since April 2012 both men and women qualify for the state old-age pension at the age of 60 years.<sup>99</sup>

A further dramatic increase was brought by the ruling of the Constitutional Court in the *Christian Roberts*<sup>100</sup> case, where the constitutionality of the provisions of section 10 of the Social Assistance Act of 2004 and Regulation 2(2) was challenged. The case was about the constitutionality of the position where men received the pension at the age of 65 and women at the age of 60. The court found the provisions of the Act together with the said Regulation to be inconsistent with section 9 and 27 of the Constitution respectively, and therefore unconstitutional and invalid. However, the applicants in this case could not receive the relief they wanted because according to the court by the time any order of invalidity would be confirmed the applicants would be 65 years old and would therefore be eligible to receive the state pension. The court could not grant the applicants a retrospective relief as such a relief or order would have given rise to budgetary concerns, the matter which would have required both the applicants and respondents to argue before the court.

Thus the court had to order a prospective implementation of an order of constitutional invalidity. The order included the rewriting of definitions in the Act and Regulation to replace the 65-year age limit of men with a 60-year limit.<sup>101</sup>

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<sup>97</sup> United Nations (UN) National Report on the Status of Older People: Report on the Second World Assembly on Aging (1994-2002), Madrid, Spain (April 2002) at 20 (hereafter, National Report on the Status of Older People).

<sup>98</sup> South Africa's Retirement Fund Reform: First Discussion Paper op cit note 8 at par 2.1.

<sup>99</sup> National Report on the Status of Older People op cit note 97 at 20.

<sup>100</sup> *Christian Roberts v The Minister of Social Development* (Case No: 32838/05) (TPD), 17 March 2010 (unreported).

<sup>101</sup> Supra at paras 85-92.

To qualify men for the state old-age pension at the age of 65 and women at the age of 60 was unconstitutional as it was against the provisions of the “equality clause” in section 9 of the Constitution.<sup>102</sup>

Section 9(1) of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law; while section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, colour, and age. The Constitution promotes equality before the law and equal treatment,<sup>103</sup> and this could not be achieved with men having to wait five years longer than women before they could receive the pension. It was also important to correct the anomaly as the majority of men below the age of 65 were denied what could be their only form of income.<sup>104</sup> Presently, the social assistance component provides for the partially universal state old-age pension which is means tested. Thus not all older persons above the age of 60 are eligible to receive the social pension.<sup>105</sup>

A person is eligible for the state old-age pension if, in addition to satisfying the age requirement, he or she meets the following requirements:<sup>106</sup>

- Is a South African citizen or is permanently resident in the Republic;<sup>107</sup>
- Lives in South Africa;

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<sup>102</sup> Supra at par 85. The Constitutional Court ruled in this case that the differentiation between men and women for purposes of qualifying for the social assistance pension was unconstitutional as it could not be justified.

<sup>103</sup> Section 9(1) of the Constitution.

<sup>104</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 235.

<sup>105</sup> Section 5(2)(b) of the Social Assistance Act of 2004. See generally on the means-test applied in South Africa's social security grants, Van der Berg S “The Means Test for Social Assistance Grants and its Recent Evolution” *Social Work* (2001) 37(2) 125 (hereafter, Van der Berg “The Means Test for Social Grants”). In this article, Van der Berg explains how the means-test works and describes the problems/challenges with the application of the means-test during the apartheid era, and since 1996 when the apartheid means-test was replaced by the new system. Having considered all the problems characterising the means-test in general, he still maintains that it should not be abolished as extending cover on a universal basis would be distributionally regressive as it would also bring about a reduction of the progressivity of the old-age pension (at 138).

<sup>106</sup> Regulation 2 of the Regulations in terms of the Social Security Act, 13 of 2004.

<sup>107</sup> It was decided in the *Khosa* case supra note 39 at par 98 that people with permanent resident status should be treated the same way as citizens of the country for purposes of qualifying for social security benefits as their exclusion is inconsistent with the Constitution.

- Has a valid identity document;
- Is not a beneficiary of another social grant;
- Passes the means-test; and
- Is not maintained in any one of the following state institutions or institutions funded by the state (e.g. a prison, state psychiatric hospital, state home for older persons, care treatment centre, or a treatment centre for drug dependants).

A means-test is used to target those who deserve to receive the pension. The future of the means test is still being debated as part of the overall retirement and social security reform, with a strong possibility of the it being removed, allowing all South African residents who qualify to receive the pension to receive it when they reach the set age. The means-test could be removed, for among other reasons, to simplify the administration of the pension and to prevent the exclusion of vulnerable people.<sup>108</sup> It is submitted that the means-test should not be removed as there is no guarantee that its removal will encourage people who are saving for retirement to continue to do so. In fact, the opposite is likely to happen as removing the means-test might just encourage more dependency on the state. This will increase government's spending on social pensions, which will also bring about an increase on the income tax paid by those who are employed and paying taxes. On the other hand, removing the means-test can go a long way in ensuring that more people who are vulnerable to the risk of poverty receive protection in the form of a social pension. This will be a bold step by government as it will move the state old-age pension towards universal coverage. This might also bring about an increase in the overall coverage within both the formal and informal sectors of the economy.<sup>109</sup> The means-test should not be done away with as it is there to ensure that only the people who are needy receive support. It

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<sup>108</sup> National Treasury, Republic of South Africa Budget Review 2013, 27 February 2013 (Chapter 6: Social Security and Social Wage) at 85, accessed from <http://www.treasury.gov.za/documents/national%20budget/2013/review/FullReview.pdf>, last visited 21 May 2015.

<sup>109</sup> Moodley-Isaac N "More People to get Grants after Means-test is Adjusted" May 31, 2008 *Personal Finance*. The Minister of Finance has announced in his 2013 Budget Speech that the means-test will be done away with as from 2016, accessed from <http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>, last visited on 21 May 2015. See also in this regard Van der Berg "The Means-Test for Social Grants" op cit note 105, on the problems relating to the means-test and its application. Van der Berg is not in support of total abolition of the means-test (at 138).

should rather be compulsory by law for all the people who are in a position to participate in retirement schemes to do so.

Through its reforms that are currently underway the National Treasury intends to, among other things, turn the state old-age pension into a universal grant, and to link social grants increases to a specified index.<sup>110</sup> The state old-age pension is the largest social assistance grant in South Africa, and the pension plays a pivotal role in poverty alleviation for the majority of people who receive it. The pension brings substantial volumes of cash into poor households and communities.<sup>111</sup> The state old-age pension is used to support the elderly, the unemployed, children and grandchildren whose parents are unemployed or have died, and other members of the household.<sup>112</sup>

The pension has proven to play a very important role in improving people's lives as it has become a form of income for many families who would have otherwise been without any income. It should be noted, however, that the main objective of the pension is poverty relief, and not the provision of income after retirement. Therefore it is essentially redistributive in nature.<sup>113</sup> It is paid to qualifying persons as of legal right,<sup>114</sup> and it is not related to the beneficiary's past earnings. Whether the person

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<sup>110</sup> Outline of a Social Security and Retirement Savings Framework: Discussion Document for the Inter-Departmental Task Team on Social Security and Retirement Reform at 2 [Updated 29 November 2007, incorporating discussions from Basic Benefit Design Workshops on 8 November and 20 November 2007] available on <http://www.treasury.gov.za/publications/other/ssrr/Session%20Three%20Papers/Outline%20Soc%20Sec%20&%20Retirement%20Savings%20Framework%20%2029%20Nov%202007.pdf>, last visited 21 May 2015 (hereafter, Inter-Departmental Task Team "Outline of a Social Security and Retirement Savings Framework").

<sup>111</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 244-245.

<sup>112</sup> Samson M "The Challenge of Ageing for Social Security in South Africa" at 9 (the paper was presented at African Conference on Ageing, Johannesburg, 2004), accessed from [www.eldis.org/go/country-profiles&id=18020&type=Document](http://www.eldis.org/go/country-profiles&id=18020&type=Document), last visited on 21 May 2015; Devereux S "Future Uncertain: Social Pensions in Southern Africa" 31 May, 2002 available on <http://www.eldis.org/id21ext/insights42art7.html>, last visited on 21 May 2015; and Barrientos A (University of Manchester, UK), Lloyd-Sherlock P (School of Development Studies, University of East Anglia, U.K.) "Non-Contributory Pensions and Social Protection" September 2002 at 9, accessed from <http://eldis.org/vfile/upload/1/document/0708/doc22073.pdf>, last visited on 21 May 2015.

<sup>113</sup> The Smith Committee Report op cit note 8 at 31.

<sup>114</sup> Section 27(1)(c) of the Constitution gives the state the duty to provide social assistance to everyone who is unable to support himself or herself or his or her family. The categories of people who qualify for social assistance are stipulated in section 4 of the Social Assistance Act, 13 of 2004,

was employed or not is not important. In 2015 the amount paid for the pension was R1 410 per month.<sup>115</sup> The payment of the grant may be reviewed by the South African Social Security Agency (SASSA) at any time, but with prior notification three months before the review takes place.

There are a number of factors which can lead to the suspension of a pension, provided the correct procedure was followed;<sup>116</sup> which include the following:<sup>117</sup>

- If the beneficiary's circumstances change;
- The results of a review;
- The beneficiary fails to cooperate when the pension is reviewed;<sup>118</sup>
- The beneficiary has committed fraud or misrepresentation;
- The grant is abused;<sup>119</sup> and
- There was a mistake when the grant was approved.

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and include children under the age of 18, foster children, care-dependent children, disabled people, war veterans, and old people.

<sup>115</sup> The amount of R1 410 is payable from 1 April 2015. The Minister of Finance has announced in his 2015 Budget Speech an increase from R1 350 to R1 410 per month as from 1 April 2015 (see 2015 Budget Speech at <http://www.treasury.gov.za/documents/national%20budget/2015/speech/speech.pdf>, last visited 21 May 2015).

<sup>116</sup> Section 39(1) of the Social Assistance Act of 2004 and Regulation 31 of the Regulations in terms of the Act. In the case of *Maluleke* supra note 37 at 413, it was held that the suspension of the payment of the applicant's old-age grant was unlawful and invalid after the government of the Northern Province had decided to cancel the old-age grants of all the people whose records did not comply with the relevant statutory requirements. The court found that the only section (section 6 of the Social Pensions Act, 7 of 1976, (of Gazankulu)) which government could have relied on, made no provision for the suspension of payment of old-age pensions in circumstances such as those in this case. Also see generally a critical analysis of the *Maluleke* decision by Plasket C "Standing, Welfare Rights and Administrative Justice: *Maluleke v MEC, Health and Welfare, Northern Province*" SALJ Vol 117 (4) 2000 at 647-661. In the case of *Ngxuza* supra note 37 at paras 7-8, it was stated that suspensions of payments of social grants were unlawful because fair procedures were not followed before the decisions to suspend the social grants. In the case of *Bushula* supra note 70 at 734, it was held that the decision to cancel a disability grant must be set aside because the department failed to give the first applicant proper notice of the intention to cancel the grant and the applicant was not given a hearing of any kind before the decision to cancel his disability grant was taken either.

<sup>117</sup> See generally, Regulations 27 and 29 of the Regulations to the Social Assistance Act, 13 of 2004.

<sup>118</sup> In that case the beneficiary will have to apply for restoration of the grant. See Regulation 27(4) of Regulations to the Social Assistance Act, 13 of 2004.

<sup>119</sup> In terms of section 19 of the Social Assistance Act, 13 of 2004, the Social Security Agency can suspend the payment of a social grant if, after an investigation, it is found that an abuse of a grant has taken place.

The pension will also stop if the beneficiary dies, is admitted to a state institution, does not claim the pension for three consecutive months, or if the beneficiary is absent from the Republic of South Africa.<sup>120</sup>

Even though the state old-age pension plays a vital role in improving the lives of individuals, families, and communities, it is not without criticisms.

The criticisms include the fact that targeting creates permanent dependency as people might strive to remain beneficiaries of the social assistance programmes instead of saving for retirement while still working.<sup>121</sup> The system also offers qualifying elderly people a war veterans' grant. To qualify for a war veterans grant, a person must have fought in the First World War, Second World War, the Zulu War, or the Korean War, and not be able to support himself or herself.<sup>122</sup>

The applicant must be a South African citizen or permanent resident, live in South Africa, be 60 years old or older, must not receive any other social grant, must not be cared for in a state institution, and must satisfy the means-test.<sup>123</sup> The pension can be suspended or stopped under the same circumstances as the state old-age pension.<sup>124</sup>

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<sup>120</sup> See section 16 of the Social Assistance Act of 2004 and Regulation 37(1) of the Regulations to the Act.

<sup>121</sup> Pauw K and Mncube L "Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints" (International Poverty Centre Country Study (Number 8): Cash Transfers Research Programme, Development Policy Research Unit (DPRU), University of Cape Town), July 2007 at 3-5, accessed from <http://www.crin.org/docs/IPCCountryStudy8.pdf>, last visited on 21 May 2015.

<sup>122</sup> The First World War, also known as the Great War, began on 28 July 1914 and ended on 11 November 1918; the Second World War (WWII) started in 1939 and ended in 1945; the Zulu War, which is also known as the Anglo-Zulu War, started in January 1879 and ended in 1896; and the Korean War was fought from 25 June 1950 to 27 July 1953.

<sup>123</sup> The War Veterans Grant is paid in terms of section 11 of the Social Assistance Act, 2004. The Minister of Finance announced in his 2015 Budget Speech an increase from R1 350 per month to R1 410.

<sup>124</sup> See Regulation 27(1) of the Regulations to the Social Assistance Act of 2004, which provides that the Agency must, within 90 days of the date on which a social grant will be reviewed, inform the beneficiary in writing of the date of such review.

#### 5.4.2 Administration and regulation

Social grants are administered and paid by the South African Social Security Agency, which started functioning in April 2005.<sup>125</sup> The Agency was set up by government to eradicate fraud and to improve the administration of social grants. It has taken over the administration of social grants from national and provincial government.<sup>126</sup>

The Bill of Rights applies to the Agency as an organ of state<sup>127</sup> in terms of section 8(1) of the Constitution. The Agency has the duty to ensure that appropriate social assistance is afforded to all who qualify for it.<sup>128</sup> On the other hand, the Agency is compelled by section 7(2) of the Constitution to *respect, protect, promote, and fulfil* the rights in the Bill of Rights; including everyone's right to have access to social security.

The Agency must not unlawfully or unreasonably interfere with everyone's right of access to social security. For example, the Agency may not stop or suspend the payment of a social grant without valid reasons and without following proper procedures and it may also not unreasonably delay the payment of a social grant or the approval of an application for a social grant. Thus the state shall have failed in its constitutional duty to *respect, protect, promote, and fulfil* the beneficiary's right of access to social security if the Agency does not consider an application for the state old-age pension within a reasonable time, if it fails to pay a pension, and if it unlawfully terminates payment of a pension.

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<sup>125</sup> The South African Social Security Agency (SASSA) was introduced by Chapter 2 of the Social Security Agency Act of 2004.

<sup>126</sup> The functions of the South African Social Security Agency are listed under section 4 of the Social Security Agency Act, 13 of 2004. Previously, that is after the introduction of the final Constitution, the provision of social assistance in this country was the responsibility of both the national and provincial departments, and this brought about many functional and regulatory problems. The system was too fragmented as there were various departments involved in the provision and administration of the social security system. As a result, the system could not be coordinated well.

<sup>127</sup> Section 239 of the Constitution.

<sup>128</sup> Olivier MP, Okpalupa MC, Smit N, Thompson M, D Toit AM, Greyling E, Van Rensburg J, Liffmann R, Ogunronbi SO, and Porter I *Social Security: General Principles* 1999 at 499 (hereafter, Olivier et al *Social Security: General Principles*).

In *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial*,<sup>129</sup> Van Rensburg J stated the following about a disability grant (and in principle, any social grant):

“A disability grant, once granted, confers upon the beneficiary the right to receive that grant until it is lawfully terminated in terms of the Act and the regulations. In my judgement, such right cannot be validly terminated without the rules of natural justice and the right to fair administrative action, including the right to be heard, being observed.”<sup>130</sup>

A person who is aggrieved by a decision of the Agency must lodge an appeal in writing to the Minister within 90 days of gaining knowledge of such a decision, setting out the grounds on which the appeal is based, and submit a copy thereof to the Agency. The Minister may appoint a person or persons to constitute a tribunal to consider that appeal. The tribunal must dispose of the appeal within 30 days, unless the Minister directs otherwise. The Minister must communicate the outcome of the appeal in writing and in the official language of preference of the beneficiary within ten days of the decision of the tribunal.<sup>131</sup> The courts of law also have the power to enforce constitutional rights, as well as constitutional obligations imposed on the state or state organs, including the South African Social Security Agency.<sup>132</sup>

The court system is, however, not the best dispute resolution mechanism for social security disputes, and in particular, for matters relating to social grants – taking into account the type or category of people who mostly rely on social assistance grants as their only form of income. Most of these people are poor, vulnerable, illiterate, and have a very limited or no knowledge of the law and court proceedings. The court processes can take time before the dispute is resolved and it costs a lot of money, which the applicants of social assistance grants do not have, which is one of the reasons why they are applying for social assistance. The court proceedings are also

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<sup>129</sup> See the case of *Bushula* supra note 70.

<sup>130</sup> Supra at 854.

<sup>131</sup> Section 18(1-7) of the Social Assistance Act, 13 of 2004.

<sup>132</sup> Sections 27(2) (the right to have access to social security) and 26(2) (the right to have access to adequate housing) of the Constitution give the state certain duties in terms of the realisation of rights in these sections. In the *Certification* case supra note 6, the court held that socio-economic rights are to some extent justiciable (at paras 76-77). The Constitutional Court revisited the issue of socio-economic rights in the case of *Grootboom* supra note 19 (at par 20), where the decision in the *Certification* case (supra note 6) was reaffirmed. In the case of *TAC (2)* supra note 19 at par 99, the court held that the court should not hesitate to say so if the state fails in its constitutional obligations.

adversarial in nature, which is not really advantageous to grant applicants who are distressed by the socio-economic circumstances they find themselves in. People who are in urgent need of social assistance cannot wait for long periods for their applications to be approved and therefore need a dispute resolution mechanism that is less complicated and which will provide a quicker solution to their problems. It is important therefore to have a specialised body which will handle all social security-related complaints. This body must be easily accessible, with an informal and flexible approach to dispute resolution, and its services must be offered for free.<sup>133</sup>

The duty of the Social Security Agency to *respect, protect, promote, and fulfil* the right to have access to social security obliges the Agency to also facilitate, rather than obstruct, access to social security.<sup>134</sup> The Agency should not arbitrarily stop, delay, or deny qualifying elderly people access to the state old-age pension. It may also not defend legitimate claims for payments of social grants brought against it in the courts of law in order to avoid paying the grants to qualifying beneficiaries.<sup>135</sup>

A specialised dispute resolution forum will thus ensure that qualifying people receive help as soon and as efficiently as possible.

## **5.5 CONTRIBUTORY OCCUPATIONAL RETIREMENT SCHEMES**

### **5.5.1 Description**

The contributory occupational retirement schemes are discussed in more detail in Chapter 6 below.<sup>136</sup> Therefore, only an overview of the system is given in this chapter.

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<sup>133</sup> See generally, Nyenti MAT “Dispute Resolution in the South African Social Security System: The Need for more Appropriate Approaches” *Obiter* 2012 at 27-46 (hereafter, Nyenti “Dispute Resolution in the South African Social Security System”).

<sup>134</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 78.

<sup>135</sup> See for example *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC); and *Ntame v MEC Department of Social Development and Two Similar Cases* [2005] 9 BPLR 762 (SE).

<sup>136</sup> See Ch 6.

These schemes<sup>137</sup> are generally established by employers for their employees. An occupational retirement fund simply refers to a fund which has been created specifically for employees or workers.<sup>138</sup> They are regulated by the state using an institution called the Financial Services Board (FSB), through various pieces of legislation,<sup>139</sup> with the main one being the Pension Funds Act 24 of 1956, which has in recent times gone through a series of amendments. Occupational retirement funds include those established by private employers, the sector or industry specific funds,<sup>140</sup> and a fund for government employees.<sup>141</sup>

These funds<sup>142</sup> take the form of social insurance schemes. Both employers and employees contribute towards the fund in terms of the fund rules. Only those who contribute are eligible to receive the benefits offered by the funds. The means-test that applies with respect to the state old-age pension does not apply with regard to retirement fund benefits,<sup>143</sup> as a person is entitled to benefits by contributing to the fund. The benefits are also available to the members' dependants in certain circumstances.<sup>144</sup>

Membership of the fund becomes one of the conditions of employment for all employees who are eligible to join – including the new employees once the employer establishes a fund.<sup>145</sup> However, it is by law still not compulsory for employers to establish pension schemes for their employees except in instances where the Minister has issued a sectoral determination for a specific sector in that regard.

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<sup>137</sup> Occupational retirement funds (for example, their nature and benefits they provide) are discussed in more detail Ch 6.

<sup>138</sup> Sephton B, Cooper DI, and Thompson C *A Guide to Pension and Provident Funds Legal and Policy Considerations* 1990 (Glossary of Terms Used) at 5 (hereafter, Sephton et al *A Guide to Pension and Provident Funds*).

<sup>139</sup> See in this regard par 6.3 in Ch 6.

<sup>140</sup> See par 6.2 in Ch 6.

<sup>141</sup> See par 6.4.6.3 in Ch 6.

<sup>142</sup> Occupational pensions are discussed in more detail in Ch 6.

<sup>143</sup> Van der Berg S "South African Social Security under Apartheid and Beyond" Vol 14, No 4, Dec 1997 *Development Southern Africa* at 480-491 (hereafter, Van der Berg "South African Social Security under Apartheid and Beyond").

<sup>144</sup> Strydom et al *Essential Social Security Law* op cit note 49 at 10.

<sup>145</sup> Dewar N, De Kock A, Kruger N, Roper R *The Practical Guide to Retirement Funds and Retirement Planning* (2005-2006) at 41 (hereafter, Dewar *The Practical Guide to Retirement Funds and Retirement Planning*).

Examples of such determinations are: the Sectoral Determination 2: Civil Engineering Sector: 12 March of 2001 (as amended) where in item 20 the employer is duty-bound to establish a retirement fund for its employees and also for both the employer and employees to contribute equally into the fund; Sectoral Determination 6: Private Security Sector: 30 March 2001 (as amended), which provides for the establishment of the Private Security Sector Provident Fund and for the compulsory participation of employers and employees in the fund. The benefits that accrue by reason of membership of a particular fund are determined by the rules of that fund.<sup>146</sup> These funds are available to those who are employed in the formal sector of the economy to the exclusion of the majority of people who work in the informal sector.<sup>147</sup>

During the period of employment, people make contributions into the fund; the benefits of which will serve as income when they are no longer working as a result of old-age.<sup>148</sup> However, the fact that only those who are employed in the formal sector are covered means there are many other people who are without cover. This means fewer people are covered and that many people who are excluded will have to rely on state pension. It therefore remains a great challenge for South Africa to come up with ways in which cover can be extended to those who are presently excluded. Different types of retirement funds and benefits provided by these funds are discussed in Chapter 6 below.<sup>149</sup>

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<sup>146</sup> *Idem.*

<sup>147</sup> Outline of a Social Security and Retirement Savings Framework: Discussion Document for the Inter-departmental Task Team on Social Security and Retirement Reform op cit note 110 at 2. In *South Africa's Retirement Fund Reform: First Discussion Paper* (op cit note 8 at 5), the Financial Services Board estimates coverage of employees in this sector to be 60%, which is comparatively high considering the fact that participation is not yet compulsory in this country. This reflects the extent to which membership of occupational funds is accepted as an obligatory condition of employment.

<sup>148</sup> This view has been supported by the following Committees: The Smith Committee Report op cit note 8 at 32; The Mouton Committee Report op cit note 8 at 17-22; The Taylor Committee Report op cit note 8 at 94.

<sup>149</sup> Discussed under par 6.4.

### **5.5.2 Administration and regulation**

The Pension Funds Act of 1956 establishes ground rules for the registration and proper administration<sup>150</sup> of retirement funds. Every fund must have its own rules fashioned according to the nature of the fund and the needs of the members of that fund. The fund rules are very important for the operation of the fund,<sup>151</sup> and the fund must be administered in terms of the rules,<sup>152</sup> applicable legislation, and common law principles. Fund rules are regarded as the constitution of the fund.<sup>153</sup>

In terms of Regulation 30 of Regulations to the Pension Funds Act of 1956, the rules must contain, among others, eligibility conditions, the payment and calculation of contributions, the nature and extent of benefits, rule amendments, dispute resolution, unclaimed benefits, and the appointment of trustees.<sup>154</sup> The rules of the fund are binding on the fund and members, shareholders, officers, and on any person who claims under the rules or whose claim is derived from a person so claiming.<sup>155</sup> The rules must be consistent with the provisions of the Pension Funds Act.<sup>156</sup> The rules of the fund must be considered in the context of an employment relationship and it is the responsibility of the employer to ensure that the fund rules are not structured in a manner that would amount to unfair labour practice in terms of section 186(2) of the

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<sup>150</sup> These roles are covered in Chapters II and III of the Pension Funds Act of 1956.

<sup>151</sup> Section 13 of the Pension Funds Act provides that fund rules are binding on fund members, beneficiaries, board members, and principal officers.

<sup>152</sup> See generally Pension Funds Circular PF96.

<sup>153</sup> In terms of section 13 of the Pension Funds Act, 24 of 1956, fund rules are binding on the fund and members, shareholders, officers, and on any person who claims under the rules or whose claim is derived from a person so claiming. It was confirmed in *Mostert NO v Old Mutual Life Assurance Company (South Africa) Ltd* [2001] 8 BPLR 2307 (PFA) at par 30, that the fund rules amount to the constitution of the fund. See also *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 78D-E, where the court stated that the fund rules were the fund's constitution as that was the document by which the fund was constituted. It was also stated in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at par 28 (hereafter, *Tek Corporation*) that the trustees may not do what they are not empowered to do by the fund rules. See also generally *Mgabisa v Central Retirement Annuity Fund & Another* [2005] 7 BPLR 636 (PFA) at par 10; *Mahlathi v Metropolitan Preservation Provident Fund* [2005] 6 BPLR 498 (PFA) at par 8; and *Holmes v Morris Crane Aid Pension Fund* [2005] 4 BPLR 309 (PFA) at par 11.

<sup>154</sup> Regulation 30 of the Regulations to the Pension Funds Act of 1956.

<sup>155</sup> Section 13.

<sup>156</sup> Regulation 30(2) of the Regulations to the Pension Funds Act of 1956.

Labour Relations Act of 1995<sup>157</sup> and in contravention of section 23(1) of the Constitution, respectively.<sup>158</sup>

All fund rules must be approved by the Registrar of Pension Funds.<sup>159</sup> The board of the fund takes binding decisions and enforces them in terms of fund rules using its board of trustees. Thus all the affairs of the retirement funds are regulated by the fund rules.

In terms of section 1 of the Pension Funds Act, "rules" means the rules of a fund, and includes:<sup>160</sup>

- (a) The Act, charter, deed of settlement, memorandum of association, or other document by which the fund is constituted;
- (b) The articles of association or other rules for the conduct of the business of the fund; and
- (c) The provisions relating to the benefits which may be granted by and the contributions which may become payable to the fund.

A registered fund's legal capacity to conclude contracts or enter into legal relationships emanates from the fund rules. If an activity of the fund is neither expressly nor impliedly provided for in the fund rules, such activity shall be regarded as being outside the powers the funds have in terms of their rules and will therefore

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<sup>157</sup> An unfair labour practice in this regard may relate to unfair distribution of employee benefits. In terms of the definition of "unfair labour practice" in section 186(2)(a) of the Labour Relations Act of 1995, unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation), or training of an employee or relating to the provision of benefits to an employee.

<sup>158</sup> In *Low v BP Southern Africa Pension Fund and Another* [2000] 2 BPLR 171 (PFA) at 194-195, a benefit enhancement provided only to members with more than 20 years' service, aimed at improving the employer's competitive position in the employment market, was considered to be perfectly legitimate and not in contravention of the other members' right to fair labour practice.

<sup>159</sup> Sections 11 and 12 of the Pension Funds Act of 1956.

<sup>160</sup> Section 1 of the Pension Funds Act of 1956 defines "rules" as rules of a fund registered in terms of the Pension Funds Act.

be null and void and will also be *ultra vires*.<sup>161</sup> Employers and employees appoint the board of trustees, which runs the affairs of the fund in line with the fund rules. However, the administration of the funds lies mainly with insurance companies.<sup>162</sup> The main objectives of a board of trustees are to direct, control, and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.<sup>163</sup>

In performing its duties, the board of trustees must take reasonable steps to ensure that members' interests are protected; act with due care, diligence, and good faith; avoid conflict of interest; and act with impartiality in respect of all members and beneficiaries.<sup>164</sup>

The board or individual trustees can be held liable if they together or individually conduct themselves in a manner that contravenes its objectives and duties in terms of sections 7C and 7D of the Pension Funds Act, respectively. The Registrar monitors pension funds to ensure that their affairs are conducted in an honest and responsible manner. On the other hand, the functions of the Financial Services Board include ensuring compliance with laws regulating financial institutions.<sup>165</sup> The Registrar has the powers to approach the High Court, having jurisdiction for an order to force any institution to comply with any law or to stop acting in contravention of any law.<sup>166</sup>

If the Registrar believes that a person is contravening any law for which the Registrar has any powers, the Registrar can refer the offence to the Enforcement

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<sup>161</sup> See the case of *Tek Corporation* supra note 153 at par 28.

<sup>162</sup> Spring M (Chief Editor of Personal Finance Newsletter) *A Private Report: A comprehensive study of pension, provident, retirement annuity, and deferred compensation schemes; alternative funding vehicles such as unit trusts, shares, property and gold coins; strategic planning and detailed recommendations for a comfortable retirement* 12 ed July 1991 at 4 (hereafter, *Spring A Comprehensive Study of pension, provident, retirement annuity and deferred compensation schemes*).

<sup>163</sup> Section 7C(1) of the Pension Funds Act of 1956.

<sup>164</sup> Section 7C(2). The duties of the board of trustees are discussed in more detail in Ch 6.

<sup>165</sup> Section 3 of the Financial Services Board Act; and *Spring A Comprehensive Study of pension, provident, retirement annuity and deferred compensation schemes* op cit note 162 at 4.

<sup>166</sup> Section 6(1)(b) of the Financial Institutions (Protection of Funds) Act 28 of 2001.

Committee,<sup>167</sup> which is an administrative body with powers to determine whether there has been any contravention of the law, and impose administrative sanctions where it finds that there has been contravention; for example by ordering such a person to pay a sum of money to the Financial Services Board,<sup>168</sup> or by issuing cost orders and compensatory orders on offenders.<sup>169</sup> These administrative sanctions do not constitute a previous criminal conviction.<sup>170</sup> However, if the Registrar is himself or herself by law empowered to impose a penalty, such a case may not be referred to the Enforcement Committee.

## **5.6 VOLUNTARY PROVISIONS**

### **5.6.1 General**

People may voluntarily save for retirement by using private schemes or insurance arrangements. While occupational retirement funds are established by employers for their employees, voluntary provision<sup>171</sup> relies much more on an individual deciding, sometimes in addition to an occupational retirement scheme he or she has with the employer, to make savings for retirement. This arrangement is made when a person is still working or self-employed as regular contributions must be made into the savings vehicle.<sup>172</sup> Voluntary schemes include, among others, the retirement annuity fund, deferred compensation schemes, standard insurance policies, and unit trusts. These schemes are discussed next.

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<sup>167</sup> Section 6A(1).

<sup>168</sup> Section 6D.

<sup>169</sup> Section 6D(2)(a)-(b)(i).

<sup>170</sup> Section 61(3).

<sup>171</sup> Supported by the following Committees: The Smith Committee Report op cit note 8 at 32; The Mouton Committee Report op cit note 8 at 17-22; The Taylor Committee Report op cit note 8 at 94 – see Figure 16 – proposed strategic framework for retirement provision in South Africa.

<sup>172</sup> The Smith Committee Report (ibid) at 31.

## **5.6.2 Retirement Annuity Fund**

A retirement annuity is a private pension plan for the individual. Most retirement annuity funds are funded by long-term policies. The funds are administered by an insurer and the member pays contributions to the fund. When the day of retirement arrives, the fund benefit becomes payable by the fund to the member. Retirement annuity funds are permanent funds established for the sole purpose of providing life annuities to their members, and annuities to the dependants or nominees of deceased members. These schemes are required to register as pension fund organisations under the Pension Funds Act of 1956.<sup>173</sup> An employer-employee relationship is not required in the case of a retirement annuity, as it is a personal retirement investment vehicle.<sup>174</sup>

It is mainly for self-employed persons, professional people, independent entrepreneurs, employees whose companies do not have a pension scheme, or whose scheme has inadequate benefits, and those who frequently move from one job to another during their career.<sup>175</sup> Retirement annuities operate with individual endowment type contracts. Members may only access their money at the age of 55, unlike a pension and provident fund where members have access to their benefits when they resign from employment and terminate their membership.<sup>176</sup>

The objective of a retirement annuity in this regard will be to fund a retirement benefit. The member decides where and how to invest the money and the performance of the policy will depend on performance of the market.

A member of the fund will be negatively affected, for example if he or she stops contributing to the policy before reaching the age of 55 as the insurer will have to cover the costs incurred as a result of the termination of the policy. These costs

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<sup>173</sup> Section 4 of the Pension Funds Act of 1956.

<sup>174</sup> Dewar *The Practical Guide to Retirement Funds and Retirement Planning* op cit 145 at 60.

<sup>175</sup> Spring *A Comprehensive Study of pension, provident, retirement annuity and deferred compensation schemes* op cit note 162 at 4.

<sup>176</sup> Marx GL, Hanekom K *The Manual on South African Retirement Funds and Other Employee Benefits* 2009 Vol 1 at 13 (hereafter, Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits*).

would have been covered by the insurer should the policy have run over the full contracted period.<sup>177</sup>

Retirement annuity funds have the following advantages and disadvantages:<sup>178</sup>

- Attracts tax benefits,
- Benefits cannot be attached (e.g. by creditors),
- Members determine their contributions depending on affordability from year to year,
- Members choose financial institutions they like,
- When the member receives the benefit, he or she can use the benefit to buy an annuity,
- They only mature at the age of 55, which can be a long time if someone needs money urgently, and
- Some of the old policies require full commission and are as a result expensive.

A major difference between a retirement annuity fund and a retirement fund is that the former is not established for a group of employees and so membership is generally voluntary. As membership is voluntary, there is no limit on who may join a retirement annuity fund. However, they do not offer the advantage of employer contribution to the policy as there is no need for an employer-employee relationship.<sup>179</sup> Most of the retirement annuity funds are underwritten funds and thus do not have assets other than policies used to fund their liabilities of paying life annuities to members.<sup>180</sup> The value of the annuity is calculated when the policy matures. This value is made up of the member's contributions over the years, plus

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<sup>177</sup> Ibid at 90.

<sup>178</sup> Spring A *Private Report: A Comprehensive Study of pension, provident, retirement annuity and deferred compensation schemes* op cit note 162 at 14-15.

<sup>179</sup> Section 4 of the Pension Funds Act of 1956.

<sup>180</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 176 at 92.

the accumulated value of capital profits and income gained from investment, less the various expenses the insurer will charge.

A member may choose to withdraw one-third of the capital sum in cash. The two-thirds balance has to be used to buy what is called a “compulsory annuity”, which can be paid to the member on a monthly, quarterly, or annual basis.<sup>181</sup> Members of retirement annuity funds who are not happy with the benefits payable by the fund under the policy can lodge complaints with the Pension Funds Adjudicator or the Ombudsman for Financial Services Providers under section 27 of the Financial Advisory and Intermediary Services Act, 37 of 2002.

### **5.6.3 Deferred compensation scheme**

A deferred compensation scheme is one in which an employee agrees to defer part of his or her earnings from employment until retirement. For example, instead of receiving a salary increase, the employee may agree with the employer to invest that amount in a scheme on the employee's behalf. When the employee retires, the employer gives the employee the invested money as a lump-sum.<sup>182</sup> Benefits paid as a lump-sum do not always provide a long-term source of income in retirement as they can be consumed within a short space of time while the beneficiary still has many years to live. Again, it will not make any difference if the amount of the benefit/savings is small. This should, however, be encouraged as it is another method of saving employees can use.

### **5.6.4 Standard insurance policies**

An insurance policy that complies with the definition of a standard insurance policy in Schedule 6 of the Income Tax Act of 1962 can also be used for purposes of saving for retirement. The person pays premiums for the policy every month, and upon

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<sup>181</sup> Spring A *Comprehensive Study of pension, provident, retirement annuity and deferred compensation schemes* op cit note 162 at 23.

<sup>182</sup> Sephton et al *A Guide to Pension and Provident Funds* op cit note 138 at 38-39.

maturity receives a benefit made up of the premiums plus investment income. However, the premiums are not tax deductible and there is no protection of benefits against creditors as there is in the case of pension and provident fund benefits.

The investment income is taxable in the hands of the insurer and will reduce the returns the policy owner will eventually receive.<sup>183</sup> Even though standard insurance policies may not provide sufficient benefits for retirement purposes, they can play a supplementary role to other retirement insurance schemes.

### **5.6.5 Unit trusts**

Unit trusts<sup>184</sup> are created and managed by management companies, which are mainly private insurance companies. The Financial Services Board is the regulatory body of the unit trust industry in South Africa. A large number of people called investors pool their resources to invest in shares, bonds, money market instruments, and other investments. Investors can either put in a lump-sum as an investment or use a monthly debit order. These investors will then share in gains, losses, income, and expenses on a proportional basis. The advantages of unit trusts include the following: investment safety, performance reporting by management companies, transparency, affordability, convenience, diversification, competitive cost structures, and professional management. Unit trusts are also easy to buy and to sell.

They are able to provide small investors with an opportunity to invest in stock and bond markets.<sup>185</sup>

One can thus use unit trusts to save for retirement, as long as the person is not going to be tempted to access the money before the time of retirement. It should be accepted though, that by their nature, unit trusts cannot be used as the only vehicle

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<sup>183</sup> Ibid at 40.

<sup>184</sup> See Oldert N *Understanding Unit Trusts: Details of New Legislation* 4ed January 2003 at 15. According to Oldert, the first South African unit trust was introduced by Sage in 1965. However, according to Merriman CO *Unit Trusts* 2ed 1959 at 1, the first unit trust was introduced in 1868 in the City of London, and was a Foreign and Colonial Trust which took the form of unincorporated trust.

<sup>185</sup> Oldert (ibid) at 15-21. See also generally on the historical development of unit trusts, types of unit trusts, how a unit trust is created, etc., Merriman (ibid) at 1-10, 14-17 and 30-35.

of saving for retirement, but may be used to supplement other conventional methods for retirement savings.

### **5.6.6 Administration and regulation**

Voluntary schemes are administered by insurance companies or management companies. However, the FSB as the regulator supervises the business of all financial institutions, except those of the banking sector. Any person who feels aggrieved by a decision of the executive officer may in terms of the Financial Services Board Act of 1990,<sup>186</sup> or any other law, appeal against the decision to a board of appeal, established in terms of section 26 of the Act. Appeals must be noted within 20 business days and the FSB must furnish reasons for its decision within one month. If the appellant does not find the reasons acceptable, he or she should, within one month, give notice of appeal with full particulars. The appeal board will then determine a date, place, and time for the hearing.<sup>187</sup>

Those who have complaints about bad or inappropriate advice received from a financial service provider may approach the Financial Advisory and Intermediary Services Ombudsman<sup>188</sup> to consider and dispose of their complaints. However, note should be taken that the Ombudsman cannot consider complaints relating to pension funds.<sup>189</sup>

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<sup>186</sup> Financial Services Board Act 97 of 1990.

<sup>187</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 176 at 73.

<sup>188</sup> Established by section 20 of the Financial Advisory and Intermediary Services Act of 2002.

<sup>189</sup> See in this regard, Ombudsman-brochure-english-2013.pdf, accessed from [www.ombud.co.za](http://www.ombud.co.za), last visited on 21 May 2015. Section 30H(2) of the Pension Funds Act of 1956 has provisions on how and when to lodge complaints to the Pension Funds Adjudicator.

## 5.7 INFORMAL ARRANGEMENTS

### 5.7.1 Description

The modern-day informal arrangements have developed as a result of the exclusionary nature of formal social security systems. Communities have also relied on the informal systems of support to protect themselves against social and economic hardships they have and still continue to experience. The informal systems rely on reciprocal support, social networks of support, and the element of solidarity (*Ubuntu*) between individuals, families, or communities to fight against poverty.<sup>190</sup>

In African communities, mostly individuals and families used the kinship arrangements as forms of support. However, these systems were seriously affected by industrialisation and urbanisation, which opened the way for modern forms of mutual aid support, such as savings clubs, social clubs, burial societies, stokvels, kinship, networks, patrons, religious and other non-governmental organisations, and food cooperatives.<sup>191</sup>

Thus, in addition to social assistance grants and social insurance arrangements, the informal arrangements play a complementary role to formal social security arrangements in this country. They contribute a lot in eradicating poverty<sup>192</sup> within the South African poor communities, and many families survive on benefits coming out of these informal arrangements. The informal means of support should therefore

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<sup>190</sup> Patel L *Social Welfare & Social Development in South Africa* 2005 at 138-139. See also generally, Triegaardt JD "Accomplishments and Challenges for Partnerships in Development in the Transformation of Social Security in South Africa" (2005) at 3-4, available at <http://led.co.za/document/accomplishments-and-challenges-partnerships-development-transformation-social-security-sout>, last visited on 21 May 2015 at 7.

<sup>191</sup> Triegaardt (idem at 7-8), and see also generally Molefe SP "An Overview of Characteristics of Self-help Organisations Amongst Blacks in South Africa – A historical perspective" *Social Work/Maatskaplike Werk* 32 (2) 1996 at 177-178.

<sup>192</sup> Subbarao K, Bonnerjee A, Braithwaite J, Carvalho S, Ezemenari K, Graham C, Thompson A *Safety Net Programs and Poverty Reduction. Lessons from Cross-Country Experience* (1997) (Washington DC: The World Bank) at 5.

not be ignored in the process of rationalising and streamlining social security provision in South Africa.

Informal schemes are generally open for people who share the same background, like relatives and friends, or people who share a common goal – and here people may establish social groups such as stokvels. These institutions generally supplement the support from families. Even though people may prefer stokvels to other formal forms of savings, it should be noted that stokvels, just like any other informal arrangement, are not without problems. For example, as opined by Dekker,<sup>193</sup> the arrangements are subject to limitations for reasons that include the following: they can easily lose their effectiveness as members of the family, especially the younger generation, move to urban areas to look for jobs; benefits are sometimes very little and cannot meet the present-day demands; and there is no guaranteed protection against social and economic factors by the benefits offered by the system.<sup>194</sup> Thus, individuals, families, communities, and members of different social groups might receive benefits that are inadequate as compared to the type or demands of the risk(s) the persons or community wanted to protect themselves against. Other risks might include where all the resources of the scheme are lost due to mismanagement or dishonesty by some of the members of the scheme.

### **5.7.2 Regulation and administration**

Informal schemes generally have their own set of rules which are in the form of a constitution.<sup>195</sup> However, problems start when members fail to abide by the rules of

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<sup>193</sup> Dekker AH *Informal Social Security: A Legal Analysis* (Doctoral Thesis) April 2005 at 141 (hereafter, Dekker *Informal Social Security*).

<sup>194</sup> Idem.

<sup>195</sup> The National Stokvels Association of South Africa (NASASA) provides a template of a constitution which can be used by *stokvels* when writing their own constitutions (available at [www.nasasa.co.za](http://www.nasasa.co.za), last visited 07 September 2015). It was discovered in the study completed by Moodley L “Three Stokvel Clubs in Urban Black Township of KwaNdangezi, Natal” (Department of Economics, University of Durban-Westville), 27 Feb 2008: <http://dx.doi.org/10.1080/03768359508439821>, last visited 21 May 2015) at 364-365), that all club operations were based on a formal constitution which has operation and disciplinary codes. The constitution (or rules) are made and agreed upon by all members at the time the club is established. The clubs also have committees made up of a chairperson, secretary, and treasurer. Members are compelled to attend regular meetings where

the scheme. Where there are no proper systems in place – for example on, how to record and keep minutes of the meetings and enforce resolutions taken, how to handle and deal with members' contributions, the control and distribution of benefits and the discipline of members – the scheme might not survive for a long time.

The constitution of each and every scheme should provide for a number of regulatory issues; such as membership, contributions, benefits, investments, discipline, meetings, dispute resolution procedures, recording of minutes and resolutions, and, most importantly, the scheme's banking account. There must be a way to enforce all these.

The constitution would have provisions on how to deal with a member or members who do not abide by the rules of the scheme. Punishments for violating the constitution range from verbal and written warnings, suspension of the membership of an offender, fines for late arrival at meetings, and there are even provisions for expulsion from the scheme where the offence is of a serious nature. In most cases the executive committee or the chairman, in conjunction with the secretary or all the members of the scheme, deliberate and decide together on an appropriate sanction for different transgressions.

The problem lies with the fact that there are no enforcement mechanisms in case a member fails to cooperate or to abide by the decision taken to punish him or her. Where a member is not happy with the sanction, there is normally no provision for an appeal or review process and as such there is room for abuse of powers or even for biasness from the side of those who have the responsibility to decide on the matter and appropriate sanction. Most of these schemes break up because of issues pertaining to members' discipline and the nature of sanctions meted out where friends or relatives take sides.<sup>196</sup> Most of the informal schemes depend on kinship

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contributions are collected. These clubs mainly survive on confidence and trust between members (who are mainly friends, family members, or colleagues).

<sup>196</sup> Own experience/observation.

relationships and are founded on the principle of reciprocity. It is therefore more of a fraternal regulatory relationship, which does not always work.<sup>197</sup>

In cases where members of the scheme cannot resolve a dispute, they or an aggrieved party, as the case may be, may approach a civil court on a common law basis in the same way as he or she would do with formal schemes.<sup>198</sup>

This is not always the best route to follow considering the adversarial nature of the court system and also how costly it might be. Informal schemes are mostly made up of close relatives, friends, neighbours, or colleagues, and relationships are likely to break down should the matter escalate to the level of the courts of law.

## **5.8 SUMMARY AND EVALUATION**

The South African retirement income security system relies more on formal arrangements. The system consists of social assistance, occupational retirement funds, and private savings.<sup>199</sup> There are also other arrangements; which mostly take informal forms of savings. In South Africa a significant percentage of workers in formal employment are members of retirement funds.<sup>200</sup>

However, the problem facing this country is that too many people still reach retirement age with insufficient retirement benefits and many more are still excluded by the system and therefore would go into retirement with no benefits at all.<sup>201</sup> South Africa does not have a public retirement scheme and this has unfortunately resulted in the majority of people, especially those in the informal sector of the economy, being left out. At the moment, the coverage that is provided by the South African retirement system is clearly not able to provide adequate protection to all the workers in this country. The only available form of income for people who are excluded by the

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<sup>197</sup> See generally Dekker *Informal Social Security* op cit note 193 at 139-140.

<sup>198</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 225.

<sup>199</sup> Ibid at 1.

<sup>200</sup> Strydom et al *Essential Social Security Law* op cit note 49 at 28.

<sup>201</sup> South Africa's Retirement Fund Reform: First Discussion Paper op cit note 8 at 5; Olivier et al *Social Security: A Legal Analysis* op cit note 9 at 243-244 and 252-254.

system comes through the state old-age pension. Because of gaps in South Africa's retirement system, the social assistance old-age pension presently serves as income replacement instead of being a safety-net. The South African social security system uses social insurance primarily to protect those in formal employment, while social assistance is meant to protect the poor. The social assistance old-age pension is means tested, which means that it is not universal.

The onus is thus upon the individuals to prove that they are destitute and therefore qualify to receive the grant. The system also follows a categorical approach which only targets certain categories of people to the exclusion of the majority of other vulnerable groups. In addition, private provision is encouraged and common in the country.<sup>202</sup> People who are employed in the formal sector of the economy belong to retirement funds which are mostly established by their employers. Therefore coverage in the formal sector is quite high, while those working in the informal sector have little cover or no cover at all. Another shortcoming is that employers are by law not obliged to establish retirement funds for their employees except in limited circumstances where the establishment of a fund and participation in the fund are established through a sectoral determination issued by the Minister for a particular sector. Examples of such sectoral determinations may be found in the civil engineering sector and the private security sector.

This is a big challenge as it affects the effectiveness and adequacy of the system. It also opens gaps in the system as some of the employers can choose not to establish funds for their employees and that will leave these employees vulnerable to elements of poverty when they are no longer working and earning a salary due to old-age. The system also allows for private savings, which are voluntary and are made on an individual basis. As the name implies, the savings are made on a voluntary basis, which means it is not compulsory for people to save using private savings vehicles. These are mostly used by people who already belong to occupational retirement funds to supplement the benefits they will receive from those

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<sup>202</sup> Van der Berg "South African Social Security under Apartheid and Beyond" op cit note 143 at 488-489.

funds. The savings vehicles are normally not within the reach of those working in the informal sector and therefore cannot be considered as alternatives to a national fund.

People have also relied on informal arrangements to protect themselves against social and economic risks. These arrangements evolved from kinship forms of support to the modern-day models of support, which are in the form of savings clubs, social clubs, burial societies, stokvels, and food cooperatives. Most of these arrangements are, however, not sustainable.

The benefits are sometimes very little and cannot meet the members' needs. They therefore do not provide guaranteed protection against social and economic factors. They are not formally regulated and generally depend on kinship regulatory relationships, which can easily be affected by other factors such as internal fights, strained relationships, and loss of trust. The informal arrangements are therefore susceptible to many risks.

The system does not provide comprehensive coverage. A more comprehensive approach needs to be adopted in line with the Taylor Committee Report's recommendations<sup>203</sup> for comprehensive social protection instead of the narrow approach the system has taken so far.

The concept of social protection is more appropriate for a developing country like South Africa than the concept of social security, which takes a more formal and structured approach. Social security is more suitable in conditions where large numbers of citizens depend on the formal economy for their livelihood. However, in the context of a widespread informal economy like South Africa, formal social security arrangements do not always work for the vast majority of the working population. Those lacking social protection belong to the economically weaker sections of the community and therefore require adequate and secure protection from poverty. A sound social and retirement income security system should bring all categories of people into the national system, covering the whole population

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<sup>203</sup> The Taylor Committee Report op cit note 8 at 41.

regardless of the type of employment sector they find themselves in. A primary reform objective for this country, according to South Africa's National Treasury Task Team for Social and Retirement Reform, is to provide basic income protection for all South Africans through a combination of social assistance and contributory savings. The aim should be to create a system that will protect everyone – employed or unemployed.<sup>204</sup>

The country's policies and national legislation should be seen to promote the progressive realisation<sup>205</sup> of universal protection and access for the whole society where immediate cover is not possible for everyone. Even though universal benefits may be seen as an option, they cost more and might even bring the unwanted result of discouraging people from saving for retirement. It should, however, also be accepted that universal benefits can contribute in promoting equality<sup>206</sup> and human dignity,<sup>207</sup> as they promote social protection which does not only provide for mere survival, but also ensures social inclusion.

The next chapter examines South Africa's occupational retirement funds.

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<sup>204</sup> South Africa's Social Security and Retirement Reform: Second Discussion Paper op cit note 8 at 8.

<sup>205</sup> As required by section 27(2) of the Constitution. The section obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights in section 27.

<sup>206</sup> Section 9 of the Constitution.

<sup>207</sup> Section 10.

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## CHAPTER 6

# SOUTH AFRICA'S OCCUPATIONAL RETIREMENT SYSTEM

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### 6.1 INTRODUCTION

This chapter examines retirement funds which are established by employers for their employees. These funds are called “occupational retirement funds” as there is an employment relationship between the employer who establishes the fund and the employees belonging to that fund. Occupational funds may also be an initiative of the trade unions, sector, industry, or may result from a sectoral determination issued by the Minister for a particular sector.

South Africa's occupational retirement schemes take the form of private schemes focused primarily on the formal sector of the economy,<sup>1</sup> to the exclusion of the majority of the workers in the informal sector of the economy. Van der Berg has observed very low coverage in the following categories: agriculture, trade, catering, accommodation, small traders, shopkeepers, and domestic workers.<sup>2</sup> Coverage in the formal sector was estimated to be between 66% and 84% by South Africa's National Treasury in its December 2004 Discussion Paper<sup>3</sup> which is high considering the fact that participation is by law not compulsory. This can be an indication that workers in this sector have accepted membership of occupational retirement funds as an obligatory condition of employment. It has been discovered that people in South Africa generally retire with insufficient benefits due to a number of reasons; some of which will be highlighted in the discussions that follow.<sup>4</sup>

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<sup>1</sup> See the National Treasury South Africa Retirement Fund Reform (A Discussion Paper) December 2004 (The Three Pillars of Retirement Funding System) at 5 (hereafter, South Africa Retirement Fund Reform: First Discussion Paper).

<sup>2</sup> See Van der Berg S “South African Social Security under Apartheid and Beyond” Vol 14, No 4, December 1997 *Development Southern Africa* at 489.

<sup>3</sup> South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 13.

<sup>4</sup> See generally the National Treasury's two Retirement Reform Discussion Papers: South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 and South Africa's Social Security and

Dewar et al reported in 2005 that only 6% of the South African population could retire with adequate retirement savings, with the other 94% either being forced to continue working beyond their retirement age – with the majority relying on the state old-age pension.<sup>5</sup> Factors that contribute to inadequate benefits, according to Dewar et al, include shortened periods of employment, taking lump-sum benefits at retirement, early retirement, poor investment decisions, and the fact that people are living longer than expected. It is further reported that in the year 2001 about R62 billion was withdrawn by fund members from their funds before they reached the age of retirement.<sup>6</sup>

These figures are alarming for a country that aims to see everyone adequately protected with adequate benefits when they retire. In evaluating South Africa's occupational retirement system, it is important to consider the following three vital elements as highlighted by Colin Gillion:<sup>7</sup>

- The type of protection provided;
- The level of protection provided; and
- The categories of people covered by the system.

This evaluation should be done in relation to the obligations the state has in terms of the Constitution of the Republic of South Africa, 1996. In terms of section 27 of the Constitution, everyone in this country is guaranteed the right of access to social security. Section 27(2), on the other hand, requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to social security.

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Retirement Reform: Second Discussion Paper (Republic of South Africa (National Treasury)) February 2007 (hereafter, South Africa's Social Security and Retirement Reform: Second Discussion Paper). These two Papers describe the nature of South Africa's current retirement system with its positive elements and weaknesses.

<sup>5</sup> See Dewar N, De Kock A, Kruger N, Roper P *The Practical Guide to Retirement Funds and Retirement Planning* 2005-2006 at 18 where the authors call this unfortunate situation which South Africa is facing "a wake-up call".

<sup>6</sup> Ibid at 19-25.

<sup>7</sup> Gillion C, Turner J, Bailey C, Latulippe D *Social Security Pensions: Development* (International Labour Office Geneva) 2000 at 193 (hereafter, Gillion et al *Social Security Pensions*).

What these provisions imply is that everyone should have access to social security, and that those who do not yet have access, must be given progressive realisation by the state using reasonable legislative and other measures. This obligation should, for purposes of this study, be understood to mean that the state has the duty to progressively extend coverage to those who are currently not covered and improve coverage for those who are not adequately covered. This will include changing the laws and policies on retirement provision and creating a framework for more inclusivity and adequate protection.

The discussion in this chapter is limited to the following: the nature of the system, the types of retirement schemes, the regulatory framework, the scope of coverage, types of benefits and their preservation and protection, protection of member's interests and rights, and legal remedies available to beneficiaries.

## **6.2 THE NATURE OF SOUTH AFRICA'S OCCUPATIONAL RETIREMENT SYSTEM**

The historical development of South Africa's occupational retirement funds was discussed in Chapter 4<sup>8</sup> of this study and therefore only a brief description is provided here. It is important to mention for background purposes that the first formal regulation of retirement funds came in 1958, after the introduction of the Pension Funds of 1956.<sup>9</sup> Prior to that, pension funds were in the form of trusts and were not regulated by any statute. The Pension Funds Act has come a long way and has over the years seen numerous amendments which brought the retirement system in this country to where it is today.<sup>10</sup> Occupational retirement funds are used by workers to save money for their retirement.

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<sup>8</sup> Discussed under par 4.3.3 in Ch 4.

<sup>9</sup> Pension Funds Act 24 of 1956 (hereafter Pension Funds Act of 1956).

<sup>10</sup> Downie JAB *Essentials of Retirement Fund Management in Southern Africa* 2005 at 5 (hereafter, Downie *Essentials of Retirement Fund Management in Southern Africa*) at 4.

Retirement funds must conform to the definition of a pension as defined in section 1 of the Pension Funds Act of 1956<sup>11</sup> in order to be recognised as such. A “pension fund organisation” is defined as follows:<sup>12</sup>

- (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members; or
- (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons; or
- (c) any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits, referred to in section 37C on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a), (b) or (c) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act of 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or collect contributions from or on behalf of members.

All the funds that provide benefits on retirement must register with the Registrar of Pension Funds, except where such a fund is exempted from registration.<sup>13</sup>

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<sup>11</sup> Pension Fund Act of 1956.

<sup>12</sup> Section 1 of the Pension Funds Act of 1956 defines the concepts “pension fund” and “pension organization”. In terms of the section, there are three types of “pension fund organisations”, namely an (a) association of persons, (b) any business carried under a scheme or arrangement, and (c) a beneficiary fund.

<sup>13</sup> Section 4 of the Pension Funds Act of 1956 requires every pension fund (except those which are exempted from registration in terms of the Act) to register with the Registrar of Pension Funds. Section 1 of the Act defines “Registrar” as the Registrar or Deputy Registrar of Pension Funds mentioned in section 3 of the Act. Section 3 provides that the executive officer and a deputy executive officer (mentioned in section 1 of the Financial Services Board Act, 97 of 1990), shall also be the Registrar and the Deputy Registrar of Pension Funds, respectively. Funds can be exempted by the Registrar from complying with any provision of the Pension Funds Act of 1956 in terms of section 2(3)(a) of the Act.

This is to ensure that funds are properly regulated and administered to protect the interests of fund members and/or beneficiaries. If a fund, which has not been exempted, fails to register as required, that fund will not be recognised as a retirement fund by the Registrar and members thereof will not enjoy the necessary protection afforded by such recognition.<sup>14</sup> These statutory measures are there to ensure that only the funds that satisfy the requirements of the Pension Funds Act of 1956 run the business of pension funds. The legislature has even put in place punitive measures for those who fail to meet this statutory requirement. Failure to comply with the provisions of section 4 of the Act constitutes an offence and if a person is found guilty, he or she could be fined an amount not exceeding R10 million or sentenced to imprisonment for a period not exceeding ten years, or to both a fine and imprisonment.<sup>15</sup> The Registrar of Pension Funds is also empowered by section 37(2) of the Pension Funds Act of 1956 (as substituted by section 14 of the Financial Services Laws General Amendment Act 22 of 2008) to impose an administrative penalty not exceeding R1 000 or such amount as prescribed by the Registrar for every day during which a person fails to submit to the Registrar any documents or information required by the Registrar; for example in relation to the registration of a fund.

The intention of the legislature in imposing these sanctions is to deter people from establishing and operating pension funds illegally, as that can expose fund members and beneficiaries to serious risks.

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<sup>14</sup> Section 31(1)(b) of the Pension Funds Act of 1956 prohibits any person from carrying on the business of a pension fund, unless that fund has been provisionally or finally registered under the Act. In terms of section 31(1)(d) of the Act, no person shall apply to his or her business a name which has the words "pension fund" or any other name which might give an impression that the person runs a business of a pension fund, unless such business is registered as a pension fund under the Act. See also generally on the registration of pension funds and the effect thereof, Marx GL, Hanekom K *The Manual on South African Retirement Funds and Other Employee Benefits* 2009 Vol 1 at 16 (hereafter, Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits*).

<sup>15</sup> Section 37(1)(a) of the Pension Funds Act of 1956.

It should be noted though that there are funds which, even though they are established for workers, are not required to be registered in terms of the Act. Those funds include those established by the state<sup>16</sup> and to which the state contributes financially.

Government employees in South Africa belong to the Government Employees Pension Fund (GEPF), which is regulated by the Government Employees Pension Fund Law of 1996. Until May 1996, there were five categories of state pension or provident funds designed by the government as an employer.<sup>17</sup> The word "state" has been given a broader meaning by the Supreme Court of Appeal in *Greater Johannesburg Transitional Council v Eskom*<sup>18</sup> to include all institutions which are collectively concerned with the management of public affairs, unless a contrary intention appears.

The court stated *in casu* that "state" may in certain circumstances have a wider meaning than government and that for the purposes of the Pension Funds Act of 1956, "state" may also encompass "organs of state", as defined by section 239 of the Constitution of the Republic of South Africa, 1996 (the Constitution).<sup>19</sup>

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<sup>16</sup> See in this regard *Greater Johannesburg Transitional Council v Eskom* 2000 (1) SA 866 (SCA) at 875-876 (hereafter, *Greater Johannesburg Transitional Council*).

<sup>17</sup> Those funds are the following: The Associated Institutions Pension Fund, which was established and regulated under the Associated Institutions Pension Fund Act, 41 of 1963; the Temporary Employees Pension Fund, which was established and regulated under the Temporary Employees Pension Fund Act, 75 of 1979; the Authorities' Service Pension Fund, established and regulated under the Authorities' Service Pension Fund Act, 6 of 1971; and the Authorities' Service Superannuation Fund, established and regulated under the Authorities' Service Superannuation Act, 6 of 1971.

<sup>18</sup> See generally the case of *Greater Johannesburg Transitional Council* supra note 16.

<sup>19</sup> In terms of section 239 of the Constitution of the Republic of South Africa, 1996 (the Constitution), "organ of state" means any department of state or administration in the national, provincial, or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of legislation, but does not include a court or a judicial officer.

Reference to “state” may therefore include any institutions exercising public powers or performing public functions in terms of legislation, whether or not they are controlled by government and state-owned enterprises such as Eskom, the Financial Services Board, and universities.<sup>20</sup>

The following sectorial funds are also not regulated by the Pension Funds Act of 1956, but by legislation in terms of which they were established: The *Transnet Fund*, which is a fund for the employees of Transnet, was established by and is regulated by the Transnet Pension Fund Act of 1990,<sup>21</sup> with effect from 29 June 1990; the *Telkom Fund*, a fund for the employees of Telkom South Africa that was established in terms of section 9(1) of the Post Office Act of 1958,<sup>22</sup> with effect from 1 October 1991 and is regulated by that Act – the *Telkom Retirement Fund* is also supervised under the Post Office Act; and the *Post Office Fund* was established by Section 10 of the Post Office Act, with effect from 1 October 1991.<sup>23</sup>

Funds for political office-bearers<sup>24</sup> are also not governed under the Pension Funds Act. These funds are excluded from registration under the Pension Funds Act of 1956 until such time that they, with the consent of the Minister, have to register in terms of the Act.<sup>25</sup>

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<sup>20</sup> The wording of section 4A of the Pension Funds Act of 1956 was interpreted by the Pension Funds Adjudicator (then, Prof. John Murphy) in *Retired University of Natal Staff Association v Associated Institutions Pension Fund & Another* [2000] 3 BPLR 302 (PFA) at 308, to mean that “the Minister has the discretion to decide whether to establish a management board for a pension fund to which the state contributes financially or not, and also whether to agree to the registration of such fund in terms of section 4 of the Pension Funds Act or not”. In *CASU* (at 310-311), the Adjudicator held that universities in South Africa (in this case the University of Natal) are “organs of state” by virtue of the functions they perform, universities exercise powers and perform functions associated with government and therefore that the Associated Institutions Pension Fund was a pension fund to which the state contributes financially.

<sup>21</sup> Transnet Pension Fund Act, 62 of 1990.

<sup>22</sup> Post Office Act, 44 of 1958.

<sup>23</sup> Van den Heever A “Pension Reform and Old Age Grants in South Africa”, 12 June 2007, at 5, accessed from [http://www.researchgate.net/researcher/2010761091\\_Alex\\_M\\_van\\_den\\_Heever](http://www.researchgate.net/researcher/2010761091_Alex_M_van_den_Heever), last visited on 22 July 2015 (hereafter, Van den Heever “Pension Reform and Old Age Grants in South Africa”).

<sup>24</sup> The example in this case would be, the Members of Parliament and Political Officers Pension Fund regulated under the Members of Parliament and Political Office Bearers Pension Scheme Act of 1984.

<sup>25</sup> The pension funds to which the state contributes financially are exempted from registration by section 4A of the Pension Funds Act of 1956. On the other hand, the Government Employees Pension Fund is regulated by the Government Employees Pension Law of 1996.

Funds for state employees are discussed briefly in paragraph 6.4.6, as more focus is on what can be regarded as private retirement funds.

The Pension Funds Act of 1956 also previously did not apply to pension or provident funds established or continued in terms of a collective agreement in accordance with the Labour Relations Act 66 of 1995 (before 1 February 1999). This was mainly to encourage collective bargaining.<sup>26</sup> During that dispensation, the Pension Funds Adjudicator held in *Maputuka v Gauteng Building Industry Pension Scheme*<sup>27</sup> that he did not have jurisdiction over any bargaining council fund, irrespective of when it was established. The reason given by the Adjudicator was that, as a bargaining council fund, the respondent was not governed by the provisions of the Pension Funds Act of 1956. A complaint involving a bargaining council was supposed to be determined or dealt with in terms of the dispute resolution of the collective bargaining agreement of the relevant bargaining council.<sup>28</sup> The position was clarified by section 2(1) of the Act as amended and now the Pension Funds Act of 1956 also applies to those funds.<sup>29</sup>

Section 2(2)(a) of the Act gave all the funds previously created as such until 1 January 2008 to register in terms of the Act. If they were unable to do so, they could apply to the Registrar for an extension until 30 April 2008.<sup>30</sup> It is submitted that all retirement funds should be regulated by one piece of legislation to ensure that there is uniformity and consistency in the regulation of all retirement funds in the country. This will ensure that members of pension funds enjoy the same treatment and protection.

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<sup>26</sup> See in this regard *Arendse v Metal Industries Provident Fund & Another* [2001] 7 BPLR 2182 (PFA) at par 18, where the Pension Funds Adjudicator stated that the purpose of section 2(1) of the Pension Funds Act of 1956 (both before and after the amendment) is to allow industrial self-regulation of pension funds by a process of collective bargaining in duly formed bargaining forums.

<sup>27</sup> See *Maputuka v Gauteng Building Industry Pension Scheme* [2004] 11 BPLR 6233 (PFA) at paras 9-11.

<sup>28</sup> *Supra*.

<sup>29</sup> Section 2(1) of the Pension Funds Act of 1956 provides that the provisions of the Act apply to any pension fund, including those established in terms of a collective agreement and registered in terms of section 4. However, the section further states that this is subject to section 4A and any other law in terms of which a fund is established.

<sup>30</sup> This is in terms of Financial Services Board Pension Funds (PF) Directive No 1.

The Pension Funds Act of 1956, which is a specialised piece of legislation, is (with necessary amendments) fit for the purpose of regulating the whole pension industry in South Africa.

Registration of a pension fund organisation makes that fund a body corporate.<sup>31</sup> On the other hand, the registration of a fund defined by section 1(b) of the Pension Funds Act of 1956 will mean that its assets, obligations, and liabilities are of the fund to the exclusion of any other legal entity or person.<sup>32</sup> Legal personality in simple terms means that the fund will be able to sue or be sued. Such a fund will further be able to acquire rights and duties separate from its members, former members, and beneficiaries.<sup>33</sup> This is similar to the Netherlands where pension funds are regarded as independent legal entities.<sup>34</sup>

In Belgium, pension funds can either take the form of a special purpose entity with legal personality; for example a foundation, trust or corporate entity; or a legally separated fund managed by a pension management company or other financial institution.<sup>35</sup> This differs from the United Kingdom, where pension funds are established under trust law. In terms of section 592(1) of the Income and Corporation Taxes Act of 1988, a pension scheme needs to be registered under irrevocable trust to benefit from tax reliefs.<sup>36</sup>

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<sup>31</sup> See in this regard section 5(1)(a) of the Pension Funds Act of 1956. See also *Venter v Protektor Pension Fund* [2000] 3 BPLR 340 (PFA) at 345 (hereafter, *Venter*) and *Webb and Co. Ltd v Northern Rifles; Hobson & Sons v Northern Rifles* 1908 TS 462 at 464 (hereafter, *Webb and Co*).

<sup>32</sup> Section 5(1)(b) of the Pension Funds Act of 1956.

<sup>33</sup> See the case of *Venter supra* note 21 at 345. In *Mostert NO v Old Mutual Life Assurance Company (South Africa) Ltd* [2001] 8 BPLR 2307 (SCA) at paras 44-52 (hereafter, *Mostert*) the court said that "the fact that section 5(1)(a) of the Pension Funds Act of 1956 specifically states that the fund will become a body corporate capable of suing and being sued in its corporate name while on the other hand section 5(1)(b) does not say that, may at first blush seem to lend support to the argument that such a fund does not have a separate legal personality". The court then held that section 5(1)(b) of the Act must be seen in the context of the whole of section 5(1), which on proper interpretation must be taken to do so. In another decision of *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at par 15 (hereafter, *Tek Corporation Provident Fund*), Marais JA stated that both sections 5(1)(a) and (b) of the Pension Funds Act of 1956 mean that a pension fund is a legal *persona* and that it owns its assets in the fullest sense of the word "owns". It should be noted that even though in South Africa a pension fund organisation acquires the status of a legal person upon registration, that is not the case in English law (England), where a pension fund takes the form of a trust and is regulated under trust law.

<sup>34</sup> Discussed under par 3.4.2.2 in Ch 3.

<sup>35</sup> Discussed under par 3.3.2.2 in Ch 3.

<sup>36</sup> Discussed under par 3.5.2.2.2 in Ch 3.

It should be noted that in English law, a trust is not regarded as a legal person and, as such, trustees have control over trust property for the benefit of beneficiaries and they can sue or be sued.<sup>37</sup>

In the case of *Venter v Protektor Pension Fund*,<sup>38</sup> the Pension Funds Adjudicator held that a pension fund is a *universitas personarum*, which implies that the fund is a voluntary association with corporate personality.

In another old case, *Webb and Co. Ltd v Northern Rifles; Hobson & Sons v Northern Rifles*,<sup>39</sup> the court defined a *universitas* as follows:

“A *universitas personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations from that of its members.”<sup>40</sup>

Legal personality means a fund is a legal entity separate from its members. The fund enjoys limited liability; for example, if members of the board of management of the fund acted negligently or recklessly, the fund will be exonerated of any liability and the board or individual members may be jointly or individually held responsible for the wrong doing.<sup>41</sup> This is to ensure that the board takes its job seriously and that it always acts with due care and diligence and in good faith.

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<sup>37</sup> See in this regard Hayton D “The Extent of Pension Trustees’ Obligations in South Africa” (Paper presented at the Pension Lawyers Association 2004 Conference in Cape Town) 2004 February at 1 and 2, accessed from <http://www.pensionlawyers.co.za/resources/downloads/2004-2/>, last visited 23 August 2015.

<sup>38</sup> See the case of *Venter* supra note 31.

<sup>39</sup> See the case of *Webb and Co* supra note 31.

<sup>40</sup> Supra.

<sup>41</sup> See *Mes v Art Medical Equipment Pension Fund (now liquidated) and Others* [2006] 2 BPLR 140 (PFA) (hereafter, *Mes*); *Trustees African Explosives Pension Fund v New Properties Ltd; Trustees African Explosives Pension Fund v Nestel* 1961 (3) SA 245 (W); and the case of *Mostert* supra note 33.

Retirement funds are mostly managed by insurance companies, financial institutions, industrial councils, and government.<sup>42</sup>

They have an element of insurance and saving, and can therefore be considered to be an integral part of the social insurance component of social security.<sup>43</sup> South Africa's retirement system can be considered to be quasi-mandatory as in most cases a person will become a member of a retirement fund established by the employer when he or she starts working for that employer. When a person enters into a contract of employment with the employer or is employed within a sector<sup>44</sup> which already has a retirement fund, that person automatically becomes a member of the fund by virtue of being an employee.

A retirement fund is administered in terms of the fund rules, which are regarded as the constitution of the fund. The activities of the fund, including its management, must be authorised by fund rules and the relevant legislation.

The fact that fund rules constitute the constitution of a pension fund was confirmed in the case of *Mostert v Old Mutual Life Assurance*<sup>45</sup> and *Tek Corporation Provident Fund*,<sup>46</sup> respectively. It was further stated in *Tek Corporation Provident Fund* supra that the pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the rules of the fund, relevant legislation, and the common law. Any action that is outside what is authorised by the fund rules will be *ultra vires*.<sup>47</sup> Thus everything that is done in

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<sup>42</sup> Van der Merwe T "The Occupational Pillar of the South African Pension System" *Development Southern Africa* Vol 21, No 2, June 2004 at 311 (hereafter, Van der Merwe "The Occupational Pillar of the South African Pension System").

<sup>43</sup> *Ibid* at 304.

<sup>44</sup> It should also be noted that in terms of section 55(4) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA), the Minister of Labour may, when making sectoral determinations for employees in specific sectors, also make pronouncements with regard to retirement fund membership. For example, the Minister may make membership of a fund compulsory for all employees in a particular sector.

<sup>45</sup> See in this regard the case of *Mostert* supra note 33 at par 30.

<sup>46</sup> See the case of *Tek Corporation Provident Fund* supra note 33 at par 15. See also an old decision of *Abrahamse v Connock's Pension Fund* [1963] 1 All SA 159 (W) at 159-164 where the fund rules were referred to as the constitution.

<sup>47</sup> See the case of *Tek Corporation Provident Fund* supra note 33.

relation to the fund must be permitted by the fund rules or applicable legislation, otherwise the board's actions could amount to abuse of power or maladministration.

Fund rules should, among other things, contain information on contributions employees and the employer must pay to the fund, their level, and the benefits payable by the fund.<sup>48</sup> The level of contributions is normally stated as a percentage of an employee's weekly wage or monthly salary.<sup>49</sup>

In its 2012 Benchmark Survey, Sanlam averaged contributions by employers at just above 10%, and contributions by employees for some funds as being just below 6%, while for others as above 6%. If put together, employees' and employer's contributions come to a total of about 16%.<sup>50</sup>

This contribution level is not far from what is advocated by the World Bank – which considers contribution rates of between 10% and 13% of the total annual salary as a suitable level for occupational pension funds.<sup>51</sup> It should be noted, however, that contributions paid to the fund and the benefits offered by the fund can also be an outcome of collective agreements.<sup>52</sup>

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<sup>48</sup> Section 13A of the Pension Funds Act of 1956 deals with payment of contributions to retirement funds. Section 13A(8) of the Act (as added by section 17 of the Financial Services General Amendment Act, 45 of 2013) provides a list of persons who may be held personally liable for non-compliance with section 13A.

<sup>49</sup> Sephton B, Cooper DI, and Thompson C *A Guide to Pension and Provident Funds Legal and Policy Considerations* 1990 (Glossary of Terms Used) at 5 (hereafter, Sephton et al *A Guide to Pension and Provident Funds*).

<sup>50</sup> See in this regard Sanlam's 2012 Benchmark Survey at 14 accessed from <http://www.sanlambenchmark.co.za/webadmin/include/content/Benchmark%20Survey%202012.pdf>, last visited on 07 September 2015 (hereafter, Sanlam's 2012 Benchmark Survey); and Sanlam's 2011 Benchmark Survey at 6, respectively, accessed from <http://www.sanlambenchmark.co.za/webadmin/include/content/2011%20Stand-Alone.v2.pdf>, last visited on 07 September 2015 (hereafter, Sanlam's 2011 Benchmark Survey).

<sup>51</sup> *South Africa Retirement Fund Reform: First Discussion Paper* op cit note 1 at 13.

<sup>52</sup> In terms of section 23(5) of the Constitution of the Republic of South Africa, every trade union, employers' organisation, and employer has the right to engage in collective bargaining. In terms of section 213 of the Labour Relations Act, 66 of 1995, a collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and, on the other hand, one or more employers, one or more registered employers' organisations, or one or more employers and one or more registered employers' organisations.

Section 13A(1) of the Pension Funds Act of 1956 gives the employer of any member of a registered fund the duty to pay any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration and any contribution for which the employer is liable in terms of the fund rules. Failure by the employer to adhere to the requirements of this section may result in a fine or imprisonment.<sup>53</sup>

In the case where the employer has been deducting contributions from the employee's salary but failed to pay them to the fund, the Pension Fund Adjudicator has held in a number of determinations that an appropriate relief is one which has the effect of placing the complainant in the position he or she would have been had the employer timeously paid the contributions.<sup>54</sup>

In such a case, the employer will be required to compute the employee's withdrawal benefit plus late payment interest owed by the employer in terms of section 13A(7) of the Act. This is how serious the legislature is in ensuring that retirement benefits receive adequate protection in order for fund members and/or beneficiaries to receive benefits that are adequate when the members retire. Retirement funds also pay "risk benefits" either through the fund itself or the employer can make separate arrangements with an insurance company for that purpose. For example, death benefits<sup>55</sup> are payable to the deceased member's dependants should the member die before his or her retirement date.

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<sup>53</sup> Section 37(1) (as inserted by section 49 of the Financial Services Laws General Amendment Act, 45 of 2013) provides that a person is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding ten years, or both such a fine and imprisonment if the person contravenes or fails to comply with section 13A. Regulation 33(5) (of Regulations to the Pension Funds Act of 1956) provides that such failure must be reported to a tions. It should be noted that if the Registrar of Pension Funds is of the view that the employer has contravened the provisions of section 13A, he or she may refer the matter to the Financial Services Board Enforcement Committee (see the discussion of the powers of the Enforcement Committee under par 5.5.2 in Ch 5). Where the employer's failure is a contravention of fund rules, such a complaint can be lodged with the Office of the Pension Funds Adjudicator. See further regarding the employer's duty to pay contributions, Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 10 at 5.

<sup>54</sup> See in this regard the following determinations made by the Office of the Pension Funds Adjudicator: *Zondi v Private Security Sector Provident Fund and Others* [2013] 3 BPLR 457 (PFA); *Smit v Road Freight Provident Fund and Other* [2013] 3 BPLR 421 (PFA); *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3830 (C); and *Mabale v Feedmix Provident Fund and Others* [2008] 1 BPLR 29 (PFA).

<sup>55</sup> A "death benefit" can be described as an amount, either in the form of a percentage of an annuity or a lump-sum payment which a beneficiary (for example a dependant of the deceased) receives when

It can be deduced from the definition of a “pension fund organisation” that the primary objective of a retirement fund is to provide its members with benefits when they retire or to members’ dependants should the member die before retirement. The benefits received should be at a level that will allow the member to keep the same standard of living or a standard that will be reasonably comparable to the standard of living he or she had prior to retirement. Retirement funds’ rules can also determine the extent to which a fund can be used for other purposes.<sup>56</sup> What is critical though is the fact that the fund should be used primarily to provide retirement benefits to members.<sup>57</sup> Using retirement benefits for any other purpose will not serve the purpose they are created for, which is to serve in the place of income when a person has retired.<sup>58</sup>

The idea is that if more people save money for retirement, then a smaller percentage of people will go into retirement without any form of income.

This will reduce the number of people who rely on state social assistance arrangements when they retire as the majority of people will have adequate income in their retirement. At the moment South Africa has a high number of people working in the formal sector of the economy who are members of retirement funds.<sup>59</sup> South Africa is, however, faced with two challenges. Firstly, the country needs to come up with a plan on how to extend coverage to categories of people who are currently not

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the member of a retirement fund passes away before the date of retirement. See the discussion about distribution of “death benefits” under par 6.6.4.2.

<sup>56</sup> See in this regard *Kransdorff v Sentrachem Pension Fund & Another* (1999) 9 BPLR 55 (PFA) at 66.

<sup>57</sup> Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 10 at 5.

<sup>58</sup> This view has been supported by the following Committees: The Smith Committee: The Committee on Strategy and Policy Review of Retirement Provision in South Africa, 1995 at 32 (hereafter, The Smith Committee Report); The Mouton Committee: the Committee of Investigation into a Retirement Provision System for South Africa, was appointed in 1988 at 17-22 (hereafter, The Mouton Committee Report); and The Taylor Commission (Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002 at 94 (hereafter, The Taylor Committee Report).

<sup>59</sup> In South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 5, the Financial Services Board estimates coverage of employees in this sector to be 60%, which is comparatively high considering the fact that participation is not yet compulsory in this country. This reflects the extent to which membership of occupational funds is accepted as an obligatory condition of employment.

covered by the system, and secondly, the country must improve the quality or level of coverage for those who are inadequately covered.

The majority of those who are either completely not covered or inadequately covered by the system come from those who are employed in the informal sector of the economy including the self-employed.

The discussion will now move to the legislative framework of South Africa's retirement system to see how the legislature has resolved to regulate the pension funds industry in an effort to protect the interests of fund members and to safeguard that the funds achieve their objectives.

## **6.3 THE LEGISLATIVE FRAMEWORK**

### **6.3.1 General**

Even though retirement funds in South Africa are mostly managed by financial institutions and insurance companies, these funds are regulated by the state through legislation.<sup>60</sup> The two main statutes that regulate retirement funds in South Africa are the Pension Funds Act of 1956 and the Income Tax Act of 1962<sup>61</sup>.

Other statutes which apply to retirement funds include the Long-term Insurance Act of 1998,<sup>62</sup> the Financial Services Board Act of 1990,<sup>63</sup> Financial Institutions Act (Protection of Funds) of 2001,<sup>64</sup> the Inspection of Financial Institutions Act of 1998,<sup>65</sup> and the Financial Advisory and Intermediary Services Act of 2002 (FAIS Act).<sup>66</sup>

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<sup>60</sup> Sephton et al *A Guide to Pension and Provident Funds Legal and Policy Considerations* op cit note 49 at 5 (Glossary of Terms Used).

<sup>61</sup> Income Tax Act, 58 of 1962.

<sup>62</sup> Long-Term Insurance Act, 52 of 1998.

<sup>63</sup> Financial Services Board Act, 97 of 1990.

<sup>64</sup> Financial Institutions Act (Protection of Funds), 28 of 2001.

<sup>65</sup> Inspection of Financial Institutions Act, 80 of 1998.

<sup>66</sup> Financial Advisory and Intermediary Services Act, 37 of 2002.

### **6.3.2 Pension Funds Act 24 of 1956**

There were no statutes specifically regulating pension funds in South Africa before the introduction of the Pension Funds Act of 1956. Retirement funds were either regulated as trusts or were regulated under specific statutes that established them or by provincial ordinances.<sup>67</sup> All retirement funds in South Africa, except those specifically excluded from the operation of the Act, are regulated by the Pension Funds Act of 1956,<sup>68</sup> which plays a protective role to fund members.

The Act regulates the registration and proper administration<sup>69</sup> of retirement funds. The Act ensures that funds are administered in such a way that they will achieve their objectives. Most of its provisions are peremptory. For example, funds are required to register with the Financial Services Board in order to gain recognition from the regulator,<sup>70</sup> and they are also required to be approved by the South African Revenue Services (SARS) to receive tax benefits meant for retirement funds.<sup>71</sup> The industry is regulated by the Registrar of Pension Funds.<sup>72</sup>

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<sup>67</sup> For example, the South African Public Library (Pensions and Provident Fund) Act, 9 of 1924, and under ordinances such as the Cape Provincial Ordinance, 15 of 1943.

<sup>68</sup> Section 2(1) of the Pension Funds Act of 1956 provides that subject to section 4A and any other law in terms of which a fund is established, the provisions of this Act apply to any pension fund, including a pension fund established or continued in terms of a collective agreement concluded in a council in terms of the Labour Relations Act of 1995, and registered in terms of section 4. Note should be taken that section 4A of the Pension Funds Act of 1956 contains more provisions regarding the registration of pension funds to which the state contributes financially.

<sup>69</sup> These roles are covered in Chapters II (Registration and Incorporation) and III (Manner of Administration and Powers of Registered Funds) of the Pension Funds Act of 1956.

<sup>70</sup> Section 4 of the Pension Funds Act of 1956 regulates the registration of pension funds.

<sup>71</sup> See in this regard relevant provisions under sections 10 and 11 of the Income Tax Act, 58 of 1962.

<sup>72</sup> Section 3(1) of the Pension Funds Act of 1956 provides that the person appointed as executive officer in terms of section 1 of the Financial Services Board Act of 1990 is the Registrar of Pension Funds and has the powers and duties provided for by the Pension Funds Act or any other law. In *Pepkor Retirement Fund & Another v Financial Services Board & Another* [2003] 8 BPLR 4977 (SCA) at par 11, Cloete JA, stated as the following: "The Act (Pension Funds Act of 1956) was passed, as appears from the preamble thereto, to provide, *inter alia*, for the regulation of pension funds. It is the Registrar who performs this function. As the learned Judge in the court below pointed out ... virtually every section of the Act contains some or other provision reflecting the Registrar's supervision over the affairs of pension funds."

The Financial Services Board Act of 1990 established the Financial Services Board (FSB),<sup>73</sup> and in terms of section 3 of the Pension Funds Act of 1956, the chief executive officer of the FSB assumes the functions of the Registrar. The Registrar has certain powers and duties given to him or her by the Act,<sup>74</sup> which are protective in nature.

The duties include making decisions on the following:

- The registration of pension funds;<sup>75</sup>
- Authorisation of a fund to have a board consisting of less than four members or exempt a fund from the requirement that the members of the fund elect members of the board;<sup>76</sup>
- Approval of any appointment of an auditor or withdrawal of any prior approval of such an appointment;<sup>77</sup>
- Approval and registration of an amendment of pension fund rules;<sup>78</sup> and
- Approval of an amalgamation of pension funds or the transfer of business from one fund to another.<sup>79</sup>

The Registrar monitors pension funds to ensure that their affairs are conducted in an honest and responsible manner. On the other hand, the functions of the FSB include,

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<sup>73</sup> The Financial Services Board (FSB) was established in terms of section 2 of the Financial Services Board Act of 1990.

<sup>74</sup> See *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C) at par 169 (588F-G) and the case of *Pepkor Retirement Fund* supra note 72 par 48.

<sup>75</sup> For example; in terms of section 4(3) of the Pension Funds Act of 1956, the Registrar may provisionally register a fund if it has complied with his or her requirements and if he or she believes that registration is in the public interest. What this provision means is that the Registrar may decide not to grant a fund provisional or final registration where the fund has failed to comply with his or her requirements and where it will not be in the public interest to do so. Cloete JA stated the following in the case of *Pepkor* supra note 72 at par 14: "The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objectives. That is the whole purpose which underlies the Act." The Judge further stated (at par 14) the fact that the function of the Registrar is generally performed in the public interest.

<sup>76</sup> Section 7B of the Pension Funds Act of 1956.

<sup>77</sup> Sections 9(3) and 4.

<sup>78</sup> Section 12.

<sup>79</sup> Section 14.

ensuring compliance with laws regulating financial institutions.<sup>80</sup> It is important to note regarding the regulation of pension funds that South Africa is planning to move towards what is known as the “Twin-Peaks System” of regulating the financial sector. The system has its roots in the Financial Sector Regulation Bill of 2013. This Bill will eventually repeal the Financial Services Board Act of 1990, which established the Financial Services Board (with the exception of section 28, but with consequential amendments). The “Twin-Peaks” will consist of a “Prudential Authority”, which will focus on the safety and soundness of financial institutions (prudential supervision) and a “Market Conduct Authority”, which will look at the manner in which financial institutions conduct their business, as well as the fair treatment of financial customers (market conduct supervision). Prudential supervision will fall under the South African Reserve Bank and the Market Conduct Authority will be a stand-alone entity. The Prudential Authority and Market Conduct Authority are established by section 11 of the Bill.

The Pension Funds Act of 1956 in Chapter III provides for an important aspect of the fund administration or management, which is mainly placed in the hands of the board of management<sup>81</sup> – generally known as the “board of trustees”. The board of management is an important component of fund management as it is responsible for the success or failure of the fund. The board takes important decisions that can affect the fund, fund members, and their dependants.

Its decisions need to be well thought out as they might eventually either directly or indirectly affect the primary objective of the fund, which is to ensure that members

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<sup>80</sup> The supervision and enforcement of compliance with the laws regulating financial institutions is in terms of section 3 of the Financial Services Board Act of 1990. Those laws include the following: Collective Investment Schemes Control Act, 45 of 2002; Credit Rating Services Act, 24 of 2012; Financial Advisory and Intermediaries Services Act, 37 of 2002; Financial Institutions Act, 28 of 2001; Financial Markets Act, 19 of 2012; Financial Services Ombud Schemes Act, 37 2004; Financial Supervision of the Road Accident Fund Act, 8 of 1993; Friendly Societies Act, 25 of 1956; Inspection of Financial Institutions Act, 80 of 1998; Long-term Insurance Act, 52 of 1998; Pension Funds Act, 24 of 1956; and the Short-term Insurance Act, 53 of 1998. It was stated in the case of *Pepkor* supra note 72 at paras 19 and 20 respectively, that “The FSB is empowered by section 3(a) of the Financial Services Board Act, read with the definition of the term “financial institution” in section 1 of the Act, to supervise the exercise of control, in terms of any law, over the activities of the fund...”

<sup>81</sup> Section 7A of the Pension Funds Act of 1956.

receive adequate benefits when they retire. It is important, therefore, for the board of trustees to run the affairs of the fund in a manner that the assets of the fund are adequately protected and to ensure that the interests of fund members and of their dependants are well protected and promoted. The Pension Funds Act of 1956 gives the board of trustees certain duties to ensure that they run the affairs of the funds in the manner that will enable them to achieve their objectives. These duties are discussed in relation to fund members' rights under paragraph 6.8.2 below.

### **6.3.3 The Income Tax Act 58 of 1962**

The Income Tax Act of 1962 plays a significant social security role in relation to retirement income provision in South Africa as it contains measures intended to encourage people to make savings for their retirement through tax savings. Employer and employee contributions paid to funds that conform to certain standards are tax deductible, while the pay outs from approved funds also receive preferential tax treatment.<sup>82</sup> Tax deductions should encourage more people to save for retirement and by doing so reduce the burden that could have been on the state to support them. If more people save money for their retirement, then more people will be protected against falling into poverty and the government will also be in a position to channel its funds to other things such as infrastructure development, building of schools, etc. The provisions of the Income Tax Act relating to funds are generally not obligatory.<sup>83</sup>

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<sup>82</sup> In terms of section 10(1)(d)(i) of the Income Tax of 1962, receipts and accruals from pension funds, pension preservation funds, provident preservation funds, retirement annuity funds, or beneficiary funds shall be exempted from normal tax. On the other hand, section 11(1) of the same Act provides that "for the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from income of such person so derived, (k)(i) any sum contributed during the year of assessment to any pension fund by way of current contribution by a person who holds any office or employment ...; (ii) any sum paid during the year of assessment to any pension fund by any person who, as a member of such fund, has in terms of the rules governing such fund undertaken to pay such sum in respect of any past period which is to be reckoned as pensionable service of that member ...; (l) any sum contributed by an employer during the year of assessment for the benefit of his employee to any pension fund, provident fund or benefit fund ...."

<sup>83</sup> Sephton et al *A Guide to Pension and Provident Funds* op cit note 49 at 1-2.

### **6.3.4 Other statutes**

#### **6.3.4.1 *Financial Services Board Act 97 of 1990***

Most importantly, this Act established the Financial Services Board (FSB), which is the body regulating the financial institutions that include retirement funds in South Africa.<sup>84</sup> The responsibilities of the FSB include supervising the compliance with laws regulating financial institutions and the provision of financial services.<sup>85</sup>

Retirement funds need proper regulation as that will ensure compliance with relevant laws, openness, and fairness in all the funds' dealings, including with their members and in handling the assets of the funds.<sup>86</sup> Any person who feels aggrieved by the decision of the executive officer in terms of the Financial Services Board Act or any other law may appeal against the decision to a board of appeal, established in terms of section 26 of the Act.

#### **6.3.4.2 *Financial Institutions (Protection of Funds) Act 28 of 2001***

In terms of section 2 of the Act, all persons dealing with funds and these include pension funds, must observe the utmost good faith and exercise proper care and diligence and not use the funds in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the fund.

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<sup>84</sup> Section 2 and 3 of the 22 of 1990. The possibility that this Act might be repealed in the near future is discussed under par 6.3.2.

<sup>85</sup> The Supreme Court of Appeal held in the case of *Pepkor* supra note 72 at par 20 that the FSB is empowered by section 3(a) of the Financial Services Board Act of 1990, read with the definition of the term "financial institution" in section 1 of the Act, to supervise the exercise of control, in terms of any law over the activities of the fund.

<sup>86</sup> See the objects of the board of trustees in section 7C of the Pension Funds Act of 1956. There are different types of trustees namely member-elected trustees, employer-appointed trustees, independent trustees (trustees that are not employed or controlled by the employer or its employees or any organisation which acts on behalf of members of the fund, the Financial Services Board keeps a register of independent trustees), and professional trustees (trustees that give expert advice on matters where board members may lack sufficient expertise).

Similar duties are prescribed by section 7C of the Pension Funds Act of 1956 for the board of trustees of a retirement fund.<sup>87</sup> Duties of the board of trustees are discussed under paragraph 6.8 below.

#### **6.3.4.3 *The Inspection of Financial Institutions Act 80 of 1998***

Section 2 of this Act gives the Registrar the powers to appoint inspectors. On the other hand, section 3(1) and (2) empowers the Registrar to inspect the affairs of any financial institution to check if there are no irregular dealings. In terms of section 12, any person who fails to cooperate with inspectors commits an offence and may be imprisoned for a period of up to two years or be liable to pay a fine or to both a fine and imprisonment. This is to ensure that funds are administered in accordance with the prescribed laws, and that the affairs of the funds are managed to the best interests of the fund, its members, and/or beneficiaries.

#### **6.3.4.4 *Financial Advisory and Intermediary Services (FAIS) Act 37 of 2002***

This Act regulates all financial services providers who give advice or provide intermediary services to their clients.<sup>88</sup> An example in this regard would be advice with regard to a retirement annuity. The objectives of this Act include ensuring that the financial providers act honestly and fairly and that they comply with all applicable statutory or common law requirements applicable to the conduct of business.<sup>89</sup>

A client who is aggrieved by the conduct of a representative refers the matter to the Financial Advisory and Intermediary Services Ombudsman,<sup>90</sup> who deals with complaints if the internal complaints procedure of the Financial Services Providers was unsuccessful and the complainant wants to pursue the matter further.

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<sup>87</sup> Section 7C of the Pension Funds Act of 1956.

<sup>88</sup> Section 1 of the Financial Advisory and Intermediary Services Act of 2002 defines "financial service provider" as "any person, other than a representative, who as a regular feature of the business of such person furnishes advice; or furnishes advice and renders any intermediary service; or renders an intermediary service.

<sup>89</sup> Section 16(1)(a) of the Financial Advisory and Intermediary Services Act of 2002.

<sup>90</sup> Section 20(3).

The Ombudsman acts as an adjudicator in disputes between clients and Financial Services Providers.<sup>91</sup>

Below follows a discussion on different types of retirement funds in South Africa.

## **6.4 THE TYPES OF RETIREMENT FUNDS**

### **6.4.1 General**

There are primarily two types of retirement funds in South Africa, namely a “pension fund” and a “provident fund”. The other one, which is mainly used by the self-employed, professionals, and any other person who can afford to make contributions to the fund and those who would like to top up the benefits they will receive from pension and provident funds, is a “retirement annuity fund”<sup>92</sup>, and one other important fund is a “preservation fund” – which is solely used to preserve retirement benefits.

#### **6.4.1.1 Retirement annuity fund**

A retirement annuity fund is not employment-related and there is therefore no need for a person to be employed in order to join this fund. Participants in the fund also do not enjoy employer contributions. A retirement annuity fund can serve a supplementary role to occupational retirement funds. It takes the form of a private pension plan for individuals, hence it is a personal investment vehicle.<sup>93</sup> Retirement annuity funds must register under the Pension Funds Act of 1956.<sup>94</sup>

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<sup>91</sup> Section 28(5)(a).

<sup>92</sup> Retirement annuity funds also discussed under par 5.6.2 in Ch 5.

<sup>93</sup> Dewar et al *The Practical Guide to Retirement Funds and Retirement Planning* op cit note 5 at 60.

<sup>94</sup> Section 4 of the Pension Funds Act of 1956.

The fund is funded through a long-term policy which is administered by an insurer. The benefit can only be accessed when a person reaches the age of 55.<sup>95</sup>

At retirement a member has the same options as a member of a pension fund. It should be noted, however, that a retirement annuity fund does not provide an income at retirement as it merely serves as a savings vehicle. A person can choose to either use the full benefit or a compulsory two-thirds to buy an annuity. The fund also pays a benefit to dependants and/or beneficiaries in case of a member's death before reaching the age of 55 or before accessing the benefit. A person who cancels membership or contributions to the fund will also have to wait until he or she reaches the age of 55 to access the fund. Such a person also has the option to transfer the benefit from the former fund to another retirement annuity fund if he or joins a new fund. Contributions may take the form of regular contributions, lump-sum contributions or a transfer from another fund. Retirement annuity funds can also be considered to serve as preservation funds as they only allow withdrawals when a member reaches the age of 55.<sup>96</sup> Membership is open for everyone who can afford to pay contributions on voluntary basis.<sup>97</sup>

#### **6.4.1.2 Preservation fund**

A preservation fund is specifically used to invest or preserve a benefit received from either a pension fund or provident fund when a member is dismissed, has resigned, or has been retrenched. A member of a retirement fund who exits the fund under such circumstances can transfer part or the whole of their benefit to this fund. Such a person will be entitled to a further once-off withdrawal from a preservation fund after joining the fund. Similar to a retirement annuity fund, a member of a preservation fund may retire from the fund any time after reaching the age of 55 if the rules of the

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<sup>95</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 13.

<sup>96</sup> Brown M "Retirement Annuity Funds in South Africa" June 2013 at 1-3, accessed from: [http://www.etsara.co.za/news/latest/retirement\\_annuity\\_funds\\_in\\_sa.pdf](http://www.etsara.co.za/news/latest/retirement_annuity_funds_in_sa.pdf), last visited 07 September 2015.

<sup>97</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 92.

fund provide for that. A member can also retire from employment but not exit a preservation fund and vice versa. It is also not required that there should be an employer and employee relationship with regard to the membership of a preservation fund. A person can transfer his or her benefit to a preservation fund of his or her choice. The transfer of a withdrawal benefit from an occupational retirement fund to a preservation fund does not attract tax.<sup>98</sup> This is the government's way of encouraging people to preserve their retirement benefits until they reach retirement. Once the benefit is placed in a preservation fund, a member will no longer make any contributions to the fund.<sup>99</sup> It is at the moment not compulsory for people who make withdrawals from their funds to preserve those benefits. A move which would have seen the introduction of compulsory preservation of retirement benefits was rejected by trade unions in the early 1980s after the enactment of the Preservation of Pensions Bill. This Bill was aimed at legislating the compulsory transfer of retirement benefits when employees changed jobs. In terms of this Bill, the employee would move the benefit from the fund the old employer participated in to the fund the new employer is participating in.<sup>100</sup>

Preservation funds are very important from a social security perspective as many people in this country retire with insufficient funds because of the leakages that exist within the system. People are allowed to withdraw money when they change jobs and this reduces the benefits they will receive when they retire. It is therefore high time that the government should make it compulsory for people who resign or change jobs to preserve the money they withdraw from the funds their former employer/s participated in and access it only at the time of retirement.

The discussion of retirement annuity funds and preservation funds is limited to this brief description as they are not necessarily employment related.

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<sup>98</sup> Retirement Fund Note RF1/2012, 1 November 2012; Naidoo P (Legal Specialist: Research Momentum Employee Benefits – FundsAtWork) Legal Update No.1 of 2013, 10 January 2013, [https://eb.momentum.co.za/downloads/pdf/LegalUpdate\\_1\\_2013\\_PreservationFunds\\_10\\_January\\_2013.pdf](https://eb.momentum.co.za/downloads/pdf/LegalUpdate_1_2013_PreservationFunds_10_January_2013.pdf), last visited on 26 July 2015.

<sup>99</sup> Dewar et al *The Practical Guide to Retirement Funds and Retirement Planning* op cit note 5 at 70.

<sup>100</sup> Field W "Employees' Pension and Provident Fund Rights: A Renewed Interest Develops" (1991) 12 *ILJ* at 965 (hereafter, Field "Employees' Pension and Provident Fund Rights").

The need for compulsory preservation of retirement benefits in South Africa, however, has become high priority and therefore can no longer be ignored. The preservation of retirement benefits is discussed further under paragraph 6.6.3 below.

Pension funds and provident funds are discussed in paragraph 6.4.2 below as they are the two main types of retirement funds. It should be noted that even though the term “pension fund” is generally used to refer to all retirement funds, it is important to be able to distinguish between a “pension fund and a provident fund” in order to understand what they are about. Pension and provident funds can take the form of either a “defined-benefit” or “defined-contribution” fund. The difference between the two is in the way the retirement benefit is calculated.<sup>101</sup> It is believed the first retirement funds in South Africa were in the form of defined-contribution schemes which were funded by endowment policies.<sup>102</sup>

These funds were replaced by defined-benefit funds in the 1960s. A shift back to defined-contribution funds occurred in the 1980s as a result of pressure from black trade unions, which were against the introduction of the draft Pension Preservation Bill of 1980<sup>103</sup> as it would have limited withdrawals that employees could make from their retirement funds.<sup>104</sup> This Bill sought to regulate the compulsory transfer of pension and provident fund benefits when the employees changed jobs. Unions were in favour of defined-contribution provident funds as they are simple and for the

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<sup>101</sup> Downie *Essentials of Retirement Fund Management in Southern* op cit note 10 at 10-13; Sephton et al *A Guide to Pension and Provident Funds* (Glossary of terms used) op cit note 49 at ix-x; The Smith Committee Report op cit note 58 at 25

<sup>102</sup> Standard insurance policies are discussed under par 5.6.4 in Ch 5.

<sup>103</sup> The Draft Pension Preservation Bill of 1980 was intended to introduce compulsory preservation and to stop leakages on resignation before retirement, which had been recognised as a major reason for inadequate retirement benefits from occupational schemes. See Andrews J “Conversion from Defined Benefits to Defined Contribution – The South African Experience” at 3-4 accessed from <http://www.actuaries.org/EVENTS/Seminars/Brighton/presentations/andrews.pdf>, last visited 22 July 2015.

<sup>104</sup> See Andrews “Conversion from Defined Benefits to Defined Contribution – The South African Experience” (idem). See also generally on the unions’ dissatisfaction about the introduction of the Preservation of Pension Bill, Field “Employees’ Pension and Provident Fund Rights” op cit note 100 at 965-967; *South Africa’s Retirement Reform: First Discussion Paper* op cit note 1 at 10.

fact that members could receive lump-sum benefits when they retired or when they lost their jobs.<sup>105</sup>

#### **6.4.2 The distinction between a pension fund and a provident fund**

A pension fund is a retirement fund in which a member can take only up to one-third of the retirement benefit as a lump-sum payment, and the balance is paid out in the form of a monthly pension over the rest of the member's life.<sup>106</sup> What is good about a pension fund, and also for social security purposes, is the fact that a pension benefit is paid in the form of regular income during retirement and the chances of squandering all the money saved for retirement are minimised. A member of a pension fund also receives tax deductions for contributions made into the fund. The monthly annuity payable is taxed as normal income.<sup>107</sup>

A provident fund, on the other hand, is a retirement fund in which a member receives up to 100% of the retirement benefit as a lump-sum cash payment.<sup>108</sup> The whole pension benefit is available to the member at retirement and the money will be subject to tax. It should be highlighted here that the main objective of a retirement fund is to provide the member with adequate income during retirement, in the case of disability, or an adequate benefit to dependants of the member should the member die before retirement. This is the reason why regular income payment should be preferred instead of lump-sum payments. This should also be understood as being the objective underlying the right of access to social security in section 27 of the Constitution of the Republic of South Africa, 1996; the aim being to protect people from falling into poverty.

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<sup>105</sup> See Munnell G, Orszag M *The Oxford Handbook of Pensions and Retirement Income* (Anthony Asher: Pensions in Africa) 2006 at 825-826. See also generally, Field "Employees' Pension and Provident Fund Rights" op cit note 100 at 965-967; Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 12.

<sup>106</sup> Sephton et al *A Guide to Pension and Provident* op cit note 49 at (x).

<sup>107</sup> Snyman I "Work, Retirement and Financial Crises: The Views of a Number of Key Persons from Employer's and Employees' Bodies" 1988 at 22 (hereafter, Snyman "Work, Retirement and Financial Crises").

<sup>108</sup> Sephton et al *A Guide to Pension and Provident Funds* op cit note 49 at (x).

The problem with a provident fund, and from a social security perspective, is that the person receives all the money at once and the chances of squandering the money during the first few months or years are very high, depending on individual persons and circumstances they find themselves in.

The risks that face members who opt to take lump-sum cash payments include a longevity risk, that is where a member outlives his or her retirement savings; and investment risks, that is where investments made fail to perform as projected or underperform or the member experiences both. The best way to guard against these risks, especially the longevity risk, is to go for annuitisation of the benefit, which will ensure that the person receives income as long as he or she lives.<sup>109</sup> People who participate in provident funds often choose lump-sum cash payments when they retire or when they exit the funds as they want immediate access to the cash, sometimes due to difficult economic conditions but also due to other factors such as lack of proper advice at the time of withdrawal and a lack of understanding the dire consequences of choosing to take a cash lump-sum.

There are many risks with lump-sum cash payments which make it not the best option for social security purposes; considering the fact that an employee who receives the whole benefit as lump-sum cash will be without income for the rest of his or her life in retirement should he or she not be able to make a good investment or use the money wisely. It should be accepted though that these challenges do not necessarily mean that provident funds are an absolute bad option as it will always depend on how the receiver of the benefit handles or uses the money.<sup>110</sup>

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<sup>109</sup> The National Treasury: Preservation, Portability and Governance for Retirement Funds (Technical Discussion Paper C for Public Comment) 21 September 2012 at 21, accessed from [http://www.treasury.gov.za/comm\\_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%202012%20.pdf](http://www.treasury.gov.za/comm_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%202012%20.pdf), last visited on 07 September 2015 (hereafter, The National Treasury *Preservation, Portability and Governance for Retirement Funds*).

<sup>110</sup> Snyman "Work, Retirement and Financial Crises" op cit note 107 at 21.

South Africa's National Treasury has proposed in its Discussion Paper on Preservation, Portability and Governance for Retirement Funds<sup>111</sup> for regulations to be introduced to allow for the payment of a portion of the benefit from a provident fund as a lump-sum, with the remaining portion of the benefit used to buy an annuity which the member will receive as regular income. This, according to the National Treasury, should be the case except where the value of the benefit is below a certain level. This proposal is welcomed as it will place a restriction on the freedom retirees always had to take all the money and use it for other things except for their actual purpose, being income replacement during retirement. The National Treasury has made further proposals with regard to how provident fund benefits should be dealt with. Those proposals include aligning the retirement benefits of provident funds to those of pension and retirement annuity funds. According to the National Treasury, this will help those who retire from provident funds to better manage longevity and investment risks. It will further prevent retirees from spending their retirement benefit too quickly and becoming reliant on the state or their families for support. The proposal will also see members of provident funds enjoy the same tax deduction on their own contributions as those who contribute to pension funds.

The National Treasury is looking at a number of options in its effort to address the problem of leakages currently found in the system. The first option is to continue with things the way they are, that is to allow members of funds to access their benefit in full and in cash, but to close the door for the establishment of any new provident funds. The second option is to preserve vested rights and allow the value of the fund credit accrued on the day of the implementation of the legislation to be paid out as a lump-sum on retirement. The growth on this amount and new contributions will be subject to the same rules governing retirement benefits. The third option is to adopt a vesting scale system that will allow employees aged 50 and above, at the date of implementation of the legislation, to take a larger portion of their retirement savings as a lump-sum at retirement. Provident fund members aged below 50 at the date of

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<sup>111</sup> The National Treasury: Preservation, Portability and Governance for Retirement Funds op cit note 109 at 22-24.

implementation of legislative changes will be subject to provisions applicable to pension fund members.<sup>112</sup>

It is submitted that applying the same rules for both pension and provident funds will mean the system is in fact providing for one form of a fund which is a pension fund. This raises the question whether there will still be a need for provident funds. The transitional arrangements suggested by the National Treasury provide some solutions to a certain extent, while others open the door for more problems. For example; the first option will bring about the discontinuation of provident funds, while on the other hand, it will allow members who are already in the fund time to exit the fund as they reach retirement age. The challenge with this option is the issue of administration costs because more people will exit the fund, while on the other hand, there will be no new members joining the fund. The higher the number of people who exit the fund, the lesser the number of participating members; which then means that the smaller number of people who remain in the fund will have to carry the costs of running the fund.

The second option allows for the member of the fund to receive the value of the credit which had accrued on the day of implementation of the new legislation as a lump-sum. This option will favour those who are closer to retirement as they are likely to receive the whole benefit as a lump-sum as it will not make sense to annuitise the benefit for contributions of, for example, five years and less. The last option will see members who are 50 years and above taking home a larger portion as a lump-sum, while those below 50 will have to settle for regular pensions. The question here is whether such law will stand the constitutional test, as those who have to take regular pensions might feel hard done and discriminated against.<sup>113</sup> It is submitted that the best option will be to give members an opportunity to decide what they want, of course with professional advice guided by factors such as age, years of

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<sup>112</sup> *Idem.*

<sup>113</sup> Section 9(1) of the Constitution of the Republic of South Africa, 1996, states that everyone is equal before the law and has the right to equal protection and benefit of the law. On the other hand, section 9(3) is against any unfair discrimination directly or indirectly on one or more grounds that include among others gender, sex, and age.

contribution, and the amount of benefit. Members can choose whether they would still want to receive the benefit as lump-sum cash payment or as regular income when they retire. In this regard, retirement benefits of those who choose annuitisation will attract the application of the law that applies to pension funds. Provident funds may then be abolished or only be used by those who can prove that they already belong to either a pension fund or a retirement annuity fund.

### **6.4.3 Defined-benefit pension and provident funds**

A defined-benefit fund is also known as a “fixed-benefit” or “promised-benefit” fund. The benefit the employee is entitled to at retirement is calculated using the period he or she has been a member of the fund and his or her annual salary before retirement.<sup>114</sup>

The employee’s contribution is usually fixed, as a percentage of earnings; while on the other hand, the employer’s contribution is calculated looking at how much is needed to provide the employee with an adequate benefit. In other words, the employer has to meet the balance of the cost to achieve the targeted benefit. Thus the employees’ contributions and benefits are fixed, while the employer contribution varies.

The benefit in a defined-benefit provident fund is a 100% lump-sum cash payment – the amount of which depends on the length of the period the employee has been a member of the fund.<sup>115</sup> The disadvantage with this is that the employee who takes another job closer to a retirement date will lose a portion of his or her pension benefit. It is therefore important for employee members of the funds not to change jobs during the vesting period. A defined-benefit fund is a better option from a social security perspective if a person does not change his or her job closer to the vesting period as they will be guaranteed a certain amount when they retire. On the other hand, a defined-contribution fund member’s benefit will depend on the contributions

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<sup>114</sup> The Mouton Committee Report op cit note 58 at 553.

<sup>115</sup> Sephton et al *A Guide to pension and Provident Funds* op cit note 49 at 6-9.

made and also on how the market behaved. Thus a defined-benefit fund is less risky,<sup>116</sup> (provided the employee does not change jobs closer to retirement), as compared to a defined-contribution fund.

Benefits payable from defined-benefit funds are determined by the member's needs. For example, while a member with a spouse will be entitled to a spouse's pension and a member with dependants will be entitled to dependants' benefits, a member without a spouse or dependants will not be entitled to these benefits. The question with this position is whether this is constitutional, in that members of the same fund are treated differently based on their marital or dependency status.<sup>117</sup> It is submitted that this should indeed be approached on the basis of need in that, for example, a fund cannot pay a benefit for a spouse who does not exist or pay a disability benefit to an able-bodied person. This will not make sense based on the fact that benefits are mainly risk-based. Therefore, there should be no need to compensate a person for a risk which has not occurred and this surely cannot be considered to be constitutionally unfair.

#### **6.4.4 Defined-contribution pension and provident funds**

A defined-contribution fund is also known as a "fixed-contribution" or "money-purchase" fund. This form of a fund may be seen as a savings scheme. The contribution amount is determined by the rules of the fund. The retirement benefit received at retirement depends on the contributions made and interests accumulated. Most provident funds take the form of defined-contribution funds. The contributions work in exactly the same way as in a defined-contribution pension fund.

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<sup>116</sup> See generally, Baker A, Logue DE and Rader JS *Managing Pension and Retirement Plans: A guide for Employers, Administrators, and Other Fiduciaries* (Published to Oxford Scholarship Online, July 2005) at 1-8 (hereafter, Baker et al *Managing Pension and Retirement Plans*).

<sup>117</sup> See Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 115. Section 9(1) of the Constitution guarantees everyone equality before the law and equal protection and benefit of the law. Section 9(4), on the other hand, states that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). The grounds in subsection (3) include marital status.

Retirement benefits are calculated in the same way too, but the whole benefit in a defined-contribution provident fund may be taken as a lump-sum.<sup>118</sup> Defined-contribution funds need members who are familiar with issues of investment as the level of benefit depends more on the contributions made and the investment returns. The member's benefit is not necessarily based on the number of years a person has worked for one particular employer; neither is it dependent on the employee's age. However, this can be a disadvantage to employers as the plan does not discourage valuable employees from leaving their employers in search of greener pastures. The plan is attractive to employees as they will not lose much by changing jobs. The cost of administering a defined-contribution fund is lower than that of a defined-benefit fund. Employers providing defined-contribution funds may have to make higher contributions to offset the risk premium demanded by employees due to the added risk.<sup>119</sup>

#### **6.4.5 Other types of funds**

There are other types of retirement funds which are created to serve a specific purpose. These funds are discussed below. These funds include preservation funds, which have already been described in paragraph 6.4.1 above.

##### **6.4.5.1 Umbrella funds**

An umbrella pension or provident fund is a single fund created and usually managed by an insurance company. It is a fund that is already in existence, registered, and has a board of management and fund rules which govern all those who join the fund. Employers or groups of employers who cannot establish their own funds join umbrella funds. Joining umbrella funds saves employers a lot of money in administration costs,<sup>120</sup> and therefore reduces the costs that would have been incurred by the members of the funds, which means more money will go to members

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<sup>118</sup> Hanekom et al (ibid) at 9-10.

<sup>119</sup> Baker et al *Managing Pension and Retirement Plans* op cit note 116 at 1-8.

<sup>120</sup> Dewar et al *The Practical Guide to Retirement Funds and Retirement Planning* op cit note 5 at 35-36.

and not towards administration costs. Umbrella funds take the form of a defined-contribution fund.<sup>121</sup> At the time of exit, a member can either take the benefit in cash or transfer it to another fund.

These funds offer participating employers various risk benefits either as part of the fund or as a separate scheme. Some of these funds are sector-specific and do not take employers outside that specific sector. This country has seen an increase of umbrella funds in the past few years. Concerns raised regarding umbrella funds relate to their governance; whereby employees are generally not represented on the boards of trustees as required by the Pension Funds Act of 1956. The boards of umbrella funds are usually made up of employees of insurance companies and the administrator of the fund. This is the case notwithstanding the fact that umbrella funds may apply for exemption from being required to have the required number of member elected trustees if it will not be practical for it to do so.<sup>122</sup>

Umbrella funds are a way to go if the intention is to improve on the management of funds and also to save on costs. Employers which would not have been able to establish funds for their employees are able to join these funds and this will therefore also increase the number of people who are covered by the system.

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<sup>121</sup> Van den Heever "Pension Reform and Old Age Grants in South Africa" op cit note 23 at 3.

<sup>122</sup> Hendrie S, Smith A, Hobden T, Genesis OM: Risk benefit provision through provident and pension funds (Research undertaken for South African Treasury), 17/10/2007: Version 1.1 at 18 (hereafter, Hendrie et al *Risk Benefit Provision through Provident and Pension Funds*). See also generally on the nature of umbrella funds and their growth in this country, Hacking H "Research: Appeal of Umbrella Funds Continues to Grow" *The Prospector* (Old Mutual Corporate), 19 September 2010 at 5.

#### **6.4.5.2 Industrial funds**

Most of these funds were established by means of collective agreements in terms of the Labour Relations Act 66 of 1995. These funds were not previously regulated under the Pension Funds Act of 1996. All bargaining council funds which had not been registered in terms of this Act had to be registered by 1 January 2008, and those which could not do so by the given date could only be given extension until 30 April 2008.<sup>123</sup>

This was long overdue as the Pension Funds Act of 1956 is specialised for that purpose, while on the other hand, the Labour Relations Act is meant to regulate the employment relationship between the employer and employees.

#### **6.4.5.3 State-controlled funds**

In South Africa, all those who are employed by different government departments belong to a common fund known as the Government Employees Pension Fund (GEPF).<sup>124</sup> This fund is regulated by the Government Employees Pension Law of 1996.<sup>125</sup> Homelands previously also had their own separate and independent funds.<sup>126</sup> All those funds have been discontinued<sup>127</sup> and now all government employees belong to one fund.<sup>128</sup>

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<sup>123</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 96.

<sup>124</sup> The Government Employees Pension Fund was established in terms of the Government Employees Pension (GEP) Law, Proclamation 21 of 1996, to manage and administer pension matters related to government employees. The normal retirement age is 60 years but members can retire early under certain circumstances. The fund also pays ill-health and disability benefits, resignation benefits, funeral benefits, orphan's annuity, and spouse's annuity (both also paid where a member dies while still in service and had a full potential service period of at least ten years) and death benefits. Retirement annuities are guaranteed for five years after a member goes on retirement. Should a member die within this period, his or her beneficiaries will receive the balance of the five year annuity payments in the form of a once-off cash payment. See in this regard [http://www.gepf.gov.za/index.php/our\\_benefits](http://www.gepf.gov.za/index.php/our_benefits), last accessed 07 September 2015.

<sup>125</sup> Proclamation 21 in GG 17135 of 19 April 1996 [date of commencement: 1 May 1996].

<sup>126</sup> The Government Services Pension Fund (eligible employees of the following government departments belong to this fund: public servants appointed in terms of the Public Service Act; educators; personnel of the Services Departments – those were the South African Police Service, the Department of Correctional Services, the South African National Defence Force, and National

Note should be taken that even though government employees belong to the Government Employees Pension Fund, there are those who work for state organs, for example in the security forces, who have their own separate funds.

## **6.5 THE SCOPE OF COVERAGE**

Coverage in the formal sector of the South African economy is provided through private retirement schemes which are regulated by the government through legislation. South Africa does not have a public retirement fund.<sup>129</sup> As a result, the majority of people, especially from the black communities are either not covered or inadequately covered because most of them are employed in the informal sector of the economy as farm workers, day labourers, and domestic workers, and are earning very little.<sup>130</sup>

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Intelligence Agency); The Associated Institutions Pension Fund (Act 41 of 1963) (eligible employees of the following institutions belonged to this fund: research councils; cultural institutions; universities; technickons; and institutions which have been declared Associated Institutions. While most of these institutions opted to manage their own pension funds, some employees chose to remain members of the AIPF); the Temporary Employees Pension Fund (eligible employees in the temporary employment of the employers participating in the above two funds belonged to this fund); and the Authorities' Service Pension Fund (eligible employees of an Authority or Territorial Board established under the Bantu Authorities Act, 68 of 1951, belonged to this fund. Local Authorities of the following authorities qualified: Lebowa; Gazankulu; Kwandebele; Kangwane; KwaZulu; and QwaQwa. Eligible employees in the temporary employment of the aforementioned authorities belonged to this fund). The following previous funds were also discontinued: the Government Employees Pension Fund of the Transkei, the Transkeian Government Service Pension Fund, the Ciskeian Civil Servants Pension Fund, the Government Pension Fund of Bophuthatswana, the Government Pension Fund of Venda, the Government Superannuation Fund of Venda, and the Authorities' Service Superannuation Fund.

<sup>127</sup> Section 14 of the Government Employees Pension Law, 1996.

<sup>128</sup> See generally, Government Employees Pension Fund: Member's Guide at 9, accessed from [http://www.gepf.co.za/uploads/annualReportsUploads/Member\\_Guide\\_Page\\_Final\\_1-23.pdf](http://www.gepf.co.za/uploads/annualReportsUploads/Member_Guide_Page_Final_1-23.pdf), last visited 26 July 2015. All the assets of the old funds were transferred to the Government Employees Pension Fund in terms of section 14 of the Government Employees Pension Funds Law, 1996.

<sup>129</sup> The Mouton Committee Report op cit note 58 at 10. Note should be taken that Belgium, the Netherlands, and the United Kingdom have public pension funds. See in this regard the discussions in Ch 3.

<sup>130</sup> Olivier MP, Smit N and Kalula ER (eds) *Social Security: A Legal Analysis* 1ed (2003) at 137-138 (hereafter, Olivier et al *Social Security: A Legal Analysis*).

Thus, even though coverage is relatively high in this country, the focus is mainly on those who are employed in the formal sector of the economy. This can be attributed to, among other factors, that workers in the formal sector are better organised than those in the informal sector.<sup>131</sup> The system is also rigid as it does not allow workers the opportunity to select an occupational pension fund of their own choice. Employees are obliged to belong to the funds established by their employer or within the sectors they are working in. Workers are also not able to switch between funds of their own accord and usually have to change jobs to be able to change their pension funds. This in a way limits workers' freedom to participate in funds of their own choice and further denies them the opportunity to invest their money with funds they think will offer them better service and adequate benefits.

Freedom to choose one's preferred fund and to shift accumulated funds to a new retirement fund with a better investment performance could promote competition and encourage fund managers to keep costs low and make sound investment decisions. This might also open the door for more workers to participate in saving for their retirement. Such flexibility may, however, also mean more system costs, which might have to be carried by participants.

In terms of the Income Tax Act of 1962, an employer-employee relationship must exist in order for the employer to establish a retirement scheme.<sup>132</sup> This means that other categories of workers who do not qualify as employees are excluded and have to make individual arrangements. All present and future employees who qualify to be members of the fund must participate in the fund, otherwise the South African Revenue Services (SARS) will not approve the fund.<sup>133</sup> Membership of more than one fund is permissible, provided that the employee qualifies in terms of the

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<sup>131</sup> Gillion et al *Social Security Pensions* op cit note 7 at 197–198.

<sup>132</sup> This can be deduced from the definitions of "pension fund" and "provident fund", respectively in section 1 of the income Tax Act of 1962.

<sup>133</sup> Dewar et al *The Practical Guide to Retirement Funds and Retirement Planning* op cit note 5 at 40-41. A pension or provident fund must be approved by the Commissioner of SARS. The requirements that must be met before such approval will be given are contained in the definitions of the terms "pension fund" and "provident fund" in section 1 read with section 3(5) of the Income Tax Act of 1962.

requirements of the funds involved.<sup>134</sup> Eligibility for membership is generally stipulated in the fund rules and mainly depends on the person being employed.

South Africa's National Treasury in its First Discussion Paper on Retirement Reform published in 2004<sup>135</sup> estimates coverage of employees in the formal sector to be between 66% and 84%, which is considerably high, taking into account the fact that participation in this country is by law generally still not compulsory.<sup>136</sup> This in fact confirms the fact that membership of occupational retirement funds is accepted as an obligatory condition of employment in the South African workplace.

A research study undertaken for the South African National Treasury in 2007 found that most or all people in higher-income categories, earning R120 000 annually and employed in the formal sector, were members of either a pension or provident fund. The gaps in coverage were discovered in the below R60 000 income group for both formal and informal workers. About four million or little over 60% from a population of six million formal employees earning R60 000 annually were members of retirement funds. Thus, roughly three million or 42% of the formally employed in this income category did not have retirement coverage through a formal fund arrangement. There were still another 360 000 formal employees without retirement coverage in the R60 000 to R120 000 annual income category and the total number of formally employed without retirement fund membership was estimated at a little over three million individuals. This represented almost 40% of the formally employed below the R120 000 annual income threshold.<sup>137</sup>

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<sup>134</sup> Dewar et al (ibid) at 41.

<sup>135</sup> South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 13.

<sup>136</sup> Dewar et al *The Practical Guide to Retirement Funds and Retirement Planning* op cit note 5 at 3.

<sup>137</sup> Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" op cit note 122 at 35-36.

This is an indication that people in the lower-salary level in both the formal sector and the informal sector of the economy are not adequately covered as the number of those who are covered is less than the number that is not covered. This is a worrying factor, considering the fact that these are categories of people who are likely to experience poverty in their retirement. This is also a demonstration that the thinking that employees in the formal sector are reasonably well covered needs to be qualified by further stating that it is in fact those earning higher salaries that are adequately covered. Of even greater concern is that Sanlam<sup>138</sup> discovered from the majority of fund members and mostly from black communities who find it difficult to save for retirement, that this is due to factors that include the following: most of them are sole breadwinners with everyone in their families depending on their salary; they are financially responsible for other people like siblings, parents, and other immediate or extended family members; and most of them do not earn enough money to use some to save for the future as they have immediate needs such as taking care of children and providing shelter and health needs for the entire household.

What is interesting and encouraging, however, is the fact that most of the respondents demonstrated an understanding that saving for retirement is something that should start early in one's career and also that people should save money regardless of how small their salary may be.<sup>139</sup> Other contributing factors include a high level of debt, the fact that people receive retirement advice very late in their careers, and that generally people fail to prioritise health and medical care when saving for retirement and as a result some of the money from a retirement benefit is spent on medical costs.<sup>140</sup>

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<sup>138</sup> Sanlam Limited is a South African financial services group.

<sup>139</sup> Sanlam's 2012 Benchmark Survey op cit note 50 at 4-5.

<sup>140</sup> Ibid at 5.

The informal sector is certainly the most affected as there is currently no suitable savings vehicle for them, also considering the fact that most of them do not even earn anything near R60 000 a year. Most people in the low-income group work for small businesses and therefore do not earn much. Businesses in this category have low profit margins and would worry more about their survival rather than about providing for their employees' retirement. The small enterprises also often lack the capacity to establish and run their own funds. Employees who earn little are generally also reluctant to have their salaries deducted even if it is to save for the future.<sup>141</sup>

Statistics South Africa<sup>142</sup> (Stats SA) describes people who are in "informal employment"<sup>143</sup> as "persons who are in precarious employment situations irrespective of whether or not the entity for which they work is in the formal or informal sector". These are people who are not entitled to basic benefits such as pension or medical aid contributions from their employers. Most of them feel that they do not have job security as they do not even have a written contract of employment.<sup>144</sup>

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<sup>141</sup> Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" op cit note 122 at 37.

<sup>142</sup> Statistics South Africa is a government agency given the mandate under the Statistics Act 6 of 1999 to collect information (including economic and social statistics, statistics relating to employment, poverty, health, and the population). In terms of section 3(1) of the Statistics Act of 1999, statistics collected help government, businesses, and other organisations or the public in planning, decision making, and monitoring or assessment of policies. The Act is administered by the Statistician-General (Head of Statistics South Africa), who is appointed by the President in terms of section 6 of the Act.

<sup>143</sup> Statistics South Africa (the national statistical service of South Africa), Statistical Release: P0211 (Quartely Labour Force Survey (Quarter 2, 2013), at 1, accessed from <http://www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf>, last visited on 26 July 2015 (hereafter, Statistics South Africa). See Statistics South Africa's definition of "informal employment" and "informal sector". See also generally, Olivier et al *Social Security: A Legal Analysis* op cit note 130 at 253, where the informal sector is said to include informal traders, small-scale manufacturers, and domestic workers.

<sup>144</sup> Statistics South Africa (idem).

Stats SA distinguishes two components of the informal sector as follows:

- Employees working in establishments that employ less than five employees, who do not deduct income tax from their salaries/wages; and
- Employers, own-account workers, and persons helping in their household business without pay and who are not registered for either income tax or value-added tax.<sup>145</sup>

Many people working in the informal sector are excluded by the system because most schemes have been established to suit the circumstances of people in regular and more formalised employment. People employed in the informal sector are mainly from the agricultural sector and would normally depend largely on the land produce and in some cases family support, and would not worry much about saving for retirement.

The informal sector is characterised by low salaries, job insecurity, and lack of access to social security benefits. People in this sector use the money they receive for survival and would therefore have nothing left to save for retirement. The fact that their work circumstances are often uncertain is also a problem. A person must also be employed for a long period in order to be able to save enough for retirement and this is not always possible as people in the informal sector are likely to change jobs more often in search of better conditions and wages. They often give priority to more immediate needs such as food, clothes, and healthcare.<sup>146</sup>

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<sup>145</sup> Idem.

<sup>146</sup> Gillion et al *Social Security Pensions* op cit note 7 at 197–198. It is said that informal sector employees are also likely to evade paying contributions if they are required to contribute to a retirement scheme. See in this regard McGillivray W “Contribution Evasion: Implications for Social Security Pension Schemes” *International Social Security Review* Vol 54 (4) 2001 at 6; Smit N and Mpedi LG “Social Protection for Developing Countries: Can Social Insurance be More Relevant for those Working in the Informal Economy?” *Law, Democracy & Development* Vol 14 (2010) at 20; Mpedi LG “Pertinent Social Security Issues in South Africa” (Socio-Economic Rights Project: Community Law Centre University of the Western Cape), 2008 at 33; and Van Ginneken W (ed) “Social Security for the Informal Sector: Investigating the Feasibility of Pilot Projects in Benin, India, El Salvador and Tanzania” (Issues in Social Protection: Discussion Paper 5 -Social Security Department, International Labour Office, Geneva) at 3, 1997, accessed from <http://www.gcssye.net/files>, last visited on 22 July 2015.

As the majority of people are employed in the informal sector, this means that the number of people not covered is much higher than the number that is covered, which is certainly not a good thing for a system that is considered to be doing well by world standards.<sup>147</sup> South Africa's National Treasury has estimated in its First Discussion Paper for Retirement Reform that about 50% of the economically active population provide for their retirement through occupational and voluntary saving arrangements. Failure to extend coverage to the majority of the workers in the formal sector was attributed to the fact that the formal sector has a high number of part-time employees, contractors, or seasonal workers. It would also seem that generally employees on their own choose not to join a fund or they are just not eligible to join.<sup>148</sup>

It was further discovered that a certain proportion of those who are covered by the system will still rely on the state old-age grant in their retirement due to insufficient benefits.<sup>149</sup> This is a big challenge for the government as it has to carry the burden of supporting those who are not able to support themselves during retirement. The state has to use revenue that could otherwise have been directed to other things to fund social assistance and state old-age pensions to cater for these people.

It is submitted that notwithstanding all the challenges that exist with regard to extending coverage to all workers in this country, the buck still stops with the state, especially where the exclusions are caused by the absence of laws, policies, and measures that could open doors of access for many who are presently excluded. The Constitution in section 27 guarantees everyone the right of access to social security. Everyone in this context should be interpreted to include all those who are working and can afford to make contributions to retirement funds, but they cannot do

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<sup>147</sup> See in this regard the Mercer Global Pension Index 2014 Report at 16, accessed from <http://globalpensionindex.com/2014/melbourne-mercero-global-pension-index-2014-report.pdf>, last visited on 22 July 2015 (hereafter, Mercer Global Pension Index 2014 Report). In this report, South Africa was given a "C" rating, which means South Africa has a system with some good features.

<sup>148</sup> South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 19.

<sup>149</sup> Ibid at 12.

that either because the system does not provide savings vehicles that suit the nature of their employment, or that the system is not accommodative of their salary levels. In this regard, the state is obliged by section 27(2) to take initiatives that would ensure that these people's right of access to social security is realised. Those initiatives include reasonable legislative and other measures, within the state's available resources, to achieve progressive realisation of this right. The provisions of section 27(2) are more aligned to what is provided for by article 2(1) of the International Covenant on Economic, Social and Cultural Rights, except that the article, unlike section 27(2) of the Constitution, does not mention that legislation and appropriate means must be reasonable. In other words, section 27(2) has gone beyond just requiring the state to enact legislation and coming up with measures to achieve progressive realisation, but it requires those measures to be reasonable. Thus, in terms of this section, legislation and measures taken can only be considered appropriate if they are reasonable.

Therefore the question to be asked will be whether what the state has done to realise the right to access to adequate retirement provision is reasonable or not. Action taken by the state could include introducing laws and policies that would allow people to establish or participate in retirement schemes. This might require the amendment of the Pension Funds Act of 1956 to open doors for more forms of retirement schemes to cater especially for those employed in the informal sector, the self-employed, and those earning low salaries. In *Government of the Republic of South Africa v Grootboom*, the Constitutional Court when dealing with the issue of access to adequate housing had to interpret the word "reasonableness" in relation to legislation and other measures.<sup>150</sup> The Court said, among other things, that the measures taken must establish a coherent programme directed towards the progressive realisation of the right of access [to adequate housing] within the state's available means and that the programme must be capable of facilitating the realisation of the right.<sup>151</sup> The Court stated that legislative measures that are to be

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<sup>150</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 at par 42 (hereafter, *Grootboom*).

<sup>151</sup> At par 41.

taken by the state have to be supported by appropriate, well-directed policies and programmes implemented by the executive. The policies must be reasonable both in their conception and implementation.<sup>152</sup>

Thus, what the state does in its effort to extend protection to categories of people who are excluded by the system will be measured according to its reasonableness and its effectiveness in facilitating the realisation of the right. What the Constitutional Court said about this duty in the *Grootboom* supra has, according to the Taylor Report,<sup>153</sup> increased pressure on the state to put in place a coherent and comprehensive programme for progressively realising the constitutional obligations and opens a way for constitutional challenges against the state to comply with the provisions of section 27(2) of the Constitution.

In the Committee's view, this will require the state to devise, formulate, fund, implement, and to constantly review relevant measures.<sup>154</sup>

The Taylor Report set out the following as the criteria that should be used to evaluate the reasonableness of the measure:<sup>155</sup>

- Socio-economic and historical context of the deficiencies to be addressed;
- Whether there is institutional capacity to implement the programme;
- Whether the programme is open for review and whether it addresses short-, medium-, and long-term needs;
- Whether the programme is inclusive and does not exclude the majority of the people;
- Whether the measure will meet basic human needs and takes into account the extent to which the right they aim to protect is being denied; and
- Whether the programme and measures ensure that more people will be progressively included.

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<sup>152</sup> At par 42.

<sup>153</sup> The Taylor Committee Report op cit note 58 at 32.

<sup>154</sup> Idem.

<sup>155</sup> At 51.

South Africa is moving towards finalising the reform of its retirement system and it is important for the government to ensure that whatever will come out of those reforms is in both content and form reasonable, and that its implementation is reasonable to achieve the required results – also taking into account important elements put forward by the Taylor Committee.

Below follows a discussion of benefits provided by the South Africa's occupational retirement system.

## **6.6 THE TYPES OF BENEFITS**

### **6.6.1 General**

The primary objective of retirement funds is to provide retirement benefits to members when they retire. It is only in special circumstances such as where the member loses his or her job, is disabled, or dies before going into retirement, that other benefits are paid to the member or his or her dependants. Benefits payable must be at a level that will enable the member or dependants to maintain a reasonable standard of living after the member has stopped working.

The standard of living during retirement may not be the same as that which the person enjoyed prior to retirement or the death of the breadwinner, but must at least be at a level that will be adequate to protect the beneficiary from falling into the poverty trap. A social security system should be considered to be adequate only if it offers benefits that are adequate for the beneficiaries to live above mere survival. Thus, a system that provides insufficient benefits will fail the social security test as it shall also not be able to provide adequate protection to the people it is targeting. The fund rules regulate, among other things, the types of benefits payable by the funds, entitlements to benefits, and payment of benefits. Section 1 of the Pension Funds

Act of 1956 defines “benefit” in relation to a fund as any amount payable to a member or beneficiary in terms of the rules of the fund.<sup>156</sup>

As indicated above the benefits that are offered by retirement funds are not only limited to a benefit that a member receives at the time of retirement,<sup>157</sup> but may also include what are generally known as “risk benefits” or “ancillary benefits”. These include, among others, death benefits, withdrawal benefits, disability benefits, and benefits payable to a non-member spouse upon divorce.<sup>158</sup>

Withdrawal benefits are payable in circumstances where the member resigns or is retrenched from his or her job. These benefits are discussed below.

### **6.6.2 Retirement benefits and payment of minimum benefits**

The main objective of a retirement fund is to pay a retirement benefit at the time a member retires.<sup>159</sup> This comes either in the form of a monthly pension; that is, if a member belonged to a pension fund; or a cash lump-sum payment in the case of a provident fund. The benefit is meant to serve as income replacement when the person stops working and enters into retirement.

The requirements for a member who has been participating in a fund to be eligible to receive a retirement benefit usually relate to minimum age and years of contribution. The retiree becomes entitled to an unreduced benefit at a particular age if all the other conditions are satisfied.<sup>160</sup>

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<sup>156</sup> See the definition of “benefit” as inserted by section 1 of the Pension Funds Amendment Act 11 of 2007.

<sup>157</sup> Strydom EML, Le Roux PAK, Landman AA, Christianson MA, Dupper OC, Myburgh P, Barker FS, Garbers CJ, Basson AC, Dekker A and Esselaar V *Essential Social Security Law 2006 2ed* at 28.

<sup>158</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 130 at 283.

<sup>159</sup> Sephton et al *A Guide to Pension and Provident Funds* (glossary of terms used) op cit note 49 at (x).

<sup>160</sup> Gillion et al *Social Security Pensions* op cit note 7 at 41.

Thus the age of a fund member is the main determining factor with regard to accessing the benefit, while the determining factors for the level of the benefit would include years and level of contributions and returns on investments made by the fund. It may also be required that a worker must have had a minimum number of years of contribution to qualify for a benefit at a certain level.

Defined-benefit schemes usually require a minimum number of years of coverage as a contributing member to qualify for a pension benefit, with those working more years than the minimum receiving greater benefits. Workers who do not satisfy the minimum number of years of coverage often become entitled to a lump-sum cash payment.<sup>161</sup>

The Pension Funds Act of 1956 does not define "retirement age", but defines a "retirement date" as the date on which a member becomes entitled to a benefit in terms of the rules of the fund, to the grant of an annuity, or the receipt of a lump-sum payment on account of age, ill health, or retrenchment of staff.<sup>162</sup>

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<sup>161</sup> Ibid at 43-44.

<sup>162</sup> Section 1 of the Pension Funds Act of 1956 defines "retirement date". Section 187(2)(b) of the Labour Relations Act of 1995 provides that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. In *Harris v Bakker and Steyger (Pty) Ltd* (1993) 14 ILJ 15553 (IC), the case which was decided prior to the introduction of the Labour Relations Act of 1995, it was held that the employer may tell the employee to go on retirement when that employee reaches a retirement age. In such a case, the employer may not consult the employee and the employer does not commit an unfair labour practice if it terminates the employment contract of an employee who has reached a retirement age. However, in *Botha v Du Toit Very & Partners CC* [2006] 1 BLLR 1 (LC), the Labour Court held that the employee whose contract of employment is terminated after the date of retirement had passed (post-retirement) was entitled to be consulted before such termination. Note should also be taken that when an employee reaches the normal retirement age or the agreed retirement age, the contract will automatically come to an end and therefore such termination will not amount to an unfair dismissal or to a dismissal as defined by section 186 of the Labour Relations Act of 1995. See in this regard *Rubenstein v Price's Daelite (Pty) Ltd* (2002) 23 ILJ 528 (LC) and *Schwitzer v Waco Distributors* [1998] 10 BLLR 1050 (LC). Such termination will also not amount to an automatically unfair dismissal. See *Venn v Moser Industries Ltd* (1997) 18 ILJ 1402 (LAC); *Van Niekerk v Karee Mine (Western Holdings)* (2001) 22 ILJ 1202 (LC). However, the Labour Court in *SA Clothing and Textile Workers Union v Rubin Sportswear* (2003) 24 ILJ 429 (LC) held that it was automatically unfair to force employees to retire without proper consultation. The court ordered that those employees should receive compensation. In determining whether an employer has reached normal retirement age, there are a number of things to look at; namely the contract of employment concluded between the employer and employee, relevant workplace policies, and retirement fund rules. A distinction has to be drawn between fund rules which merely state the age from which a member may claim retirement benefits, and retirement age as per employment contract. Also see generally in this regard the following cases: *Kirsten v Southern Cross*

On the other hand, the Income Tax Act of 1962 (with effect from 22 July 2008) defines "retirement date" as:

the date on which a member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund, in terms of the rules of that fund, becomes entitled to an annuity or a lump-sum benefit contemplated in paragraph 2(a) of the Second Schedule on or subsequent to death or attaining normal retirement age.

This is the date on which a member of a fund becomes entitled to an annuity or a lump-sum benefit.<sup>163</sup> Pension funds rules often stipulate a retirement age and may also make provision for early retirement, which is normally from the age of 55. Generally, if a person retires before the age of 55, that is regarded as a withdrawal from the fund and not as retirement.

All funds registered in terms of the Pension Funds Act of 1956 are now required to provide for prescribed "minimum benefits" in terms of section 14A of the Act.<sup>164</sup> This has changed the position where previously funds paid members different benefits determined by circumstances in which a member exited the fund before retirement due to incidents such as resignation, retrenchment, dismissal from employment, or fund liquidation.<sup>165</sup> The Pension Funds Second Amendment Act of 2001 defines the "minimum benefit" as the member's minimum individual reserve.

A minimum individual reserve is, in terms of section 15B(2) of the Pension Funds Act of 1956, in the case of defined-benefit funds, the fair value equivalent to the present

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*Manufacturing Co Ltd* (2006) 27 ILJ 2471 (CCMA); *Evans v Japanese School of Johannesburg* (2006) 27 ILJ 2607 (LC); and *SATAWU v Old Mutual Life Assurance (SA) Ltd* [2005] 4 BLLR 378 (LC).

<sup>163</sup> Section 1 of the Income Tax Act of 1962 defines "normal retirement age". Interestingly this term is not used in the Pension Funds Act of 1956. The Act instead uses the term "normal retirement date". Pensionable age for OECD countries is defined as the age at which an individual with a full career can first receive full pension benefits in the main pension scheme. See in this regard Chomik R, Whitehouse ER *Trends in Pension Eligibility Ages and Life Expectancy, 1950-2050* (OECD Social, Employment and Migration Working Papers No. 105) (2010) OECD Publishing: <http://dx.doi.org/10.1787/5km68fzhs2q4-en>, last visited 07 September 2015.

<sup>164</sup> Section 14A inserted by section 3 of the Pension Funds Amendment Act of 2001.

<sup>165</sup> Hunter R, Esterhuizen J, Jithoo T, Khumalo S *The Pension Funds Act: A Commentary on the Act, regulations, selected notices, directives and circulars* (2010) (hereafter, Hunter et al *The Pension Funds Act: A Commentary on the Act*).

value of the member's accrued deferred pension; and in the case of defined-contribution funds, the board must determine the value of the member's individual account as determined in terms of subsection (1) plus a share of the investment reserve account, the member surplus account, and such contingency reserve accounts as the board may determine should be included in terms of section 15G in the proportion that the member's individual account value as at the effective date of the calculation bears to the total of all members' individual account values as at that date or such other method of apportionment as the board deems reasonable.<sup>166</sup> Furthermore, section 14B(3) requires the board of pension funds to establish and implement a policy for minimum pension increases. The policy must aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board. The increases are to be considered every year, with comparison to the minimum pension increase at least once every three years.

This is to ensure, among other things, that members receive benefits that are in line with inflation rates when they exit the fund.

### **6.6.3 Withdrawal benefits and preservation of benefits**

Withdrawal benefits are paid to members in cases such as where a member has resigned or where a member has been retrenched from work. Fund rules generally provide for such withdrawals.<sup>167</sup> Retrenchment often comes as a result of the employee's position becoming redundant. The Pension Funds Act of 1956 defines retrenchment in relation to a member of the fund as "dismissal from employment based on the operational requirements of the employer". Termination of employment in this regard does not arise from any fault of the employee. In other words, the

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<sup>166</sup> Section 15B(2) of the Pension Funds Act of 1956.

<sup>167</sup> Gillion et al *Social Security Pensions* op cit note 7 at 43-44. In *Telkom SA Limited & Two Others v P N Blom & Others* [2004] 6 BPLR 5781 (SCA) at par 17, where membership of the fund were terminated when employees' contracts of employment were assigned by the employer (Telkom) to Molapo Technologies (when the Telkom business in which they were employed was sold to Molapo as a going concern in terms of section 197 of the Labour Relations Act of 1995), the court held that those employees were entitled to benefits payable on transfer of their contracts.

employee is not dismissed because he or she has done anything wrong, but mainly due to the employer's needs, which include financial challenges.<sup>168</sup>

This is the reason why the law is so protective of the employee and requires the employer to go through a consultative process prior to effecting any dismissals for operational reasons.<sup>169</sup>

The employer is required to consult with all the employees affected by retrenchment and their trade unions at the time the employer is still contemplating dismissing those employees for operational reasons.<sup>170</sup> The aim of consultation and the timing thereof is, among other things, to avoid retrenchment where possible and to agree about the severance pay that is to be paid to retrenched employees. When coming to employee benefits, employees who are retrenched are not treated the same way as those employees who resign from employment and those who are dismissed due to misconduct. When an employee resigns or is retrenched, he or she receives a lump-sum benefit usually related to the contributions he or she has paid into the fund from the time he or she joined the fund.

An employee who is retrenched will be entitled to severance pay made up of a minimum of one week's remuneration for every completed and continuous year of

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<sup>168</sup> Item 1 of the Code on Dismissal Based on Operation Requirements defines "dismissal based on the operational requirements of the employer" as dismissal based on the economic, technological, structural, or similar needs of the employer. Economic reasons relate to the financial standing of the business; technological reasons refer to the introduction of new technology, for example, new machines which make existing jobs redundant or a need to adapt to new technology which leads to restructuring of the workplace; structural reasons refer to restructuring of the business/workplace which leads to the redundancy of jobs. See generally the following cases which dealt with dismissal based on the employer's operational requirements: *Fry's Metals (Pty) Ltd v National Union of Metal Workers of SA* [2003] 24 ILJ 133 (LAC); *SACTWU and Others v Discreto-a Division of Trump & Springbok Holdings* (1998) 19 ILJ 1451 (LAC); *National Union of Metal Workers of SA v Genlux Lighting (Pty) Ltd* (2009) 30 ILJ 654 (LC); and *Mazista Tiles (Pty) Ltd v NUM and Others* [2005] 3 BLLR 219 (LAC).

<sup>169</sup> Section 189 of the Labour Relations Act of 1995 (applies to small-scale retrenchments where an employer employs fewer than 50 employees) read with section 189A (applies to large-scale retrenchments where an employer employs more than 50 employees and contemplates dismissing a number of employees who fall within the categories mentioned in the section) of the Act.

<sup>170</sup> See generally, *NEHAWU and Others v University of Pretoria* (2006) 5 BLLR 437 (LAC); *General Food Industries Limited v FAWU* [2004] 7 BLLR 667 (LAC); and *Enterprise Foods (Pty) Ltd v Allen & Others* [2004] 7 BLLR 659 (LAC).

service with that employer<sup>171</sup> and a lump-sum withdrawal benefit, or the benefit may be transferred to another fund, or may even be deferred for the member to receive it on reaching the retirement age.

However, it is mostly preferred by funds to pay cash withdrawal benefits as it is not always easy to track deferred pensioners or their dependants in case the pensioner dies.<sup>172</sup> Retrenchment benefits are generally paid from employer and employee contributions plus full interest.<sup>173</sup> On the other hand, an employee who resigns from work will not be entitled to severance pay. Such an employee will only be entitled to a withdrawal benefit; that is, if he or she was a member of a retirement fund. The benefit may come in the form of a lump-sum cash payment, or it may be transferred to a new fund, or can even be deferred for the member to receive it on reaching the retirement age. It should be noted that, in terms of section 41 of the Basic Conditions of Employment Act 75 of 1997, severance pay is only paid when an employee is dismissed for reasons based on the employer's operational requirements. This implies that no severance pay will be payable where the employee has resigned or where he or she has been dismissed for misconduct.<sup>174</sup>

If upon acceptance of a benefit the member transfers the benefit directly into a retirement annuity fund or another pension fund, no tax is payable on the benefit. This will be the case if, for example, the original fund issues a cheque payable directly to the new fund. The member must not receive the benefit but it must be paid directly into another fund in order for the benefit not to attract tax. Tax is payable on resignation or withdrawal benefits only when some or all of the benefits are received by the member as cash or a cheque is issued in the member's name.<sup>175</sup>

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<sup>171</sup> Section 41 of the Basic Conditions of Employment Act of 1997 provides for severance pay. On the other hand, section 35 of the Act prescribes the formula to be followed in calculating severance pay.

<sup>172</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 130 at 284.

<sup>173</sup> Sephton et al *A Guide to Pension and Provident Funds* op cit note 49 at 5 and 12-13.

<sup>174</sup> Van Niekerk A, Christianson MA, McGregor M, Smit N and Van Eck BPS *Law@work* 2ed (2012) at 319.

<sup>175</sup> Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 10 at 124.

The withdrawal of benefits before the retirement date is a problem as it reduces the pension benefit a person will receive when he or she retires. It should also be accepted that a person who makes a withdrawal prior to the actual retirement date loses a lot as most pension and provident fund rules only offer a refund of the person's own contributions and a stipulated interest, which is generally low.

Thus employees lose the right to an adequate retirement benefit as the benefit the person receives is reduced. Employer contributions are also not paid over to employees making early withdrawals, and, if paid, it is only a small percentage. In a defined-benefit plan, the employer is in a favourable position if the long-serving employees exit before their retirement age as they leave behind the employer's contribution or the equivalent thereof and the investment returns.<sup>176</sup>

Sephton et al's view about this is that the employee should also receive the employer's contribution as it was offered to the employee as part of a package; that the employer is able to deduct the benefit immediately for income purposes, while the employee cannot; and that there is no benefit to the employer in withholding employer contributions in a defined-contribution fund. Sephton et al further argue that this practice discriminates between fund members, penalising those who do not reach retirement age irrespective of the length of service given to the employer.<sup>177</sup> Sephton et al's view holds water in that should the employee have stayed until the retirement date, he or she would have received the full employer contributions plus interests.

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<sup>176</sup> Field "Employees' Pension and Provident Fund Rights: A Renewed Interest Develops" op cit note 100 at 969-971. The "early withdrawal rule" sounds very unfair and contrary to public policy. In terms of this rule, the employee who makes an early withdrawal from the fund will only be entitled to his or her own contributions and to interest on the contributions made. Such an employee will not receive payment of the employer's contributions. The balance of what the employee could have received may be used to better the benefits of the employees remaining in the fund. Therefore, the employee who is withdrawing will lose. It is for these reasons that Hunter R (in Hunter RT *Inequities and Illegalities in Occupational Retirement Funding in South Africa* (LLM Dissertation) November 1993, at 18-19, (hereafter, Hunter *Inequities and Illegalities in Occupational Retirement Funding in South Africa*) was of the view that this rule is illegal on the basis that it is contrary to public policy (at 18-19). This rule deprives the employee of the benefits of the employer's contributions to a retirement fund and the earnings of that fund on all the contributions made by both the employee and employer to the fund.

<sup>177</sup> Sephton et al *A Guide to Pension and Provident Funds* op cit note 49 at 57.

The contributions are part of the employee's income during the period he or she works for the employer.<sup>178</sup> These contributions are meant for the employee and it is only fair that they go to the employee as he or she earned them through the service offered to the employer. The employee makes his or her services available to the employer in return for a salary (or earnings) and retirement benefits (contributions) paid by the employer, who benefits from the skills and knowledge of the employee. In this regard, employees may be differentiated in terms of how they have left the job. For example, while the employee who voluntarily resigns from his job may be denied the employer's contributions, the opposite should apply with regard to the employee who is retrenched. The employee who is retrenched is not at fault and may therefore not be punished by denying him or her the employer's contributions, while, on the other hand, the employer may be justified in withholding its contributions for the employee who is dismissed, for example due to misconduct or one who just decides to resign.

Allowing withdrawals from retirement funds has a negative effect on the benefit a fund member and/or beneficiary will receive when the time to retire arrives. There is a general concern that South Africans do not have the culture of saving, and withdrawal benefits that are consumed prior to retirement add to this problem. This is a serious challenge because it results in more and more people going into retirement with insufficient benefits or no benefits at all.

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<sup>178</sup> In *Smoker v London Fire Authority* [1991] 2 CA 502 (HL), Auld J stated that "a pension is a reward for past service whether or not is contributory, and if contributory (by employee), regardless of the relative contributions of employer and employee". Hunter *Inequities and Illegalities in Occupational Retirement Funding in South Africa* op cit note 176 at 11-12, when contributions are made to a retirement fund in terms of a contract of employment, these contributions form part of the employee's remunerations for past service. In Hunter's view, the fact that the employee only receives the benefit of the payment of such contributions when receiving investment returns in the form of a pension does not make pay deferred. Accordingly, pension benefits are not deferred pay but they are the fruit of the investment of contributions made by both the employer and the employee to the retirement fund, and the employer's contribution is simply another form of pay. Thus, once the employer has paid its contributions to the fund, it has no right to the fruit of the investment of those contributions. It was confirmed in *Oberholzer v Santam Insurance Co Ltd* 1970 (1) SA 227 (N) that a pension was a return for the plaintiff's past services regardless of whether it was deductible or discretionary. Note should also be taken that retirement funds are now required by section 14A and 14B of the Pension Funds Act of 1956 to pay their members a minimum benefit. See the discussion regarding payment of minimum benefits under par 6.6.2.

Leakages that occur prior to retirement date can be attributed to the lack of preservation of funds when people change jobs.

Preservation, according to the National Treasury in its Discussion Paper on Preservation, Portability and Governance for Retirement Funds,<sup>179</sup> occurs when money saved for retirement through pension, provident, and preservation funds remain in those funds until the person retires, or is rolled over into another similar retirement savings vehicle without incurring taxes or penalties when a person changes jobs. At the moment, a member of a retirement fund who exits the fund prior to a retirement date is not obliged to preserve the benefit he or she receives. An attempt to introduce compulsory preservation of retirement benefits in South Africa was abandoned when it met resistance from trade unions in the early 1980s. The government at that time wanted to introduce the Preservation of Pensions Bill, which would have seen retirement benefits being transferred when people changed jobs, but this move failed because the unions were not happy about the change that would deny employees access to immediate money that could be used to take them out of poverty.<sup>180</sup>

One of the proposals that has been made by the National Treasury is that it should be compulsory for members of pension funds to preserve their accrued pension benefits when they change jobs. The Treasury wants every fund to create a preservation section within the fund as a default option, and transfer funds to that preservation fund when a member leaves employment – unless the member has indicated that he or she would like to receive the benefit in cash.<sup>181</sup> It is submitted that, in order for preservation of benefits to work, the government should make it compulsory for everyone to preserve the benefit when changing jobs and that exceptions must only be made in limited circumstances. For example, a person may

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<sup>179</sup> The National Treasury: Preservation, Portability and Governance for Retirement Funds op cit note 109 at 15.

<sup>180</sup> Field “Employees’ Pension and Provident Fund Rights” op cit note 100 at 965.

<sup>181</sup> National Treasury: Preservation, Portability and Governance for Retirement Funds op cit note 109 at 17.

be allowed to withdraw the whole benefit where the amount of the benefit is below a certain level.

It should also be in exceptional circumstances such as where a person has reached a certain age, for example 55 and the chances of employment are limited, that a withdrawal should be permitted. A person should only be allowed to withdraw a certain portion of the benefit if he or she goes for a certain number of months without finding a job and has exhausted his or her unemployment benefits. Alternatively, a person can be given regular pensions until he or she finds another job, or a person who goes for a certain number of months without finding employment can be allowed a certain number of withdrawals from a preservation fund and up to a certain amount – provided the benefit is more than the amount to be determined by the relevant minister.

In this way, it will be difficult for people to access retirement benefits before they reach their retirement age, and this will go a long way in protecting benefits from being depleted way before the time and purpose they are meant for arrive.

According to Sanlam, the trend of withdrawing all the benefits when a member changes jobs has continued at a very high rate. In its 2011 survey, Sanlam reported that about 70% of people have withdrawn from a retirement fund upon resigning or being retrenched. The factors that contribute to this include the level of debt people find themselves in and unplanned living expenses.<sup>182</sup>

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<sup>182</sup> Sanlam 2015 Benchmark Survey at 6, accessed from: [http://www.sanlambenchmark.co.za/webadmin/include/content/Benchmark2015\\_1.Summary.21052015.pdf](http://www.sanlambenchmark.co.za/webadmin/include/content/Benchmark2015_1.Summary.21052015.pdf), last visited on 07 September 2015. In an article written by Louw P “Broke Teachers Break System” *The Times* 1 September 2015 at 2, the writer presents a worrying picture of financial distress the majority of teachers are experiencing. According to Louw, the National Teachers’ Union has asked the Department of Basic Education to allow teachers to cash in part of their pensions (between 30% and 40%) earlier than their retirement date as that will prevent experienced teachers from leaving the profession because of the financial challenges they are facing. It is reported in this article that teachers use their pension money to pay for their children’s education (as they do not qualify to receive financial assistance from the National Student financial Aid Scheme) and for housing (as they do not qualify for RDP housing).

It is estimated that the average South African changes jobs every seven to eight years.<sup>183</sup> This number is quite high and if the person withdraws and consumes the benefit every time he or she changes a job, such person will either end up with no retirement benefit or with insufficient benefits when he or she retires.

Such person will then have to rely on the state old-age pension for survival. It was reported in South Africa's National Treasury Second Discussion Paper for Retirement Reform that, according to the survey undertaken by Alexander Forbes,<sup>184</sup> preservation of accumulated funds by those who are under the age of 40 was less than 10% and could be as low as 1% in the category of low-income earners. It was also estimated that the majority of retirement fund members received retirement income that was less than 28% of their pre-retirement income.

South Africa's National Treasury has made certain proposals with regard to the preservation of retirement benefits. The proposals will apply to new contributions by existing employees and to growth on existing assets. They will also apply to new employees joining funds. The first option is a full withdrawal of the benefit when leaving employment with tax deductions on withdrawal above current levels. This is intended to discourage people from withdrawing the benefits. The second option is to monitor the response of people to the first option over a period of three to five years, and if there are no improvements in preservation rates, to revisit the issue. The third option is to allow partial access to a cash lump-sum before reaching retirement, but require preservation of the balance. The fourth option is to allow a withdrawal of a certain amount each month for individuals who are not able to find new employment. The fifth and last option is to require full preservation and allow no withdrawals of growth on existing assets or new contributions by new or existing employees.<sup>185</sup>

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<sup>183</sup> See in this regard Reddy C *What do Individuals Think about Compulsory Preservation Funding?* (Master of Business Administration (MBA: Gordon Institute of Business Science, University of Pretoria) Research Project) 26 September 2012 at 9.

<sup>184</sup> South Africa's Social Security and Retirement Reform: Second Discussion Paper op cit note 4 at 5 (in reference to Member Watch (Issues 1), Alexander Forbes 2006).

<sup>185</sup> The National Treasury: Preservation, Portability and Governance for Retirement Funds op cit note 109 at 17-18.

The Discussion Paper also encourages the portability<sup>186</sup> of benefits between pension funds.<sup>187</sup> The fourth option sounds workable as it will allow those who cannot find jobs and have exhausted their unemployment benefits to receive some income while still searching for a job. There should, however, be conditions for one to access the benefit. For example, a person may be required to register with the Department of Labour as a jobseeker and to regularly prove that he or she is actively looking for employment. This will ensure that the benefit is not withdrawn as a lump-sum and used for other purposes, and the conditions set will ensure that the benefit sustains the person while still looking for a job so that that person and his or her family may not fall into poverty.

#### **6.6.4 Risk benefits**

##### **6.6.4.1 General**

Most retirement funds offer their members risk benefits<sup>188</sup> such as life cover, disability, dread disease, and funeral benefit. The role played by these benefits is very significant in providing income security to the employee and those who exit employment due to the risk occurring before their retirement. According to South Africa's National Treasury in its Second Discussion Paper for Retirement Reform, "ancillary benefits" play an important role in the absence of comprehensive social security in this country.

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<sup>186</sup> Portability refers to an employee's ability to transfer accumulated retirement savings to a prospective employer's pension fund, transfer to a preservation fund with a financial institution, or leave retirement savings with their former employers when changing jobs (See the National Treasury: Preservation, Portability and Governance for Retirement Funds op cit note 109 at 5).

<sup>187</sup> Ibid at 19.

<sup>188</sup> Risk benefits are normally provided for through insurance policies separate from retirement benefits. They include life cover, disability, retrenchment, dread-disease, death, etc. Risk benefits provided as part of a registered and approved fund are called approved benefits while those provided as part of a separate insurance benefit are called unapproved benefits.

This is the reason why the National Treasury considers it desirable that the design of occupational pension funds continue to include a supplementary package of benefits but that these benefits should be appropriate to the member profile of each fund.<sup>189</sup>

Fund rules stipulate what type of cover is offered to members, including for when members are forced to leave the fund before retirement due to unforeseen circumstances such as death, disability, or ill health. Where a fund does not offer its members risk benefits, the employer may do so through a separate group scheme. However, unlike with retirement funds, contributions paid by the employer to these schemes will be considered for tax purposes. An employer can approach an administrator, insurer, or employee benefits consultant for assistance to put together a suitable package of benefits.<sup>190</sup> Death, ill-health, and disability benefits are discussed below.

#### **6.6.4.2 Payment of death benefits and protection of dependants**

Retirement funds pay death benefits. This benefit is paid to make sure that the dependants of the deceased member are not left destitute due to the member's death.<sup>191</sup> A benefit can be in the form of a lump-sum, instalment, or pension depending on whether the scheme is a pension or provident fund. In its 2011 survey, Sanlam observed that almost all the funds surveyed in that year provided lump-sum death benefits to dependants.<sup>192</sup> Some of the funds offered spouse pension in addition to a lump-sum benefit. The lump-sum benefits are often reinsured with an insurance company, but trustees may decide to pay the benefit in the form of instalments if it is in the best interest of the dependants of the deceased member.<sup>193</sup>

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<sup>189</sup> South Africa's Social Security and Retirement Reform: Second Discussion Paper op cit note 4 at 22.

<sup>190</sup> Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" op cit note 122 at 26-27.

<sup>191</sup> Idem at 26.

<sup>192</sup> Sanlam's 2011 Benchmark Survey op cit note 50 at 9.

<sup>193</sup> Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 10 at 23-25.

The benefit levels are normally set in the fund rules, and should a member require more cover, he or she will have to request it privately as an individual.<sup>194</sup>

Section 37C of the Pension Funds Act of 1956 regulates how death benefits<sup>195</sup> payable after a member's death should be distributed to a deceased member's dependants. In terms of this provision, death benefits do not form part of a member's estate and should be dealt with in the manner stipulated in the section.<sup>196</sup> The section gives the trustees discretionary powers to distribute death benefits in the manner they deem equitable. A member's freedom of testation is clearly limited in this regard, although it could be argued that this is done for a good cause. It is important to mention at this stage that there is a proposal made by the National Treasury in its First Discussion Paper for Retirement Reform that trustees should try to comply with the expressed wishes of the deceased member, and only depart from those wishes where in their opinion there are compelling reasons why they should not.<sup>197</sup> It is submitted that a closer reading of section 37C will show that what is being proposed by the National Treasury is exactly what the section anticipates that the trustees should in fact do, even though this is not necessarily done in practice. Naturally, the board should start by looking at the nomination form before it can start searching for other dependants whose names may not be on the form. It is only after discovering that there are other dependants who could also possibly be eligible to receive the benefit that the board should move to determine if those people are worthy of a share in the benefit, either because they were or would have in future been legally or factually dependent on the deceased member.

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<sup>194</sup> Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" op cit note 122 at 28.

<sup>195</sup> Benefits that can be distributed in terms of section 37C are payable by a pension fund upon the death of a member in terms of the rules of that fund and not benefits payable; for example, by an insurer directly to a member's nominated beneficiaries.

<sup>196</sup> See generally *Mashazi v African Products Retirement Benefit Provident Fund and Another* 2003 (1) SA 629 (W) at 632H-633A (hereafter, *Mashazi*); *Kaplan and Another NO v Professional and Executive Retirement Fund and Others* 1999 (3) SA 798 (SCA) at 803A-B (hereafter, *Kaplan*); and *Malanga and Group Five Multi-Benefit Retirement Fund* [2001] 10 BPLR 2607 (PFA) at par 12.

<sup>197</sup> South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 47.

The trustees have discretion whether to pay the benefit as income or a lump-sum.<sup>198</sup> The National Treasury encourages the payment of regular income instead of lump-sum payments. Lump-sum payments should especially be done in cases where benefits are so small that it will not be cost-efficient to pay them as regular income. Where a dependant is, according to the trustees (or in case of a minor dependant), not in a position to manage the benefit, the board could establish a beneficiary fund (before the 2007<sup>199</sup> amendments to the Pension Funds Act of 1956, the board could establish a trust) into which the benefit will be paid and managed on behalf of the dependant.<sup>200</sup>

Section 37C serves a social security purpose<sup>201</sup> and therefore complements the provisions of section 27(1)(c) of the Constitution of the Republic of South Africa. The section is there to promote the objectives of social security; one of which is to protect dependants from being destitute. This section enforces the right of access to social security entrenched in section 27 of the Bill of Rights.

It can also be said that the trustees also perform a social service role when they investigate whether the deceased had other dependants or not and by distributing a death benefit to deserving beneficiaries.<sup>202</sup> The aim of social security is to guarantee an adequate living standard and minimum income protection, and to safeguard the acquired standard of living. On the other hand, the purpose of a retirement fund is to provide a form of benefit to its members when they retire or to their dependants when the members die.

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<sup>198</sup> See generally, Sher H "Pension Funds" (1997) *Juta's Business Law* Vol 5 No 2 at 59-61; Le Roux PAK "Decisions in terms of s 37C" (1999) *CLL* Vol 8 (10) at 99-100; Moledi I "Taking the Mystery out of Section 37C" 2003 *Sowetan* August 19 at 20; and Manamela T "Chasing Away the Ghost in Death Benefits" (2005) *SA Merc LJ* 2005 Vol 17 at 279-284.

<sup>199</sup> Section 37C was amended by the Pension Funds Amendment Act of 2007.

<sup>200</sup> South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 47.

<sup>201</sup> See the case of *Mashazi* supra note 196 at 632.

<sup>202</sup> See in this regards Sanlam 2005 Mini-Survey at 2, accessed from [http://www.sanlambenchmark.co.za/webadmin/include/content/2005%20Survey-Executive%20Summary\\_2.pdf](http://www.sanlambenchmark.co.za/webadmin/include/content/2005%20Survey-Executive%20Summary_2.pdf), last visited on 07 September 2015 (Sanlam's 2005 Mini-Survey).

In making sure that the dependants of a member who dies before retirement receive some form of income, the legislature has introduced section 37C, which protects the dependants of the member after the member's death.

All the dependants of the deceased member should receive a share of the benefit as will be determined by the trustees if there is evidence that they depended on the member or would have depended on the member if he or she was still alive. The section opens a door to accommodate the deceased member's dependants who have not been named on the nomination form by allowing trustees to consider all potential dependants.

The rationale behind this section is that the dependants of the deceased member should not be left without any form of support because of the member's death. The section promotes social protection and has to be well interpreted and applied by boards of trustees<sup>203</sup> in order to serve the intended purpose. Trustees may, however, not pay a benefit to a dependant who has unlawfully caused the death of the member. In common law there is a saying that "the one who has caused the unlawful death of another is precluded from benefiting financially from such death".<sup>204</sup>

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<sup>203</sup> See generally these cases: *Kaplan* supra note 196, and the case of *Mashazi* supra note 196 at 632H-J.

<sup>204</sup> See *Makhanya v Minister of Finance and Others* 2001 (2) SA 1251 (D) at 1254 where the court held that the principle should also be used with regards to benefits paid in terms of legislation.

The word “dependant” is defined by the Pension Funds Act of 1956 to give trustees an idea of who should qualify to receive a benefit when the distribution of a death benefit is being made. Section 1 of the Act defines a “dependant” as follows:<sup>205</sup>

Dependant in relation to a member of a retirement fund, means:

- a) a person in respect of whom the member is legally liable for maintenance;
- b) a person in respect of whom the member is not legally liable for maintenance, if such person –
  - i. was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
  - ii. is the spouse of the member;
  - iii. is a child of the member, including a posthumous child, an adopted child, and a child born out of wedlock;
- c) a person in respect of whom the member would have become legally liable for maintenance had the member not died.

Clearly the definition of dependant in this regard is too wide and therefore opens a door for different categories of dependants and at different levels. Thus, broadly speaking, a dependant is a person whom a member is legally or factually liable to maintain or whom the member would in future have become legally liable to maintain.<sup>206</sup>

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<sup>205</sup> Section 1 of the Pension Funds Act of 1956 defines “dependant”.

<sup>206</sup> It was held in *Wellens v Unsgaard Pension Fund* (2002) 12 BPLR 4214 (PFA) at par 16 (hereafter, *Wellens*), that the mother of the deceased, who was not a dependant of the deceased at the time of his death, was entitled to receive death benefits because she would have become dependent on him at a future date. See also generally *Wasserman v Central Retirement Annuity Fund* (1) [2001] 6 BPLR 2160 (PFA); and *Van Zyl v Delta Motor Corporation Salaried Provident Fund and Another* PFA/EC/698/04/Z/CN (unreported). See generally on legal dependency the following determinations: *Dyas v CTS Provident Fund & Another* [2003] 3 BPLR 4448 (PFA); *Dijane v Tiger Oats Provident Fund* [2003] 6 BPLR 4773 (PFA); *Mkaba v SA Breweries Staff Provident Fund* [2002] 3 BPLR 3209 (PFA); *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA); *Bruce v Lifestyle Retirement Annuity Fund* [2001] 7 BPLR 2193 (PFA); and *Cala Dairies cc v Orion Money Purchase Provident Fund & Another* (2) [2001] 11 BPLR 2683.

This definition includes both those persons a member was legally bound to maintain; for example, spouses and children and those whom the member was not legally bound to maintain, known as factual dependants.<sup>207</sup> An example here will be children born out of wedlock.<sup>208</sup>

The following people will all qualify as dependants: spouses, children, and parents<sup>209</sup> of the deceased member. Spouses will qualify in terms of section 1(b)(ii),<sup>210</sup> biological children in terms of section 1(a), stepchildren in terms of section 1(b)(i), and parents will qualify in terms of both section 1(a) and (b)(i).<sup>211</sup>

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<sup>207</sup> See the following determinations on the test for factual dependency: *Govender v Alpha Group Employees Provident Fund and Another* (2) [2001] 8 BPLR 2358 (PFA); *Khambule v Telkom Retirement Fund* [2003] 10 BPLR 5214 (PFA); *Stacey (Koevort) v Old Mutual Protektor Pension Fund and Another* [2005] 1 BPLR 3 (PFA); *Hlathi v University of Fort Hare Retirement Fund and Others* [2009] 1 BPLR 37 (PFA); and *Gerber v Aberdare Cables (Pty) Ltd Provident Fund and Another* [2010] 3 BPLR 275 (PFA). See also generally Mhango M "What Should the Board of Management of a Pension Fund Consider when Dealing with Death Claims Involving Surviving Cohabitants?" (2010) *PER/PELJ* Vol (13) 2 at 183-204; and Lehmann K "Death and Dependency: The Meaning of 'dependant' under section 37C of the Pension Funds Act 24 of 1956" Vol 126 (4) *SALJ* 650-666 (2009).

<sup>208</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 130 at 179-180.

<sup>209</sup> Van Heerden B, Cockrell A, and Keightley R *Boberg's Law of Persons and Family* 2ed (1999) at 233-248. With regard to spouses' reciprocal duty to support each other, see generally *Miller v Miller* 1940 CPD 466 at 469; *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 139-140; and *Witham v Minister of Home Affairs* 1989 (1) SA 116 (Z) at 131. An order to pay medical expenses for the medical treatments of a divorced partner also qualifies as maintenance. See in this regard *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA) at par 22. On the parents' duty of support towards their children, see generally *Bannatyne v Bannatyne & the Commissioner for Gender Equality* 2003 (2) SA 362 (hereafter, *Bannatyne*); *Heystek v Heystek* 2002 (2) SA 754; *Burse v Bursey and Another* 1999 (3) SA 33 (SCA); *Sparks v Sparks* 1996 (3) SA 33 (SCA); *S v Macdonald* 1963 (2) SA 431 (C) at 433; *Lloyd v Menzies* NO 1956 (2) SA 97 (D) at 103; and *In Re Estate Visser* 1948 (3) SA 1129 (C) at 1133. Children may also be obliged to support their parents in appropriate circumstances. See generally *B v B and Another* 1997 (4) SA 1018 (SE); *Pike v Minister of Defence* 1996 (3) SA 127 (CKS); *Van Vuuren v Sam* 1977 (1) SA 100 (W) at 101; *Jacobs v Cape Town Municipality* 1935 CPD 474 at 479; and *Wright v Wright* 1907 TS 204.

<sup>210</sup> See *Mabetlela & Another v Progress Provident Fund* [2003] 7 BPLR 4915 (PFA) at par 11 (hereafter, *Mabetlela*); and *Moshidi v Kimberly-Clark Provident Fund and Another* [2003] 7 BPLR 4947 (PFA) at par 24.

<sup>211</sup> See generally *Nsele and Human Rights Commission Staff Provident Fund* [2000] 7 BPLR 756 (PFA) at par 11; and *Khutswane and Malbak Group Pension Fund and Another* [2000] 12 BPLR 1354 (PFA) at par 14 (hereafter, *Khutswane*). In *Kekana v Nedcor Defined Contribution Provident Fund* [2010] 3 BPLR 295 (PFA), where the complainant was aggrieved by the respondent's decision to grant death benefits to a child whose paternity was questionable, the Pension Funds Adjudicator indicated that a biological relationship was not the sole factor considered in the distribution of a death benefit. The Adjudicator highlighted the fact that what was the issue was dependency and not a biological relationship, as an important factor in determining whether or not anyone must receive a death benefit (at par 5.5). In *Cele v Alexander Forbes Retirement Fund* [2010] 1 BPLR 35 (PFA) at 39, the Adjudicator held that even though the two minor children were not the deceased's biological

Section 1(b)(i) covers a live-in girlfriend or boyfriend; and people living in a same-sex relationship if they can prove that they depended on the member prior to his or her death.<sup>212</sup> Same-sex relationships should enjoy the same protection as other unions since section 9 of the Constitution protects everyone against unfair discrimination, including on the grounds of sexual orientation.<sup>213</sup>

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children, they were financially dependent on the deceased and that qualified them as factual dependants.

<sup>212</sup> See *Tladi and Pfizer Provident Fund, Pfizer Laboratories (Pty) Ltd* PFA/GA717/02/CN (unreported) at 7-8. In *Smith v SAA Flight-Deck Crew Provident Fund and Another* [2010] 3 BPLR 330 (PFA), the Pension Funds Adjudicator was satisfied that the board of trustees was correct in allocating 50% of the deceased's death benefit to the second respondent who cohabited with the deceased when he was alive. It was found in this matter that the second respondent shared a house with the deceased and was financially dependent on the deceased prior to his death. It was also apparent that the deceased wanted both the complainant and the second respondent to benefit from the estate.

<sup>213</sup> See in this regard *Langemaat v Minister of Safety and Security and Others* (1998) [1998] 8 BLLR 880 (T) at 883 (hereafter, *Langemaat*), where in the court's view partners in a same-sex union deserved respect and protection as married couples because, according to the court, the stability and permanence of their relationship are the same. See also generally on same-sex relationships *Satchwell v President of the Republic of South Africa and Another* [2004] 1 BPLR 5333 (CC) (hereafter, *Satchwell*), in this case sections of the Judges' Remuneration and Conditions Act, 88 of 1989 were declared unconstitutional to the extent that they afforded benefits to the spouses of judges but not to same-sex partners; in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (hereafter, *National Coalition for Gay & Lesbian Equality*), the court interpreted the term "spouse" in the then Aliens Control Act, 96 of 1991, to include "same-sex life partner", in order to give effect to the constitutional prohibition on discrimination on the grounds of sexual orientation. In another case of *Farr v Mutual and Federal Insurance Company Ltd* 2000 (3) SA 684 (C), the court held that two gay men living together in a domestic relationship constituted a family. The applicant's same-sex partner was held to be a member of the applicant's family within the meaning of the exclusion. The court took into account the degree of permanency and the manner in which the partners lived together and concluded that it resembled a marriage between husband and wife; Jivan U "From Individual Protection to Recognition of Relationships: Same-sex Couples and the South African Experience of Sexual Orientation Reform" 2007 *Law Democracy and Development* 19 at 19-46 provides an analysis (through an analysis of case law, especially after 1994) of the protection (or lack of protection) of same-sex partners before 1994 and after; Carpenter G "The Right not to be Discriminated Against on the Ground of Sexual Orientation, *National Coalition for Gay and Lesbian Equality v Minister of Justice*" *THRHR* 2002 (65) 50; Chetty C "Sexual Orientation as a Constitutional Right: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) SA 39 (CC)" 2001 (64) *THRHR* 657; Havenga P "Same-sex Unions, the Bill of Rights and Medical Aid Schemes; *Langemaat v Minister of Safety and Security* 1998 (61) SA 312 (T)" 1998 *THRHR* (61) at 722-726; and Louw R "Langemaat v Minister of Safety and Security and Others: A Gay and Lesbian Victory but a Constitutional Travesty" (1999) Vol 15 *SAJHR* at 393-405. Louw R "Gay and Lesbian Partner Immigration and the Redefining of Family *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*" (2000) 16 *SAJHR* 313; Motara S "Making the Bill of Rights a Reality for Gay and Lesbian Couples, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*" (2000) 16 *SAJHR* 344; Silver B "Till Deportation Do Us Part: The Extension of Spousal Recognition to Same-sex Relationships" (1996) 12 *SAJHR* 575; and Smith BS and Grobler NJ "Gay Rights (and obligations!): Consequences and Implications of *Fourie v Minister of Home Affairs*" *TSAR* 2005 (4) 745.

Section 9(3) of the Constitution prohibits discrimination on among other grounds gender, sex, marital status, and sexual orientation. It should also be noted that the achievement of equality is one of the values the democratic Republic of South Africa is founded on.<sup>214</sup> It was held in *Langemaat v Minister of Safety and Security and Others*<sup>215</sup> that the parties in a homosexual relationship who had been living together for a number of years have a duty to support each other.<sup>216</sup> In this case, a lesbian police captain wanted her partner to be included in her medical aid scheme. The court found in her favour, as, according to the court, a dependant is someone who relies upon another for maintenance. According to Roux J, same-sex couples who lived together for years owe a duty of support to each other. In his opinion, the stability and permanence of their relationships do not differ from that of married couples and therefore both types of unions deserve respect and protection.<sup>217</sup> According to the Pension Funds Adjudicator in *Rory Martin v Beka Provident Fund*,<sup>218</sup> where the matter was about people living in a same-sex relationship, trustees should determine whether the person qualifies as a factual dependant by using a “mutual dependency test”, and the existence of shared common household and financial dependency. This is to establish if the two parties were dependent upon each other. Should it be found that there was mutual dependency between the two, then a benefit is payable.

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<sup>214</sup> Section 1(a) of the Constitution provides that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms. In *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, the European Court of Justice found the different retirement ages for men and women to be in contravention of article 141 of the EC Treaty. Council Directive (EC) 2000/78 (Equal Treatment Directive) was issued in 2000 to establish a general framework to combat discrimination on different grounds including age. This Directive is binding on the United Kingdom [law] and will as such outlaw age discrimination in all the areas including in pension provisioning.

<sup>215</sup> See the case of *Langemaat* supra note 213.

<sup>216</sup> Supra at 883.

<sup>217</sup> Supra.

<sup>218</sup> *Rory Martin v Beka Provident Fund* [2000] 2 BPLR 196 (PFA) at 214. See also *Van der Merwe and Others v Southern Life Association Ltd* 2000 BPLR 321 (PFA) at 331, where the Pension Funds Adjudicator accepted that the definition of dependant is wide enough to include same-sex partners. The same principle was applied in *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA) (hereafter, *Rentokil*).

The fact that the definition of a dependant has been couched in such wide terms does not make the work of the board of trustees any easier. The board of trustees has taken the role of investigators as they have the duty to make sure that all possible dependants are considered in their distribution of the death benefit. This has even prompted Sanlam to propose that persons who qualify as dependants be limited to the deceased spouse and children. According to Sanlam, in order for section 37C to operate effectively, the line should be drawn much narrower.<sup>219</sup> What Sanlam is proposing will certainly make the trustees' work much easier and will limit the distribution to legal dependants to the exclusion of factual dependants. It is submitted though that this may work against communities whose support systems still have some elements of the kinship<sup>220</sup> system; that is, where the support goes beyond one's immediate family made up of the deceased member's spouse and own children and is extended to other family members such as parents.

The benefit may be paid directly to a beneficiary, into a trust, or into a beneficiary fund.<sup>221</sup> Before the 2007<sup>222</sup> amendments to the Pension Funds Act of 1956, section 37C stated that benefits could be paid into a trust. This has since been changed and now the board has the option to pay death benefits into a beneficiary fund, which is regulated in terms of the Pension Funds Act of 1956.

The section also allows for the benefit to be paid to the guardian or caregiver on behalf of the minor. A guardian is liable to the dependent child should he or she mismanages the money put in his or her trust. The child can enforce a claim against the guardian when he or she reaches the age of majority.<sup>223</sup>

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<sup>219</sup> Sanlam 2005 Mini Survey op cit note 202 at 3.

<sup>220</sup> The kinship system is discussed in Ch 4.

<sup>221</sup> See section 37C(2) of the Pension Funds Act of 1956. See generally about the responsibilities of a guardian/caregiver in sections 18 and 32 of the Children's Act, 38 of 2005. See also *Kowa v Corporate Selection Retirement Fund and Another* PFA/GA/14151/2007/SM (unreported) at par 22 (hereafter, *Kowa*), where the Pension Funds Adjudicator ruled that any person who administers and safeguards a minor child's property and property interests should be regarded as the guardian of that minor child.

<sup>222</sup> Section 37C was amended by the Pension Funds Amendment Act of 2007.

<sup>223</sup> In terms of section 28 of the Constitution, a child is anyone below the age of 18 years. See also generally De Villiers N and Giese S "A Review of Children's Access to Employment-based

The guardian will have to be someone who is not only able to administer the money, but must also be someone who is qualified to do so and must use the benefit to provide for the minor's needs until he or she reaches the age of majority.<sup>224</sup> The objective here is to further strengthen the protection of death benefits and to ensure that these benefits are used to support the deceased member's dependants, and not for anything else. The manner of payment should always take the best interests of the minor child into account.<sup>225</sup> Thus, the board is required to apply its mind in deciding the manner the payment should be made in relation to the prevailing circumstances at that time.<sup>226</sup> A beneficiary who receives the benefit in instalments will also receive interest from the invested amount from time to time.<sup>227</sup>

The relevant provisions of section 37C now provide as follows:

37C. Disposition of pension benefits upon death of member

- (1) .....
- (2)
- (a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to:
  - (i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by
    - (aa) the member;
    - (bb) a major dependant or nominee, subject to subparagraph (cc); or
    - (cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee, or a major dependant or nominee

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Contributory Social Insurance Benefits" (Commissioned by UNICEF in partnership with the Department of Social Development), May 2008 at 7.

<sup>224</sup> See the case of *Kowa* supra note 221 at 23-24.

<sup>225</sup> Section 28 of the Constitution.

<sup>226</sup> See in this regard the following cases/determinations: *Ex Parte Oppel and Another* 2002 (5) SA 125 (C); *Mafe v Barloworld SA Retirement Fund* (PFA/FS/13033/07/CN) (unreported); and *Moralo Holcim South Africa Provident Fund* (PFA/GA/5400/2005/ZC) (unreported).

<sup>227</sup> Section 37C(3) of the Pension Funds Act of 1956.

not able to manage his or her affairs or meet his or her daily care needs;

- (ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or
  - (iii) a beneficiary fund.
- (b) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act.

In making a decision, the trustees must, among other things, consider the age of the dependants, the extent of dependency, and the financial position of the dependants, including their future earning capacity<sup>228</sup>. The board needs to consider all the factors in relation to how each applies to a particular dependant to make sure that each of the dependants receive fair consideration.

Failure by the board to properly apply its mind to all the dependants and their individual circumstances will prejudice other dependants and can even be set aside by the Pension Funds Adjudicator<sup>229</sup> or the courts of law.

A number of problems have been experienced with the interpretation and application of section 37C of the Pension Funds Act. In terms of the section, trustees must determine whether the deceased member had any dependants who are entitled to a share of the benefit when the benefit is distributed.<sup>230</sup> The process of locating dependants may be difficult, particularly as illegitimate children, common law or customary law spouses,<sup>231</sup> and anyone who was fully or partly dependent on the deceased member must be identified in order for the distribution to take place.<sup>232</sup>

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<sup>228</sup> See the duties of the board of trustees with regard to distribution of death benefits in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) paras 24-25; and *Carvalho v Lifestyle Retirement Annuity Fund & Others* (PFA/WE/7998/06/CN) (unreported).

<sup>229</sup> *Mashego v SATU National Provident Fund* [2007] 2 BPLR 229 (PFA) at 235.

<sup>230</sup> Section 1(1) of the Pension Funds Act of 1956 defines a "dependant". In terms of this section, both legal and factual dependants qualify.

<sup>231</sup> These are people whose marriages to the deceased member were conducted according to African customs and traditions and are acknowledged as a marriage for purposes of the Recognition of Customary Marriages Act, 120 of 1998. Section 4(9) of the Act provides for registration of such marriages, but makes it clear that failure to register the marriage does not make the marriage invalid.

<sup>232</sup> These examples show how difficult it can be for trustees to determine who should and who should not receive death benefits: the case of *Mabetlela* supra note 210, and in the case of *Moshidi* supra note 210 at 6-7, it was decided that a wife who was periodically visited by her customary law husband

Where the dependants and/or beneficiaries' existence has already been established, the next step would be for trustees to find them and this is not always an easy task.<sup>233</sup> In searching and ultimately paying out the benefits to the deceased member's dependants, trustees must consider the issue of the 12-month period stipulated in section 37C of the Act. In terms of section 37C(1)(a), if the fund becomes aware of the existence of a dependant or dependants within 12 months of the death of the member, the benefit must be paid to such dependant or dependants as the board of the fund may deem equitable.

However, if the board does not become aware or cannot trace any dependant within 12 months of the death of the member, and the member has designated in writing to the fund a nominee to receive the benefit, the benefit must be paid to such nominee – provided the requirements of section 37C(1)(b) have been satisfied. The requirement that payment must be made within 12 months is to ensure that the board of trustees has enough time to investigate whether the deceased had other dependants other than those he or she has placed on the nomination form. This is also to ensure that no deserving dependant is left out. The 12-month period might sound too long; however, the period should be accepted as reasonable as a shorter period will put the board under a lot of pressure as identifying or locating all the dependants can be a difficult task in certain instances. The question, however, will be what should happen to the deceased's dependants, especially minor children, during the period of waiting; that is prior to the finalisation of the investigation made by the trustees to determine who will be eligible to receive a share of the death benefit. This is something the legislature should look into for purposes of protecting the welfare of minor children while the distribution is being finalised. It is proposed

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was not a dependant of her deceased husband because he spent more time with his new customary wife (alternatively, the woman with whom he had a long-standing relationship of co-habitation). It was held by the Pension Funds Adjudicator in the case of *Wellens* supra note 206 at par 16, that the decision of the board that the mother of the deceased who was not a dependant of the deceased at the time of his death, was entitled to receive death benefits because she would have become dependent on him at a future date, was reasonable and that the conclusion was justifiable based on the facts that were before the board.

<sup>233</sup> See Moledi I "Trustees are Battling to Trace all Beneficiaries" *Sowetan* September 14, 2004 at 19. In the case of *Khutswane* supra note 211 at par 9, co-employees were summoned to go and search for the girlfriend and the illegitimate child of the deceased.

that a certain percentage of the death benefit should be deposited into the beneficiary fund to be used for the immediate and/or urgent need of minor children.

The trustees will naturally have to take into account the short- and medium-term needs of the minor children, for example school fees and medical expenses, to determine how much should be put in the beneficiary fund. This amount will have to be taken into account later when the distribution is finalised.

Where a member has a dependant and has also nominated a beneficiary in writing, the fund is required to pay the benefit within 12 months of a member's death in such proportions as the board may deem equitable; subject to section 37(1)(bA).<sup>234</sup>

In a case where the fund is not aware or cannot trace any dependants within 12 months, and the deceased member has not designated any nominee, the benefit or the remaining portion of the benefit after payment to the designated nominee shall be paid into the estate of the member.

The benefit can also be paid in the Guardian's Fund if no inventory in respect of the member has been received by the Master of the High Court in terms of section 9 of the Estates Act 66 of 1965.<sup>235</sup> Should the trustees fail to act timeously and without good reason, that might put the fund in *mora* and the fund might even have to pay the dependants some interest.<sup>236</sup>

#### **6.6.4.3 Payment of benefits due to disability or ill health**

Disability benefits are offered in order to protect the member from the risk that he or she will no longer be able to earn a salary as a result of being disabled or ill and will

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<sup>234</sup> That is, provided it applies to the nomination made on or after 30 June 1989: provided further that, in respect of a designation made on or after the said date, the fund shall not be prohibited from paying the benefit, either to the dependant or nominee contemplated in paragraph (bA) or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.

<sup>235</sup> This is in terms of section 37C(1)(c) of the Pension Funds Act of 1956.

<sup>236</sup> See generally *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA).

have to leave his or her job and exit the fund.<sup>237</sup> Thus, the benefits cover early retirement due to disability and ill health. Disability benefits take the form of lump-sum payments or a regular income. Where a lump-sum disability benefit is paid, the likelihood is that the member's employment with the employer will also be terminated as these benefits are generally paid where a member is suffering from a physical or mental infirmity which prevents him or her from performing his or her duties or similar work for which he or she was employed. Ill-health benefits are paid to members who become unable to work due to infirmity or sickness.<sup>238</sup>

The person must be below the age of 55 and must qualify in terms of the definition of disability as contained in the fund rules to receive a disability benefit. Thus, the member must be functionally impaired.<sup>239</sup>

The amount payable is calculated in relation to a member's salary at the time he or she became disabled.<sup>240</sup> The benefit is usually limited to 75% of the member's salary. The member must go through medical procedures to determine if he or she is indeed disabled before a benefit can be released as insurers would like to satisfy themselves that the person is disabled, as well as the extent of the disability before they pay. In some instances the assessment of disability is done on a periodic basis to determine if the person's disability status has not changed or improved. It is important for the employer and fund to align their definitions of disability, otherwise there might be situations where a member may no longer be able to work for their

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<sup>237</sup> Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" op cit note 122 at 26.

<sup>238</sup> Idem.

<sup>239</sup> In *Reynolds v Metal & Engineering Industries Retirement Fund* (1) [2001] 1 BPLR 1507 (PFA) at 1511, the fund rejected a disability claim on the basis that the complainant could still do some of his usual tasks and was therefore not completely disabled. The Pension Fund Adjudicator ordered that the complainant should be reassessed to allow the Adjudicator the opportunity to make a determination as to whether the fund's decision to refuse the complainant's application was reasonable in the circumstances (at 1512). In Belgium, disability benefits are paid to a maximum age of 65 in line with the normal retirement age in the country. See in this regard Jousten A, Lefebvre M, Perelman S "Disability in Belgium: There is More than Meets the Eye" (Working Paper 17114, National Bureau of Economic Research) 2011, available at <http://www.nber.org/papers/w17114>, last visited on 07 September 2015.

<sup>240</sup> A disabled person is, within the context of a disability grant, defined by section 1 of the Social Assistance Act of 2004 as "any person who has attained the prescribed age and is, owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance".

employer, and so has to leave the retirement fund and the insurer refuses to admit their claim. This can lead to a situation where a member is unemployed because he or she is disabled, and without income because the insurer refuses to pay as it does not consider the member disabled in terms of its policy.<sup>241</sup>

#### **6.6.4.4 Challenges with risk benefits**

HIV/Aids has a great impact on retirement funds as it increases incapacity and mortality. Incapacity will increase the number of disability claims, while mortality will increase the number of survivors' claims against pension funds. HIV/Aids also has a great effect on productivity and output. As soon as a member becomes incapacitated by the illness, he or she leaves employment and withdraws from the fund to use the money for their medical expenses, and when there is no more money, they and their children rely on their elderly parents for support.

When the members (parents) die, their children continue relying on their grandparents for support and the whole family depends on the state old-age pension. Older people also lose financial support of their children because of the pandemic. It is thought that risk benefits will continue to play an important role in South Africa's social security landscape as a result of HIV/Aids as it is expected that the number of deaths in the category of the working age will exceed the number of new participants in the near future.<sup>242</sup>

Risk benefits depend mainly on employment. Thus the person's employment plays a significant role in determining whether he or she should be a member of a risk protection scheme and receive benefits from the scheme, and also for that person's dependants to benefit from the scheme should the risk the member is covered against occur. After exiting the fund, the risk benefits which were offered by the fund

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<sup>241</sup> Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" op cit note 122 at 31-32.

<sup>242</sup> Van Zyl E "Old-age Pensions in South Africa" *International Social Security Review* Vol 56, No 3-4 July–December 2003 at 111; and Hendrie et al "Risk Benefit Provision through Provident and Pension Funds" (ibid) (Executive Summary) at (v).

are no longer available, unless a member decides to continue with the risk cover policy with an insurance company on an individual basis. It then becomes a problem should a member who is already in retirement suffer a risk, such as disability or ill health.<sup>243</sup> What this would mean is that such a person would have to use a retirement benefit to pay for all his or her medical costs from the retirement benefits. These costs can be very high and might deplete a retirement benefit within a very short space of time, and such a person would then be left with no income for support during retirement. The situation can become worse should the person live longer under such a condition. In this case, a member outlives his or her retirement savings and lives with a condition which in most cases was never planned for. This demonstrates a serious need for retirement funds to consider including a post-retirement medical benefit as one of the benefits offered by the funds.

Death benefits are paid at the discretion of the board of trustees, which means mistakes can happen resulting from many factors, such as insufficient information received by trustees during their investigations and biasness towards some of the dependants. Another worrying factor is that dependants are generally not represented when decisions are made, and communication with them is also often non-existent or very poor.<sup>244</sup> This often results in board of trustees relying on second-hand information to decide on distributions.

Where members changed jobs during their career and die before retirement, the dependants might not know about the benefits held by the previous employers or funds and as such they might not be able to access them. Dependants who later discover that there was some benefit they could have received, would often find it difficult to prove their claim as that normally happens after a long period of time has elapsed.

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<sup>243</sup> Ibid at 26.

<sup>244</sup> Ibid at 11.

## 6.7 PROTECTION OF RETIREMENT BENEFITS

### 6.7.1 General

Pension benefits receive special protection to ensure that they are not wasted or depleted before a member's retirement date as they are meant to sustain the member during retirement and, if possible, until death. These benefits can also serve as a source of income for the member's dependants should the member die before retirement.<sup>245</sup>

According to South Africa's National Treasury in the Second Discussion Paper for Retirement Reform, the protection of retirement benefits is also about member protection and includes a combination of adequate funding, the protection of rights to benefits, good governance, adequate disclosure, and trustee and member education.<sup>246</sup> Retirement benefits qualify for protection under section 25 of the Constitution; also known as the "property clause".

Section 25 provides that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. In *Transkei Public Servants Association v Government of RSA*,<sup>247</sup> the Court said

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<sup>245</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 7 at 165.

<sup>246</sup> South Africa's Social Security and Retirement Reform: Second Discussion Paper op cit note 4 at 29.

<sup>247</sup> See *Transkei Public Servants Association v Government of RSA* (1995) 9 BCLR 1235 (TK) at 1246 (hereafter, *Transkei Public Servants Association*), where the court had to decide whether employee benefits such as a housing subsidy are property rights. The court stated that the concept of property in section 28 of the Constitution (interim) may be broader to include employment benefits and subsidies. See also Devenish A *A Commentary on the South African Constitution* (Butterworths 1998) at 71; Johan de Waal, Iain Currie, Gerhard Erasmus *The Bill of Rights Handbook* 6<sup>th</sup> impression 2004 at 415-516 where it is stated as follows: "It seems unjustifiable to say that if your house is taken from you by the state you are entitled to compensation, but that if the state freezes or reduces your pension you are not, simply because in the former case you are dispossessed of a real right and in the latter of a personal right .... In addition, a particularly important source of wealth in the modern state is 'interests in government largesse': claim rights against the state to certain resources or performances such as state pensions, medical aid schemes, state jobs and state contracts." According to De Waal et al, most of these public law rights have the character of property and should therefore receive property clause protection. Lewis C "The Right to Private Property in a New Political Dispensation in South Africa" *South African Journal on Human Rights* 1992 at 392-393 (writing about the inclusion of the right to property in the interim Constitution) mentioned the fact that there are many other important sources of wealth other than land and that all the other types of property must be taken into account

“property” within the meaning of the constitutional clause (in the interim Constitution), possibly extends to social benefits, pension and medical benefits, and employment rights.

According to the Court, “property” would encompass a broader field of incorporeal objects and would extend to social and economic interests and benefits.<sup>248</sup> However, for a right to become property, it must be a vested right, which means a right should be more than just an expectation and must have accrued to the claimant according to the relevant rules of common law or statute. Thus no arbitrary deprivation of retirement benefits shall be allowed. With regards to pension benefits, a right in a member’s interest in a pension fund has been correctly held by the Pension Funds Adjudicator in *Atkinson and Others v Southern Field Staff Pension Fund*<sup>249</sup> to qualify as property. The Adjudicator in this case accepted the fact that the concept of property in the constitutional sense is not restricted to movable or immovable corporeals, but that it also includes incorporeals. The Adjudicator, however, moved to clarify the position with regard the enjoyment of the rights to ownership of such property. He alluded to the fact that as a member’s interest in a pension is of incorporeal nature consisting of a complexity of contingent contractual rights, expectations, and interests; entitlement to the benefits will be determined by the

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when justifications for private property, its distribution, and protection in a Bill of Rights are considered. The author alluded to the fact that while property means immovable property to many, to lawyers it means both movable and immovable property. See also importantly the ground-breaking article on the new face of property by Reich CA “The New Property” *The Yale Law Journal* Vol 73(5) at 770, where it is stated that the valuables that are distributed by government are gradually taking the place of conventional forms of wealth. According to the author, the wealth of people comes from the government as many people live on government largess (for example, social benefits provided by government). This, coupled with a distinctive system of law, according to the author, brings profound consequences as it, among other things, has an impact on the power of private interests, and their relationship to each other and the government. See the following US cases which confirm a global recognition of welfare benefits to be property: *Goldberg v Kelly* 397 US (1970) at 262; and *Logan v Zimmerman Brush Co* 455 US 422 (1982) at 430.

<sup>248</sup> See the case of *Transkei Public Servants Association* supra.

<sup>249</sup> See *Atkinson and Others v Southern Field Staff Pension Fund* [2000] 4 BPLR 367 (PFA) at par 38, where it was stated that the concept of property in the constitutional sense is not restricted to movable or immovable corporeals, but includes incorporeals, where one may have a right which is the objective of another right such as ownership. However, at par 46 the Pension Funds Adjudicator qualified the latter statement as follows: “A finding that a member’s interest in a pension fund is of a proprietary nature deserving of constitutional protection does not necessarily mean that the member enjoys rights of ownership of the contributions made to the fund on his or her behalf. The property is of an incorporeal nature consisting of a complexity of contingent contractual rights, expectations and interests. The extent of entitlement or access to the benefits of the resources of the fund is contingent and will be determined by the circumstances and the application of legitimate and rational rules regulating that access”.

application of rules regulating entitlement or access to those benefits. The Adjudicator was correct, considering the fact that contributions made by fund members to the fund do not necessarily give fund members ownership of the assets of the fund, but only gives them a legal expectation to receive a benefit at a later date. Thus, a fund member only receives legal entitlement to the fund when the benefit accrues in terms of the fund rules.

The Pension Funds Act of 1956 also accords retirement benefits special protection under section 37A(1) of the Act.

This section prohibits any attachment or reduction of the member's pension benefit subject to the following exceptions:<sup>250</sup>

- Payment of income tax in terms of the Income Tax Act 58 of 1962;
- Payment of maintenance in terms of the Maintenance Act 99 of 1998;<sup>251</sup>
- A maximum amount of R3 000 per annum which can be taken into account in a determination in terms of a judgment debtor's financial position of section 65 of the Magistrates' Court Act 32 of 1944; and
- Deductions permitted under section 37D.

A fund may only make deductions from the member's retirement benefit in very limited circumstances, as per the provisions of section 37A(1) of the Pension Funds Act of 1956. The effect of this section is to establish a general rule protecting pension benefits from creditors. Its main objective is to protect pensioners against being deprived of their source of income in their retirement.

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<sup>250</sup> Section 37A(1) of the Pension Funds Act of 1956. This provision is similar to section 91(1) of the Pensions Act of 1995 (United Kingdom), which provides that no pension entitlement from an occupational scheme can be assigned, commuted, surrendered, or charged, or set off. This provision is, however, subject to certain exceptions such as where money is due to a scheme or where the employer is entitled to deduct money for an obligation due to it as a result of the beneficiary's criminal, negligent, fraudulent act, or omission.

<sup>251</sup> See generally the cases of *Bannatyne* supra note 209; *Mngadi v Beacon Sweets & Chocolates Provident Fund & Others* [2003] 2 All SA 279 (D) (hereafter, *Mngadi*); and *Magewu v Zozo & Others* (2004) (4) SA 578 (C) (hereafter, *Magewu*).

The next discussion looks at circumstances under which deductions are allowed by the Act and why the legislature possibly decided to allow them.

### **6.7.2 Section 37D exceptions**

Section 37D of the Pension Funds Act of 1956 sets out limited instances under which deductions may be made from a member's pension benefit as follows:

- (1) A registered fund may:
  - (a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962), and any amount due to the fund in respect of:
    - (i) a loan granted to a member in terms of section 19(5); or
    - (ii) any amount for which the fund becomes liable under a guarantee furnished in respect of a member for a loan granted by some other person to the member in terms of section 19(5), from:
      - (aa) ...;
      - (bb) ...;
      - (cc) ...;
  - (b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of:
    - (i)
      - (aa) a loan granted by the employer to the member for any purpose referred to in section 19(5)(a); or
      - (bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19(5)(a),  
to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act; or
    - (ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud, or misconduct by the member, and in respect of which:
      - (aa) the member has in writing admitted liability to the employer; or
      - (bb) judgment has been obtained against the member in any court, including a magistrate's court,

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- from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;
- (c) deduct any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or beneficiary in respect of:
- (i) such member's or beneficiary's subscription to a medical scheme, registered otherwise than provisionally in terms of the Medical Schemes Act, 1998 (Act No. 131 of 1998);
  - (ii) any insurance premium payable by such member or beneficiary to a long-term insurer registered in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998);
  - (iii) any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund,
- from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such amount, if due, to such medical scheme, insurer or person concerned, as the case may be.
- (d) deduct from a member's benefit or minimum individual reserve; as the case may be:
- (i) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No. 99 of 1998); or
  - (ii) any amount assigned from his or her pension interest to a non-member spouse in terms of a decree granted under section (8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979)...

The following deductions are analysed in the paragraphs below to determine why the legislature saw it fit to allow them: amounts outstanding in respect of housing loans which were granted to members directly by the fund or employer; any amount for which the fund or employer is liable in terms of a guarantee given by the fund or the employer in respect of a housing loan; amounts where the employer stood surety for a housing loan granted to the member by a company which is a separate legal entity from the employer where the employer would be liable under it for the full amount of the loan; damages caused to the employer by the member as a result of theft, fraud, dishonesty or misconduct provided certain conditions are met; any amount in terms

of a maintenance order; and a portion of a member's pension interest in terms of a divorce order.<sup>252</sup>

Section 37D, which is an exception to section 37A of the Pension Funds Act of 1956, provides for at least eight instances where a fund will have the power to make deductions from a pension benefit. While section 37A(1) establishes a general rule protecting pension benefits from creditors, section 37D, on the other hand, opens a door for deductions in very limited and special circumstances. The main objective of section 37D is to make the benefit available to fund members for situations that are crucial for the well-being of the member and member's dependants. It is only in one or two instances that deductions are allowed, as will be seen below.

Retirement benefits are a very important asset of a fund member as it is an important component of member's income during retirement. It is therefore important for the board of trustees to make sure that they interpret and apply the provisions of section 37D within the spirit which the section was drafted for. The significance of this section lies in the fact that it is only in special circumstances that retirement benefits are allowed to be tampered with. It should be accepted that if retirement benefits were readily accessible, and if random deductions could be made on them, that would leave a member with no benefit to take home when the member retires, or a member will be left with insufficient benefit.

Below is the discussion of important deductions permissible under section 37D of the Pension Funds Act of 1956.

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<sup>252</sup> Section 37D of the Pension Funds Act of 1956 as amended. The onus is on the person seeking a deduction to prove that the deduction falls within section 37D of the Pension Funds Act of 1956. See in this regard *Rowan v Standard Bank Retirement Fund and Another* [2001] 2 BPLR 1643 (PFA); and *Odayan v Orion Money Purchase Pension Fund and Another* [2005] 6 BPLR 523 (PFA).

### **6.7.2.1 Housing loans**

Fund rules may provide for other kinds of benefits. For example, retirement funds can give members housing loans (pension secured/supported loans). The funds do this by way of investments.<sup>253</sup>

The rules of the fund may also make provision to provide guarantees for housing loans. Such loans are granted under the following circumstances:<sup>254</sup>

- To repay an existing loan previously taken in respect of property belonging to a member or spouse or both (on which a residence will be erected to be occupied by the member or a dependant);
- To acquire property on which a residence has been or will be erected, or to erect a residence on immovable property to be occupied by member or a dependant; and
- To make additions or alterations or maintain or repair a residence which a member or spouse or both have ownership of or a right to ownership through a right to occupation, which will be or is occupied by a member or dependant.

The loans covered under section 37D(1)(a)(i), (b)(i)(aa), and (bb) of the Act for purposes of section 19(5) of the Act, are those amounts outstanding in respect of housing loans, which were granted to members directly by the fund or employer, and any amount for which the fund or employer is liable in terms of a guarantee given by the fund or the employer in respect of a housing loan.<sup>255</sup> With these exceptions, funds do not only look to make investment returns, but they also play a social security role in that members who would have otherwise been unable to afford to build houses or who would not have qualified for housing loans from financial institutions such as banks, are given these loans by their funds at low interest rates.

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<sup>253</sup> Section 19(5) read with item 9(b) of the Schedule to Regulation 28.

<sup>254</sup> Section 37D(1)(i) and (ii) read with section 19(5)(a) of the Pension Funds Act of 1956.

<sup>255</sup> *Khumalo v Coca Cola Canners Provident Fund and Others* [2004] 1 BPLR 5409 (PFA).

In order not to burden the member with a debt which the member will not be able to pay back, section 19(5)(c) of the Pension Funds Act of 1956 restricts the maximum loan a fund may grant to a member to the fair value of the property and/or the value of the member's withdrawal benefit. The loan or guarantee may not be more than 90% of the market value of the property in respect of which a first mortgage bond will be registered.

Members must be able to repay the loan in order not to negatively affect the benefit they will receive at the time they retire. Thus housing loans should not be meant to give members early access to their retirement benefit.<sup>256</sup> The loan must be for housing and nothing else as this is mainly to help members to meet their immediate housing needs. In *Nikani v Sala Pension Fund*<sup>257</sup> where a certain amount of money was deducted from a member's withdrawal benefit for a housing loan which was still owed, but which he claimed not to know anything of, the Pension Funds Adjudicator held that because there was evidence to prove that the member had a home loan which was in arrears, the deductions made were in line with the provisions of the Pension Funds Act of 1956. However, if it could be discovered that the amount that a member received as a housing loan was used for something else, that will be against the provisions of sections 37D(1)(i)-(ii) and 19(5) of the Act. For example, in *Zuze v Nampak Contributory Provident Fund*,<sup>258</sup> the Adjudicator found that there were no housing loans given to a member as alleged by the fund, but that there were 12 loans taken by a member over a period of ten years. The loans could not have been for purposes provided for under section 19(5) of the Pension Funds Act of 1956, and therefore could not be deducted from the benefit due to the spouse. The amount which was deducted from the spouse's benefit at the time of divorce for the alleged outstanding housing loan was refunded to the complainant. These cases confirm that

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<sup>256</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 7 at 153-155.

<sup>257</sup> See in this regard, *Nikani v Sala Pension Fund* (PFA/GA/10026/2006/MD) (unreported).

<sup>258</sup> See *Zuze v Nampak Contributory Provident Fund* (hereafter, *Zuze*); and *NBC Fund Administrators (Pty) Ltd and Another* (PFA/GA/31676/2009/MR) (unreported).

the purpose of the loan must be for a housing-related purpose and not for anything else.<sup>259</sup>

However, in another case of *Farrell v Cape Municipal Pension Fund and Another*,<sup>260</sup> the complainant was dissatisfied with the calculation of her share of pension interest as she was of the view that she should only be liable for 50% of the outstanding housing loan and that the member's spouse was still paying instalments on the housing loan even after the outstanding amount was deducted from the pension interest. The Pension Funds Adjudicator correctly held in this regard that the fund was correct in deducting the outstanding housing loan in view of the provisions of section 37D(3)(a) of the Pension Funds Act of 1956.

### **6.7.2.2 Damages caused to the employer by the employee**

Section 37D(1)(b)(ii) also allows deductions from retirement funds for damages caused to the employer by a member as a result of theft, fraud, dishonesty, or misconduct<sup>261</sup> – provided certain conditions are met. These conditions are where the member has admitted liability in writing and judgment by a court of law has been obtained. It should be clear from the written statement that the member admits liability. The member should specifically allow for the deduction to take place in respect of a wrongdoing or delict committed against the employer. If judgment is given by a court of law against the member, it must relate to a civil judgment sounding in money or a compensatory order made by a criminal court in terms of section 300 of the Criminal Procedure Act 51 of 1977, specifically stating that compensation must be made to the employer for the damage or loss suffered. It should be understood that acknowledgement of liability by an employee in this

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<sup>259</sup> See generally on housing loans offered by retirement funds, Sing L “Pension-Secured Loans: Facilitating Access to Housing in South Africa?” (Prepared for FinMark Trust), accessed from [http://www.housingfinanceafrica.org/wp-content/uploads/2009/06/Pension\\_secured\\_loans.pdf](http://www.housingfinanceafrica.org/wp-content/uploads/2009/06/Pension_secured_loans.pdf), last visited 22 July 2015.

<sup>260</sup> See *Farrell v Cape Municipal Pension Fund and Another* [2011] 2 BPLR 189 (PFA) at 192-193.

<sup>261</sup> It was held in *Moodley v Scottburgh, Umzinto North Local Transitional Council & Another* 2000 (4) SA 524 at 532C-E (D), with regard to the word “misconduct” that its general meaning must be inferred from that of specific words like theft, dishonesty, fraud, or misconduct. Therefore “misconduct” in section 37D(b)(ii) must be taken to include dishonest conduct, or at least an element of dishonesty.

regard is only for the employee's misconduct and not for any other thing, including unrelated debts. However, there are times where employers are caught trying to deduct money for other unrelated contractual arrangements from their employees.

Some of the things that employers may want to deduct pension money for include money owed to the employers for debts such as car loans, computer loans, and advance salaries paid to employees at some stage during their employment relationship with the employer concerned. The boards of retirement funds need to be reminded in this regard that deductions made outside what is allowed by section 37D are unlawful.

In *Sibanyoni v Concor Holdings (Pty) Ltd and Another*,<sup>262</sup> the Pension Funds Adjudicator had to determine whether the document signed by the complainant constituted an unequivocal acknowledgement of liability, on the basis of which the fund could effect a deduction from the complainant's benefit in terms of section 37D(1)(b)(ii) of the Act. Upon termination of the complainant's employment, he became entitled to a withdrawal benefit to the amount of R126 919, 61. However, when the complainant applied for his benefit, he was informed that his withdrawal benefit had been paid to the employer as compensation for the loss that he had caused to the company through an alleged theft. The employer initially instructed the fund to withhold the complainant's benefit as there was a pending criminal case against the complainant for theft committed whilst in employment. The case was later withdrawn due to a lack of evidence. The employer thereafter instructed the fund to make a deduction from the complainant's withdrawal benefit, since the complainant had allegedly acknowledged liability in writing that he caused damage to the employer in the amount of R157 158, 93. The fund did so and paid R85 677, 13 to the employer on the strength of the admission of liability. The complainant alleged that the affidavit which he signed did not constitute a full and complete acknowledgement of liability, with the result that the deduction by the fund was unlawful. The Adjudicator found that the affidavit did not constitute an unequivocal

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<sup>262</sup> *Sibanyoni v Concor Holdings (Pty) Ltd and Another* [2005] 4 BPLR 352 (PFA) (hereafter, *Sibanyoni*).

acknowledgement of liability because even though the employee admitted liability to stealing a cheque, the admission was not about a specific cheque and for a specific amount.

Two important factors came out in *Govender v L'Oreal SA Provident Fund*<sup>263</sup> with regard to the requirement that the court of law must have passed judgment in favour of the employer. In this case the employer had not yet obtained any judgement against the members of a fund, but had a good case against them. In such a case, the Pension Funds Act of 1956 allows for the fund to withhold the members' pension benefits pending the establishment of the entitlement to the deduction in terms of section 37D. The Pension Funds Adjudicator in this case agreed that the fund could be allowed to withhold the benefit as he felt that a strong *prima facie* case had been made to show that should a court order be obtained, the employer will qualify for protection under section 37D of the Act. However, the Adjudicator could not rule in that manner as it was discovered that the employer did not comply with rule 13 of the fund rules, which required the employer to give written notice to the fund of its request to withhold a benefit.<sup>264</sup>

Deduction in section 37D has been interpreted by the Pension Funds Adjudicator in *Appana v Kelvinator Group Services of SA Provident Fund*<sup>265</sup> to by implication also include the power to withhold payment of the benefit, for a reasonable period, pending the determination or acknowledgement of liability by the employee. However, the fund or employer cannot withhold the benefit indefinitely. The employer is not allowed to withhold the benefit indefinitely. In *Buthelezi v Municipal Gratuity Fund and Another (1)*,<sup>266</sup> a delay of just less than two years was considered unreasonably long and in excess of the Municipal Council's power to withhold. It is important for boards of trustees of retirement funds to always remember that they are expected to act in a fair and reasonable manner in exercising their duties, including their decisions to make deductions or withhold benefits for purposes of

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<sup>263</sup> *Govender v L'Oreal SA Provident Fund* [2005] 6 BPLR 482 (PFA).

<sup>264</sup> *Supra* at paras 12-13 and 16-17.

<sup>265</sup> *Appana v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA)),

<sup>266</sup> *Buthelezi v Municipal Gratuity Fund and Another (1)* [2001] 5 BPLR 1996 (PFA).

section 37D deductions. In this regard the board should know that it is acting as an administrative functionary and that it is as a result bound by the provisions of section 33 of the Constitution. For example, the board cannot just act arbitrarily when making such decisions.

The board should always aim to protect the interests of the fund members and beneficiaries. Where the board does not exercise its powers reasonably, its decisions may be taken to a court of law on review basis.<sup>267</sup> It would appear that section 37D gives the employers preference over other creditors in this regard, mainly because the employer participates in and contributes to the fund. It should be accepted that by allowing deductions for the loss caused by the employee to the employer, the legislature is indirectly giving fund members the responsibility to deal with the employer with honesty at all times. The employer is protected against dishonest employees and it is only fair that the employer is allowed to deduct any loss suffered as a result of an employee's dishonest dealings from the employee's pension benefit. The protection of the employee's pension benefit in this regard is limited as it stops immediately when the employee chooses to act dishonestly in his or her dealings with the employer – provided the two requirements set out section 37D(1)(b)(ii) have been complied with.

### **6.7.2.3 Maintenance**

Section 37D(1)(d)(i) allows for deductions for maintenance obligations. Retirement funds can deduct or withhold a portion of a retirement benefit for purposes of maintenance payment<sup>268</sup> under the Maintenance Act 99 of 1998. This Act provides that notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity, or compassionate allowance or other similar benefit will be liable to

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<sup>267</sup> See in this regard *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W); *Newclicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO* 2005 (2) SA 530 (C); and *Mafongosi and Others v United Democratic Movement and Others* 2002 (5) SA 567 (TKH).

<sup>268</sup> See in this regard the following cases: *Mngadi* supra note 251; *Magewu* supra note 251; *Soller v Maintenance Magistrate, Wynberg and Others* 2006 (2) SA 66 (C).

be attached or subjected to execution under any warrant of execution or any order issued or made under Chapter V of the Act in order to satisfy a maintenance order.<sup>269</sup>

The orders under this Chapter include an order to secure a pension benefit due by a defaulting member to pay maintenance which is in arrears to a child.<sup>270</sup> It is clear from these provisions that pension funds can enforce maintenance orders against defaulting fund members. This is to ensure that children, and in certain instances spouses, are maintained by their parents or partners or former partners where the parties have divorced.

#### **6.7.2.4 Pension sharing on divorce**

A portion of a member's interest can be deducted at the time of divorce as per court order. This is called a "clean break" principle. The concept of pension sharing upon divorce where one of the spouses is a member of a retirement fund, was introduced in the South African law by the Divorce Amendment Act of 1989.<sup>271</sup> Before this Amendment Act, the member spouse's pension interest was not regarded as an asset in his or her estate at the date of divorce.<sup>272</sup> Even though the member spouse's pension interest formed part of his or her estate, at the time of divorce the non-member's spouse could not obtain a share of the member spouse's pension benefit because section 7(8) of the Divorce Act of 1979 delayed payment of that share until the benefit had accrued to the member spouse.

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<sup>269</sup> Section 26(4) of the Maintenance Act of 1998.

<sup>270</sup> Section 40.

<sup>271</sup> Divorce Amendment Act 7 of 1989.

<sup>272</sup> Boqwana N (of Thipa Incorporated Attorneys) "Dealing with the Pension Benefit of Divorce" (Law Society of South Africa – Legal Education and Development) 2009 at 3; Nevondwe L "The Law Regarding the Division of the Retirement Savings of a Retirement Fund Member on his or her Divorce with Specific Reference to *Cockcroft v Mine Employees' Pension Fund* [2007] 3 BPLR 296 (PFA) *Law, Democracy & Development* 2009 (13) at 1-12; and Marumoagae C "Breaking Up is Hard to Do, or is it? The Clean Break Principles Explained" *De Rebus* (September 2013) at 38-40.

In terms of section 7(8), a court may give an order to award a non-member spouse<sup>273</sup> a portion of a member's interest in a retirement fund when the member exits the fund or when a retirement benefit accrues to such a member. After the amendment, a non-member spouse could receive a portion of the pension interest, but only at the time the member exited the fund and not at the time of divorce.

This undermined a "clean break" following divorce<sup>274</sup> and was unfair to a non-member spouse who had to wait until the member spouse exited the fund, which could take years and at times the non-member spouse might not even see that day due to other factors such as death before the member spouse's exit or before the benefit could accrue to the member spouse. In other words, the non-member spouse could only receive the share when, for example, the member retired, resigned, or died.

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<sup>273</sup> "Spouse" means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act (68 of 1961), the Recognition of Customary marriages Act (120 of 1998), or the Civil Union Act (17 of 2006), or the tenets of a religion (inserted by section 1 of Act 11 of 2007). According to Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 165 at 86, the ruling in *Volks NO v Robinson* [2005] 2 BPLR 101 (CC), which held that the consequences of marriage may not be imposed on persons, or the estate of persons, who were not prevented by law from marrying but who simply chose not to marry and that it is both reasonable and justifiable for legislation to differentiate between married and unmarried persons when determining who should be granted the benefits that may arise from marriage, only applies to benefits granted in terms of legislation such as maintenance and the right to be considered as a beneficiary of lump-sum benefits payable by retirement funds on the deaths of deceased in-service members. This ruling, according to the authors, did not preclude funds from granting cohabitantes the same benefits, such as pensions, that are granted to married spouses if this was authorised by their rules. That reference to 'permanent life partner' in the definition of "spouse" appears to have been intended to reverse the impact of the case of *Volks* supra decision on the distribution of death benefits in terms of the Pension Funds Act.

<sup>274</sup> Section 7 of the Divorce Act of 1979 provides that the pension interest of a member of the pension fund shall be taken into account when dividing the joint estate of parties married in community of property upon divorce. What this section means is that the portion to be shared will only be determined after the court has declared that the pension interest forms part of the member's estate. In *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D) at 3032, it was held that the applicant was not entitled to receive a share of the member's pension interest until such time as the estate is divided following a divorce. In another case of *Sempapalele v Sempapalele and Another* [2002] 2 BPLR 3035 (O) at 3039, the court held that the applicant's claim that she was entitled to half of the respondent's pension interest had to fail as she had failed to get a court order granting her a share in the pension interest in terms of section 7 of the Divorce Act of 1979 at the hearing of the divorce matter. See also generally Heaton's criticism of the previous position where the non-member spouse had to wait for the member spouse to exit the fund before he or she could receive his or her share of the benefit, in Heaton J "Striving for Substantive Gender Equality in Family Law: Selected Issues" (2005) 21 *SAJHR* at 571 (hereafter, Heaton "Striving for Substantive Gender Equality in Family Law").

The problem with this position was that during the period the non-member spouse will be waiting for the member to exit the fund, the non-member's share remained the same until the date of payment, while, on the other hand, the member's benefit would increase with contributions and investment returns throughout the period of membership. This meant that the amount the non-member spouse was entitled to was determined according to the total amount of the member spouse's contributions up to the date of divorce only, and could not increase despite the amount of time that may have lapsed before the benefit was paid out.<sup>275</sup> This was clearly unfair to a non-member spouse who wanted immediate access to benefits and a clean break from the marriage with the member.

The legislature realised that there was a problem with the previous position and has since addressed it by introducing amendments through the Pension Funds Amendment Act of 2007, the Revenue Law Amendment Act 60 of 2008, and the Financial Services Laws General Amendment Act 22 of 2008. In terms of the amendments, the date of accrual of the retirement benefit is accelerated and will be the date of the court order. This is to enable a non-member spouse to receive a share of the member spouse's pension interest on divorce if that is what is directed by the court order.<sup>276</sup> In terms of section 37D(1)(d)(i) of the Pension Funds Act of 1956 (as amended), a non-member spouse is now allowed to claim a portion of the member's pension interest at the time of divorce. What this implies is that the non-member spouse no longer has to wait for a member spouse to exit the fund before he or she can access a share from the member's pension benefit. In other words, the change accelerated the date of accrual of the benefits to the non-member spouse to the date of divorce.

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<sup>275</sup> See generally Masie D "Funding a Clean Break" (BusinessDay) accessed from <http://www.netassets.co.za/retirement/retirement.asp?websiteContentItemID=70781>, last visited April 2009. See also Heaton's criticism of the previous position, in Heaton J "Striving for Substantive Gender Equality in Family Law: Selected Issues" (idem).

<sup>276</sup> Section 28 of Pension Funds Amendment Act of 2007.

The Pension Funds Adjudicator<sup>277</sup> had the opportunity to apply this amendment for the first time in the ground-breaking determination of *Cockcroft and Mine Employees' Pension Fund*.<sup>278</sup> The Adjudicator held in this matter that the amendment notionally accelerated the date of accrual of the benefit to the member spouse to the date of divorce. According to the Adjudicator, section 37D(1)(e), as it was after the first amendment by the Pension Funds Amendment Act of 2007 but before it was deleted by the Financial Services Laws General Amendment Act of 2008, deemed the date of accrual of the benefit to be the date of divorce. She also had to determine whether the new provision applied to divorce orders granted prior to the effective date of the new amendments, which was 13 September 2007. She was of the view that the amendment was not to apply retrospectively, but prospectively and also that the member spouse was not required to pay interest to the non-member spouse retrospectively with effect from the date of divorce.<sup>279</sup>

The non-member spouse has 120 days after receipt of a court order to elect whether he or she wants the share to be paid directly to him or her or have it transferred to another approved pension fund.<sup>280</sup> The court order must identify the fund from which the share must be deducted, otherwise the fund can refuse to honour the order.<sup>281</sup>

A social security challenge with this shared benefit is that most of the non-members' spouses are likely not to save or preserve the benefit in approved retirement schemes. Most of them might be tempted to take the benefit as cash and use it for other things, such as buying a new car or going on a long holiday.

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<sup>277</sup> The Pension Funds Adjudicator was Ms M Mohlala at that time.

<sup>278</sup> See the ground-breaking determination by the then Adjudicator (Ms Mohlala), *Cockcroft and Mine Employees Pension Fund* [2007] 3 BPLR 296 (PFA).

<sup>279</sup> See the case of *Cockcroft* supra at paras 22-23. See also an analysis of the *Cockcroft's* determination and its possible implications by Barrow O and Gubula N "The Right to Claim a Share of Spouse's Retirement Benefits on Divorce" *Without Prejudice* November 2007 at 13-14; and Marumoagae MC "A Non-Member Spouse's Entitlement to the Member's Pension Interest" *PER/PELJ* 2014 Vol 17 (6) at 2488-2524.

<sup>280</sup> Section 37D(4)((b)(ii) of the Pension Funds Act of 1956.

<sup>281</sup> Section 37D(4)(a)(i)(aa).

It is important for a non-member spouse, especially those working and earning a salary, to preserve the benefit in another fund and use the money to supplement the pension benefit they will receive when they retire. There is also a growing trend of people divorcing specifically to access the retirement money.<sup>282</sup> This is very unfortunate as the money is then not used for the purpose it was meant for. This again regrettably contributes to the high level of poverty in this country. Such are the types of gaps which currently exist in South Africa's retirement system. With these gaps, money that could have been used to take care of the non-member spouse in retirement or money that could have been used to supplement the non-member's spouse's retirement benefit, that is, if he or she was working, is used for other things and in that way the benefit does not serve its intended purpose.

It is therefore important to enforce the preservation of the benefit even in this regard. For example, the receiving spouse, if working and earning above a specified salary threshold; can be required to preserve a certain percentage of the benefit and he or she can use the rest as he or she likes.

The whole benefit can be paid, for example where the person is not employed or where the amount of the share is below a certain amount; otherwise the system should avail other options on how the money can be preserved to earn interest and to be released when that person reaches the age of 55.

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<sup>282</sup> See generally Cameron B "Splitting a pension on divorce", 23 January 2012 *Personal Finance*, accessed from <http://www.iol.co.za/business/personal-finance/retirement/splitting-a-pension-on-divorce-1.1218453>, last visited 26 July 2015.

## **6.8 MANAGEMENT OF RETIREMENT FUNDS AND THE PROTECTION OF MEMBERS' INTERESTS AND RIGHTS**

### **6.8.1 The powers of the board of trustees**

The Pension Funds Amendment Act of 1996<sup>283</sup> introduced far-reaching changes to the management of retirement funds. In terms of the said changes, now all new funds registered on or after 19 April 1997 and all existing funds with effect from 15 December 1998 must have a board of management consisting of at least four members of which at least 50% must be elected by the members.<sup>284</sup> Employers and employees appoint the board of management,<sup>285</sup> which runs the affairs of the fund as directed by the fund rules. The idea with this balanced representivity is for both employers and workers to be jointly responsible for the management of the fund. The board of trustees must exercise its powers and perform its duties as empowered by the fund rules, and not as directed by those who elected them. Thus, members of the board are expected to use their discretion without being influenced by those who elected them to the board. They may also not under any circumstances undertake to perform their duties or exercise their discretion in a particular way.<sup>286</sup>

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<sup>283</sup> The Pension Funds Second Amendment Act, 22 of 1996. Section 7A of the Pension Funds Act of 1956 (dealing with the constitution of the board of management of a fund) was inserted into the Act by section 2 of the Pension Funds Second Amendment Act of 1996.

<sup>284</sup> Section 7A(1) of the Pension Funds Act of 1956.

<sup>285</sup> Every registered fund, unless exempted by section 7B, is required by section 7A of the Pension Funds Act of 1956 to have a board of management (board of trustees) made up of at least four board members, 50% of which must be elected by members of the fund and 50% elected by the employer or employers participating in the fund.

<sup>286</sup> See in this regard *PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood And Allied Workers Union (CEPPWAWU)* 2008 (2) SA 351 (W) at par 24 (hereafter, *PPWAWU National Provident Fund*); *Tobin v Motor Industries Pension Fund* (2001) BPLR 2769 (PFA); and *Hoosen NO & Others v Deedat & Others* 1999 JOL 5179 (A) at par 21. See also an English decision of *British Coal Corporation v British Coal Staff Superannuation Scheme Trustees Ltd* [1995] 1 All ER 912, where it was stated that a person may not be expected to exercise a discretion regarding a fund within a group he belongs to as such a person cannot be able to weigh his own interests against those of others. See also another British case of *Manning v Drexel Burnham Lambert* [1995] 1 WLR 32.

The board of trustees has the duty to take all reasonable steps to protect the interests of the members in terms of fund rules and the provisions of the Pension Funds Act of 1956. The board also has common-law fiduciary duties<sup>287</sup> to act with due care, diligence, and in good faith;<sup>288</sup> to avoid conflict of interests;<sup>289</sup> and to act with impartiality in respect of all members and beneficiaries<sup>290</sup> of the fund. These common law duties have since been codified in sections 7C and 7D of the Pension Funds Act of 1956.<sup>291</sup> These duties are discussed below.

## **6.8.2 Trustees' fiduciary duties and members' rights**

### **6.8.2.1 General**

The board of trustees manages the fund and looks after the interests of the fund members. The board also has a relationship with other stakeholders, such as the participating employer, service providers, fund administrators, and investment managers. It is, however, the relationship that the board has with the fund and fund members and/or beneficiaries which is of great relevance to this discussion.

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<sup>287</sup> These common-law duties are codified in section 7C of the Pension Funds Act of 1956. The word "fiduciary" emanates from the Latin word "*fiducia*" which means "trust". The board of trustees therefore holds the assets of the fund in trust on behalf of the members of the fund (see in this regard Hudson A, *The Law on Investment Entities* (2000) at 85-86. See also generally on the topic of fiduciary duties, Havenga M *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* (LLD Thesis, University of South Africa) (1995). According to Havenga M "Breach of Directors' Fiduciary Duties: Liability on What Basis" (1996) 8 *SA Merc LJ* at 366, the fact that analogies are usually made between the fiduciary offices of directors and other fiduciaries, such as trustees and agents confirm that a fiduciary duty exists.

<sup>288</sup> Section 7C(2)(b).

<sup>289</sup> Section 7C(2)(c).

<sup>290</sup> Section 7C(2)(d). See also PF Circular 98 dealing with the objects and duties of the boards of the funds.

<sup>291</sup> It was held in *PPWAWU National Provident Fund* supra note 286 at par 21, that section 7C of the Pension Funds Act of 1956 created statutory duties that overlap with the pre-existing common law fiduciary duties of the board. See also *Doyle v Board of Executors* 1999 2 SA 805 (C) at 813A-B (hereafter, *Doyle*) and *Estate Kemp and Others v McDonald's Trustees* 1915 AD 491 at 499.

The relationship between the board of trustees, the fund, and fund members is called a “fiduciary relation”. It is this relationship that gives rise to what are generally known as “fiduciary duties”. It was held in *Doyle v Board of Executors*<sup>292</sup> that a trustee occupies a fiduciary office which imposes upon him or her the duty of utmost good faith towards beneficiaries, whether actual or potential. A fiduciary duty is a high duty of care and involves the elements of good faith, trust, and honesty. Trustees are fiduciaries as they occupy a position of trust to the fund. Fiduciary duties mean that the board of trustees must act in good faith and in accordance with the powers conferred on them, and must be loyal to the fund<sup>293</sup> to the exclusion of others. It is assumed this also refers to fund members and beneficiaries. The board must not make any secret profit in the exercise of their powers and must also not allow themselves to be placed in a position in which their interests or the interests of third parties are inconsistent with or in conflict with their duties to the fund.<sup>294</sup>

The board of a retirement fund cannot choose not to be obliged to perform their fiduciary duties. In other words, the board cannot opt-out of its fiduciary duties in any way. These duties are imposed on the board of trustees by common law and are also now codified in sections 7C and 7D of the Pension Funds of 1956. In terms of section 7C(1) of the Act the object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund. On the other hand, subsection (2) states that the board shall, in pursuing its objects take all reasonable steps to ensure that the interests of the members in terms of the rules of the fund and the provisions of the Pension Funds Act of 1956 are protected at all times.

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<sup>292</sup> See the case of *Doyle* supra.

<sup>293</sup> The fund in this regard is the principal of the (agent) trustee or fiduciary. In *Mothew (t/a Stapley & Co) v Bristol and West Building Society* [1996] EWCA Civ 533 [1996] 4 All ER 698 at 711-712, Millet LJ said the following about a person who occupies a position of trust, or a fiduciary: “A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary .... A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of the third person without the informed consent of his principal.”

<sup>294</sup> Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 165 at 172-173.

According to Hunter et al,<sup>295</sup> trustees' duties include ensuring that the fund is and will for the foreseeable future remain financially sound and be able to pay benefits to members and beneficiaries when those benefits accrue. These duties, and in particular the latter, are very important for a number of reasons; including that it is upon the board of trustees to ensure that fund members and/or beneficiaries receive adequate benefits when the time to retire arrives. The Financial Institutions (Protection of Funds) Act of 2001<sup>296</sup> provides that a director, member, partner, official, employee, or agent of a financial institution who invests, keeps safe custody, controls, administers, or alienates any trust property must with regard to the trust property and the terms of the instrument or agreement by which the trust in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties.<sup>297</sup> Thus, trustees in a wider sense are regarded as such (trustees) because they stand in a fiduciary relationship to the trust.

There has been an ongoing debate as to whether the board of trustees owes a fiduciary duty to both the fund and fund members, or only to the fund. In the case of *Tek Corporation Provident Fund and Others v Lorentz*,<sup>298</sup> the court had held that the board of trustees indeed owes a fiduciary duty to the fund and its members and beneficiaries. This view was supported by the court in *Doyle v Board of Executors*,<sup>299</sup> where it was held that the board of trustees holds a fiduciary position with respect to both the fund and its members as it administers or manages the fund and its assets on behalf of the members. However, there have been conflicting views about the issue.

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<sup>295</sup> Ibid at 162.

<sup>296</sup> Financial Institutions (Protection of Funds) Act of 2001.

<sup>297</sup> Section 2(b). The wording of this section is almost similar to the wording of section 2 of the Financial Institutions (Investment of Funds) Act 39, of 1984.

<sup>298</sup> See the case of *Tek Corporation Provident Fund* supra note 33 at par 28.

<sup>299</sup> See the case of *Doyle* supra note 291 at 813A-B.

For example, Marumoagae<sup>300</sup> thinks that the board of trustees does not owe a fiduciary duty to the members of the fund<sup>301</sup> as the board cannot be expected to go out of its way to satisfy members' wishes, but that the board's responsibility is to ensure that in the process of carrying out its duties on behalf of the fund, members are not prejudiced unjustly.<sup>302</sup> It is submitted that it is not the wishes of the fund members which the board must protect, but their interests. According to Marumoagae, the board only owes the members of the fund and stakeholders the duty of good faith.<sup>303</sup> He submits that the board owes a fiduciary duty to the fund as it holds the assets of the fund in a fiduciary capacity.<sup>304</sup> Hunter et al share Marumoagae's view. Hunter et al are of the view that the board of trustees owes a fiduciary duty to the fund and not to its members; the same way in which members of the board of a company owes fiduciary duties to the company and not its individual members or shareholders.<sup>305</sup> In their view the members of a retirement fund do not have any rights to the assets of the fund, but will in any event benefit from proper management and administration of the fund.<sup>306</sup> However, according to Liberty, a person who is a trustee will have consequential fiduciary duties to fund members.

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<sup>300</sup> Marumoagae MC "Do Boards of Trustees of South African Retirement Funds Owe Fiduciary Duties to Both the Funds and Fund Members? The Debate Continues" [2012] *PER/PELJ* Vol 15(2) at 554-569.

<sup>301</sup> According to Marumoagae (ibid at 560), fiduciary duties should be understood as the obligation and responsibility the board of trustees has to be loyal to the fund, and thereby to carry out its duties towards the fund with dignity and honesty in order to advance the objectives of the fund. His view is that the boards of trustees owe fiduciary duties only to the funds they serve and not to the members of the funds. This view is supported by Hunter R "The Governance of Pension Funds" (Paper prepared for the Annual Convention of Financial Planning Institute, Durban) April 2002, at 2 par 2.1, accessed from <http://www.bowman.co.za/FileBrowser/ArticleDocuments/Governance-Of-Pension-Funds.pdf>, last visited on 23 August 2015. On the other hand, Scogland WL "Fiduciary Duty: What Does it Mean?" *Tort & Insurance Law Journal* Vol 24 No 4 (Summer 1989) at 803, states that in general terms a person is a fiduciary to the extent that he possesses or exercises any discretionary authority or responsibility in plan administration; exercises any authority or control respecting a plan's assets; or renders investment advice with respect to a plan's assets for a fee.

<sup>302</sup> Marumoagae (ibid) at 556.

<sup>303</sup> In Marumoagae's view (ibid) at 558, the duty of good faith emanates from the provisions of section 2(a) of the Financial Institutions (Protection Funds) Act of 2001.

<sup>304</sup> Marumoagae (ibid) at 559.

<sup>305</sup> See in this regard Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 165 at 165, where in footnote 124 reference is made to Meskin et al *Henocheburg on the Companies Act* at par 208, where the authors state that directors owe no fiduciary duties to the members individually and not even to a member who is a majority shareholder.

<sup>306</sup> Hunter et al (ibid) at 164-166.

This point makes sense in that indeed the board of trustees administers or manages the fund and its assets on behalf of the members.<sup>307</sup> The fund and its members are mutually connected and inclusive of each other, as without the members there will be no fund and consequently no retirement benefits. The board is entrusted with the duty to protect the interests of the fund members and therefore it cannot be seen working against those interests by, for example, making secret profit at the members' expense or placing itself in a position of conflict with the interests and aspirations of the members of the fund. It is for these reasons that the board can be considered to in one way or another also owe fiduciary duties to fund members. Trustees must act in the sole interests of the fund and its members, and this includes acting in good faith at all times. For example, decisions relating to the investment of the funds must be in the best interest of the fund and its members. Liberty defines trust as "an arrangement through which the ownership of, or control of, property of one person is, by virtue of a trust instrument, made over to, bequeathed to, or controlled by another person, the trustee, for the benefit of another or others".<sup>308</sup>

According to Liberty, retirement funds and their assets fall under the definition of a trust and sometimes have their own specific trust instrument called "a deed of trust", but that even where there is no specific deed of trust for the fund, the fund rules constitute a trust instrument.

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<sup>307</sup> See in this regard the case of *Doyle* supra note 291 at 813A-B. This view is also support by Mdluli SM "The Role of the Board of a South African Defined Contribution Fund that Offers Investment Choice" *SA Merc LJ* (2011) 23, at 251 (hereafter Mdluli "The Role of the Board").

<sup>308</sup> Liberty Corporate: The Fiduciary Duties of Retirement Fund Trustees (Brochure on the Fiduciary Duties of Retirement Fund Trustees) at 8, accessed from <http://www.libertycorporate.co.za/our-brochures/Documents/our-brochures/fiduciary-duties-of-retirement-fund-trustees.pdf>, last visited on 22 July 2015 (hereafter, Liberty Brochure on Fiduciary Duties of Retirement Trustees). In the English case of *Cowan v Scargill* [1985] Ch 270, it was stated that "the starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries". The court further stated that this duty is of great importance and that in abiding by the law trustees must put the interests of the beneficiaries first. However in *Edge v Pensions Ombudsman and Another* [1999] All ER 546 (CA), it was held that the trustees are not required to treat the members of the pension scheme equally. In *casu*, a surplus was used to improve the benefits of the active members of the fund and not those of the retired members. The Pensions Ombudsman held that the trustees acted impartially but when the matter was taken on appeal, the court held that the trustees were entitled to choose and prefer some beneficiaries over others and that it was not upon the Ombudsman to second-guess their discretion. What is expected from the trustees is to consider all the beneficiaries fairly.

This is, however, correctly disputed by Hunter et al who are of the view that trust law principles cannot just easily apply to the relationship between the board of trustees of retirement funds and fund members; because trusts and retirement funds differ. Hunter et al attribute the confusion regarding the application of trust law to retirement funds to the fact that, before 1956, retirement funds in South Africa were established as trusts.<sup>309</sup>

Liberty states that where a person, such as a trustee, is charged with the control of another's property, such person will be bound by fiduciary duties, whether a written document (in this regard a deed of trust) to that effect exists or not. Where a fund has, in addition to its rules, a separate deed of trust, this is regarded as forming part of the fund rules and must be registered along with the rules.<sup>310</sup> Liberty maintains that the assets of retirement funds constitute trust property and any person holding or administering that property is a trustee and therefore stands in a fiduciary relationship to the fund, and owes fiduciary duties to that fund and the members thereof.<sup>311</sup>

It is submitted that even though the principles that apply to trusts may look relevant to retirement funds, it should be accepted that retirement funds in South Africa have moved away from taking the form of trusts and are therefore not trusts and cannot be regulated by the same law that regulates trusts. Retirement funds are legal persons, while trusts are not.<sup>312</sup> Thus, even though trustees are regarded as such because they stand in a fiduciary relationship to the trust (retirement fund), this should not be interpreted to imply that retirement funds are trusts, as opined by Liberty.

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<sup>309</sup> Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 165 at 163.

<sup>310</sup> Idem.

<sup>311</sup> Liberty Brochure: Fiduciary Duties of Retirement Trustees op cit note 308 at 13. See also Thomas G and Hudson A *The Law of Trusts* 2004 at 20, where they state that trustees' obligations in relation to a trust instrument are twofold: firstly, they have the duty of good conscience which requires them to avoid conflict of interest, to deal fairly with all beneficiaries and not to make unauthorised profits from the trust; secondly, they have obligations to manage the trust properly, which requires them to act in the beneficiaries' best interests, to act in a prudent manner when making investments, and to give beneficiaries different kinds of information.

<sup>312</sup> See *Land and Agricultural Bank of South Africa v Parker & Others* 2005 (2) SA 77 (SCA) at par 10 where the Supreme Court of Appeal said a trust is not a legal person.

It should also be noted that the boards of retirement funds are bound by the Constitution and they must in exercising their duties bear in mind their constitutional responsibilities. The Constitution is the supreme law of the country,<sup>313</sup> and the Bill of Rights is especially entrenched<sup>314</sup> in the Constitution and it binds the executive, the judiciary, and all organs of state, as well as natural or juristic persons – provided certain conditions have been met.<sup>315</sup> Decisions of boards of trustees are also subjected to administrative law review.<sup>316</sup> Note should, however, be taken that even though members of retirement funds enjoy certain rights, these rights are not absolute and they can be limited as long as the limitation satisfies the requirements of section 36 of the Constitution, which is also generally known as the “limitation clause”.

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<sup>313</sup> Section 2 of the Constitution states that this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. See also Olivier et al *Social Security: A Legal Analysis* op cit note 130 at 52.

<sup>314</sup> The Bill of Rights is not easily amended. In terms of section 74(2) of the Constitution, Chapter 2 (Bill of Rights) may be amended by a Bill passed by the National Assembly with a supporting vote of at least two-thirds of its members and the National Council of Provinces with a supporting vote of at least six provinces.

<sup>315</sup> Section 8(2) of the Constitution states that a provision of the Bill of Rights binds a natural or juristic person if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

<sup>316</sup> See the discussion under par 6.8.1.

For example; in limiting the rights in terms of the law of general application<sup>317</sup> to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,<sup>318</sup> consideration should be given to the nature of that right,<sup>319</sup> the importance of the purpose of the limitation,<sup>320</sup> the nature and extent of the limitation,<sup>321</sup> the relationship between the limitation and its purpose,<sup>322</sup> and less restrictive means to achieve the purpose.<sup>323</sup> The law of general application with regard to retirement funds, boards of trustees, and fund members will be the Pension Funds Act of 1956 and retirement funds' rules.

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<sup>317</sup> See *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) at par 41, where it was stated that the limitation must be derived from the law of general application and not an executive act or policy.

<sup>318</sup> See *S v Makwanyane* 1995 (6) BCLR 665 (CC) at par 104 (hereafter, *Makwanyane*); and the case of *National Coalition for Gay and Lesbian Equality* supra note 213 at par 34. In *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (2) BCLR 150 (CC) at par 37, the court held that limitation of rights is wide-ranging and therefore the courts must take into account all relevant factors that go to the justification of the limitation.

<sup>319</sup> This provision has been drawn from article 4 of the International Covenant on Economic, Social and Cultural Rights, 1966, which provides that state parties to the present Covenant recognise that in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law, only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. It, however, looks like the Constitutional Court looks more into the importance and the purpose of the right and not necessarily its nature. See in this regard *South African Transport and Allied Workers Union and Another v Garvas and Others* (City of Cape Town as Intervening Party and Freedom of Expression Institute as *Amicus Curiae*) 2012 (8) BCLR 840 (CC) at paras 61-63 and 81.

<sup>320</sup> The purpose aimed to be achieved by the limitation of the right must be of sufficient importance to justify the limitation of the right. What is being looked at in this regard are the values of an open and democratic society based on human dignity, equality, and freedom as set out in section of the Constitution. The next step will be to determine whether in terms of the value system the purpose is sufficiently important to justify the limitation of the right. In the case of *Makwanyane* supra note 318 at par 185, the court in determining the justifiability of capital punishment held that the deterrence of violent crime was an acceptable purpose but that retribution was not.

<sup>321</sup> The more severe the infringement, the more compelling the purpose must be. Thus the harm done must be proportionate to the benefits/purpose achieved by the limitation. In *S v Meaker* 1998 (8) BCLR 1038 (W) at 1054, the accused was challenging the "reverse onus" provision that an owner of a vehicle is deemed to be the driver in any contravention of the traffic laws. The fact that the consequence of the limitation on the right to remain silent would result only in a fine was not an appropriate consideration in determining the nature and extent of the limitation on the right.

<sup>322</sup> In the case of *Makwanyane* supra note 318 at par 184, it was found that there was no sufficient evidence to demonstrate that capital punishment achieved prevention, deterrence, and redistribution.

<sup>323</sup> Section 36(1)(a)-(e) of the Constitution. In the case of *Makwanyane* supra note 318 at par 128, the Constitutional Court held that long imprisonment can also serve the same purpose as the death sentence. In *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (3) BCLR 231 (CC) at paras 129-130, the majority decision found that there was no objective way in which a narrower limitation could be framed in order to safeguard the applicant's right to freedom of religion.

Specific fiduciary duties of the board of trustees are discussed below. The discussion also covers the rights which fund members and/or beneficiaries have in relation to some of these duties.

**6.8.2.2 *The duty to take all reasonable steps to protect the interests of members in terms of the rules of the fund and the provisions of the Act***

The duty to take all reasonable steps to protect the interests of members underpins the main objective of a retirement fund, which is to ensure that members and/or beneficiaries receive adequate benefits when a member retires or to a member's dependants should a member die before he or she could retire. The board must act in the best interests of the fund and its members at all times in its management of the fund. This is where, according to Hunter et al, pension funds differ from companies, which are established and operated to achieve the best possible return on the capital invested by shareholders; while, on the other hand, pension funds are not profit orientated.<sup>324</sup> With regard to pension funds, the benefits come from contributions made by both employee members and employers as determined by the fund rules. In administering the fund, the board of trustees must make sure that all the decisions made are to the benefit of the fund and in turn to the benefit of the members and/or beneficiaries. The board must do this guided and authorised by the fund rules and the provisions of the Pension Funds Act of 1956. According to Hunter et al, the board is required to make sure that the fund is financially sound and that it is able to pay benefits when they accrue. It also means that members of the board of trustees cannot procure an amendment to the rules of the fund to provide that they are indemnified by the fund against all claims for compensation for losses resulting from their negligent or culpable acts or omissions, and cannot rely on disclaimers on liability in regard to incorrect information given to members and beneficiaries.<sup>325</sup>

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<sup>324</sup> Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 165 at 166-167.

<sup>325</sup> Hunter et al (ibid) at 162-163. See also the following cases referred to by Hunter et al (idem): *Warner v Old Mutual Staff Retirement Fund* [2000] 7 BPLR 804 (PFA); *Connery v Old Mutual Life Assurance Co (SA) Ltd & Another* [2002] 6 BPLR 3544 (PFA) (hereafter, *Connery*); and *Central Retirement Annuity Fund v Adjudicator of Pension Funds & Others* [2005] 8 BPLR 655 (C).

### **6.8.2.3 The duty to act with due care and diligence**

This duty arises with regard to dealings with assets, property, and information belonging to the fund. The standard of care required in this regard is greater than that of a reasonable person.<sup>326</sup> The board of trustees will have to act with the prudence and caution of a person who is required to manage another person's affairs. This was confirmed in the case of *Administrators Estate Richards v Nichol and Another*.<sup>327</sup> The said standard is of the *bonus et diligens paterfamilias* of Roman law. Such a person is obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way to any business risks.<sup>328</sup>

The duty to act with care has four main elements in relation to retirement fund trustees:<sup>329</sup>

- To handle the property entrusted to them with greater care than they would in dealing with their own property;
- To be fully acquainted with all relevant legal aspects of their role as trustees;
- To make sure that all relevant matters are properly covered in meetings; and
- To keep members fully informed of all changes that relate to them and their benefits in terms of the fund.

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<sup>326</sup> It was held in an old decision of *Sackville-West v Nourse & Another* 1925 AD 516 that the standard of care required of a trustee in relation to trust property was higher than that which an ordinary person might generally observe in the management of his or her own affairs.

<sup>327</sup> See *Administrators Estate Richards v Nichol and Another* [1998] 4 All SA 555 (A).

<sup>328</sup> Supra at 561.

<sup>329</sup> Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 10 at 113. See also generally the *Mouton Committee Report* op cit note 58 at 437.

Due diligence, on the other hand, requires the person who occupies the position of trust to engage properly with the affairs of the fund. For example, board members will be required to always apply their mind to the issues that come before the board. The board will be in breach of the duty to act with due care and diligence if they fail to act as expected of persons in their position. Such a breach may even amount to delict and the member or board may be liable should the fund suffer any loss as a result of such a breach.<sup>330</sup>

#### **6.8.2.4 The duty to act in good faith**

The board of trustees owes a fiduciary duty to the fund and a duty of good faith to the members and other stakeholders. However, there are no degrees of good faith.<sup>331</sup> Thus, any judgment of the trustees' action will be based on an unqualified standard of good faith.

Any breach of good faith, regardless of its effect or nature, means that the trustees' action is *mala fide* or in bad faith.<sup>332</sup> Hunter et al describe the duty of good faith by the board of trustees to mean that the board:<sup>333</sup>

- Must exercise such power and discretion as authorised by the fund rules;
- Exercise the power or discretion granted to it only for its proper purpose;
- Take into account all those facts and considerations which are relevant to its decision;
- Disregard those facts and circumstances that are irrelevant to the issue at hand;

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<sup>330</sup> Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 172 at 177-178.

<sup>331</sup> This was confirmed by the National Treasury in its First Discussion Paper (2004) (South Africa Retirement Fund Reform: First Discussion Paper op cit note 1 at 56), where it is said that "the right of members to elect trustees has had the effect of improving 'democracy' in retirement funding but many trustees fail to appreciate that they owe their primary (fiduciary) duty to the fund as a whole and not to the 'constituency' (employer, in-service members, union or pensioners) who appointed or elected them". See also generally *Marais v Momentum Life Pension Fund* [2003] 10 BPLR 5222 (PFA).

<sup>332</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 103.

<sup>333</sup> Hunter et al *The Pension Funds Act: A Commentary on the Act* op cit note 165 at 181-182.

- free itself from bias and refrain from fettering its discretion;
- take a decision that is reasonable based on reasons given for it; and
- if asked for them, provide reasons for its decisions.

In *Ganes and another v Telecom Namibia Ltd*,<sup>334</sup> it was held that the duty of good faith entailed that an employee was obliged not to work against the employer's interests, not to place himself in a position where his interests conflicted with that of the employer, not to make a secret profit at the expense of the employer, and not to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as an employee of the employer.<sup>335</sup> The board of trustees is also expected not to work against the interests of the fund and its members and/or beneficiaries. The board must always act to advance the interest of the fund and may not act in such a way that the interests of the fund suffer and personal interests are furthered instead of the interests of the fund. In *Tatiya v Liquor and Catering*, the Pension Funds Adjudicator said:<sup>336</sup>

“In other areas of administrative and employment law, the courts have consistently held that the duty to act in good faith incorporates the duty to disclose adequate relevant information. This is particularly so when individuals face an impending decision which may have adverse implications for them.”

The duty of good faith requires trustees to ensure that members are placed in a position to make properly informed choices regarding the options available to them, as failure to provide such information constitutes a breach of their common-law duty of good faith and an improper exercise of their powers.<sup>337</sup> This duty requires trustees to disclose to members, former members (pensioners), and beneficiaries information relating to the fund for the protection and enforcement of their rights. Failure to disclose such information without good reasons will amount to an improper exercise of the fund's powers and/or maladministration by the board of management.<sup>338</sup>

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<sup>334</sup> *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

<sup>335</sup> *Supra* at par 25.

<sup>336</sup> *Tatiya v Liquor and Catering* [1999] 11 BPLR 315 (PFA).

<sup>337</sup> *Caffin and Dooling v African Oxygen* [1999] 10 BPLR 113 (PFA) (hereafter, *Caffin*); *Euijen v Nedcor* [2000] 5 BPLR 465 (PFA).

<sup>338</sup> *Noordien v Metal Industries Provident Fund* [2002] 3 BPLR 3236 (PFA).

In *Caffin v African Oxygen*,<sup>339</sup> the complainants wanted access to the minutes of the trustee meetings and all other documentation concerning the activities, deliberations, and decisions of those to whom they had delegated their duties or functions. Having considered the relevant statutes, the Pension Funds Adjudicator said that the duty of the trustees to act in good faith carries with it the concomitant right of members to have access to sufficient and relevant information to protect and advance their rights, interests, and expectations arising under the fund. In certain cases, such information might well include relevant minutes of trustees' meetings. In *Lediga v Bosal Afrika Group Provident Fund and Another*,<sup>340</sup> the complainant was dissatisfied with the amount of his retrenchment benefit. He had also requested information regarding his transfer value in a predecessor fund and any surplus in the predecessor funds. The fund argued that it had provided him with a breakdown of his equitable share in the present fund, and that it no longer had records or information concerning his benefits and transfer values in previous funds. The fund was willing to supply the information provided the complainant bore the cost of obtaining same from an actuary. The Pension Funds Adjudicator correctly held that this was unreasonable and that the fund had not discharged its statutory duties in terms of section 7D of the Pension Funds Act of 1956 to supply adequate and appropriate information to the complainant. The Adjudicator stated that the fund could be seen as a natural successor of the previous pension funds since it received transfer values of members employed by the same employer. The Adjudicator ordered the fund to provide the complainant with the information required and to bear any related costs.

Section 32 of the Constitution gives everyone the right of access to any information held by the state and any information that is held by another person, including in this case a retirement fund, and that is required for the exercise or protection of any rights.

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<sup>339</sup> See the case of *Caffin* supra note 337.

<sup>340</sup> *Lediga v Bosal Afrika Group Provident Fund and Another* [2001] 7 BPLR 2211 (PFA) (hereafter, *Lediga*).

The Promotion of Access to Information Act of 2000<sup>341</sup> was promulgated on 2 February 2000 to give effect to the constitutional right of access to information. The Promotion of Access to Information Act applies to the records<sup>342</sup> of public and private bodies<sup>343</sup> and it prescribes the procedure which must be followed in order to gain access to a record.<sup>344</sup> A person who requests a private body, for example, the board of a pension fund, for access to its records must be given access if the records are required for the exercise or protection of any rights.<sup>345</sup>

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<sup>341</sup> Promotion of Access to Information Act 2 of 2000.

<sup>342</sup> Section 1 of Promotion of Access to Information Act of 2000 defines "record" as any recorded information, regardless of form or medium, in the possession or under the control of a private body, and whether or not it was created by that private body. The record/s or information must be in the possession of that body as the law does not require the body to find information from third parties or other sources (See in this regard Mdluli "The Role of the Board" op cit note 307 at 253. According to Mdluli (idem), neither the Pension Funds Act of 1956 nor the Pension Funds Adjudicator defines the nature of the duty to provide members with adequate and appropriate information with respect to members with investment choices as it happened in *Crous v Imatu Staff Pension fund & Others* [2001] 4 BPLR 1817 (PFA) where the complainant complained that she was not properly informed of the options available to her and the fact that she bore investment risks. Mdluli's view is that even though the Pension Funds Adjudicator had found a lengthy documentation provided to the complainant to be clearly informing her of the options available to her and the fact that she bore investment risks, the Adjudicator, however, failed to stipulate any minimum requirements that the information supplied to the complainant had to meet in order to qualify as sufficient to enable her to make an informed choice (at par 18).

<sup>343</sup> Section 3 of the Promotion of Access to Information Act of 2000.

<sup>344</sup> Part 2-4 of the Promotion of Access to Information Act of 2000.

<sup>345</sup> See section 50 of the Promotion of Access to Information Act of 2000. See also the case of *Zuze* supra note 258, where the Pension Funds Adjudicator was faced with the question whether or not the complainant was entitled to information relevant to the calculation of her claim; it was held that the fund must provide her with the information as requested. The Pension Funds Adjudicator held that the complainant had the right of access to information relevant to the amount due to her, including how the amount was calculated and the terms and conditions governing the payment of benefits. In coming to the conclusion, the Pension Funds Adjudicator relied on the ruling in the case of *Smith* supra note 212. In *Noordien* supra note 338 at paras 19-20, where the complainant (non-member spouse) requested information regarding the amount paid to her former husband as well as the bank account into which it was paid. The fund refused to provide such information arguing that it would amount to breach of the duty of confidentiality owed to the member. The Pension Funds Adjudicator held that the complainant's right to receive information was stronger than that of her former husband and that the fund did not have any sound reasons to refuse to give her the information she requested. The Pension Funds Adjudicator was of the view that the complainant would suffer undue financial hardships if she was not furnished with the information. The Adjudicator accepted that the duty was owed to both parties but that the interest of the non-member spouse needed more protection in this instance than that of the former husband.

It should be noted, however, that the right of access to information in the hands of the state is unqualified, while the right of access to information in others' hands is qualified on a need-to-know basis; that is, the information must be required in order to exercise or protect the right.<sup>346</sup> The fund or board thereof will thus also have a duty to provide specific information on request by a member.

Section 7C(2)(a) of the Pension Funds Act of 1956 provides that one of the objects of the board is to take all reasonable steps to ensure that the interests of members are protected; including in the event of termination or reduction of contributions to a fund by an employer, to increase of contributions of members, and withdrawal of the participating employer. One of the duties of the board is in terms of section 7D(c) to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits, and duties in terms of the rules of the fund. The section obliges the board to furnish members with adequate and appropriate information to enable them to exercise their rights in terms of the rules. Failure by the board to provide such relevant information will amount to a breach of duty of good faith and will constitute maladministration of the fund.<sup>347</sup>

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<sup>346</sup> Section 9(a)(i-ii) of the Promotion of Access to Information Act of 2000.

<sup>347</sup> In *Ngoepe v Metal Industries Provident Fund and Another* [2003] 11 BPLR 5316 (PFA), the complainant lodged a complaint with the Office of the Pension Funds Adjudicator after he had requested information from the fund regarding its rules, as well as a detailed breakdown of the computation of his withdrawal benefit. The fund failed to provide him with the requested information. The Pension Funds Adjudicator held that the fund had the duty to ensure that adequate and appropriate information is communicated to the complainant and other members of the fund (at par 13). Again in *Lediga* supra note 340 at 2216, the Adjudicator held that failure by the fund, in the absence of appropriate justification, to provide relevant information requested by the member to exercise his rights constituted a breach of the duty to act in good faith and therefore amounted to an improper exercise of powers and maladministration of the fund. In *Kriedemann v Lubritene Provident Fund* [2002] 2 BPLR 3082 (PFA) at par 15, the Pension Funds Adjudicator held that the board of the fund has a duty in terms of section 7D to, among other things, ensure that material information is communicated to members of the fund informing them of their rights, benefits, and duties in terms of the rules of the fund. The Adjudicator further held that failure by the board to provide material information to fund members amounts to maladministration. In *McEwan v First National Bank Pension Fund* [2000] 8 BPLR 913 (PFA) at 918-919, the Adjudicator held that the fund members have a right to adequate and appropriate information in terms of section 7D(c) and the constitutional right to information.

Members of retirement funds may also upon payment of the fees prescribed by regulation inspect at the office of the Registrar the rules of the fund, last revenue account, last balance sheet and may without paying any fee inspect at the Registrar's office the last report by a valuator prepared in terms of section 16 of the Pension Funds Act of 1956, last statement and report thereon prepared in terms of section 17, and any scheme which is being carried out by the fund in accordance with the provisions of section 18 of the Act.<sup>348</sup> The fund may also not furnish the member who requested certain information with incorrect information.<sup>349</sup>

In terms of the PF Circular 130, even though not binding,<sup>350</sup> the fund must have and make available to beneficiaries a code of conduct, an investment policy statement, a communication policy, and a performance assessment tool for trustees, which should inform their education and training policy. Fund members have the right to access the fund rules, actuarial valuations, and audited financial statements. Communication to members must be appropriate, timely, accurate, complete, consistent, useful, comprehensible, and accessible. It must also be transparent, fair, and display accountability.

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<sup>348</sup> Section 22 read with section 35 of the Pension Funds Act of 1956.

<sup>349</sup> In the case of *Connery* supra note 325 at paras 24 and 26, the Pension Funds Adjudicator stated that the duty of care and diligence requires the fund and the administrators not to act carelessly and without diligence. The Adjudicator held that the issuing of a disclaimer of a liability does not show the level of prudence expected on the part of the administrators, but constitutes an abdication of responsibility on their part which could amount to maladministration. The information provided by pension funds to members must be accurate. The Pension Funds Adjudicator has dealt with this issue in a number of determinations including the following: *Bona v South African Local Authority Fund & Another* (1) [2001] 10 BPLR 2563 (PFA); *Neicker v Orion Money Purchase Pension Fund* [2002] 3 BPLR 3218 (PFA); *Strydom v Cape Technikon* [2001] 3 BPLR 1797 (PFA); *Metcalfe v ABSA Consultants & Actuaries (Pty) Ltd & Another* [2002] 12 BPLR 4167 (PFA); *Krog v Joint Municipal Pension Fund* (PFA/GA/5769/2005/ZC) (unreported); and *De Bruyn v Telkom Retirement Fund* [2000] 11 BPLR 1220 (PFA). Mhango M "Can Inaccurate Benefit Statements Lead to Pension Fund Liability under the South African Pension Funds Act" (2011) 23 *SA Merc LJ* at 462 states that pension funds must give their members periodic and accurate benefit statements because these statements are probably the only financial instruments pension funds members can rely on to plan for their retirement. It is therefore important for pension funds and administrators to pay special care in the preparation of benefit statements, since failure to do so may lead to liability.

<sup>350</sup> See in this regard *Chairman of the Board of Sanlam Pensionfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T); [2007] 1 BPLR 57 (T) at par 9 (hereafter, *Chairman of the Board of Sanlam*). In terms of section 33A of the Pension Funds Act of 1956, the Registrar "may" issue a directive to a pension fund, an administrator or any other person, which sets out what is required and what is prohibited. Thus the Registrar's powers to issue directives are not legislative but administrative in nature.

Members and beneficiaries must receive communication on the performance of the fund's investment, which are relevant to members and which will assist them to determine the credibility and trustworthiness of the fund administrators and delivery of benefits. The Circular requires the fund to respond promptly to all communication by members, beneficiaries, and stakeholders. Complaints made by fund members must be treated seriously and be noted by the board. Members should also be reminded periodically of the need to review the investment choices made by them. The fund may in certain cases even provide basic training to fund members to make sure that they understand the operations of the fund and the fund's investments.<sup>351</sup>

The board must communicate to fund members the investment performance of the fund, the average costs per member, and the fees and disbursements paid to independent board members. The members must be informed about determinations of the Pension Funds Adjudicator given against the fund, regulatory issues raised by the Registrar, and deviations from rules and policies.<sup>352</sup> Trustees must also, among other things, and importantly so, ensure that fund members understand their position in terms of meeting their retirement goals. If members are well informed about this, they will be in a position to start thinking about their life in retirement and will also be able work out retirement budgets using that information. This will avoid high expectations that members normally have of receiving enormous amounts of money when they retire and it will further help fund members to determine if they are saving enough and also if they will need another form of saving to supplement what they will receive at the time of retirement.

In *Hilton Hotel Employees v Trustees of the Liquor and Catering Trade (Pietermaritzburg) Provident Fund and Another*,<sup>353</sup> where the complainants sought an order requiring the respondents to furnish them with information they needed to

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<sup>351</sup> Items 57-63 of PF Circular 130.

<sup>352</sup> Items 57-63 of PF Circular 130. In its 2011 Benchmark Survey op cit note 50 at 13, Sanlam found that annual benefit statements, a rule booklet, and information on the intranet/Internet were the most popular tools of communication used by the funds. The most popular topic was found to be the benefit structure and investment performance.

<sup>353</sup> *Hilton Hotel Employees v Trustees of the Liquor and Catering Trade (Pietermaritzburg) Provident Fund and Another* [2000] 5 BPLR 511 (PFA) at 518.

properly assess the fund's liability to dormant members such as themselves, the Pension Funds Adjudicator held that the right to obtain information was a prerequisite for establishing that the trustees had acted improperly. The complainants had proved that they reasonably required the information to understand the basis of the allocation and application of the unclaimed benefits in the fund.<sup>354</sup>

Again in *Ndlovu v Vegmoflora Fund and Another*,<sup>355</sup> the Pension Funds Adjudicator upheld, in part, the complainant's ancillary complaint that the fund had failed to provide certain information he had requested for the purposes of informed decision making.<sup>356</sup> In *Caffin v African Oxygen*,<sup>357</sup> the Pension Funds Adjudicator correctly held that the complainants may, in appropriate circumstances, be entitled to the minutes of trustee meetings, as long as the relevancy of the minutes of that particular meeting for purposes of the complaint was established. However, it was not the case in this instance as the request was of a general nature. In other determinations, the Pension Funds Adjudicator ruled that a duty to provide information existed where members are required or entitled to exercise options in terms of the rules of a fund.<sup>358</sup>

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<sup>354</sup> Supra at 519.

<sup>355</sup> *Ndlovu v Vegmoflora Fund and Another* [2002] 3 BPLR 3224 (PFA) at par 27.

<sup>356</sup> Supra at par 28.

<sup>357</sup> See the cases of *Caffin* supra note 337 and *Ndlovu* supra note 355.

<sup>358</sup> See *Letlonkane v Southern Staff Pension Fund* [1999] 11 BPLR 266 (PFA) at 274; and *Roux v Messina Group Pension Fund* [2000] 10 BPLR 1166 (PFA) at 1174.

In promoting the fund's duty to disclose information, the Financial Services Board published two Circulars dealing with minimum disclosure requirements, namely Pension Funds Circular 86 and 90. Requirements set out in the Circulars are not statutory requirements but are merely a code of best practice agreed to by the stakeholders.<sup>359</sup> Circular 86 requires retirement funds to provide new entrants with an explanatory pamphlet within three months of joining the fund, and existing members with an annual benefit statement<sup>360</sup> within which specific disclosure is required. Funds are further required to provide all members with prescribed information on fund restructuring, withdrawal, retirement, and death. Information given to members must cover details of benefits; for example what benefits are payable and when, rate of contributions, members' right to inspect the rules and the financial returns and valuation reports, the internal dispute resolution procedure, and the importance of nominating a beneficiary. Pension Funds Circular 90 deals with disclosure to pensioners, deferred pensioners, and dependants or nominated beneficiaries of deceased members where the benefit is a pension or lump-sum paid in instalments.<sup>361</sup> It should be noted, however, that even though the Promotion of Access to Information Act of 2000 gives effect to the right of access to information, that access is subject to justifiable limitations; including but not limited to limitations aimed at the reasonable protection of privacy, efficient and good governance, in a manner which balances that right to any other rights, including the rights in the Bill of Rights.

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<sup>359</sup> PF Circulars are mere guidelines and have no binding effect. See in this regard: *Chairman of the Board of the Sanlam* supra note 350 at par 9 where the Registrar stated that the circular is just a guideline for the board and that the board has discretion to comply or not to comply with the circular.

<sup>360</sup> In *Wentworth v GG Umbrella Provident Fund & Others* [2009] 1 BPLR 87 (PFA) at paras 23-29, the Pension Funds Adjudicator held that it is reasonable that members of pension funds should receive benefit statements at least once a year. This is now provided for in PF Circulars 86 and 90. In *Hoffmann v IF Umbrella Provident Fund and AON South Africa (Pty) Ltd* PFA/WE/31623/2009/SM (unreported) at par 5.2, the Pension Funds Adjudicator stated that the provision of benefit statements to members on a regular basis serves an important function because it gives members relevant information regarding their benefits.

<sup>361</sup> Pension Funds Circulars 86 and 90 on "Minimum Disclosure" requirements are available on [www.fsb.co.za](http://www.fsb.co.za), last visited 22 July 2015.

For example, disclosure of information should be refused if such a disclosure would involve unreasonable disclosure of personal information concerning a third party such as a deceased person.<sup>362</sup>

#### **6.8.2.5 The duty to avoid conflict of interests**

The trustees are required to maintain an independent and dispassionate interest in the affairs of the fund and at the same time promote the interests of its various beneficiaries. Interests include interests in terms of the rules of the fund and the Pension Funds Act of 1956. The board and its members collectively or individually may not do anything that would place them in a position of conflict of interest with the fund. The duty includes the obligation to disclose any conflict of interest. This means that a trustee may not make any profit from any activities relating to the fund during his term of office except as may be regarded as remuneration under the rules. They may also not benefit themselves as members at the expense of other beneficiaries and members. The common law requires them to account for and to pay to the fund any profit they may have derived. They must hold assets of the fund for the benefit of the fund and its members, and may not have any personal interest in trust property. Trustees must be satisfied that only members and their beneficiaries benefit from the fund's assets. Trustees must therefore ensure that any person regarded by them as a beneficiary is indeed a beneficiary and that he or she is correctly entitled to benefits. In this case, trustees would, for example, be expected to receive adequate confirmation that anyone claiming to be a beneficiary is indeed entitled to receive the benefit.<sup>363</sup>

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<sup>362</sup> See sections 34(1) (about public bodies) and 63(1) (about private bodies) of Promotion of Access to Information Act. See also Olivier at al *Social Security: A Legal Analysis* op cit note 130 at 115.

<sup>363</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 113; see also a preamble to PF Circular 130 and the Mouton Committee Report op cit note 58 at 428-439.

**6.8.2.6 The duty to act impartially in respect of all members and beneficiaries**

The duty to act impartially in respect of all members and beneficiaries requires the board of trustees to ensure that all members are treated equally and that no member is favoured either at the expense of other members or in such a way that all the members cannot enjoy equal treatment. Trustees will be expected to be transparent in their dealings with the fund and its members and this may be achieved by making public their decisions and actions.<sup>364</sup> The trustees have a common law duty and they are also obliged by section 9 of the Constitution of the Republic of South Africa, 1996, to treat all members of the fund equally and impartially. Section 9 of the Constitution guarantees everyone equality before the law and further provides that everyone has the right to equal protection and benefit of the law. In terms of section 9(4) of the Constitution, no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds; including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Retirement funds are frequently faced with matters where they are called to decide whether same-sex partners qualify as spouses or dependants of fund members. Section 9 of the Constitution is given effect to by the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000<sup>365</sup>. Section 6 of this Act prohibits unfair discrimination against any person by the state or any other person. On the other hand, Chapter 2 of the Act places a duty on all persons to eliminate discrimination on the grounds of race, gender, and disability. Retirement funds are also bound by these provisions to treat everyone equally. Discrimination by the fund may relate to the administration of the fund or the application of the fund rules by the board.

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<sup>364</sup> Downie *Essentials of Retirement Fund Management in Southern Africa* op cit note 10 at 115.

<sup>365</sup> Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

In *TWC and Others v Rentokil Pension Fund and Another*,<sup>366</sup> the matter dealt with the question whether a same-sex partner qualified as a dependant or spouse of the deceased member of the fund in terms of section 37C of the Pension Funds Act of 1956. The Pension Funds Adjudicator held that when interpreting section 37C, read with section 1 of the Pension Funds Act of 1956, he was obliged to give effect to the value contained in section 9 of the Bill of Rights that same-sex relationships (unions) in appropriate circumstances should enjoy the same status, rights, benefits, and responsibilities as a heterosexual union.<sup>367</sup>

The High Court held in *Langemaat v Minister of Safety and Security and Others*<sup>368</sup> that the stability and permanence of same-sex relationships are no different from married couples and that both types of unions are deserving of respect and protection. In *casu*, the applicant, a lesbian police officer, had applied to have her live-in partner registered as a dependant member of the medical aid scheme known as Polmed.<sup>369</sup> The rules of this scheme defined a dependant as, among others, “the legal spouse or widow or widower or a dependent member”. According to the Court, the rules excluded a large number of persons who were *de facto* dependants of the medical scheme members and as such constituted discrimination.<sup>370</sup>

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<sup>366</sup> See generally the case of *Rentokil* supra note 218.

<sup>367</sup> Supra at 224.

<sup>368</sup> See the case of *Langemaat* supra note 213.

<sup>369</sup> See generally the case of *Langemaat* supra note 213 at 448-449, where in the court's view medical aid regulations which do not recognise same-sex relationships are invalid and therefore unconstitutional; in *Muir v Mutual and Federal Pension Fund* [2002] 9 BPLR 3864 (PFA) at par 9 the Pension Funds Adjudicator held that the complainant who was involved in a long-term lesbian relationship with the deceased was a factual dependant of the deceased in *Minister of Home Affairs v Fourie and Others*; in *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] 10 BPLR 807 (CC) at par 114 (hereafter, *Fourie*) the court held that failure of the common law and Marriage Act to protect same-sex couples constituted an unjustifiable violation of their right to equal protection of the law under section 9(1) and not to be discriminated unfairly in terms of section 9(3) of the Constitution. In *National Coalition for Gay and Lesbian Equality* op cit note 213 at par 98, the court ordered that the words “or partner, in a permanent same-sex life partnership” be read in after the word “spouse”. See also Havenga P “Same-sex Unions, the Bill of Rights and Medical Aid Schemes” 1998 (61) *THRHR* at 724-725, where after considering the court's reasons for the decision, he concluded that couples in a same-sex union will have to prove not only that there is a duty of support based on the time that their relationship existed, but also that the one party needs financial assistance and that the other party is able to provide it. This means that the legal and factual requirements to find a duty of support must be present. According to Havenga, this approach is only valid if it applies also to the married couples.

<sup>370</sup> See the case of *Langemaat* supra note 213 at 449.

The same was reiterated by the Constitutional Court in *Satchwell v President of the Republic of South Africa and Another*<sup>371</sup> and in *Minister of Home Affairs and Another v Fourie and Others*,<sup>372</sup> where the court held that failure of the common law and the Marriage Act to protect same-sex couples in such a way that they can enjoy the same status, entitlements and responsibilities given to heterosexual couples constituted an unjustifiable violation of their right to equal protection by the law. What the equality clause says in respect of retirement funds, boards, and members of funds is that retirement funds may not unfairly discriminate directly or indirectly against their members on one or more grounds stipulated in section 9(3) of the Constitution. In terms of section 9(5) of the Constitution, discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. In this regard, a member who alleges unfair discrimination on one or more of the prohibited grounds by the fund or board of the fund must prove that discrimination has occurred and the fund must then show that no unfair discrimination took place.<sup>373</sup>

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<sup>371</sup> See the case of *Satchwell* supra note 213. See also generally on the analysis of the *Satchwell* decision, Goldblatt B “Notes and Comments: *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC)” (2003) 19 *SAJHR* at 118 and 122-123 who states that the judgment in the *Satchwell* case restated the view of the Constitutional Court that there are many different forms of family in society deserving of legal recognition and protection, and that it recognised the growing legislative trend of providing benefits to non-spousal partners. However, Goldblatt indicates that it is difficult to understand why the court added the requirement of proof of a duty of support in cases where spousal benefits are claimed as it is likely that proof of permanent life partnership would almost always entail demonstrating the existence of a reciprocal duty of support. The author is of the view that the court has failed to indicate what the parties need to demonstrate in order to prove the existence of reciprocal undertakings of support. According to Reddy V “Decriminalisation of Homosexuality in Post-Apartheid South Africa” *Agenda* 67 (2006) at 149 (accessed from <http://dx.doi.org/10.1080/10130950.2006.9674708>, last accessed on 22 July 2015), although the *Satchwell* judgment specifically grants “spousal” benefits to claimant, the political benefits of the judgment are profound in so far as the court, through extension of benefits, establishes the legal meaning of “spouse” to same-sex relationships in a way that affirms strange identities. See also generally, Albertyn C “Substantive Equality and Transformation in South Africa” (2007) 23 *SAJHR* at 253-276; and Brown T “South Africa’s Gay Revolution: The Development of Gay and Lesbian Rights in South Africa’s Constitution and the Lingering Societal Stigma Towards the Country’s Homosexuals” *Elon Law Review* Vol 6 (2014) at 455-477; as well as the following determinations by the Pension Funds Adjudicator: *Van der Merwe & Others v The Southern Life Association Ltd & Another* [2000] 3 BPLR 321 (PFA); the case of *Rentokil* supra note 218; *Swanepoel v Abrahams & Gross Provident Fund & Another* [1999] 10 BPLR 216 (PFA); and *Ngewu and Another v Post Office Retirement Fund and Others* [2013] 1 BPLR 1 (CC).

<sup>372</sup> See the case of *Fourie* supra note 369 at par 114.

<sup>373</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 110.

In *Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd and Others*,<sup>374</sup> the applicants wrote to the company requiring that they be permitted to join the Staff Benefit Fund, alleging direct and indirect race discrimination on the part of the fund. The applicants in another statement alleged that the Staff Benefit Fund was for white employees and the other funds for black employees. After the matter was referred to the CCMA but remained unresolved, it was then referred to the Labour Court, which held that the employer unfairly discriminated against its black employees by treating them differently regarding the membership of funds the employer participated in.

The court further held that there was discrimination in the fund membership and contributions which were not the same with the one for black employees being lower than the one paid for white employees. With regard to the onus of proof, the court held that once the applicants (employees) established that there was discrimination, the evidentiary burden shifted to the respondent (employer) to show that there was unfair discrimination.<sup>375</sup>

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<sup>374</sup> See *Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd and Others* [1997] 11 BPLR 1438 (LC). See also Cohen T "Justifiable Discrimination: Time to Set the Parameters" *SA Merc LJ* 255 (2000) at 267, where it is stated that where differentiation is based on one of the specific grounds as outlined by section 9(3) and 4 of the Constitution, it is deemed to constitute unfair discrimination, whether the differentiation is direct or indirect and that this is underscored by the presumption in section 9(5) which states that discrimination on one or more of the listed grounds is unfair unless the contrary is proven. This will be the case until the discrimination passes the requirements as stated in the "limitation clause" in section 36 of the Constitution. According to McGregor M "Elements of an Employment Discrimination" *JBL Vol 10, Part 2* at 105, what happened in the case of *Leonard Dingler* is an example of indirect discrimination. In her view, in a case of unfair discrimination the applicant (employee) must show not only the existence of a differentiation, but must also show that it was on a listed ground. In her other article, McGregor M "An Overview of Employment Discrimination Law" *SA Merc LJ* (2002) 14 at 162-163, states that if one reads the provisions of the Employment Equity Act of 1998 against the background of *Leonard Dingler*, it is clear that third parties who can apply employment policies or practices such as medical aid funds, retirement funds, recruitment agencies, and labour brokers are also prohibited from discriminating. Therefore it is not only the employers who are prohibited by section 6 of the Employment Equity Act from discriminating against their employees. Employment policy and practice include remuneration, employment benefits such as pensions, and terms and conditions of employment.

<sup>375</sup> See the case of *Leonard Dingler* supra at 1452.

The board of trustees must act with impartiality at all times and it may not unfairly discriminate between its members,<sup>376</sup> member's dependants, or beneficiaries. For example, the board cannot decide that the member must receive a higher benefit because he or she is of a particular gender. Note should be taken, however, that there will be cases where differentiation between members of one fund would not necessarily amount to unfair discrimination. For example; in *Maltman v Natal Joint Municipal Pension Fund (Superannuation) and Another*,<sup>377</sup> the complaint was about the differentiation between older members and younger members of the fund in calculating transfer values which resulted in older members being subsidised by younger members. The Pension Funds Adjudicator held that it was reasonable to treat these two categories of members differently. The Adjudicator also held that there was a rational connection between the differentiation and the objective of the fund, which is to provide benefits to members upon retirement.

### **6.8.3 Trustee liability**

The Pension Funds Act of 1956 does not provide a specific penalty for trustees' failure to comply with their common law fiduciary duties and statutory duties outlined in sections 7C and 7D of the Act. Penalties imposed by common law include having to return profits made as a result of improper conduct, and being liable in their personal capacity for any loss or damage caused by such conduct.<sup>378</sup> It should be noted that the trustees' failure to take appropriate action could lead to personal liability. A failure to take appropriate action could be considered by the courts to constitute negligence on the part of trustees.

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<sup>376</sup> In *Meyer v Iscor Pension Fund* [2003] 3 BPLR 4427 (SCA) at par 22 (hereafter, *Meyer*) the court stated that the trustees' fiduciary duty towards members of the fund includes a duty of impartiality, which means they have an obligation not to treat members differently or to discriminate between them unfairly.

<sup>377</sup> *Maltman v Natal Joint Municipal Pension Fund (Superannuation) and Another* [2005] 4 BPLR 314 (PFA).

<sup>378</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at at 107.

Trustees may on conviction in terms of the Financial Institutions Act of 2001 be fined or be imprisoned for a period of 15 years in addition to being ordered to repay all losses suffered by the fund, without being protected and indemnified by the fund.<sup>379</sup>

In *Jowell v Bramwell-Jones*<sup>380</sup> it was held that the trustee who departed from the standard of care to be expected of a *diligens paterfamilias* will be obliged to make good the loss sustained by the estate. He or she may be removed from office where his or her acts and omissions endanger the trust property. The measure of damages in an action against the trustee is the amount required to restore the trust to what it would have been had the trustee not been guilty of misappropriation or the unauthorised disposal or investment of trust assets as the case may be. Such a claim must be satisfied out of the trustee's private assets.<sup>381</sup> Trustees are thus obliged at all times to conduct the affairs of the trust in the best interest of the beneficiaries of the trust.

Remedies available where trustees act in breach of their duties include the following:<sup>382</sup>

- If the breach of duty has caused actual loss, the trustees can be sued personally for damages;
- If the breach of duty is likely to cause loss, the trustees can be prevented from continuing to behave in the manner which may cause the loss; and
- If the breach is very serious, the trustees can be removed from office.

In *Mes v Art Medical Equipment Pension Fund and Others*,<sup>383</sup> the Pension Funds Adjudicator held the trustee personally liable for compensation plus interest where the trustee of the fund was found to be in breach of duty of good faith in allowing the policy to lapse.

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<sup>379</sup> Section 10 of the Protection of Funds Act 28 of 2001. Hanekom (ibid) at 115.

<sup>380</sup> *Jowell v Bramwell-Jones* 1998 (1) SA 836.

<sup>381</sup> Supra at 894H-J and 895C.

<sup>382</sup> Dewar et al *Essentials of Retirement Fund Management in Southern Africa* op cit note 5 at 115.

<sup>383</sup> See in regard the case of *Mes* supra note 27.

The Pension Funds Adjudicator further held that the legal position regarding the duties of the pension funds trustees are well established. He said that in the present case, the trustees had a duty in terms of the agreement with the insurer, to pay premiums to the insurer timeously and that the trustees also bore the duty to members to ensure that the policies did not lapse. The Adjudicator held that section 7C of the Pension Funds Act of 1956 requires trustees to direct, control, and oversee fund operations in accordance with applicable laws and the rules of the fund and, in so doing, to take all reasonable steps to ensure that members' interests are protected at all times; that section 7D(d) imposes a duty on trustees to ensure that contributions are paid timeously; and that both criminal sanctions and penalty interest face a trustee who breaches such duty. He further held that the Financial Institutions (Protection of Funds) Act also requires a trustee to observe the utmost good faith and exercise proper care and diligence. The Adjudicator stated that the Act imposes a criminal sanction on trustees who fail to comply with their duties as well as liability to beneficiaries who suffer loss as a result of such failure, and that the trustee's argument that he was liable to the fund and not the complainant was without merit. The Adjudicator held the trustee personally liable to compensate the complainant for the financial loss she suffered by reason of his failure to exercise his duties with proper care and diligence. Even though pension fund trustees are not required to have any particular qualifications or experience, that does not take away the amount of responsibility they have with regard to managing the affairs of retirement funds. Trustees are expected to apply their minds every time they deal with matters of the fund and may not act dishonestly or negligently in their dealings with the fund or fund assets, otherwise they will be liable to make good whatever loss or damage their actions or activities shall have caused.<sup>384</sup>

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<sup>384</sup> The trustees will be liable for the loss emanating from breach of their fiduciary duties, just like directors of companies. In terms of section 77(2) of the Companies Act, 71 of 2008, a director of a company may be held liable in accordance with the principles of the common law relating to breach of a fiduciary duty for any loss, damages, or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75 (to disclose a personal interest), 76(2) (to avoid a conflict of interest), or 76(3)(a) and (b) (to act in good faith and for a proper purpose or in the best interests of the company, or (c) (to act with the required degree of care, skill and diligence). Liability in this regard is joint and several.

Trustees may be liable in their personal capacity should negligence be proved. However, trustees that are innocent may not be liable for the actions of their co-trustees. Where trustees are at fault, they can be jointly and severally liable even though they are not equally at fault. Trustees may exclude joint liability contractually and may also exclude personal liability where a trustee is not personally at fault. It should be accepted that where trustees fail to act with care, diligence, and in good faith, it is only fair that they be held liable for their irresponsible actions or activities and repay or compensate the fund for the loss so that members or beneficiaries can get the benefits they are entitled to. In terms of section 2(a) of the Protection of Funds Act of 2001, persons dealing with funds of and with trust property controlled by financial institutions must, with regard to those funds, observe the utmost good faith and exercise proper care and diligence; must regard trust property and the terms of the instrument or agreement by which the trust or agency in question has been created; observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and (b) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned.

## **6.9 REMEDIES AND DISPUTE RESOLUTION**

### **6.9.1 General**

Section 33 of the Constitution gives everyone, including fund members and/or beneficiaries, the right to administrative action that is lawful, reasonable, and procedurally fair. It further gives everyone whose rights have been adversely affected by administrative action, the right to be given written reasons.<sup>385</sup>

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<sup>385</sup> Section 33(2) of the Constitution.

The members' right to just administrative action is in line with trustees' common-law duty to act with care, diligence, and good faith. Section 33 protects members of retirement funds against adverse decisions of boards of funds. Section 33(3) requires that national legislation be enacted to give effect to these rights. This brought the enactment of the Promotion of Administrative Justice Act of 2000<sup>386</sup> (PAJA), which came into operation on 30 November 2000.

Administrative action is defined in section 1 of the Promotion of Access to Justice Act as any decision taken, or any failure to take a decision, by –

- (a) An organ of state, when:
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) A natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision...

The Promotion of Access to Justice Act of 2000 imposes a duty on administrators to give effect to the rights in section 33 of the Constitution, to establish fair administrative procedures, to provide for the review of administrative actions, to enhance the accessibility of rules and standards, to promote efficient administration, and to establish an administrative review council and to provide for matters incidental thereto.<sup>387</sup> Any person who is unhappy with an administrative decision can challenge the decision by judicial review in a court of law. If the court finds that the decision is unlawful, unreasonable, or procedurally unfair, it can make any of the following orders: declare the administrator's decision invalid, order the administrator to reconsider the decision, or replace the decision with the court's own decision.<sup>388</sup>

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<sup>386</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>387</sup> Section 33(3)(a-c) of the Constitution.

<sup>388</sup> In the case of *Pepkor Retirement Fund* supra note 72 par 47, the court stated as follows: "A material mistake of fact should be a basis upon which a court can review an administrative decision. That if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should be reviewable ...The decision maker in this case would not have made the decision had he known of the true facts."

In *Government Employees Pension Fund and Another v Buitendag and Others*,<sup>389</sup> where the surviving adult children of a deceased employee and member of the Government Employees Fund died, a gratuity became payable. The Fund awarded the gratuity to the deceased's husband and step-son and nothing was awarded to the children as the board of the fund was at that time not aware of the existence of the children. The question facing the court was whether the fact that the board did not know about the existence of the children entitled the court to set aside the board's decision.<sup>390</sup> The court found that the obligation to provide the board with the necessary information to allow it to make a proper decision was upon the Provincial Government,<sup>391</sup> and as the Fund was not aware of all the material facts, the allocation made by the board had to be set aside. The court reaffirmed the principle that where legislation has empowered a functionary to take a decision in the public interest, the decision should be made on the material facts which should have been available to the functionary concerned; otherwise it would be a miscarriage of justice if the decision of the board was not set aside. Conradie JA filed a separate judgment concurring with the majority judgment where he emphasised the fact that the Fund is an organ of state that performs an administrative function. That if the children in this case wanted to be heard, they should have been given an opportunity to be heard. The judge stated that while the Fund may not be obliged to afford a hearing to every claimant, depending on the prevailing circumstances, it is obliged to do so when a hearing is requested.<sup>392</sup>

In South Africa there are a number of forums that handle complaints relating to retirement funds; namely the Office of the Pension Funds Adjudicator; the Commission for Conciliation, Mediation and Arbitration; the Labour Court; the High Court; and the Constitutional Court.<sup>393</sup>

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<sup>389</sup> *Government Employees Pension Fund and Another v Buitendag and Others* [2007] 1 All SA 445 (SCA).

<sup>390</sup> *Supra* at par 14.

<sup>391</sup> At par 20.

<sup>392</sup> At paras 24-30.

<sup>393</sup> Hanekom et al *The Manual on South African Retirement Funds and Other Employee Benefits* op cit note 14 at 344.

However, only the powers of the Pension Funds Adjudicator and the courts will be discussed for purposes of this study; the reason being that the Adjudicator's office has been specifically created for this purpose, while the High Court, apart from the fact that it can hear pension-related matters, also has jurisdiction to hear reviews of the determinations made by the Pension Funds Adjudicator. Whether or not the court is an appropriate forum for pension or social security-related disputes is debatable – as will be seen in the discussion below.

### **6.9.2 The Pension Funds Adjudicator**

The Office of the Pension Funds Adjudicator was established in 1996.<sup>394</sup> This is similar to the Pensions Ombudsman who handles pension-related disputes in the United Kingdom. The Minister of Finance in consultation with the Policy Board appoints the Adjudicator.<sup>395</sup>

The overall function of the Adjudicator is to investigate and determine complaints<sup>396</sup> lodged in terms of the Pension Funds Act of 1956, in a procedurally fair, economical, and expeditious manner.<sup>397</sup> It is important to note that the Adjudicator will only hear disputes that qualify as “complaints” in terms of the Pension Funds Act.

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<sup>394</sup> The Office of the Pension Funds was established in terms of sections 30B (section 30B inserted by section 3 of the Pension Funds Amendment Act 22 of 1996) of the Pension Funds Act 24 of 1956.

<sup>395</sup> Section 30C(1) of the Pension Funds Act of 1956.

<sup>396</sup> See *Ngalwana V Pension Dispute Resolution Procedure – An Easy Guide* (1999) at 40 – on a discussion of what a “complaint” is.

<sup>397</sup> Section 30D of the Pension Funds Act of 1956.

Section 1 of the Pension Funds Act defines a "complaint" as:

a complaint of a complainant relating to the administration of a fund; the investment of its funds; or the interpretation and application of its rules and alleging:

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.

A complaint must relate to a fund or pension fund organisation as defined by section 1 of the Pension funds Act. What a person brings to the Pension Funds Adjudicator as a complaint must relate to and fall under the categories set out in the definition of a complaint in order to qualify as a complaint that can be heard by the Adjudicator. Importantly, the person who lodges a complaint must allege that a decision taken by the fund or any person<sup>398</sup> in terms of the fund rules was not within the scope of powers of the fund or that person, or that the decision was not taken properly.<sup>399</sup>

The definition has been coached in wide terms to allow members to approach the Adjudicator with problems they experience with regard to how the fund is run, how their monies are invested, and how the fund rules are interpreted or applied. This is purely to protect the fund members' interests.

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<sup>398</sup> Any person in this regard will include, for example, the fund member or former member, employer, administrator, principal officer, actuary, valuator, or underwriter.

<sup>399</sup> Any decision taken outside the powers given by the fund rules will be *ultra vires* and of no effect; see in this regard the case of *Tek Corporation Provident Fund* supra note 33 at par 28; *Greenwood v Old Mutual Staff Retirement Fund(2)* [2000] 11 BPLR 1229 (PFA); and *San Giorgio v Cape Municipal Pension Fund* [2007] 2 BPLR 255 (PFA).

The Pension Funds Adjudicator has jurisdiction over all pension funds registered in terms of the Pension Funds Act of 1956 and bargaining council funds, as these funds must as from 1 January 2008 be registered in terms of the Act.<sup>400</sup> The Pension Funds Adjudicator does not have jurisdiction to hear social security disputes. For example, a person who is aggrieved by the failure of South Africa's Social Security Agency to pay his or her state old-age pension cannot approach the Adjudicator with the complaint. Such a person will have to approach a court of law that has jurisdiction to hear the matter.

The Adjudicator will also not be able to hear matters relating to insures in relation to a group life policy or annuities purchased by a fund in the complainant's name, or short-term income replacement schemes, or the conduct of trust companies.<sup>401</sup>

Section 30E(1) empowers the Pension Funds Adjudicator to investigate any complaint and make the order which any court of law may make, and in terms of section 32(2) of the Bill of Rights, when interpreting any legislation and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights. In this regard, "forum" would include the Office of the Pension Funds Adjudicator.

Orders that the Adjudicator may make in terms of section 30E include just and equitable orders under section 172 of the Constitution.<sup>402</sup>

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<sup>400</sup> Section 2 of the Pension Funds Act of 1956.

<sup>401</sup> See generally the following cases: *Olivier v Packard Group Pension Fund & Another* [2004] 8 BPLR 5945 (PFA) at paras 18-19, the Adjudicator stated that he (Prof. John Murphy at that time) did not have jurisdiction over a complaint that related to a group life policy as it did not provide retirement benefits, and that the appropriate forum to hear the matter of that nature was the office of the Ombudsman for Long-Term Assurance; in *De Wet v Cargo Carriers Retirement Fund & Another* [2004] 5 BPLR 5682 (PFA) at para 11-12, the Adjudicator held that he did not have jurisdiction on a complaint relating to a disability policy as the policy did not carry on the business of providing retirement benefits; and lastly in *Moonsamy v Uniserve Income Security Scheme & Another* [2004] 7 BPLR 5907 (PFA), the Adjudicator stated that he did not have jurisdiction over income-continuation schemes as such schemes are benefits prior to retirement only, and that the benefits stop on retirement.

<sup>402</sup> See in this regard, *Fourie v Free State Municipal Pension Fund* [2002] 12 BPLR 4131 (PFA) at par 32, which stated that section 172 of the Constitution, which deals with powers of courts in

Section 172 of the Constitution provides as follows:

- (1) When deciding a constitutional matter within its power, a court:
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

In terms of section 30E, the Adjudicator can make the same order as any court in a constitutional matter. This includes the power to declare a fund rule or the decision of a board of trustees invalid, and to grant a *mandamus* correcting the defect or to correct a rule by the process of reading it.<sup>403</sup>

In *Sebola v Johnson Tiles (Pty) Ltd and Others*,<sup>404</sup> the Pension Funds Adjudicator struck down as *ultra vires* and unconstitutional a rule of the fund that sought to deprive members of their right to receive a percentage of the employer's contributions to the fund if they were to be found guilty of misconduct (in general) in the workplace. According to the Adjudicator, allowing that to happen would subject the member to a double punishment of dismissal from work and the forfeiture of the employer's portion of the withdrawal benefit. He found that the application of the rule was arbitrary and that its effect was disproportionate to the purpose it aimed to achieve.<sup>405</sup>

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constitutional matters, read with section 30E(1)(a) of the Pension Funds Act of 1956, vests in him the power to declare fund rules unconstitutional and to make any other order which is just and equitable.

<sup>403</sup> See in this regard, *Low v BP Southern Africa Pension Fund and Another* [2000] 2 BPLR 171 (PFA) at 180, where the Pension Funds Adjudicator added that he could also correct a rule by extending a benefit enhancement to a group of members who were being unfairly discriminated against.

<sup>404</sup> See in this regard, *Sebola v Johnson Tiles (Pty) Ltd and Others* [2002] 3 BPLR 3242 (PFA) (hereafter, *Sebola*).

<sup>405</sup> See the case of *Sebola* supra at par 48. See also in this regard *Mokoena & Others v Administrator, Transvaal* 1988 (4) SA 912 (W) at 917, where Goldstone J held that the great loss of pension benefits as a result of dismissal was a ground for requiring the Administrator to give its employees a hearing before dismissal. See also *Zenzile & Others v Administrator of the Transvaal & Others* (1989) 10 ILJ 34 at 39 where Coetzee J cited with approval Goldstone J's judgment.

In the Adjudicator's view, the drafter of the rules intended to deprive only members who had been dismissed on grounds of misconduct which had an element of wilful dishonesty of their entitlement to the employer's portion of the withdrawal benefit.<sup>406</sup> The misconduct for which the complainant was dismissed was unauthorised absence from duty for a period of 21 days. If the rule were to be applied, the complainant would have forfeited an amount in excess of R50 000.

However, the court in *Mine Employees' Pension Fund v Murphy NO and Others*<sup>407</sup> set aside the Adjudicator's decision, where he found that he had the power to make a finding on the constitutionality of the fund's rules and the conduct of its trustees. The court stated that the Adjudicator's function is circumscribed to disposing of and investigating complaints lodged and constrained by issues as pleaded in the complaint. It also stated that the Adjudicator's office does not give him or her any general power to investigate issues *mero motu*. The court held that if the Adjudicator does so, his or her actions would be *ultra vires*. In *Grobler v Pension Funds Adjudicator and Others*,<sup>408</sup> the court correctly held that in the event that the Adjudicator sets aside a fund rule, he or she may order the board of trustees to amend the rule to make it consistent with the Constitution and to submit such a rule amendment to the Registrar for approval.

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<sup>406</sup> See the case of *Sebola* supra note 404 at par 20.

<sup>407</sup> See *Mine Employees Pension Fund v Murphy NO and Others* [2004] 11 BPLR 6204 (W) at par 31, where the court said it is clear from the provisions of section 30O(1) of the Pension Funds Act of 1956, and that the function of the Pension Funds Adjudicator is to dispose of complaints lodged in terms of section 30A(3) of the Act. See also in this regard *Metro Group Retirement Fund and Another v Murphy and Another* [2002] 9 BPLR 3821 (C) at 3825; and *Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy NO and Others* 2000 9 BPLR 953 (D) at 958, 2001 (3) SA 683 (D) at 693E-H (hereafter, *Shell and BP South Africa*); and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at par 58.

<sup>408</sup> See *Grobler v Pension Funds Adjudicator and Others* [2006] 1 BPLR 26 (T) at 34 where the court held that the Adjudicator had a right to make any order that a High Court could make including reviewing and setting aside the registration of the emended rule.

The Adjudicator has, in trying to put the issue of constitutional jurisdiction with regard to the constitutionality of the fund rules into perspective, said the following in *Maritz v Absa Pensioenfonds*<sup>409</sup>:

“It would be inconceivable that the Adjudicator lacked the jurisdictional power to make a finding on the constitutionality or otherwise of a rule, should it be placed in issue. A fund rule is not a statute, and therefore pronouncements on its constitutional validity need not be limited to expressions by Courts of the standing of the High Court or higher. A finding that a rule is unconstitutional amounts to a determination that it has not acquired the binding effect and force of law conferred by s 13 of the Pension Funds Act 24 of 1956.”

It can therefore be accepted that the Adjudicator has the power to decide on the constitutionality or otherwise of fund rules should such an issue come before him or her.

The Adjudicator's office is a creature of statute and as such does not have inherent jurisdiction, and his or her powers and functions are confined to those conferred upon him or her by the provisions of Chapter VA.<sup>410</sup>

A person who is not satisfied with the determination of the Adjudicator may within six weeks after the date of the determination, submit an application for relief to the High Court having jurisdiction over the matter.<sup>411</sup> In *Meyer v Iscor Pension Fund*,<sup>412</sup> the court confirmed that it is clear from the wording of section 30P(2) that the contemplated appeal to the High Court is an appeal in the wide sense. The High Court is therefore not limited to a decision, whether the Adjudicator's determination was right or wrong; nor is the court confined to the evidence or the grounds upon which the Adjudicator's determination was based. The court can consider the matter afresh and make any order it deems fit.<sup>413</sup>

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<sup>409</sup> See *Maritz v ABSA Groep Pensioenfonds* [2005] 5 BPLR 421 (PFA) at par 2.

<sup>410</sup> See in this regard *Shell and BP South African Petroleum Refineries* supra note 325 at 958; and the case of *Meyer* supra note 376 at paras 6-7.

<sup>411</sup> Section 30P of the Pension Funds Act 24 of 1956.

<sup>412</sup> See the case of *Meyer* supra note 376 at par 9.

<sup>413</sup> Supra.

The dispute submitted to the High Court for adjudication must therefore still be a “complaint” as defined in the Act. It must also be substantially the same complaint as the one determined by the Adjudicator.

It is also possible to approach the High Court directly without first lodging the complaint with the Adjudicator.<sup>414</sup> Determinations made by the Adjudicator may also be taken to the High Court on review.<sup>415</sup> It is not necessary to join the Adjudicator as a party to any appeal against his or her determination.

Joining the Adjudicator as a party to an appeal was held by the court in *Old Mutual Life Assurance Company (SA) v Pension Funds Adjudicator and Others*<sup>416</sup> to be highly improper as it is not in the public interest that he or she should become embroiled in the dispute between the parties in the dispute after a determination in the same dispute had already been issued.

Complainants may either lodge a complaint directly with the Adjudicator, or may first give the fund an opportunity to consider the matter and respond to the complaint. In terms of section 30A(1), a complainant may lodge a written complaint with a fund for consideration by the board of the fund notwithstanding the provisions of the rules of the fund. The fund or participating employer must consider the complaint and reply in writing to the complainant within 30 days after the receipt of the complaint.

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<sup>414</sup> This follows from the interpretation of section 30H(2) of the Pension Funds Act of 1956 which precludes adjudication by the Pension Funds Adjudicator where proceedings have been instituted in a civil court.

<sup>415</sup> The following cases are examples of where the Pension Funds Adjudicator's determination was taken to the High Court on review: *Armcor SA Ltd v Murphy NO* 1999 4 SA 755 (C); and the case of *Meyer* supra note 376 at par 22.

<sup>416</sup> See generally, *Old Mutual Life Assurance Company (SA) v Pension Funds Adjudicator and Others* [2007] 1 BPLR 117 (C) at par 16.

However, according to the Pension Funds Adjudicator in *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund and Another*,<sup>417</sup> this does not mean prior lodging of a written complaint with either the fund or the employer before it is lodged with the Adjudicator is a requirement for jurisdiction of the Adjudicator over such complaints. If the complainant is not satisfied with the reply of the fund or participating employer, or if no reply is received within 30 days after the receipt of the complaint, the complainant may lodge the complaint with the Office of the Pension Funds Adjudicator.

In terms of section 30H, the Adjudicator shall not investigate any complaint if the proceedings have already been instituted in any civil court before the lodging of the complaint. The proceedings are, generally, informal, but the Adjudicator may also hold hearings, in which event the parties may appear in person to present their case. In terms of section 30K, no party is entitled to legal representation at proceedings before the Adjudicator, but this does not constitute an absolute prohibition on legal representation. In *Henderson v Eskom and Another*,<sup>418</sup> the Pension Funds Adjudicator indicated that "legal representation" is usually understood to mean representation by attorneys or advocates practising as such. The Adjudicator held that the wording of section 30K imposes no prohibition and that as a result he at common law has discretion whether or not to allow representation. The position was clarified in *Mellor v The Bidcorp Group Provident Fund and Another*,<sup>419</sup> where the Adjudicator said that section 30K simply prohibits entitlement to legal representation. He held that when legal representation is allowed by the Adjudicator without any objection from the other parties, or after determination of any such objection, then it should follow that in appropriate cases costs may be awarded in accordance with the principle that an award of costs will follow success in the suit. Section 30L provides for the keeping of a permanent record, in writing or by mechanical or electronic means, of the proceedings relating to the adjudication of a complaint and the evidence given.

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<sup>417</sup> See *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund and Another* [2005] 3 BPLR 272 (PFA) at par 10.

<sup>418</sup> See *Henderson v Eskom and Another* [1999] 12 BPLR 353 (PFA) at 356.

<sup>419</sup> See *Mellor v The Bidcorp Group Provident Fund and Another* [2003] 7 BPLR 4926 (PFA) at 4934, par 30.

After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons for it, signed by him or her, to all parties concerned, as well as to the Registrar of the court which would have had jurisdiction had the matter been heard by a court.<sup>420</sup>

The Adjudicator has the powers to rescind or vary any order or judgment that he or she has made in which there was an ambiguity or an obvious error or omission, either *mero motu* (of his own accord), or upon the application of any party affected.

This is in terms of Uniform Rule 42(1) and section 36(c) of the Magistrates Courts Act read with section 30E(1) of the Pension Funds Act.<sup>421</sup> Any determination of the Adjudicator shall be deemed to be a civil judgment by any court of law had the matter in question been heard by such a court, and shall be so noted by the Registrar of the court, as the case may be. A warrant of execution may be issued by the Clerk or the Registrar of the court in question and executed by the Sheriff of such a court after expiration of a period of six weeks after the date of the determination, on condition that no application has been lodged to court by an aggrieved party.<sup>422</sup>

Any person who acts in contempt of the Adjudicator, as set out in section 30V of the Pension Funds Act of 1956, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

Section 30I of the Pension Funds Act provides that the Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date upon which the complaint is received by him or her in writing.

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<sup>420</sup> Section 30L of the Pension Funds Act of 1956.

<sup>421</sup> See generally, *Goddard v ASI Pension Fund and Others* (3) [2001] 4 BPLR 1841 (PFA); and *Somagaca v Mines 1970 Provident Fund and Another* [2002] 9 BPLR 3895 (PFA).

<sup>422</sup> Section 30O of the Pension Funds Act of 1956.

Section 30I(2) now categorically states that the provisions of the Prescription Act of 1969<sup>423</sup> apply in respect of the calculation of the three-year period referred to in section 30I(1).

This brings the time limit with regard to lodging of complaints in respect of pension funds in line with other debts. In such a case, the beneficiaries might have to approach the court of law and apply for condonation of late application. This process could be very expensive and the matter might take even longer to resolve. This might further delay dependants' access to the money needed urgently to cover school fees, medical costs, food, and other important day-to-day needs.

Section 30I(2) previously provided that if the complainant was unaware of the occurrence of the act or omission which gave rise to the complaint, the period of three years would commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence – whichever occurred first. Section 30I(3) gave the Adjudicator the power, on good cause shown or on his own motion either before or after the expiry of any period prescribed, to extend such period or condone non-compliance with any time limit prescribed. The Adjudicator's discretion in this regard has been removed.<sup>424</sup>

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<sup>423</sup> Prescription Act 68 of 1969. See *Swarts v Sanlam Umbrella Provident Fund: Participating Employer-Herholdt Holdings (Pty) Ltd and Sanlam Life Insurance Ltd* PFA/FS5258/2011/SM (unreported) at par 5.6, where the Pension Funds Adjudicator refers to the decision of the Constitutional Court in *Mohlomi v Minister of Defence* 1997 (1) SA 124 at par 11, where the court said stated among the reasons for rules prescription, that inordinate delays in litigation damage the interests of justice and that they protract the disputes over the rights and obligations sought to be enforced, prolong the uncertainty of all concerned about their affairs, and by then witnesses may no longer be available to testify and documentary evidence may have disappeared.

<sup>424</sup> Section 30I was substituted by section 21 of the Pension Funds Amendment Act of 2007.

Previous Adjudicators had given different interpretations to the old provisions of section 30I. In *Sligo v Shell Southern Africa Pension Fund and Shell South Africa (Pty) Ltd*,<sup>425</sup> the Adjudicator (Prof. Murphy) held that section 30I created its own prescription regime which operated to the exclusion of the Prescription Act, and in *Manzini v Metro Group Retirement Fund and Another (2)*,<sup>426</sup> he said that the time-barring provisions contained in section 30I of the Act must be read in conjunction with the Prescription Act.

However, in *Nyayeni v Illovo Sugar Pension Fund and Another* and *Sibanyoni v Concor Holdings (Pty) Ltd and Another*<sup>427</sup> respectively, the Adjudicator (Adv. Ngalwana) gave the section a totally different interpretation where he said that Chapter III of the Prescription Act applies to claims or legal proceedings instituted for the recovery of debt. He said further that where the claim or legal process is intended to achieve relief other than a recovery of a debt, Chapter III of the Prescription Act does not apply. Adjudicator Mohlala, Adv. Ngalwana's predecessor, also had the opportunity of applying the amended section 30I in some of her determinations where she had also taken the view that the new provisions of section 30I did not apply retrospectively. In *JS Madsen v Norwich Group Indoor Staff Pension Fund*,<sup>428</sup> the complaint was received by the office of the Pension Funds Adjudicator in 2005, while the cause of action arose in 1991; that is 11 years later.

The Adjudicator held that although the Adjudicator's discretion has been removed, the complainant is entitled to have his complaint adjudicated on the legal framework applicable at the time that he lodged his complaint.

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<sup>425</sup> See *Sligo v Shell Southern Africa Pension Fund and Shell South Africa (Pty) Ltd* [1999] BPLR 299 (PFA) at 308.

<sup>426</sup> See generally, *Manzini v Metro Group Retirement Fund and Another (2)* [2003] 11 BPLR 5285 (PFA) at 5294-5295.

<sup>427</sup> See *Nyayeni v Illovo Sugar Pension Fund and Another* [2004] 11 BPLR 6249 at 6253; and the case of *Sibanyoni* supra note 262 at par 10.

<sup>428</sup> See *Madsen v Norwich Group Indoor Staff Pension Fund* PFA/EC/5874/05/NS (unreported).

She held further that our courts will only hold that a statutory provision which interferes with vested rights or imposes a liability or a burden is retrospective in operation where the legislature either expressly indicates this or clearly intended the statute to have that effect. The Adjudicator expressed the same view in *Sadie v South African Retirement Annuity Fund and Old Mutual Assurance Company*.<sup>429</sup>

It is submitted that prescription law must not be applied strictly to pension law matters, considering the purpose of pension funds and the role played by pension benefits. Pension benefits play a social security role as they are there to ensure that the recipients thereof, and their dependants should a member die, are guaranteed some form of income and that they maintain an adequate standard of living which they would not have enjoyed had it not been because of the benefit.

If the member, or his or her dependants for that matter, are deprived the opportunity to lodge complaints relating to retirement benefits claims because the complaint has in terms of the law prescribed, be it out of their ignorance, lack of knowledge, or any other reason, that would defeat the purpose for which a retirement fund is established. The Adjudicator should be given the powers to use his or her discretion to condone late submission as it was the case before – provided valid reasons are given why the complaint or claim is submitted late. This is to ensure that those members or former members who could not lodge complaints in time due to reasons beyond their control are allowed to lodge those complaints regarding their retirement benefits from their many years of contributions and the same should apply to the dependants' claims or complaints. In doing so, the state will also benefit in that it will not have to provide for the elderly who contributed to retirement funds when working but now cannot enjoy the benefit because of an unfavourable law which is in fact supposed to protect them.

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<sup>429</sup> See *Sadie v South African Retirement Annuity Fund and Old Mutual Assurance Company* PFA/WE/4702/2005/LM (unreported).

### **6.9.3 The courts of law**

Socio-economic rights, including social security rights, have already been declared to be justiciable.<sup>430</sup> The courts in this country, particularly the High Courts and the Constitutional Court, play a very important role in the protection, enforcement, and adjudication of social security or retirement security rights. People who are aggrieved by decisions of boards of trustees of retirement funds can approach the High Court with their complaints.

On the other hand, the Constitutional Court can also be approached with all complaints related to pension law that also impact on the constitutional rights of an aggrieved party.<sup>431</sup> Where a constitutional right has been violated, the courts may make any order that is just and equitable.<sup>432</sup>

The courts are also expected to give an appropriate relief in remedying an infringement of a constitutional right.<sup>433</sup> The Supreme Court of Appeal may decide on appeals on any matter, except on constitutional matters,<sup>434</sup> which must be handled by the Constitutional Court.

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<sup>430</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 at paras 76-77 (CC); *Grootboom* supra note 150 at par 20; and *Minister of Health and Others v Treatment Action Campaign and Others* (2) 2002 (5) SA 721 at par 25 (CC).

<sup>431</sup> Section 167(3) of the Constitution.

<sup>432</sup> Section 172(b).

<sup>433</sup> Section 38(1) of the Constitution. See also *Fose v Minister of Safety and Security* (1997) (3) SA 786 (CC) at par 19, where "appropriate relief" was described as relief that is required to protect and enforce the Constitution, which may include (depending on the circumstances of each particular case) a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.

<sup>434</sup> Section 167(7) of the Constitution describes a constitutional matter as any issue involving the interpretation, protection, or enforcement of the Constitution.

Even though our courts can adjudicate on social security matters, the issue with that is that the courts provide adversarial adjudication, which is not necessarily suitable for resolving disputes pertaining to social security rights. The court system takes time to resolve disputes as the focus of the court is on matters of a different nature and from all areas of the law.

The High Courts and the Constitutional Court handle different matters and are not meant only for social security disputes or pension-related disputes.

The costs of the courts and of legal representatives are too high and most of the aggrieved parties cannot afford the costs, and would either have to drop the case or use the very same money they are fighting for in court to pay legal fees and for the costs of the case should they lose as there is no guarantee that when they take their cases to court they will win. Considering the purpose of social security benefits, it will not make sense if the aggrieved party loses the whole benefit to the payment of costs relating to the case or to wait for years to receive the benefit, which is meant to assist him or her at the time he or she is vulnerable, while the case still has to be heard and decided by the court.

## **6.10 SUMMARY AND EVALUATION**

In South Africa, those who can afford to save for their retirement through occupational and private savings vehicles can do so. Occupational retirement funds are specifically meant for employees as they are established by employers, trade unions, or sectors for employees. Occupational retirement funds take the form of either a pension or a provident fund, while private or individual savings mainly take the form of retirement annuity schemes. The funds can be categorised into private funds and those established for civil servants, as well as for employees of state organs. Most of the employees who are employed in the formal sector of the economy belong to occupational funds. However, those who are employed in the informal sector are mostly excluded. This is a worrying factor as it is believed these people are in the majority as compared to those in formal employment.

This category of workers can also be considered as the most vulnerable, taking into account their employment conditions which include low salaries and employment insecurity. They are often not able to make any savings for their retirement and will therefore not be able to provide for themselves in retirement, and are most likely to rely on state support as soon as they reach the qualifying age.

The reasons why these workers are currently excluded by the system include the following:<sup>435</sup>

- Difficulties in the collection of contributions;
- Unaffordability due to low wages; and
- Other immediate needs such as food and healthcare.

Retirement funds in South Africa are regulated primarily by the Pension Funds Act of 1956. Regulation is at a higher level by world standards.<sup>436</sup> These funds can, in addition to a retirement benefit, provide risk benefits. The system can be considered to satisfy widely accepted social security principles of risk pooling (that is, higher-risk participants are subsidised by lower-risk individuals), efficiency (whereby low-income participants are not penalised by being forced to let go of their disposable income for expensive service), and fairness (where benefits received by individuals are linked to the contributions they make to the fund). Retirement funds are, however, generally not offering risk benefits during retirement and it is left to individual members to decide whether to join private insurance or not.

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<sup>435</sup> Reynaud E "The Extension of Social Security Coverage: The Approach of the International Labour Office" ESS Paper No 3 (Social Security Policy and Development Branch: International Labour Office) at 16-17 available on [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=682162](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682162), last visited on 22 July 2015.

<sup>436</sup> The Melbourne Mercer Global Pension Index has given South Africa 76.3% for integrity (which is a B+ grade) which looks at regulation, governance, protection and costs. See in this regard, Melbourne Mercer Global Pension Index 2014 Report on cit note 147 at 8.

Employers are free to decide whether to set up a fund or not, what type of fund, and which categories of employees will be eligible to participate in the fund.<sup>437</sup> The system does not make it compulsory for employers to establish retirement funds for their employees, nor does it make it compulsory for employees to join existing funds – unless in cases where employers make it a condition of employment or where a sectoral determination has been issued in that regard. This is a huge problem as it creates gaps in the system, where only some employees enjoy coverage and nothing can be done to force employers not participating to do so. Fund rules stipulate the level of contributions to be made by employers and employees.

The main concern with the system is that generally many South Africans reach retirement age with no benefits or with insufficient benefits.

Factors that contribute to this problem include the following:<sup>438</sup>

- General lack of saving;
- Withdrawals made before retirement date;
- The majority of people work in the informal sector or experience irregular employment; and
- Lack of compulsory preservation of benefits.

The system does not provide comprehensive coverage as advocated by the Taylor Committee Report.<sup>439</sup> The system does not always provide adequate benefits, hence those who are not adequately covered have to rely on state old-age pension for survival when they retire.

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<sup>437</sup> Ibid (Annexure 2) at 18.

<sup>438</sup> Social Security and Retirement Reform (Questions and Answers) – National Treasury 21 February 2007 at 2, available on <http://www.treasury.gov.za/documents/national%20budget/2007/Q&A%20Social%20security%20and%20retirement%20reform.pdf>, last visited 22 July 2015; see also generally Van der Merwe “The Occupational Pillar of the South African Pension System” op cit note 42 at 321.

<sup>439</sup> The Taylor Committee Report op cit note 58 at 40.

The preference of provident funds to pension funds by many retirement funds members also has a negative effect on the objectives of a retirement fund. Provident funds pay cash lump-sums which are exposed to many risks. Lump-sum cash received is normally used for current consumption such as buying an expensive car or going on a long holiday.

The personal nature of the provident scheme carries with it the feeling that it is accessible to meet other, more immediate, financial obligations, and members are ignorant or not aware of the fact that each withdrawal from a provident fund reduces the capacity of the fund to provide long-term protection. This leaves the person with no funds or insufficient funds to live on in retirement. Such a member will have to rely on the state old-age pension for support.<sup>440</sup> A member may also lose the money through poor business ventures or investments.

The system also has serious limitations as members cannot switch between funds or join funds of their own choice. They usually have to change jobs in order to change funds. Freedom to choose one's preferred fund and to shift accumulated funds to a new retirement fund with a better investment performance could promote competition, and force fund managers to keep costs as low as possible.<sup>441</sup> HIV/Aids also has a serious impact on retirement funds as those who are seriously ill will make early withdrawals due to incapacity. Early withdrawals mean low benefits. This will also affect the funds as more people will make withdrawals from the fund and a smaller number of participants will carry the costs of running the fund.

Funds registered in terms of the Pension Funds Act of 1956 fall under the jurisdiction of the Pension Funds Adjudicator. However, there is still a multiplicity of other forums which adjudicate disputes concerning occupational retirement funds.

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<sup>440</sup> Van der Merwe "The Occupational Pillar of the South African Pension System" op cit note 42 at 321.

<sup>441</sup> Ibid at 320.

This unfortunately allows for forum-shopping and does not promote consistency and equality.<sup>442</sup> Another factor is that even though the complaints procedure at the Office of the Pension Funds Adjudicator's office is fairly simple, many pension funds members are not at the level that allows them to understand pension-law funds administration which can sometimes be very complex.

This and other factors negatively affect the members' chances of effectively using the Adjudicator's services to enforce their rights and to have their complaints speedily resolved. People who have been aggrieved by decisions of boards of retirement funds can choose to approach the High Courts. The costs of taking the matter to a High Court can be very high and the person will need the services of a legal representative to do so. While funds and funds administrators can afford the high legal fees, the opposite is the case with members of the funds or complainants who are sometimes out of their jobs or are dependants without financial resources.

Clearly the system has more weaknesses than strengths. These gaps that have been identified affect the adequacy of the system and will have to be addressed through the reform process the system is currently undergoing.

Section 27 of the Constitution of the Republic of South Africa guarantees everyone the right of access to social security and if the system maintains its exclusionary nature, this right will remain just a dream to many. It is in this regard that the state is given a duty to take reasonable legislative and other measures, within its available resources, to progressively realise the right of access to social security, and in particular retirement security (provision).

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<sup>442</sup> Idem at 55.

Going back to the elements that were noted at the beginning of this chapter for purposes of evaluating South Africa's retirement system, it is submitted that because the system is exclusionary in nature (that is, not all categories of workers are covered), the system allows leakages before the date of withdrawal, and the fact that the system does not always provide adequate benefits, it can be concluded that even though the system has some positives, there is still a lot that needs to be done to achieve a higher level of protection and to include all the categories of people who are able to pay contributions and save money for their retirement.

The next and last chapter provides a summary of the findings of this study, makes recommendations, and suggests a new model that will extend coverage to those who are presently excluded.

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## CHAPTER 7

### THE FUTURE OF SOUTH AFRICA'S OCCUPATIONAL RETIREMENT SECURITY SYSTEM: SUMMARY AND RECOMMENDATIONS

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#### 7.1 SUMMARY OF SOUTH AFRICA'S RETIREMENT SECURITY SYSTEM

Before colonisation, African people provided for themselves and their families through traditional arrangements of kinship. The family was the primary source of support for everyone within the family.<sup>1</sup> However, the kinship system was later affected by colonisation and industrialisation, which brought with them Western methods of support.<sup>2</sup> The Western system introduced social policies and laws that only favoured whites<sup>3</sup> and to provide social assistance for whites who were unemployed.<sup>4</sup> Extension of coverage to blacks only came in the 1960s and 1970s as many black people moved to cities in search of jobs in the mines and other emerging industries. This affected the traditional ways of survival in favour of Western methods.<sup>5</sup>

South Africa's approach to social security provision changed with the dawn of democracy, which introduced a right-based approach that has its roots in section 27 of the Constitution of South Africa, 1996. The section gives everyone the right to have access to social security and appropriate social assistance for those who are not able to support themselves and their dependants.

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<sup>1</sup> The kinship support system is discussed under paragraph (par) 4.2 in Chapter (Ch) 4 above. See also generally, on the kinship system, Eric O Ayisi *An Introduction to the Study of African Culture* 1979 at 36-45; Dekker AH *Informal Social Security: A Legal Analysis* (Doctoral Thesis) April 2005 at 139-140 (hereafter, Dekker *Informal Social Security*).

<sup>2</sup> The effect of industrialisation is discussed under par 4.2 in Ch 4 above. See also Patel L *Social Welfare & Social Development in South Africa* 2005 at 66 (hereafter, Patel *Social Welfare & Social Development in South Africa*).

<sup>3</sup> Patel (ibid) at 66, 70 and 71.

<sup>4</sup> The history of state old-age pension is discussed under par 4.3.2 in Ch 4.

<sup>5</sup> The effect of industrialisation on traditional ways of support is discussed under pars 4.2.2 and 4.3.3 in Ch 4.

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Social security provision in South Africa takes the form of formal arrangements comprising social assistance and social insurance. Social assistance arrangements are primarily meant for poverty relief and are redistributive in nature.<sup>6</sup> Social insurance is for those who are employed as it is contributory in nature. People contribute to insurance schemes such as retirement funds and receive benefits when they retire from work.<sup>7</sup> These schemes have a social objective as members carry one another's burden, and help those who are in a weaker position and those who are vulnerable to the risk of poverty.

Occupational retirement funds are generally introduced by employers for their employees.<sup>8</sup> Both employers and employees contribute to these funds to build up sufficient reserves over a period of time. The reserves are then paid out in the form of retirement benefits when members retire. The benefits received from these funds play a very important social security role in that they replace the person's income when he or she is no longer able to continue working and to earn a salary because of being old. Those who do not have employer established retirement funds or those who are members of such funds but who would like to supplement the benefits they will receive from their funds, may also join private savings schemes offered by financial institutions and insurance companies.

South Africa's retirement security system follows a three pillar approach comprising:

- Means-tested state provided pensions;
- Occupational retirement funds; and
- Privately arranged savings for retirement.

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<sup>6</sup> Discussed under par 5.4 in Ch 5.

<sup>7</sup> Discussed under par 5.5 in Ch 5.

<sup>8</sup> Discussed under par 4.3.3 in Ch 4.

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There are also informal forms of support<sup>9</sup> which play a complementary role to the three formal pillars.

South Africa's retirement security provision comprises separation of poverty relief, employment related retirement savings, and private savings in the form of retirement annuity funds – administered by private financial institutions and regulated by the government.<sup>10</sup>

South Africa does not have a public retirement fund and mainly uses employer-established funds managed by the private sector. These schemes are regulated by the government through various pieces of legislation,<sup>11</sup> under the governance of the Financial Services Board.

Benefits payable by occupational funds are restricted to the employee members and their dependants<sup>12</sup> in certain circumstances.<sup>13</sup> The benefits are not means tested, but are linked to contributions made during the period of employment. In addition to retirement benefits, retirement funds also offer withdrawal and risk benefits.

These additional benefits also play a significant role as they ensure that the person who is out of work prior to his or her actual retirement date, due to disability, ill health or retrenchment, receives some form of income, or that his or her dependants receive death benefits in the case of his or her death.<sup>14</sup> Dependants receive some form of compensation for the permanent loss of support resulting from the death of the breadwinner who contributed to the fund.<sup>15</sup>

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<sup>9</sup> Discussed under par 5.7 in Ch 5.

<sup>10</sup> National Treasury: South Africa Retirement Fund Reform (A Discussion Paper) December 2004 at 1 (hereafter, South Africa Retirement Fund Reform: First Discussion Paper).

<sup>11</sup> Pension Funds Act 24 of 1956 (the Pension Funds Act of 1956).

<sup>12</sup> "Dependent" is defined in section 1 of the Pension Funds Act. See the discussion on what "dependant" in the context of death benefits means in par 6.6.4.2 in Ch 6.

<sup>13</sup> See generally *Kaplan and Another NO v Professional and Executive Retirement Fund and Others* 1999 (3) SA 798 (SCA).

<sup>14</sup> Benefits are discussed under par 6.6 in Ch 6.

<sup>15</sup> Discussed under par 6.6.4.2 in Ch 6 above. See also generally, Olivier MP, Smit N and Kalula ER (eds) *Social Security: A Legal Analysis* 1<sup>st</sup> ed (2003) at 307-308 (hereafter, Olivier et al *Social*

## **7.2 SUMMARY OF SOCIAL SECURITY OBJECTIVES OF OCCUPATIONAL RETIREMENT FUNDS**

Social security provision in South Africa remains an important political and social issue for a number of reasons which include, among others, the history and damage caused by apartheid and its discriminatory laws and policies which created serious social and economic inequalities in the country.

In the White Paper for Social Welfare,<sup>16</sup> social security within the South African context is described as follows:

“Policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing their basic needs ...”

South Africa's approach to social security encompasses both public and private measures which are aimed at providing a safety-net for members of society against economic and social distress. Social security aims to provide protection against all possible social risks and provide a safety-net that ensures a minimum standard of living. Its objective is to give support to people, such as the elderly, who are vulnerable to being exposed to social and financial hardships.<sup>17</sup> It tackles some of the economic risks communities and individuals are facing and it also promotes their economic efficiency. Social security guarantees the members of society minimum income protection and an adequate living standard, and safeguards their acquired standard of living.<sup>18</sup>

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*Security: A Legal Analysis*); Olivier MP, Okpalupa MC, Smit N, Thompson M, Du Toit AM, Greyling E, Van Rensburg J, Liffmann R, Ogunronbi SO, and Porter I *Social Security: General Principles* 1999 at 157 (hereafter, Olivier et al *Social Security: General Principles*).

<sup>16</sup> GN 1108 in GG 18166 of 8 August 1997 (Chapter 7) (hereafter, The White Paper).

<sup>17</sup> East R *Social Security Law* 1999 at 1 (hereafter, East *Social Security Law*).

<sup>18</sup> Olivier et al *Social Security: A Legal Analysis* op cit note 15 at 39.

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It serves as an income replacement measure that compensates for the financial consequences of a number of social contingencies, which include old-age or retirement.<sup>19</sup> Retirement funds are created to enable people to make contributions into the funds while still working so that they can receive income in the form of a pension benefit when they are no longer working because of age.

There is risk pooling in that members of different ages contribute to a single fund and those who retire at any particular time receive benefits from contributions made by those who are still working and participating in the fund.<sup>20</sup>

Even though benefits paid by occupational retirement schemes are to an individual, they also contribute enormously to the betterment of society in general. If individuals participate in retirement funds, their families and the community will be directly or indirectly protected and the state will also be protected because revenue that would have been used to support people who failed to save money for retirement, will be used for other things such as education and infrastructure development. It is the duty of the state to protect both itself and society against the detrimental effects of social and economic factors. Thus the role of government can be seen as that of defending basic inalienable human rights, which include the right of access to social security.<sup>21</sup> The state has the duty to create a framework that will allow more people to save money for retirement. This duty comes from section 27 of the Constitution, which guarantees everyone the right of access to social security and appropriate social assistance where individuals cannot support themselves and their dependants. Where there is no access, the state is obliged by section 27(2) to progressively provide such access. Benefits offered must also be adequate to protect members of the funds against being destitute when they retire and to ensure that beneficiaries are able to maintain the same standard of living during retirement.

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<sup>19</sup> Ibid at 31.

<sup>20</sup> East *Social Security Law* op cit note 17 at 15-16.

<sup>21</sup> See generally the discussion under par 5.2 in Ch 5.

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The primary objectives of retirement and social security may be summarised as being to:

- Relieve want;
- Prevent destitution;
- Provide financial support to those considered to be poor or of being vulnerable to poverty;
- Restore up to a reasonable level income which is lost by reason of inability to work;
- Guarantee an adequate living standard; and
- Protect society and the state (avoid individuals becoming a burden on the state and to society).

Thus the purpose of retirement income security encompasses a number of social security objectives.

### **7.3 SUMMARY OF THE SHORTCOMINGS WITHIN SOUTH AFRICA'S RETIREMENT SECURITY SYSTEM**

The following is a summary of what the study has found to be the areas of concern in South Africa's retirement security system:

- The system focuses more on formal employment and excludes people who are working in the informal sector of the economy, who are less skilled, and who are mostly black.<sup>22</sup> Those who qualify in terms of the requirements receive the state old-age pension;<sup>23</sup> those who work for employers or sectors which have established retirement funds participate in those funds;<sup>24</sup> and

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<sup>22</sup> Discussed under par 4.2 in Ch 4.

<sup>23</sup> Discussed under par 5.4 in Ch 5.

<sup>24</sup> Discussed under par 6.2 in Ch 6.

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those who are in a position to join private savings schemes do so.<sup>25</sup> The benefits are for those who make contributions and are therefore not universal. The system has the effect of creating classes of uninsured and the partially insured.<sup>26</sup> It generally extends social protection only to those who qualify as employees to the exclusion of other categories of workers.<sup>27</sup> Consequently, all those who are excluded become dependent on the state old-age pension. The majority of people still do not have access to retirement schemes. A number of factors, including the level of unemployment,<sup>28</sup> the informal sector taking the majority of workers, and scattered periods of employment, contribute to the problem.<sup>29</sup> The system excludes those earning low salaries, which leaves them without any means of income when they retire. This category of workers is forced to depend on the state old-age pensions after retirement.<sup>30</sup> Those who are employed in the informal sector of the economy are not covered for a variety of reasons, which include the fact that it would be extremely difficult to collect contributions from these workers and sometimes also from their employers,<sup>31</sup> retirement schemes require regular contributions, if little contribution is made then little will be received, and high administrative costs.

The employment conditions of those working in the informal sector also differ from those in the formal sector, whilst most social insurance schemes have been established to suit the circumstances of people in regular employment.

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<sup>25</sup> Discussed under par 5.6 in Ch 5.

<sup>26</sup> See generally James E "Coverage under Old Age Security Programs and Protection for the Uninsured – What are the Issues?" 1999 at 2-3, accessed from <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2163>, last visited 05 August 2015.

<sup>27</sup> MP, Smit N, Kalula ER, Mhone GCZ *Introduction to Social Security* 2004 at 46 (hereafter, Olivier et al *Introduction to Social Security*).

<sup>28</sup> Unemployment is one of the major contributing factors towards lack of savings in South Africa. According to Statistics South Africa, the rate of unemployment was at 27% in October 2013, accessed from [statssa.gov.za](http://statssa.gov.za), last visited on 05 August 2015.

<sup>29</sup> Discussed under par 6.5 in Ch 6.

<sup>30</sup> Discussed under par 6.5 in Ch 6.

<sup>31</sup> The Smith Committee: The Committee on Strategy and Policy Review of Retirement Provision in South Africa, 1995 (Annexure S4).

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People who are not earning much are unlikely to contribute to retirement funds. In 2007, research undertaken for South African National Treasury discovered gaps in coverage for people earning below R60 000 annually from both the formal and informal sector. It was discovered that more than six million South Africans in some form of employment were not included in formal retirement savings structures – the majority of these being those in the informal sector of the economy.<sup>32</sup> The growing popularity of contract work also limits coverage provided by occupational pensions, because it shifts the responsibility of retirement provision entirely to the individuals. The only real available option for them is to participate in voluntary savings plans or in informal arrangements which may not provide them with sufficient benefits to maintain their living standards when they retire.<sup>33</sup>

- The system is fragmented as not all the workers are covered under one umbrella, sectors have funds specifically for employees working in those sectors regulated by various pieces of legislation, more than one statute apply to the retirement funds industry, and there is no uniformity in terms of fund administration and administrative costs.
  
- Participation in occupational pension funds is at the moment not compulsory and employers are also not obliged to introduce funds for their employees except in the sectors where the Minister has issued a sectoral determination in that regard. As a result, workers who never participated in the funds end up relying on the state old-age pension for survival. The state pension is presently not serving as a safety-net, but as the main source of income for the majority of those who have never saved for their retirement.<sup>34</sup>

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<sup>32</sup> Discussed under par 6.5 in Ch 6.

<sup>33</sup> See generally Van der Merwe T “The Occupational Pillar of the South African Pension System” *Development Southern Africa* Vol 21, No 2, June 2004 at 313 (hereafter, Van der Merwe “The Occupational Pillar of the South African Pension System”).

<sup>34</sup> State old-age pension is discussed under par 5.4 in Ch 4.

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- The system allows for leakages prior to the date of retirement. This reduces the size of the benefit a person will receive at retirement. As a result, many people reach retirement age with insufficient benefits. In this way, money which was meant for retirement is used for other things such as current consumption, debts, expensive cars, or holidays.<sup>35</sup> In the cases of divorce, the non-member spouse who receives a portion of a member's benefit is not compelled to save or preserve that money until the date of retirement, while, on the other hand, a member spouse does not have access to the money. In this way a non-member spouse can use the portion he or she received for anything and be left destitute once the money is depleted.
  
- The levels of pensions are relatively low. Furthermore, the period of membership of a retirement fund is often too short to build up sufficient accumulated funds for retirement as people start very late to save money for retirement. Also, a very small number of people transfer their accumulated funds to other pension funds when they change jobs or are retrenched.<sup>36</sup> The system does not make it compulsory for those who withdraw from the funds to preserve their benefits. A person can, upon resigning from work or changing jobs, take all the money in the fund and use it in any way he or she likes. This is problematic since those people more often than not end up with insufficient benefits when they retire.<sup>37</sup>

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<sup>35</sup> Discussed under par 6.6.3 in Ch 6.

<sup>36</sup> Discussed under par 6.6.3 in Ch 6. See also Van der Merwe "The Occupational Pillar of the South African Pension System" op cit note 33 at 322-323.

<sup>37</sup> Discussed under par 6.6.3 in Ch 6.

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- South Africa does not have a public retirement fund. This has resulted in many people from the informal sector, low-income earners, and the self-employed being excluded from participation in the system.<sup>38</sup> The system therefore does not accommodate all categories of workers. A public fund forms part of current reform proposals.<sup>39</sup>
  
- Many people who belong to provident funds take the benefit as a 100% cash lump-sum when they retire. In such a case, the chances of spending all the money during the first few months or years are very high. This makes provident funds (in their present form) not the best option for social security purposes, considering the fact that an employee who consumes the benefit shortly after receiving it will be without income for the remaining years of his or her life. However, this should not be taken to mean that there are those retirees who cannot use the money wisely; for example, invest the money, buy property, or start a successful business. That being the case, it remains a fact that there are more risks than advantages with provident funds from a social security perspective than there are with pension funds.<sup>40</sup>
  
- Most employees in the formal sector do not have the opportunity to select an occupational pension fund of their own choice. People are also not able to switch between funds of their own accord and usually have to change jobs to change their pension funds. Individuals are not granted the opportunity to choose a fund that will serve their interests best and are obliged to stay with a pension fund, even if its overall performance is poor.

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<sup>38</sup> Discussed under par 6.5 in Ch 6.

<sup>39</sup> Discussed under par 5.3 in Ch 5. See also South Africa Retirement Fund Reform: First Discussion Paper op cit note 10 at 20 and National Treasury South Africa's Social Security and Retirement Reform: The Second Discussion Paper (Republic of South Africa (National Treasury)) February 2007, at 3 (hereafter, South Africa's Social Security and Retirement Reform: Second Discussion Paper).

<sup>40</sup> Discussed under par 6.4.2 in Ch 6. See also generally, Snyman I "Work, Retirement and Financial Crises: The Views of a Number of Key Persons from Employer's and Employees' Bodies" 1988 at 21.

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Freedom to choose one's preferred fund and to shift accumulated funds to a new retirement fund with a better investment performance could promote competition, and force fund managers to keep costs low.<sup>41</sup>

- Retirement funds generally pay other benefits such as risk benefits in addition to retirement benefits. However, membership of social insurance schemes providing these benefits depends mainly upon a person being employed. Thus, risk benefits are provided for the period when a member of the fund is still employed. After exiting the fund, the risk protection is no longer available, unless a member decides to continue with a risk cover policy with an insurance company on an individual basis. It then becomes a problem should a person who is already in retirement suffer the risk. What this would mean is that such a person would have to use the retirement benefit to pay for all the costs of his or her disability or ill health, which could be very high.<sup>42</sup>
  
- Death benefits are paid at the discretion of the board of trustees in terms of section 37C of the Pension Funds Act 24 of 1956 and the fund rules. It should be accepted that it is unlikely that the trustees will always get the distribution right, as has been evident from the number of complaints lodged with the Office of the Pension Funds Adjudicator relating to how trustees have distributed the deceased's death benefits. The other problem is that dependants are not represented on these boards and communication with them is generally non-existent or very poor.<sup>43</sup>

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<sup>41</sup> Discussed under par 6.5 in Ch 6 a. See also generally Van der Merwe "The Occupational Pillar of the South African Pension System" op cit note 33 at 320.

<sup>42</sup> Discussed under par 6.6.4 in Ch 6. See also generally De Villiers N and Giese S "A Review of Children's Access to Employment – Based Contributory Social Insurance Benefits", (Commissioned by UNICEF in partnership with the Department of Social Development), May 2008 at 10 and 87.

<sup>43</sup> Discussed under par 6.6.4 in Ch 6.

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- In terms of section 30I of the Pension Funds Act 24 of 1956, the Pension Funds Adjudicator can only investigate a complaint if the act or omission to which it relates occurred less than three years before the date on which the complaint is lodged with the office. Even though this is legally correct, it can be unfair to members of the funds, considering the purpose for which pension benefits are paid. Pension benefits are there to make sure that the beneficiary is guaranteed some form of income. If the beneficiary is deprived of the opportunity to claim benefits because the law says the claim has prescribed, where, for example, the beneficiary has valid and sound reasons why the complaint was not lodged on time, that would defeat the purpose for which the pension fund is established.<sup>44</sup>
  
- There is still a multiplicity of other forums which can adjudicate disputes concerning occupational retirement funds. This unfortunately allows for forum-shopping and does not promote consistency and equal treatment.<sup>45</sup> Another factor is that even though lodging a complaint with the Pension Funds Adjudicator is fairly simple, many pension funds members do not understand pension law and funds administration, which can sometimes be very complex. This and other factors negatively affect the members' chances of using the Pension Funds Adjudicator's services effectively and to enforce their rights. On the other hand, people who are not happy with the determinations of the Pension Funds Adjudicator can appeal to the High Court. This can be very costly since cases that go to the High Court require legal representation. While funds and administrators can afford the high legal fees of taking cases to the High Court, the opposite is the case with fund members or dependants who normally do not have financial resources to take on the funds in the courts of law.<sup>46</sup>

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<sup>44</sup> Discussed under par 6.6.4 in Ch 6.

<sup>45</sup> See par 6.9 in Ch 6.

<sup>46</sup> See par 6.9 in Ch 6.

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The main factors that impact negatively on South Africa's occupational pension provision can be summarised as follows:

- The exclusionary nature of the system
- General lack of savings;
- Fragmented system;
- No universal coverage;
- Leakages;
- No suitable retirement savings vehicles for workers outside the formal sector and low income earners;
- No mandatory participation;
- No mandatory preservation;
- High administrative costs;
- No public fund;
- Preference for lump-sum cash payments; and
- Low pension levels.

It can be concluded therefore that the system has serious deficiencies which need to be addressed.

Interestingly, South Africa was given a "C" rating as an overall grade in the Melbourne Mercer Global Pension Index 2014 Report,<sup>47</sup> with all the weaknesses that have been highlighted. A "C" grade depicts a system which has some good features, but also has major risks or shortcomings which need attention. Thus, even though South Africa has a system that can be considered to be acceptable by world standards, the system still has serious shortcomings, which, if not addressed will continue to affect its efficacy and long-term sustainability.

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<sup>47</sup> In total five new countries were included in the 2014 Report; namely Austria, Finland, Ireland, Italy, and South Africa. Melbourne Mercer Global Pension Index: <http://globalpensionindex.com/2014/melbourne-mercero-global-pension-index-2014-report.pdf>, at 16, last visited 05 August 2015.

South Africa received 48.3% (which is a “D” grade) for adequacy, which looks at benefits, savings, tax support, benefit design, and growth assets; 44.6% (which is a “D” grade) for sustainability, which looks at coverage, total assets, contributions, demography, and government debt; and 76.3% (which is a “B+” grade) for the integrity of the system. South Africa scored high for integrity, which looks at regulation, governance, protection, communication, and costs.<sup>48</sup> This is an indication that the country is doing well in terms of regulation and governance but not that well with coverage and level of benefits.

## **7.4 IMPORTANT ISSUES FOR POLICY CONSIDERATION**

### **7.4.1 Primary objectives**

Retirement security should guarantee beneficiaries a basic standard of living, prevent destitution, and replace lost income. For those who are working and can afford to pay contributions, protection comes in the form of social insurance arrangements.<sup>49</sup>

Social insurance schemes such as occupational retirement funds enable people to make contributions when they are still working so that they will benefit when they are no longer working.<sup>50</sup> In general terms, a social protection system in respect of retirement security should at least have the following three main objectives:<sup>51</sup>

- Basic universal coverage for the whole population;
- Create a framework within which those who are in a position to contribute to social security schemes can do so; and
- Allow supplementary retirement savings for those who can afford it.

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<sup>48</sup> Ibid at 6-8.

<sup>49</sup> Discussed under par 5.3 and 5.4 in Ch 5.

<sup>50</sup> Discussed under par 6.2 in Ch 6.

<sup>51</sup> The International Labour Organization (ILO) - International Social Security Association (Pensions) ILO International Training Centre (Module 2: Public and Private Schemes) 2000 at 8.

In designing a system that will ensure adequate income provision and protection in old-age, the following principles as suggested by Monique Morrissey for the USA retirement reform are of great relevance.<sup>52</sup>

#### **7.4.1.1 Universal coverage**

All people who need social security or social assistance must be able to have access to it, as guaranteed by section 27(1)(c) of the Constitution of the Republic of South Africa. All workers earning above a certain salary threshold should join either a public or private scheme.<sup>53</sup>

South Africa presently does not provide universal retirement coverage as it does not have a public fund. Its retirement system uses tax incentives to encourage employers to establish retirement funds for their employees and to make contributions to those funds. Through this system individuals are also encouraged to save for retirement.

The challenge, however, is that there might be some employers who choose not to establish funds for their employees as it is at the moment by law not compulsory for them to do so. Many workers are as a result excluded from coverage.<sup>54</sup> It is for this reason that South Africa needs a system that will offer universal coverage to all workers regardless of the sector they are employed in.

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<sup>52</sup> Morrissey M "Toward a Universal, Secure, and Adequate Retirement System Retirement USA \_ Working for a Universal, Secure and Adequate Retirement System" (Conference Report) October 21, 2009 at 5-6 accessed from [http://epi.3cdn.net/a6c47aa26cbfed9ee0\\_gqm6i6s5z.pdf](http://epi.3cdn.net/a6c47aa26cbfed9ee0_gqm6i6s5z.pdf) last accessed on 05 August 2015 (hereafter, Morrissey "Toward a Universal, Secure, and Adequate Retirement System Retirement USA").

<sup>53</sup> *Ibid* at 8.

<sup>54</sup> Discussed under par 6.5 in Ch 6.

#### **7.4.1.2 Secure and adequate retirement benefits**

Benefits received at retirement should be at a level that will ensure that beneficiaries continue to live at a standard similar to the one they enjoyed when still employed. The system must pay sufficient and adequate benefits when a person retires.<sup>55</sup> The benefits received should be able to prevent a material decline in the living standards of beneficiaries.<sup>56</sup>

In South Africa a large proportion of the formally employed currently contribute to retirement funds, but the contribution rates vary and coverage rates and benefits are low for lower-income earners, while, on the other hand, administrative costs are very high. This is where the proposed National Savings Fund should come in. This Fund will be open to all workers who meet a certain income threshold. The proposal entails compulsory contribution towards funding a basic retirement that is designed to ensure a minimum level of income protection in old-age over and above the state old-age pension.<sup>57</sup>

The South African government's goal is to see members being able to accumulate sufficient assets to provide an income after retirement at the age of 65, from a combination of the state old-age pension and a retirement fund, of 75% of their earnings in the year before retirement for a low-income earner, with the possibility of a lower percentage applying at higher income levels.<sup>58</sup>

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<sup>55</sup> Morrissey "Toward a Universal, Secure, and Adequate Retirement System Retirement USA" op cit note 52 at 11.

<sup>56</sup> Ibid at 17.

<sup>57</sup> Discussed under par 5.3 in Ch 5. See also the Outline of a Social Security and Retirement Savings Framework: Discussion Document for the Inter-Departmental Task Team on Social Security and Retirement Reform at 5 [Updated 29 November 2007, incorporating discussions from Basic Benefit Design Workshops on 8 November and 20 November 2007] available on <http://www.treasury.gov.za/publications/other/ssrr/Session%20Three%20Papers/Outline%20Soc%20Sec%20&%20Retirement%20Savings%20Framework%20%2029%20Nov%202007.pdf>, last visited 21 May 2015.

<sup>58</sup> South Africa's Retirement Fund Reform: First Discussion Paper (Annexure 3) op cit note 10 at 30. See also the 2009 Sanlam Benchmark Survey at 8 (accessed from [http://www.sanlambenchmark.co.za/webadmin/include/content/Sanlam\\_EB\\_Research\\_Survey\\_2009.pdf](http://www.sanlambenchmark.co.za/webadmin/include/content/Sanlam_EB_Research_Survey_2009.pdf), last visited 07 September 2015),

### **7.4.1.3 Shared responsibility**

Retirement should be the shared responsibility of employers, employees, and the government.<sup>59</sup> In South Africa both employees and employers contribute towards retirement funds and the government mainly plays a regulatory role. The government encourages the culture of saving by offering tax benefits for members of pension funds as an incentive to save for retirement.

### **7.4.1.4 Pooled assets**

Contributions to the system should be pooled and professionally managed to minimise costs and financial risks. Thus umbrella funds for different sectors should be encouraged to minimise administrative costs.<sup>60</sup> South Africa has seen a considerable growth of multi-employer or umbrella funds in recent years. These funds offer ease of access, especially for employers. They usually have lower costs than stand-alone retirement funds, which is to the advantage of fund members, and frequently offer improved communication and better administration facilities.<sup>61</sup>

### **7.4.1.5 Payouts only at retirement**

No withdrawals should be permitted before retirement, except for disability, ill health, and retrenchments as early withdrawals reduce the benefit a member will receive at the time of retirement.<sup>62</sup> One main reason why people are retiring with inadequate retirement benefits is leakages that currently exist within the system when a person resigns or is retrenched from work.

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which discovered that that the majority of the people interviewed were aiming for a replacement ratio of between 80% and 100%. Government was reported to be considering a replacement ration of a minimum of 40%.

<sup>59</sup> Morrissey "Toward a Universal, Secure, and Adequate Retirement System Retirement USA" op cit note 52 at 20.

<sup>60</sup> Ibid at 14.

<sup>61</sup> South Africa's Retirement Fund Reform: First Discussion Paper op cit note 10 at 10.

<sup>62</sup> Morrissey "Toward a Universal, Secure, and Adequate Retirement System Retirement USA" op cit note 52 at 20

The introduction of compulsory minimum benefits in the Pension Funds Second Amendment Act of 2001 has partly succeeded in improving and guaranteeing retirement benefits at a certain level.<sup>63</sup> The Amendment Act introduced a minimum-benefit regime, which is designed to ensure that the fund pays an adequate benefit whenever a member leaves service. In terms of the Amendment Act, all retirement funds must pay a minimum benefit from 12 months after their first statutory actuarial valuations following 7 December 2001; implying that by 7 December 2005 all members of retirement funds subject to the Pension Funds Act of 1956 must benefit from the minimum-benefit regime.<sup>64</sup>

South Africa needs to introduce strict rules for withdrawals and compulsory preservation of retirement benefits to ensure that a bigger portion of the benefit withdrawn prior to retirement is ring-fenced and only made available to the member at the time of retirement – except in special circumstances elaborated on below.

#### **7.4.1.6 Pension payments**

Benefits should be paid out over the lifetime of beneficiaries. Presently, employees have a choice of belonging to either a pension fund or a provident fund. A pension fund allows a member to take only up to one-third of the retirement benefit as a lump-sum payment, and the balance is paid out in the form of regular income for the rest of the member's life; while with a provident fund, the member takes 100% of the retirement benefit as a lump-sum cash payment at retirement. The disadvantage with a member receiving a lump-sum cash payment is that the money might be spent on other things and that there are many other risks involved. A person who uses or loses all the money meant to serve as income during retirement will be left with no income for the rest of his or her life and will be forced to rely on the state old-age pension.<sup>65</sup>

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<sup>63</sup> South Africa's Retirement Fund Reform: First Discussion Paper op cit note 10 at 16.

<sup>64</sup> Ibid (Annexure 3) at 38.

<sup>65</sup> Discussed under par 6.4 in Ch 6.

#### **7.4.1.7 Voluntary savings**

Individual voluntary savings should be encouraged.<sup>66</sup> The government need to offer enticing tax benefits for those who use private savings as an incentive to save for their retirement. South Africa has retirement annuity funds and private savings schemes which are used by those who want to save money for retirement. These savings vehicles can also be used by workers in addition to the employer-established funds. They are mainly used by the self-employed and those working in the informal employment sector who can afford to save some money for retirement.

#### **7.4.1.8 Efficient regulatory framework**

The system should be regulated by a body that is efficient and governed by boards of trustees that are representative of employers, employees, and pensioners.<sup>67</sup> The regulatory body must promote retirement security.<sup>68</sup> Funds registered in terms of the Pension Funds Act of 1956 are regulated by this Act. These funds are supervised by the Registrar of Pension Funds under the Financial Services Board. However, the Financial Services Board does not only regulate retirement funds but also other financial institutions. Funds registered in terms of the Pension Funds Act of 1956 are subject to regulation concerning funding requirements, the content of their rules, the audit and statutory valuation of the funds, information to be provided on application for registration of a fund, prudential investment limits, the licensing of fund benefit administrators and asset managers, the reporting of any non-payment of contributions, and the apportionment of actuarial surpluses.<sup>69</sup>

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<sup>66</sup> Morrissey "Toward a Universal, Secure, and Adequate Retirement System Retirement USA" op cit note 52 at 22.

<sup>67</sup> Ibid at 24.

<sup>68</sup> At 25.

<sup>69</sup> South Africa's Retirement Fund Reform: First Discussion Paper (Annexure 4) op cit note 10 at 49.

Retirement funds registered and regulated under the Pension Funds Act are required to have boards which must have 50% representation from the members and 50% from the employer<sup>70</sup> – unless they are exempted by the Registrar to meet this requirement. The boards of trustees owe fiduciary duties to the funds and must protect fund members' interests and rights at all times to make sure that fund members or their dependants receive adequate benefits when the time to retire arrives.

#### **7.4.2 Recent Retirement Reforms in South Africa**

South Africa has for many years worked on improving its retirement security system. This process has seen many Committees<sup>71</sup> being appointed, which proposed various recommendations on how the system could be improved. The findings and recommendations of the Taylor Committee, the proposals made in the First and Second Discussion Papers for Retirement Reform, and supplementary notes from the Treasury are briefly highlighted below.

##### **7.4.2.1 The Taylor Committee Report**

The Taylor Committee reported to Cabinet in March 2002.<sup>72</sup> It was tasked to investigate the viability of different aspects of social security, and among them was “retirement and insurance”.<sup>73</sup> The objective of the investigation was to ensure that social policies relating to the provision of retirement and insurance benefits provide people with adequate cover and provide protection against other risks that may befall them during their financial life cycle.<sup>74</sup>

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<sup>70</sup> In terms of section 7A(1) of the Pension Funds Act of 1956, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect.

<sup>71</sup> Discussed under par 4.3.3 in Ch 4.

<sup>72</sup> The Taylor Commission (Transforming the Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, March 2002 at (iii) (hereafter, The Taylor Committee Report).

<sup>73</sup> Taylor Committee Report (Chapter 1).

<sup>74</sup> Idem at 93.

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Shortcomings found include the exclusionary nature of the system; leakages, exacerbated by a lack of compulsory preservation; high administrative costs, which are unaffordable to low-income earners; low benefits received by retirement scheme members; and a lack of a national retirement scheme. Most of these weaknesses have already been highlighted above. According to the Taylor Committee Report, the system is in dire need of reform to address these weaknesses.<sup>75</sup> The Taylor Committee considers the overarching aims of the Constitution of the Republic of South Africa to be closely related to the following social security goals: healing the injustices of the past, ensuring social justice, improving the quality of life for all South African citizens, and freeing the potential of each citizen. The Report emphasises that the meaning of the constitutional fundamental rights must be determined and understood against the background of past human rights abuses.<sup>76</sup> What this means is that people who did not have access to social security or those who could not have joined social insurance schemes to save for their retirement due to the apartheid laws, should now be given the opportunity to do so. The state must, in ensuring that people are well protected against the social risk of old-age, set up a framework within which people can either as a collective or as individuals come to realise their right of access to social security. The state is in this regard required by section 27(2) of the Constitution to use legislation and other measures to progressively ensure that everyone is covered.<sup>77</sup> Some of the Committee's recommendations have received attention from the government and now form part of recommendations made in the two Discussion Papers on Social and Retirement Funds Reform.<sup>78</sup>

The recommendations of the two Discussion Papers are discussed next.

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<sup>75</sup> At 94-95.

<sup>76</sup> At 49.

<sup>77</sup> At 51.

<sup>78</sup> South Africa's Retirement Fund Reform: First Discussion Paper (op cit note 10) and South Africa's Social Security and Retirement Reform: Second Discussion Papers (op cit note 39).

#### **7.4.2.2 National Treasury: The First Discussion Paper**

The Paper<sup>79</sup> sets out the government's objectives as follows:<sup>80</sup>

- Encourage individuals to make enough savings for retirement;
- Encourage employers to provide for retirement funding as part of the remuneration contract;
- Make retirement funding arrangements affordable;
- Protect pension benefits against the effects of inflation;
- Improve fund governance and protect members' interests; and
- Remove the means-test from state old-age pension.

The Paper highlights a number of problems that exist within the system, which include lack of a cost-efficient vehicle between the old-age grant and private savings appropriate to meet the retirement funding needs of lower and middle-income people and those whose lifetime earnings are largely informal or irregular; and high contribution rates. The Paper proposes the introduction of a National Savings Fund, which will allow irregular contributions, and ensure wide accessibility and affordable administration costs.<sup>81</sup> It will provide employees from both the formal and informal sector with access to an adequate retirement funding vehicle. The Fund will be flexible enough to accommodate the many workers who experience periods of no income.<sup>82</sup> The Fund will be a defined-contribution fund and the contributions will be tax deductible. It will link contributions to investment performance and benefits.

Everyone who has contributed to the fund will receive a pension on retirement, as well as death and disability benefits.<sup>83</sup>

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<sup>79</sup> South Africa's Retirement Fund Reform: First Discussion Paper (Objectives of Retirement Funding Policy) (ibid) at 4.

<sup>80</sup> Idem.

<sup>81</sup> At 20.

<sup>82</sup> At 20-29.

<sup>83</sup> See generally, Fisher-French M "How Social Security Reform Will Work" 05 March 2007 *Mail & Guardian*.

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It is proposed in the Paper that death benefits paid by provident funds must take the form of income payments instead of lump-sum cash payments.<sup>84</sup> The boards of retirement funds will also be required to distribute the member's death benefit in accordance with the member's wishes, as made by the member on the beneficiaries nomination form, and to only disregard the member's wishes where there are compelling reasons to do so.<sup>85</sup> The idea is to remove some of the unnecessary difficulties trustees are faced with when distributing death benefits as per the current provisions of section 37C of the Pension Funds Act.<sup>86</sup> The payment of death benefits as regular income<sup>87</sup> is aimed at protecting the benefits from being depleted within a short space of time. Should the benefit be received as a lump-sum and end up being misused, dependants will be disadvantaged and the benefit shall not have served its intended purpose. The introduction of a national fund will go a long way in addressing the problems that exist with the present system not being able to cater for all the workers in this country. It should be compulsory for all the people who meet a certain salary threshold to contribute to this fund. Only those who can prove membership of other funds providing similar or better benefits may be exempted from participating in the national fund.

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<sup>84</sup> South Africa's Retirement Fund Reform: The First Discussion Paper op cit note 10 at 36.

<sup>85</sup> Ibid at 47.

<sup>86</sup> Idem.

<sup>87</sup> South Africa's Social Security and Retirement Reform: The Second Discussion Paper op cit note 39 at 3, 10, 21 and 24.

**7.4.2.3 National Treasury: The Second Discussion Paper**

The Paper<sup>88</sup> has the following as its basis for reform:<sup>89</sup>

- To ensure a basic standard of living and prevent destitution in old age; and
- To encourage people to save in order to provide for income replacement in the event of death or incapacity, and after retirement from the workplace, through long-term insurance agreements.<sup>90</sup>

The primary reform objective in terms of this Paper is to provide basic income protection for all South Africans through a combination of social assistance and contributory savings and insurance arrangements. The aim is to close the gap between, on the one hand, poverty relief measures and social grants programmes, and on the other hand, the tax incentivised long-term insurance and savings environment, which provides inadequately in certain respects for low-wage and irregular employees.<sup>91</sup>

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<sup>88</sup> At 4.  
<sup>89</sup> At 6.  
<sup>90</sup> *Idem.*  
<sup>91</sup> At 7.

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The Paper proposes a multi-pillar social security system which will consist of the following:<sup>92</sup>

- Social assistance grants, with the means-test either removed or significantly increased, providing a safety-net against poverty in old-age;
- Mandatory participation in a national social security fund, up to an agreed earnings threshold providing basic retirement, unemployment, death, and disability benefits;
- Additional mandatory participation in private occupational or individual retirement funds, for individuals with earnings above the threshold – ensuring coverage and income replacement in retirement; and
- Supplementary voluntary savings permitting individuals to choose how they allocate income over their lifetime.<sup>93</sup>

These will be supported by the following further reforms:<sup>94</sup>

- Administrative reforms to enable the South African Revenue Service (SARS) to maintain individual contributor records and to ensure efficient and reliable benefits administration;
- Complementary reforms of the governance and regulation of the retirement fund industry, which will continue to provide occupational and individual retirement funding arrangements to supplement the basic social security scheme; and
- Reforms to the tax system which will seek to maintain sufficient incentives to provide adequately for retirement, while addressing inequities and complexity in the current system.

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<sup>92</sup> At 3-4.

<sup>93</sup> *Idem.*

<sup>94</sup> At 4.

The proposed multi-pillar approach and the introduction of the national fund are welcome as they will open doors for more people to save for their retirement. If participation is made to be compulsory, then all people who qualify in terms of a salary threshold will be forced to save a certain percentage of their income for their retirement and the higher the number of people who participate, the smaller the number of people who would want support from the government. In this way, almost everyone will be covered and the state pension will be reserved only for those who really need assistance due to reasons that include unemployment or short periods of employment.

**7.4.2.4 National Treasury: Strengthening retirement savings (an overview of proposals announced in the 2012 budget)**

In the 2012 Budget Review, the Minister of Finance provided more details (supplementary notes) on how retirement savings in this country may be strengthened. The Notes address issues such as reducing the costs of retirement products, reforming the annuities market, requiring preservation and portability, introducing a uniform approach to the tax treatment of retirement fund contributions, improving fund governance and the role of trustees, and to introduce tax incentives to promote retirement and other investment products.<sup>95</sup> According to the Notes, high costs negatively affect retirement benefits and retirement returns. The high costs also affect voluntary participation in retirement savings.<sup>96</sup> Members of defined-contribution funds receive protection when they are still contributing but when they retire, that protection diminishes and they are left to the retail market when they retire where they are required to buy annuities with their remaining two-thirds of the retirement benefit.<sup>97</sup>

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<sup>95</sup> See National Treasury "Strengthening Retirement Savings (An overview of proposals announced in the 2012 Budget)" at 3, accessed from [http://www.treasury.gov.za/comm\\_media/press/2012/2012051401.pdf](http://www.treasury.gov.za/comm_media/press/2012/2012051401.pdf), last visited on 05 August 2015.

<sup>96</sup> *Ibid* at 9.

<sup>97</sup> *Ibid* at 12.

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Due to low preservation rates, most people go into retirement with inadequate benefits. It is only 10% of South Africans who are able to retire with adequate benefits and it is because of this that the government is proposing to phase in a preservation requirement over a period of time. The introduction of compulsory preservation would mean that when a person changes jobs, the pension benefit can either be kept in the employer's fund, be moved to a preservation fund, or to the person's new employer's fund. A person will no longer be able to withdraw the benefit as cash. The preservation requirement will, however, be relaxed in cases where a person is unemployed and has received all his or her unemployment insurance benefits. Such a person will be allowed to access up to one-third of the benefit.

The same would apply for persons who can prove a medical need.<sup>98</sup> The Notes further propose the same tax treatment for all retirement fund contributions.<sup>99</sup> As part of improving governance, Pension Funds Circular 130 will be enforceable and trustees will be required to be fit and proper and must have no criminal records to qualify for the position.<sup>100</sup> Trustees will be required to invest the assets of funds in the best interests of the funds' members. The provisions of the Pension Fund Act of 1956 will be extended to public-sector funds and members of these funds will receive similar protection as received by members of private-sector funds.<sup>101</sup> The government is also intending to introduce tax-free savings instruments which will encourage people to save for short- and medium-term needs without being tempted to use their retirement savings.<sup>102</sup>

These are still proposals and it will be very interesting to see how the government will put them into practice.

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<sup>98</sup> At 13.

<sup>99</sup> *Idem.*

<sup>100</sup> At 14-15.

<sup>101</sup> At 15-16.

<sup>102</sup> At 16.

#### **7.4.2.5 National Treasury: Preservation, portability, and governance for retirement funds**

This Paper is one of a series of technical papers that followed the overview paper *Strengthening Retirement Savings*. It looks at the preservation requirement in South Africa's retirement funds and puts forward a number of proposals. The Paper acknowledges the fact that in general South Africans do not save enough for their retirement and that it is only half of the workers in the country that participate in retirement savings.

Proposals for pre-retirement preservation include the following:<sup>103</sup>

##### **Preservation and portability**

- Require retirement funds to create appropriate default preservation funds (to transfer funds into the fund when a person leaves employment, unless the person indicate otherwise);
- Allow fund members access to funds when leaving employment, and put a tax levy on withdrawals above current levels with the aim of discouraging people from making withdrawals;
- Allow withdrawals as indicated above and monitor the situation for a period of three to five years and if there are no improvements, revisit the issue;
- Allow access to a cash lump-sum of up to one-third and require compulsory preservation of the remaining two-third;
- Allow a withdrawal of a certain amount every month when a person cannot find a new job;

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<sup>103</sup> The National Treasury: Preservation, Portability and Governance for Retirement Funds (Technical discussion Paper C for Public Comment) 21 September 2012 at at 3-6, accessed from [http://www.treasury.gov.za/comm\\_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%202012%20.pdf](http://www.treasury.gov.za/comm_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%202012%20.pdf), last visited on 07 September 2015.

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- Allow no withdrawals from growth on existing assets, or new contributions from new or existing employees; and
- Encourage portability between pension funds.

**Provident fund and pension fund alignment**

- Align retirement benefits of provident funds to those of pension and retirement annuity funds to allow members of provident funds to enjoy same tax benefits as members of pension funds;
- Allow those retiring from provident funds to receive cash lump-sum payments, but stop the creation of new provident funds (with the harmonisation of tax treatment of contributions to all retirement funds);
- Preserve vested rights by allowing payment of the value of the fund credit accrued as a lump-sum on retirement on the day of the implementation of new legislation; however, growth on the fund and new contributions to be treated the same way as benefits for pension funds; and
- Allow employees aged 50 and above to take a bigger portion of their retirement savings as a cash lump-sum but subject those who are below 50 at the date of the implementation of legislation to rules applicable to members of pension funds.

The National Treasury's proposals are generally welcome as it is clear that something needs to be done to correct the situation of insufficient benefits at retirement. There is undoubtedly an urgent need to put a restriction on the freedom retirees have of withdrawing the retirement benefits before retirement and using all the money for other things except for their actual purpose, namely income replacement during retirement. It is high time that the government realises that saving for retirement and preservation of funds is never going to bring the envisaged results until participation and preservation are made compulsory through legislation.

With regard to the alignment of provident funds to pension funds, it is submitted that applying the same rules to both pension and provident funds might just mean the system is in fact providing for one form of fund, which is a pension fund, and that brings an argument as to whether there will still be a need for provident funds. There are a number of options the National Treasury has put forward with regard to how to align provident funds to pension funds; some of which might bring some challenges. The option of stopping the creation of provident funds and to allow members who are already in the fund time to exit the fund as they reach retirement age, brings up the question of costs. This will mean as more people exit the fund, fewer people remaining in the fund will have to carry the costs of running the fund. The option that allows the member to receive the value of the credit which had accrued on the day of the implementation of the new legislation as a lump-sum will favour those who are about to retire, and might be unfair to those who still have a long way to go before retirement. It would be fair if all the members were to be given an opportunity to choose what they would prefer to do with their savings. The option to allow those who are 50 years and above to take home a larger portion as a lump-sum cash payment, while those below the age of 50 settle for regular pensions, might face serious constitutional challenges as those below 50 might feel hard done and unfairly discriminated.<sup>104</sup> Further discussions and proposals on the preservation of funds and the treatment of provident funds will follow under paragraphs 7.5.5 and 7.5.6 below.

#### **7.4.3 Observations and lessons from Belgium, the Netherlands, the United Kingdom, and the World Bank**

A determination whether South Africa's occupational retirement security system meets international standards requires a look at what other countries of the world are doing. For this purpose, systems in Belgium, the Netherlands, the United Kingdom, and the approach advocated by the World Bank, should provide a good measure.

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<sup>104</sup> Different types of funds are discussed 6.4 in Ch 6.

These systems are discussed in Chapter 3 of this study and only important findings are referred to below.

#### **7.4.3.1 Belgium**

The pension system in Belgium,<sup>105</sup> similar to South Africa, follows a three-pillar approach. In Belgium it is compulsory for all people to have some form of insurance. Similar to Belgium, South Africa's social security system offers social insurance to workers, and social assistance to those who are not working or those who even though were working, could not contribute to retirement schemes as they earned too little.

The difference, however, is that in South Africa it is not compulsory for a worker to contribute to a social insurance scheme, except where the employer has already established an insurance scheme for its employees and has made it compulsory for the employees to participate in that scheme. Participation is also compulsory where the Minister has issued a sectoral determination to that effect. It is high time that South Africa should also make it compulsory for all workers (or at least from a particular salary threshold) to be insured and to participate in retirement saving. In South Africa not all workers participate in retirement funds as they are mainly for those who qualify as "employees" and who work in the formal sector of the economy – to the exclusion of other categories of workers, which include those employed in the informal sector of the economy and the self-employed.

In Belgium, social insurance is afforded along industry or professional lines and separate pension schemes exist for public employees, private employees, and the self-employed. However, the pension system for the self-employed has been criticised in terms of its legitimacy, adequacy, and financial viability. For example, the system has been found to be based on flat-rate contributions and benefits which

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<sup>105</sup> See a discussion on Belgium's retirement security system under paras 3.3 and 3.6 in Ch 3.

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inevitably generate low minimum protection levels. This has led to a relatively large dependency on social assistance provision, while, on the other hand, the absence of income-related protection necessitated the development of individual retirement provisions in the third pillar (private savings) for those who can afford it.

Occupational defined-benefit pension plans target retirement replacement rates of between 60% and 75%. However, the vast majority of sectoral pension schemes take the form of defined-contribution funds, funded exclusively by employer contributions. On the death of an insured person from occupational injury or disease, members of the family can obtain benefits at rates varying from 15% to 60% of the person's basic wage – depending on their relationship with the deceased.

Belgium's retirement security system affords everyone legal protection against contingencies such as job loss and old-age. Social protection in this country plays a major role in preventing people from falling into poverty. It has been established that high-income earners' pensions are generally insufficient to maintain their former standard of living. However, the fact that Belgium is not included in the group of countries which the Melbourne Mercer Global Pension Index graded, makes it difficult to determine how the country's retirement system fares in the international community. As highlighted above, in South Africa it is presently not compulsory for everyone to join a retirement fund, nor is it compulsory for employers to establish retirement funds except in limited cases such as where that has been made compulsory by the Minister through a sectoral determination. It is high time that South Africa makes it compulsory for employers to establish funds or join umbrella funds in the case of employers who have too small a number of employees to establish a fund of their own. This is very important considering a high number of people who go into retirement with no form of income. One other notable aspect of the Belgian system is the fact that the country has a fund specifically meant for self-employed people. South Africa does not have a fund specifically for this category of workers, but has retirement annuity funds and private savings vehicles which this category of workers can use. It is submitted that South Africa might not need a

special fund for this category of workers if the National Savings Fund is introduced.<sup>106</sup>

Self-employed people who would like to use privately arranged retirement annuity funds can do so, provided they produce evidence that show that they are participating in another fund with similar or better benefits to those offered by the National Savings Fund. In Belgium, pension-related disputes are dealt with by the Office of the Pensions Ombudsman, which is a specialised body that deals with such matters.

#### **7.4.3.2 The Netherlands**

The pension system in the Netherlands<sup>107</sup> also follows a three-pillar approach. All three pillars are taken into account when determining the amount of pension benefit a person must receive at the time of retirement.

The state pension plays a significant support role to the occupational pensions system, which excludes the unemployed and those working in the informal sector. Although there is no statutory obligation for employers to offer a pension scheme to employees, industrial relations agreements have ensured that the majority of employees are covered. The number of people covered by the system is estimated to be more than 90%. This is an indication that high participation is possible if people are willing to save for their retirement without being forced to do so. South Africa, however, presents a different picture compared to the situation in the Netherlands. The situation in South Africa, unlike in the Netherlands, calls for compulsory participation – otherwise achieving a higher level of coverage will remain a dream.

The Netherlands, just like South Africa, has a quasi-mandatory system. Employers who establish pension schemes for their employees make it compulsory for all their

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<sup>106</sup> Idem.

<sup>107</sup> See the discussion of the Netherlands' retirement security system under par 3.4 in Ch 3.

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employees or certain categories of their employees to participate in those funds. Saving for retirement is encouraged through tax relief. Most pensions take the form of defined-benefit schemes.<sup>108</sup>

Even though occupational pension plans promise to replace at least 75% of the retiree's final earnings, it is reported that most of the pension plans have been able to replace up to 100% of final earnings through defined-benefit plans. This is a sign of a good pension system. Lump-sum cash payments are not allowed, unless the benefit amount is very small. This is something very important which South Africa can take from the Dutch system. It is compulsory for members of a defined-contribution plan to buy an annuity when they retire at the age of 65. Thus the retirement age is higher than in South Africa, where it is generally from the age of 60. Pension rights in the Netherlands are transferred in full when a person changes jobs. A person can also choose to leave the pension with the previous employer. This is another good element of the system that aims to provide adequate protection to participants which South Africa should take note of. Interestingly, the Netherlands, just like South Africa, has categories of employees who are excluded by the system, such as those in the informal sector.

Unlike Belgium, the United Kingdom, and South Africa, the Netherlands system does not have a specialised tribunal or forum that specifically deals with pension or social security-related complaints or disputes. The Melbourne Mercer Global Pension Index 2014 Report gave the Netherlands a "B+" grade, which means the country has a sound system with good features, but it has some shortcomings differentiating it from an A-grade system<sup>109</sup>. The Melbourne Mercer Global Pension Index rated the

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<sup>108</sup> *Idem.*

<sup>109</sup> An "A"-grade system is a first-class and robust retirement income system that delivers good benefits, is sustainable, and has a high level of integrity. See Melbourne Mercer Global Pension Index 2014 Report op cit note 47 at 7.

adequacy sub-index<sup>110</sup> for the Netherlands to be at 75%, the sustainability sub-index at 76%, and the integrity sub-index at 90%.<sup>111</sup>

What South Africa needs to do in comparison to the Netherlands is to come up with a plan on how to extend coverage to people who are currently excluded by the system and to ensure that benefits receive adequate protection through the introduction of compulsory preservation or transfer of funds.

#### **7.4.3.3 The United Kingdom**

Even though the United Kingdom,<sup>112</sup> just like Belgium, the Netherlands, and South Africa, follows a three-pillar approach, its system is quite complex as compared to the other three countries. The difference between South Africa's system and that of the United Kingdom is that the latter provides a variety of schemes under the individual three pillars and this makes the system quite complicated.

A unique feature of the United Kingdom pension system is the possibility to contract-out or opt-out of the additional state pension. This requires coverage by an occupational or personal pension scheme providing equivalent or better benefits than the earnings-related component of the statutory scheme. Occupational pensions can be defined-benefit or defined-contribution schemes.<sup>113</sup> The system provides protection to those not in paid work and those who earn below the lower-earnings limit. It allows payment of lump-sum cash benefits upon a member's request and in the case of death or survivors' benefits, but at the discretion of

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<sup>110</sup> Melbourne Mercer Global Pension Index 2014 Report (ibid) at 72. The adequacy sub-index is determined by considering the base level of income provided, as well as the net replacement rate for a median-income earner; the sustainability sub-index is determined by considering several measures that affect the sustainability of current programs; the integrity sub-index is determined by considering the integrity of the overall pension system, but focuses more on the private sector system. It considers the role of regulation and governance, the protection provided to participants from a range of risks, and the level of communication provided to members (at 13-14).

<sup>111</sup> Ibid at 72-74.

<sup>112</sup> See the discussion of the United Kingdom's retirement security system under par 3.5 in Ch 3.

<sup>113</sup> Idem.

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trustees. Pension plans operate as trusts and are regulated by trust law. Benefits are payable either on the death of a member, or on the member's retirement – whichever comes first. Members who have completed more than two years of service and who leave the scheme can either preserve the benefit or transfer their accrued benefit to another pension plan. In other words, for this category of members it is not compulsory to transfer or preserve the benefit. This is understandable as contributions of two years and less will not make much of a difference.

The problem will be where a person changes jobs every two years. This means such a person will never be able to accumulate enough savings to build a retirement benefit. Almost all the plans have an opt out option as long as a person can produce evidence that he or she has transferred to another suitable plan that offers similar or better benefits than the one he or she was participating in. The option to opt-out is what makes the United Kingdom pension system unique from systems of other countries of the world. What this means is that even though it is mandatory to join some of the pension schemes, workers still have a choice to join alternative pension schemes organised at company level or even individual funds.

The Melbourne Mercer Global Pension Index 2014 Report gave the United Kingdom a "B"-grade rating. The United Kingdom is placed just above countries such as Ireland, the United States of America, Poland, Brazil, Germany, Singapore, and France. It has a system that has some good features, but also has major risks and shortcomings that need to be addressed.<sup>114</sup>

Even though the system is a bit complex, it is rated by the Melbourne Mercer Global Pension Index as among the best in the world. Its adequacy sub-index has been scored at almost 70%, the sustainability sub-index at 52%, and the integrity sub-index at 80%.<sup>115</sup> The United Kingdom is one of the few European countries which are not facing a serious pension crisis because of the initiatives that the government

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<sup>114</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 47 at 7.

<sup>115</sup> Ibid at 72-74.

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has taken since the 1980s to prevent the crisis from developing. However, this does not mean the system is without shortcomings. One interesting element of the system is that it is compulsory for workers to be covered, but once covered; a worker is allowed to opt-out of the scheme if they can prove that they have adequate cover somewhere else. This is a unique feature which is there to make sure that every worker has some form of protection and also that workers cannot just exit the funds as and when they wish to do so.

The system allows workers freedom of choice. It has, however, been discovered that while the system was able to provide reasonable pension income, it was nevertheless unable to deliver a retirement free from social exclusion for most of the citizens. The state provision failed to lift all individuals out of poverty because not all were protected by the first pillar against periods of out of paid work.

The other thing is that where entitlement was secured, pensions were too low. The private occupational pension also had its shortcomings as its variability of coverage between employment sectors and employers of different sizes meant that some sectors such as the self-employed, small business employment, and informal work were rarely covered, creating systematic poverty risks for the whole group of workers. With regard to private savings, the findings indicated that they were unaffordable for some, while for others it was not clear that they represented a good investment,<sup>116</sup> hence the system has undergone several reform processes.

It is high time that South Africa must make participation for all workers who can afford to make contributions to retirement schemes compulsory. The government must also give the workers freedom of choice by making it possible for them to opt-out of some of the funds they have joined (in this case, the National Savings Fund, if introduced) in instances where there are other funds which provide better benefits. The introduction of mandatory participation either in a public or private pension

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<sup>116</sup> Discussed under par 3.5 in Ch 3.

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scheme will increase the number of workers who participate in retirement savings schemes in South Africa, as not only employers will be obliged to establish retirement schemes for their employees but employees themselves will also be forced by law to join funds such as the proposed National Savings Fund.

The United Kingdom has, in its effort to encourage the culture of saving among workers, published a White Paper on "Security in Retirement: Towards a New Pensions System" with which government intends to improve the country's pension system to, among other things, make it strong, sustainable, workable, and affordable.<sup>117</sup> The government has also, starting from 2012, introduced the Pension Act of 2008, which introduced automatic enrolments into pension schemes. The Pension Act established the National Employment Savings Trust (NEST) and the new mandatory private pension for workers. This National Savings Trust will take in workers of any employer regardless of the size of the business or workforce. All companies are now required to automatically enrol their employees to this scheme. The scheme allows workers to opt-out should they decide to join other schemes that offer similar or better protection.<sup>118</sup> This move will see millions of workers in the United Kingdom having some form of protection when they retire. This is another approach that South Africa should look into to enforce participation.

The United Kingdom has the Office of the Pensions Ombudsman that handles pension-related disputes, which is a specialised office for such matters. This office works in the same way as the Office of the Pension Funds Adjudicator in South Africa.

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<sup>117</sup> Discussed under par 3.5.2.4 in Ch 3.

<sup>118</sup> Discussed under par 3.5.2.2.2 in Ch 3.

#### **7.4.3.4 The World Bank's approach**

The World Bank wants people to be self-sufficient. It encourages a multi-pillar approach, comprising a mandatory publicly managed pillar that aims to be redistributive in nature; mandatory personal and occupational plans that are fully funded and privately managed but publicly regulated; and a voluntary pillar also aimed at savings (personal savings and occupational plans). This approach emphasises saving that comes through both public and private management.

The World Bank's view is that a mandatory pillar that is privately managed is ideally suited for handling people's savings, but that a publicly managed tax-financed pillar is needed for redistribution, and that a voluntary third pillar is needed by people who want additional old-age security.<sup>119</sup> The approach followed by South Africa is not far from what the World Bank is advocating, except that South Africa does not have a public fund. A public or national fund is being proposed and is likely to be introduced in the near future.

#### **7.4.4 Lessons and obligations from international instruments**

The right to social security is an internationally recognised human right. South Africa is a constitutional democratic country which is committed to international laws and standards.<sup>120</sup> This is apparent from the inclusion of the Bill of Rights in Chapter 2 of the Constitution, the inclusion of provisions that bind South Africa to approach international law in a certain way, and the fact that South Africa has already ratified a number of international instruments. In terms of section 39(1)(b) of the Constitution, South Africa is also bound by international instruments not yet ratified by Parliament. International standards help member states by guiding and shaping national legislation and reforms. Instruments that have been ratified provide guarantees up to a certain level.

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<sup>119</sup> Discussed under par 3.2.2.3 in Ch 3.

<sup>120</sup> International law and the role it plays in the development of the right to social and retirement security is discussed in Ch 2.

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International law is important for South Africa because most of the social security instruments are couched as standards which provide the benchmark against which the country's policies and legislation can be measured. The question here will be whether the South African retirement security system meets the standards set by international instruments on social security and retirement income provision.

This determination has to be made considering the guarantee made in section 27 of the Constitution of the Republic of South Africa to give everyone access to social security, and the obligation the state has to take reasonable and other measures, within its available resources, to achieve the progressive realisation of the right to access to social security for those who do not yet have access. Various instruments were discussed in Chapter 2 and here reference will only be made to the most relevant ones:

- Article 22 of the Universal Declaration of Human Rights of 1948 states that everyone, as a member of society, has the right to social security and is entitled to the realisation of this right through national effort and international cooperation, and in accordance with the resources of each state. This article has some elements that are found in section 27(2) of the Constitution; namely the duty to ensure realisation of the right through national effort, in this case reasonable legislative and other measures, and within available resources. The Declaration is, however, not binding on governments but it has moral and political authority.
  
- The International Covenant on Economic, Social and Cultural Rights, 1966, recognises everyone's right to social security and it requires member states to guarantee an adequate standard of living to all.<sup>121</sup> According to the Committee on Economic, Social and Cultural Rights, the concept of "social security" implicitly covers all the risks involved in the loss of means of subsistence for

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<sup>121</sup> Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights of 1966, respectively.

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reasons beyond a person's control.<sup>122</sup> State parties are required to take appropriate measures to establish regimes of compulsory old-age insurance.<sup>123</sup>

The General Comment obliges member states to adopt legislative measures, national strategies, and plans of action to realise the right to social security.<sup>124</sup> This is contained in section 27(2) of the Constitution of the Republic of South Africa, which requires the state to take reasonable legislative and other measures, within its available resources, to progressively realise the right of access to social security. Thus, the measures taken by the state will be acceptable if they are reasonable. This was interpreted by the Constitutional Court in the case of *Grootboom*<sup>125</sup> to mean that the measures taken must be reasonable and effective both in their design and implementation. South Africa has ratified this Convention on 18 January 2015 and will now have to align its system towards what is required by the Convention. By ratifying this Covenant, South Africa is now legally bound to promote the realisation of economic, social, and cultural rights covered by the Convention.

- The Social Security (Minimum Standards) Convention, 1952, provides a list of contingencies which must be covered by every social security system, and it requires all member states to cover at least three of those risks.<sup>126</sup> South Africa has social insurance arrangements which cover all those contingencies, including old-age. This means that the country has surpassed the standard set by the Convention in this regard. The Convention further lists the conditions a national social security scheme must meet in order to qualify as an acceptable system for the purpose of ratifying the Convention.<sup>127</sup> The

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<sup>122</sup> The Committee on Economic, Social and Cultural Rights General Comment 6 – The Economic, Social and Cultural Rights of Older Persons (Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights), Thirteenth Session, 1995 at par 26.

<sup>123</sup> At par 27.

<sup>124</sup> At paras 67 and 68.

<sup>125</sup> See the case of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 at par 42.

<sup>126</sup> Article 2 Social Security (Minimum Standards) Convention, 1952.

<sup>127</sup> Articles 71 & 72.

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Convention wants, among other things, for the benefits paid to be periodical payments, the benefit to replace previous income to a certain extent or establish a guaranteed minimum, and for the state to carry the general responsibility for due provision of benefits and proper administration of social security institutions.

South Africa has pension funds that provide for periodical payments, and the system provides a framework within which people are able to buy annuities that will provide them with regular income in retirement. The system is also regulated at the level of international standards, as confirmed by the integrity rating of a "B+" given to South Africa in the Mercer Pension Index 2014 Report when it comes to the administration and governance of its retirement funds.<sup>128</sup> Article 26 of the Convention provides that the contingency covered must be survival beyond a prescribed age, which shall not be more than 65 years or a higher age as will be determined by competent authority taking into account the working ability of elderly people in the country concerned. In South Africa, pension funds generally pay retirement benefits from the age of 60, which is below the age of 65 set by the Convention. In terms of article 27 of the Convention, coverage for old-age benefits must not be less than 50% of prescribed classes of employees or not less than 20% of all residents from prescribed classes of the economically active population of the member's state. In this regard, the Convention sets the targets of coverage very low. South Africa has not done badly in this regard as coverage in the formal sector of the economy has been reported to be between 66% and 84%,<sup>129</sup> which is considerably high considering that participation is still not compulsory. This is the fact even though this study has shown that coverage is still very low regarding the atypically employed and those employed in the informal sector. The levels of benefits are set out in articles 65, 66, and 67 of the Convention. Interestingly, South Africa has not yet ratified this important Convention.

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<sup>128</sup> Melbourne Mercer Global Pension Index 2014 Report op cit note 47 at 6-8.

<sup>129</sup> South Africa Retirement Fund Reform: First Discussion Paper op cit note 10 at 13.

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- The Invalidity, Old-Age and Survivors' Benefits Convention of 1967 requires each member state for which Part III (old-age benefit) of the Convention is in force to secure to the persons protected the provision of an old-age benefit, which covers the contingency for survival beyond a prescribed age, which shall not be more than 65 years or such higher age as may be fixed by the competent authority with due regard to certain factors.<sup>130</sup> As indicated above, most retirement funds in this country pay retirement benefits from the age of 60 years. The Convention requires the benefit to be in the form of periodical payments.<sup>131</sup> This Convention is in favour of employees receiving retirement benefits in the form of pensions instead of lump-sum payments. A person who receives periodical payments is better off than one who receives a lump-sum and faces a high risk of squandering the money and being left with nothing in their retirement. Thus, periodical pension payments promote social security objectives better than lump-sum cash payments.<sup>132</sup> South Africa has not yet ratified this important Convention. However, what is provided for in this Convention is generally also covered by the Social Security (Minimum Standards) Convention. As indicated above, South Africa has already done more than what the Convention requires.
  
- The International Labour Organisation Income Security Recommendation 67 of 1944, even though not binding, provides guidelines which are very important for reforms in South Africa. It promotes universal coverage through social assistance,<sup>133</sup> and further provides that social insurance should afford protection in the contingencies to which all employed and self-employed persons, together with their dependants, are exposed.<sup>134</sup>

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<sup>130</sup> Article 14 and 15 of the Invalidity, Old-Age and Survivors' Benefits Convention of 1967.

<sup>131</sup> Article 17.

<sup>132</sup> Discussed under par 6.4 in Ch 6.

<sup>133</sup> At paras 28-30 of Income Security Recommendation 67 of 1944.

<sup>134</sup> At par 17.

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In terms of this Recommendation, the income security schemes should relieve want and prevent destitution by restoring, up to a reasonable level, income which is lost by reason of inability to work or to obtain remunerative work by reason of the death of a breadwinner.<sup>135</sup>

- Other instruments that have important provisions on social security and retirement provision are the Southern African Development Community (SADC) instruments, which are relatively new, namely the SADC Code of Social Security and SADC Charter of Fundamental Social Rights. The SADC Code gives member states the duty to maintain their social security systems at a satisfactory level of at least equal to that required for the ratification of ILO Convention 102. It further requires each member state to progressively raise its system of social security to a higher level, which includes achieving meaningful coverage of everyone under the system – bearing in mind the realities and level of development in the particular member state.<sup>136</sup> In terms of article 10, dealing with retirement and old-age, member states should aim to create an enabling environment that provides universal coverage for old people through social assistance, social insurance, or social allowances. The SADC Charter, on the other hand, promotes adequate social protection in the region.<sup>137</sup>

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<sup>135</sup> At par 1.

<sup>136</sup> Article 5 of the SADC Code on Social Security, 2008.

<sup>137</sup> Article 10 of the SADC Charter of Fundamental Social Rights, 2003.

International instruments are without a doubt important in the development of the social security systems of the countries of the world. Even though most of these instruments generally lack serious enforcement or punitive measures, they nevertheless play a significant role as they guide state parties in their effort to provide social security protection to their citizens. Even though an analysis of these instruments has shown that South Africa has done very well in certain respects, it should be accepted that weaknesses that still exist in the system are an indication that the country still has a long way to go before the promise made in section 27 that everyone has the right of access to social security will be realised.

## **7.5 RECOMMENDATIONS FOR EXTENDING COVERAGE AND BENEFITS**

### **7.5.1 Overview**

The nature of South Africa's social and retirement security system is such that only a certain section of workers is protected as the formal system offers protection only to those employed in the formal sector and who qualify as employees. The system also does not provide adequate protection of retirement benefits.

A sound retirement security system should at least have the following elements:<sup>138</sup>

- *Comprehensiveness*: the system must provide comprehensive coverage against all contingencies.
- *Universality*: the system must provide access to all those in need of protection without any form of discrimination (for example on the basis of, race, sex, or nationality).
- *Adequacy*: the level of benefits provided must be adequate.

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<sup>138</sup> Human Rights Resource Centre of the University of Minnesota "Circle of Rights: Economic and Cultural Rights Activism: A Training Resource, Module 11, Social Security as a Human Right", 2000 (contents of section 5) accessed from <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module11.htm>, last visited on 08 December 2014.

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- *Effective remedies*: there must be access to speedy, affordable, and effective legal remedies for people aggrieved by adverse legal rules or administrative decisions.

The pointers below are proposed by this study for policy consideration towards achieving comprehensive coverage and adequate benefits.

**KEY POLICY ISSUES**

- Extension of coverage to all categories of workers (a move towards universal coverage);
- Improvement of the level of protection (adequate benefits);
- Access to adequate,<sup>139</sup> sustainable,<sup>140</sup> and affordable<sup>141</sup> retirement schemes;
- Introduction of mandatory participation;
- Introduction of mandatory preservation; and
- A different approach of dealing with provident funds.

These issues are addressed by the proposals made below.

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<sup>139</sup> The system will be considered “adequate” if it provides benefits that are able to protect participating members against poverty.

<sup>140</sup> The system will be considered “sustainable” if it is financially sound and can be maintained over a long period.

<sup>141</sup> The system will be considered “affordable” if it is within the financial capacity of the workers.

### **7.5.2 A broader safety-net**

Section 27 of the Constitution of the Republic of South Africa recognises social security as a fundamental human right.<sup>142</sup> Social security can be considered as a concept that should be distinguished from social protection. Social protection is a wider term and provides broader, more basic, and more comprehensive protection than social security, which in a country such as South Africa focuses primarily on employment-associated risks.<sup>143</sup> Social protection aims to extend protection to all the members of the community, regardless of whether the person is employed or not and whether the person is employed in the formal or informal sector. It is more universal in approach.<sup>144</sup>

Considering South Africa's political history of discriminatory laws and policies, the adverse results thereof, and the proposals made by the Taylor Committee for the introduction of a comprehensive social security system, it should be accepted that this is the approach the country must take.

In order to achieve this, South Africa must, among other things, ensure that:

- It progressively works towards achieving universal coverage to protect everyone;<sup>145</sup>
- There are savings vehicles that are accessible to all<sup>146</sup> and which provide adequate replacement income;
- An environment for the growth of other supplementary retirement savings vehicles is created; and

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<sup>142</sup> Section 27(1)(c) affords everyone the right to access to social security, including if they are unable to support themselves and their dependants, and appropriate social assistance.

<sup>143</sup> Olivier et al *Introduction to Social Security* op cit note 27 at 11.

<sup>144</sup> Idem.

<sup>145</sup> Section 27(2) of the Constitution obliges the state to take reasonable and other measures, within its available resources, to achieve the progressive realisation of the right to have access to social security. The system is universal if it gives everyone access regardless of the employment sector in which the person is employed.

<sup>146</sup> Section 27(1)(c) of the Constitution.

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- The system must have strict rules to enforce participation, preservation, and annuitisation.

South Africa's vision with regard to the provision of social security is to create a system which will facilitate the development of human capacity and self-reliance within a caring and enabling socio-economic environment<sup>147</sup> – the approach which is being advocated by the World Bank. However, the government should realise that this can only be achieved if the majority of people are covered and also if the system has ways of pooling people into available savings arrangements. Under the Agenda for Action, the White Paper has universal access among its aims, and the government promises to introduce legislation and policies that will facilitate universal access to social welfare services and social security benefits in an enabling environment.<sup>148</sup>

These objectives are most welcome as they demonstrate South Africa's commitment to ensuring that everyone in the country is adequately covered and protected. The Constitution of the Republic of South Africa, 1996, should be commended for providing the basis for comprehensive social protection in that section 27(1)(c) gives everyone the right to access to social security, and if they are not able to support themselves and their dependants, the right to appropriate social assistance. This shows a move away from a limited social security approach in that both social assistance and social insurance form part of the right guaranteed by section 27 of the Constitution. It should be accepted that factors such as the high level of poverty, the high level of unemployment, the current exclusions, the rise in informal employment, the nature of constitutional imperatives with regards to the right to social security, equality and equal treatment for all, and the promotion and respect

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<sup>147</sup> Item 1 under Chapter 2 of the White Paper for Social Development in South Africa.

<sup>148</sup> Item 25 under Chapter 2 of the White Paper.

for human dignity<sup>149</sup> no longer allow a narrow approach to social security provision in this country.

South Africa's efforts to work towards providing comprehensive social protection should be influenced by international law which promotes everyone's right to social security. South Africa is in this regard also bound by the Constitutional provisions on how it should deal with international law. The relevant provision in this regard will be section 39(1) of the Constitution, which requires our courts, tribunals, or forums to consider international law when interpreting the Bill of Rights.

### **7.5.3 The state old-age pension**

At the moment, the state old-age pension plays a huge role in providing for people who were not able to make savings for their retirement and who satisfy all the requirements, including the means-test which ensures that only those who are poor are targeted. The means-test should not be abolished as social assistance should only be provided to those people who really need it. Removing the means-test will certainly increase the burden on the government's social security expenditure.<sup>150</sup> Social assistance should only be for people who reach old-age and have never been employed in their life or were employed but with low salaries that did not allow them to contribute to retirement savings.

### **7.5.4 A mandatory contributory (public and private) system for all those who are working**

South Africa has a well-developed private retirement security system by world standards. However, the system does not cater for all those who need coverage as it

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<sup>149</sup> Olivier et al *Introduction to Social Security* op cit note 27 at 15-16; see also the Taylor Committee Report op cit note 72 at 40-41, where the Committee suggests that a wider multi-purpose notion of comprehensive social protection be adopted which will have certain merits for South Africa, as it incorporates developmental strategies and programmes which are more appropriate for a developing country such as South Africa.

<sup>150</sup> Discussed under par 5.4.1 in Ch 5.

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focuses only on those who qualify as employees, and those who are employed in the formal sector of the economy. A public fund which would have accommodated everyone was never introduced, and in that way the system has created a gap between those who are in the formal sector and those in the informal sector and the self-employed. It is submitted that it is high time that a public fund should be introduced. Once established, it should be compulsory for every worker earning above a certain threshold to participate in the fund, unless such a person can produce evidence that he or she is already participating in another appropriate fund; for example, one established by the employer or industry. Thus, workers who are not members of any fund will be obliged to join the public fund, and those who are members of funds which do not provide satisfactory benefits or coverage, should be allowed to opt-out of those funds to join the public fund where the public fund provides better protection and adequate benefits as compared to the those funds. The government will be responsible to create the administrative framework for this fund. The introduction of a public fund will go a long way in ensuring that people save their money for their retirement. The aim of such a reform should be to assist in creating a comprehensive social security framework as proposed by the Taylor Committee, in which individuals are encouraged to save for income support in their old-age.

It should also be compulsory for employers to establish retirement funds for their employees in return for tax relief. In the case of employers who for any reason cannot establish such funds for their workers, it should be compulsory for such employers to make arrangements for their workers to have access to a private pension scheme similar to the one in the United Kingdom. This scheme will be managed by the private industry but regulated by the government. It will take the form of a contributory plan providing a minimum benefit at exit. The scheme will pay pension, and death and disability benefits. Employees of the employer or industry which establishes a fund must be automatically enrolled into those funds or into employer-arranged private pension schemes. In other words, employers will have the responsibility to ensure that their employees have their own fund or that other arrangements are made for them, and where it is not possible to provide the latter,

that the workers participate in the public fund. There must be procedures to report on this compliance with the Department of Labour and employers which comply should qualify for tax relief.

The self-employed and independent contractors should also be required to join the public fund and may only be exempted upon producing evidence that they are participating in other private funds and that the level of contributions and benefits in those funds meets the required standard. This should be linked to the SARS system for proper monitoring. The system should allow an option to opt-out from the national fund (the second pillar) and the second tier of the third pillar (as proposed in the model below) as is the case in the United Kingdom, in order to give workers a choice to join funds that they think will provide them with better service and benefits.

If South Africa wants to improve coverage and the level of benefits provided by the system, compulsory participation is the way to go as a voluntary system has clearly not been able to attract people to save. A voluntary system is characterised by some unscrupulous and sporadic savings, and some people might postpone participation indefinitely.

On the other hand, mandatory participation will call for a sound retirement security framework. People will also need more awareness about different retirement savings vehicles and their operations in order to make informed decisions about saving for their retirement.

#### **7.5.5 The mandatory preservation of retirement benefits**

One of the causes of insufficient benefits at the time of retirement is leakages that are allowed to occur prior to the actual retirement date. People who change<sup>151</sup> or

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<sup>151</sup> It is averaged that a person can change jobs between five and seven times in his or her lifetime. See in this regard Sanlam's 2012 Benchmark Survey at 9 accessed from <http://www.sanlambenchmark.co.za/webadmin/include/content/Benchmark%20Survey%202012.pdf>, last visited on 07 September 2015 (hereafter, Sanlam's 2012 Benchmark Survey); and Sanlam's 2011

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lose jobs at some stage in their life withdraw the benefit and use it for other purposes. This affects the ultimate benefit a person will receive at retirement. People who resign because they have found another or better job somewhere else should not be allowed to withdraw the benefit and use it for other purposes as the benefit is meant for income replacement in retirement. It should be mandatory for such people to either transfer the whole amount to the fund of the new employer, or to keep it in a preservation fund as it is the case in the Netherlands. In the United Kingdom, members who have completed more than two years of service and who leave the scheme are required to either preserve the benefit or transfer it to another pension plan. South Africa should follow suit by putting in place laws that will enforce the preservation of retirement funds.

This benefit should only be made available to the person when he or she reaches the age of retirement or at the age of 55 as with benefits paid by retirement annuity funds. It can only be in cases where the amount of the benefit is below a certain level that a person may be allowed to withdraw the whole benefit. A person who has lost his or her job should rely on unemployment benefits for survival. It should be in special circumstances such as where a person has reached a certain age, for example between the age of 50 and 55, and in circumstances where the chances of employment are limited, that a withdrawal is permitted. A person should only be allowed to withdraw a certain portion of the benefit if he or she goes for a certain number of months without finding a job and has exhausted his or her unemployment benefits. This also calls for a need to link unemployment benefits to retirement benefits. A person who goes for a certain number of months without finding a job can be allowed a maximum of two withdrawals from a preservation fund and up to a certain percentage, or can be given regular income until he or she finds another job and provided such a person produce evidence that he or she is actively looking for employment and that he or she is registered as a jobseeker with the Department of Labour. Regular pensions should be paid where the benefit is above a certain level,

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otherwise a cash lump-sum should be paid to that person. In this way, it will be difficult for people to access retirement benefits before they reach their retirement age, and this will go a long way in protecting benefits from being depleted way before the time and purpose they are meant for arrives.

No retirement benefit and other benefits associated with it must be paid as cash lump-sums before the date of retirement, except in special circumstances since leakages defeat the objective of retirement funds. In the case of spouses and dependants of deceased members, both divorce benefits and death benefits should not be paid as cash, unless in cases where the benefit is below a certain level and therefore too little to be paid as a regular pension. Only part of the benefit should be paid in cash where the amount is above a certain level and the rest must be paid as regular pensions in the case of dependants and spouses who do not have any other form of income.

However, spouses who are working and therefore have a source of income can be given a certain percentage of the benefit and the remaining benefit must be preserved to serve as a pension when the spouse reaches retirement age.<sup>152</sup> It should also be accepted as correctly submitted by Liebenberg and Tilley<sup>153</sup> that the preservation of pension benefits will only work if other social security mechanisms are improved. These would include improved protection and the provision for unemployment benefits. The longer people stay unemployed, the higher the chances of them being tempted or forced by economic hardships to use retirement benefits as income. This is the reason why there is a need for alternative insurance protection, which is in this case the Unemployment Insurance Scheme. The Unemployment Insurance Scheme should provide for improved benefits and for longer periods – taking into account the level of unemployment and poverty in South Africa. It cannot

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<sup>152</sup> See generally Deloitte “National Social Security Reform: Ensuring Nest Eggs Don’t Flee the Coop” 2011, accessed from [http://www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/National\\_Social\\_Security\\_Reform.pdf](http://www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/National_Social_Security_Reform.pdf), last visited 08 December 2014.

<sup>153</sup> Liebenberg S and Tilley A “Poverty and Inequality Hearings Social Security Theme” (Background paper for South African national Non-Governmental Organisation (SANGOCO, the South African Human Rights Commission and the Commission for Gender Equality), 28 April 1998 at 26.

be denied that the level of unemployment in South Africa is a huge contributor to the low level of savings in this country. If the number of people who are employed in this country can increase, then the country will have more people saving for retirement. In its 2012 Benchmark Survey, Sanlam (Employee Benefits) reports that the majority of the respondents in the pension industry showed more concern about job security either due to previous or future threats of retrenchments. The Survey mentions issues of concern relating to factors that might directly or indirectly affect retirement savings and/or preservation of funds; namely the fact that many of the respondents were cash-strapped and finding it difficult to make ends meet, many led busy and hectic lifestyles, and there were also age and health concerns and high stress levels due to issues of finances.<sup>154</sup> All these, however, should not prevent the government from introducing compulsory preservation as the benefits of having mandatory preservation outweigh those of not having it at all.

In the 2009 Benchmark Survey, Sanlam reported a high number of respondents who voted in favour of the preservation of their benefits.<sup>155</sup> This is an indication that there is enthusiasm for mandatory preservation.

#### **7.5.6 Restricting participation in provident funds and compulsory annuitisation of benefits**

It should be accepted that for social security purposes, pension funds offer much better protection than provident funds, as provident funds have more disadvantages than advantages from a social security point of view. A person who receives a lump-sum payment is likely to immediately use all the money on other things and be left with nothing for the remaining years of his or her life in retirement. This cannot be good considering the primary objectives of retirement funds. For this reason, provident funds should only be used to supplement pension funds. Thus, workers

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<sup>154</sup> Sanlam's 2012 Benchmark Survey op cit note 153 at 9.

<sup>155</sup> Sanlam 2009 Benchmark Survey at 9 accessed from [http://www.sanlambenchmark.co.za/webadmin/include/content/Sanlam\\_EB\\_Research\\_Survey\\_2009.pdf](http://www.sanlambenchmark.co.za/webadmin/include/content/Sanlam_EB_Research_Survey_2009.pdf), last visited on 07 September 2015.

should not be allowed to join only provident funds or to opt-out of pension funds to join provident funds. A worker may either belong to a pension fund and a provident fund, or a public fund and a provident fund, but not only a provident fund. Alternatively, there should be compulsory annuitisation of a certain percentage of the benefit a person receives from a provident fund. This will obviously align provident funds towards pension funds, which then raises the question of whether it will still be necessary to have provident funds. Better protection of benefits received from provident funds is required, otherwise provident funds will continue to be like ordinary savings vehicles provided by financial institutions, except for the different application of tax rules.

### **7.5.7 The level of benefits**

Retirement funds in South Africa should target replacement values at not less than 75% of a person's final salary for those who belong to defined-benefits funds. It was reported by the National Treasury in its Second Discussion Paper for Retirement Reform that, according to the survey undertaken by Alexander Forbes,<sup>156</sup> the majority of retirement fund members receive retirement income that was less than 28% of their pre-retirement income. This is a worrying factor and does not offer much hope that benefits can be targeted at 75% of one's final salary; not to mention anything closer to 100% replacement value, which has been achieved in the Netherlands. Retirement funds in this country are, however, targeting the replacement value in the case of benefits that include death and disability benefits of up to 70%.<sup>157</sup>

Adequate benefits will ensure that a person is able to maintain the same standard of living he or she enjoyed before retirement. The mandatory retirement arrangements should also incorporate provisions for post-retirement medical scheme contributions,

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<sup>156</sup> South Africa's Social Security and Retirement Reform: Second Discussion Paper op cit note 39 at 5 (in reference to Member Watch (Issues 1), Alexander Forbes 2006).

<sup>157</sup> See the discussion under par 6.6.4.3 in Ch 6.

as well as other risks such as death and disability, where possible. This will ensure that retirement benefits continue to be used for the purpose which they are meant for. Benefits received by dependants in case a member of the fund dies should also be adequate, as insufficient benefits will not provide adequate protection and the dependants of the deceased may have to turn to the government for support.

### **7.5.8 Minimum contribution rates**

Contributions to retirement funds must be at a rate that will push benefits to an acceptable level. It is stated in the National Treasury's First Discussion Paper for Retirement Reform that the World Bank encourages contribution rates of between 10% and 13% of a worker's total annual salary.<sup>158</sup> On the other hand, it is reported in the Second Discussion Paper for Retirement Reform that international practice suggests a higher rate of between 13% and 18% after tax, which comes to between 11% and 15% of a person's salary before tax.<sup>159</sup> It should be accepted that contribution rates which average at 16%, as it is the case in South Africa, are adequate by international standards.

### **7.5.9 The capping of administrative costs**

The issue of high administrative costs charged by administrators of private pension schemes has been raised many times by various Commissions and commentators. According to the Notes of the National Treasury on Strengthening Retirement Savings (an overview of proposals announced in the 2012 budget), high costs negatively affect retirement benefits. They also affect voluntary participation in retirement savings.<sup>160</sup> Thus, it is upon the government through its regulatory reforms to control costs that fund administrators can charge. For example, regulation can be

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<sup>158</sup> South Africa's Retirement Fund Reform: The First Discussion Paper op cit note 10 at 13.

<sup>159</sup> South Africa's Social Security and Retirement Reform: The Second Discussion Paper op cit note 39 at 15.

<sup>160</sup> See National Treasury "Strengthening Retirement Savings (An overview of proposals announced in the 2012 Budget)" op cit note 95 at 3.

in the form of providing a ceiling above which administrators cannot charge administrative costs. This will help in ensuring that more money in the form of benefits goes to the members of retirement schemes instead of to administrators.

#### **7.5.10 Voluntary savings**

Individual private savings<sup>161</sup> is another important component of a comprehensive social protection scheme, where people realise the importance of saving for their retirement and make efforts to join private savings schemes or retirement annuity funds offered by financial or insurance institutions.

While occupational schemes are quasi-mandatory, private savings are voluntary and people who decide to use them can also decide how much they want to contribute upon receiving their risk assessment results and advice from financial advisors.

People who are already members of retirement funds use retirement annuity schemes or other types of savings schemes to supplement their occupational pension or the provident fund benefits they will receive when they retire. These savings vehicles are also available to those who are not formally employed; for example those in informal employment and the self-employed.

The obligation placed by section 27(2) of the Constitution on the government includes the adoption of enabling strategies to assist people to gain access to the right to social security through their own endeavours and initiatives,<sup>162</sup> and retirement annuities and other savings vehicles, informal savings arrangements, and tax concessions for those who participate in retirement savings, are but a few examples of the enabling measures created by the government.

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<sup>161</sup> Discussed under par 5.6 in Ch 5.

<sup>162</sup> See generally, De Vos P "Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution" 1997 13 *SAJHR* 67 at 93-94. See also generally the discussion under par 5.2.1 in Ch 5.

### **7.5.11 Remedies or dispute resolution mechanisms**

Social security disputes must be dealt with by a specialised tribunal; considering the primary objective of social security, the adversarial nature of the court system, the time it can take for courts to resolve disputes, and the costs involved. The high costs of litigation will undoubtedly deplete or reduce the amount of benefit a retiree will receive in that a bigger portion of the benefit the person will receive if the court decides in his or her favour would go to legal costs instead of the member receiving and enjoying the whole benefit.<sup>163</sup>

The South African retirement system provides a suitable dispute resolution mechanism in the form of the Office of the Pension Funds Adjudicator. However, it is important that access to legal services be extended especially for people in rural areas. Legal aid, legal clinics, and information desks should be readily accessible to the people.<sup>164</sup> The Pension Funds Adjudicator must be given the sole responsibility of handling all pension-related disputes. The legislature should also establish an appeal body, and it should only be after the matter has been heard by this body that the parties who are still not satisfied can approach courts of law.

### **7.5.12 Retirement funds regulation**

All occupational retirement funds must be regulated under a single piece of legislation and one regulatory body. At the moment there are funds that are regulated under separate pieces of legislation and outside the Pension Funds Act of 1956. At times this creates inconsistencies and imbalances in the system. Members of retirement funds also as a result do not receive the same protection from the law.

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<sup>163</sup> Discussed under par 6.10 in Ch 6.

<sup>164</sup> See generally, Liebenberg S "Social Citizenship: A Precondition for Meaningful Democracy" Agenda, No 40, Citizenship (1999) at 64, accessed from <http://www.jstor.org/stable/4066019> (published by: Agenda Feminist Medi), last accessed on 05 August 2015.

### **7.5.13 The recognition of informal arrangements**

In addition to formal social security arrangements, there are also informal arrangements which play a significant role in providing support and other forms of security to individuals and communities. South Africa has many individuals and families who survive on the support and benefits they receive through informal schemes such as social clubs and stokvels. It is reported in the National Treasury First Discussion Paper for Retirement Reform that the majority of people who are economically active in South Africa gain some income from informal, irregular, or unregulated economic activities.<sup>165</sup>

In a study on informal social security, Dekker argued that informal arrangements should not be seen as a concept separate from formal social security, and that the definition of social security should be extended to include informal social security.<sup>166</sup>

Dekker goes on to suggest a new and broadened definition of social security as follows:

“Social security comprises the provision of benefits (in money/kind/services/support) to members of society, households and individuals through public or collective (including non-governmental, semi-formal, community and traditional) and/or arrangements to maintain a present living standard of human dignity by meeting basic needs and protecting against low or declining living standards arising from a number of basic risks, contingencies and needs.<sup>167</sup>

Dekker has attempted to come up with a wider definition for the concept of social security which is accommodative of any form of social support to cater for social risks, contingencies, and other needs. Without dwelling too much on the definition, it should be accepted that informal social security indeed plays an important role in providing mainly the basic level of subsistence to individuals and communities.

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<sup>165</sup> South Africa's Retirement Fund Reform: First Discussion Paper op cit note 10 at 12.

<sup>166</sup> Dekker *Informal Social Security* op cit note 1 at 116.

<sup>167</sup> Ibid at 123.

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The White Paper on Social Welfare states in its preamble that in order to adequately address welfare needs, an inter-sectoral reaction is required which needs the involvement of not only the government but also of civil society.<sup>168</sup> This means that both the government and society are important role players in achieving extended coverage. Furthermore, the Paper states that social welfare refers to an integrated and comprehensive system of social services, programmes, and social security to promote social development, social justice, and the social functioning of the people.<sup>169</sup> This confirms the approach the government wants to take in broadening social security provision in this country – as per the recommendations for a comprehensive social security system made by the Taylor Committee.<sup>170</sup>

One of the government's priorities in terms of the Paper is to develop a system which will establish partnerships between the government, communities, organisations in civil society, religious organisations, and the private sector.<sup>171</sup> The family is recognised as the basic unit of society.<sup>172</sup>

With regard to community development, the objectives of the government include developing family-centered and community-based programmes, encouraging voluntary participation in social and community programmes, and facilitating self-help and mutual aid support programmes.<sup>173</sup> All these clearly indicate that the government accepts the fact that informal social security arrangements have a role to play in broader social security provisioning. It is therefore upon the government to encourage people to participate in such arrangements and to provide a regulatory framework that will ensure adequate protection to members of those schemes.

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<sup>168</sup> See par 2 of the preamble to the White Paper on Social Welfare.

<sup>169</sup> Item 3 in Ch 2 of the White Paper.

<sup>170</sup> The Taylor Committee Report op cit note 72 at 15-47.

<sup>171</sup> Item 7(b) of the White Paper on Social Welfare.

<sup>172</sup> Item 31.

<sup>173</sup> Item 35.

Recognition and regulation of informal social security arrangements will go a long way in providing people, especially those in the informal sector and those earning low salaries, with a savings vehicle which is not only well regulated but also sustainable. It should be accepted, however, that informal arrangements cannot serve as a stand-alone or independent source of protection during retirement, as they are generally not sustainable to provide long-term solutions to the needs of the people.

#### **7.5.14 An integrated approach**

South Africa's social security system is at the moment fragmented as different social security risks are protected and regulated under various pieces of legislation, and are also administered by different government departments.<sup>174</sup> However, most of these statutes do not speak to one another.

It is high time that the government should bring together all social security arrangements under one administration and link benefits that are likely to interrelate, such as retirement benefits and unemployment benefits, to each other. The government needs to align all its income security protection arrangements, such as social grants and benefits provided in terms of the Unemployment Insurance Fund, the Compensation for Occupational Injuries and Diseases Fund, the Road Accident Fund, and Retirement Provisioning, to each other.

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<sup>174</sup> Discussed under par 5.2.1 in Ch 5.

## **7.6 PROPOSED APPROACH**

It should be accepted that even though South Africa can learn something from the systems in other countries, this country has a unique political, social, and developmental history which does not allow for an uncritical use of systems applicable in other countries.<sup>175</sup> The system followed in South Africa must, among other things, address inequalities and the social and economic imbalances of the past. Thus social security strategies in this country should not only be accommodative of all the people living in this country but must also provide adequate protection and benefits that can protect people against social risks and meet their needs – some of which were created by the apartheid system. In order to cover all these and for a move towards comprehensive social security provision, a four-pillar model is suggested.

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<sup>175</sup> See the discussion on the development of social security provision in South Africa under par 4.2 in Ch 4.

**Figure 1: Four-pillar model**



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The first pillar, a state pension, is redistributive and aims to prevent poverty. A public pension fund, under the second pillar, will be mandatory to all workers earning above a certain threshold, and enrolment will be automatic unless a person can prove that he or she already belongs to another fund which offers better protection. It will take the form of a defined-contribution plan and will be supported by general revenue, namely contributions will be subsidised by the government to reduce the burden for low-income earners. Contributions made into the fund will be linked to earnings. The fund will pay minimum benefits and must also pay disability and survivors' benefits. The third pillar is made up of mandatory occupational plans. Occupational schemes can either be sponsored by single or multiple employers (umbrella funds) and can be in the form of either defined-benefit or defined-contribution plans. All employers must establish retirement schemes for their employees or participate in multi-employer plans, and where the employer is not able to do so due to reasons that include the size of the business, such an employer must, being obliged to do so by the law, arrange a private pension scheme for the workers or ensure that all its employees join and participate in the public fund. Employers who comply should receive tax relief. Forcing employers to make special arrangements for their employees will create a second tier to the third pillar. Personal or private savings plans constitute the fourth pillar. Private savings schemes are voluntary plans and should together with informal arrangements play a supplementary role to the first, second, and third pillars, and may be used as top-ups to the second and third pillars. The government, even though not directly participating in this pillar, must create a sound legal framework to encourage people to make medium- to long-term savings. The government should provide incentives in the form of tax relief to those who make savings through private savings schemes. Informal arrangements should be recognised and regulated by the government as they also play a very important role, especially in black communities. These arrangements should mainly play a supporting role to the other four pillars, and should not be seen as the primary source of support during old-age as they are generally not sustainable.

## **7.7 CONCLUSION AND IMPORTANT POINTERS FOR CONTINUOUS POLICY CONSIDERATION**

South Africa's occupational retirement system focuses on formal employment. Even though the majority of workers in the formal sector are covered by the system, there is still a high number of workers who are excluded. Clearly the system does not cater for all the workers in the country. Thus, even though coverage is high by international standards, especially for a developing country like South Africa, it should be accepted that the system is inadequate and exclusionary in nature. The system fails to provide adequate protection to retirement benefits; both before retirement and during retirement. The regulation of the system is also fragmented as provisions from various pieces of legislation apply to retirement funds.<sup>176</sup> South Africa is in the process of reforming its formal three-pillar system to address most of the weaknesses highlighted in this study. It is important for South Africa to take serious cognisance of international human rights instruments and social security standards in its effort to reform its retirement system. Section 27 of the Constitution of the Republic of South Africa guarantees everyone the right to have access to social security. The section further gives the state the duty to take reasonable legislative and other measures, within its available resources, to progressively realise the right of access to social security for those who are not covered at all and those who are not adequately covered. The state is generally doing commendable work through its social assistance provision, where the elderly receive a meanstested old-age pension from the age of 60. The burden on the state to provide this pension is enormous as the majority of the people who are not covered by the present occupational retirement system and those who are not adequately covered rely on the state's social assistance. There is at the moment an obvious lack of coordination between the state pension and the occupational retirement system. The state, private institutions and individuals<sup>177</sup> all have a role to play in the development of a sound retirement system.

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<sup>176</sup> See the discussion under par 6.3 in Ch 6.

<sup>177</sup> Section 7(2) read with section 8(2) of the Constitution of the Republic of South Africa, 1996.

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The state is obliged by section 27(2) of the Constitution to progressively introduce not only policies but schemes (such as the National Savings Fund) through which people can save money for their retirement, and to develop a framework within which private institutions and individuals will be able to actively participate. The framework created should ensure that everyone who is able to participate, does exactly that. The system must encourage people to save rather than to rely on government support. It must make participation compulsory as it has been obvious that people will generally not save for their retirement if there is no law forcing them to do so. People who are working and can afford to save for their retirement, must do so. Protection in this regard should by all means possible not provide for mere survival and must promote social inclusion, and preserve equality and human dignity. A society with an adequate standard of living is a society with human dignity.<sup>178</sup> The introduction of a National Savings Fund and compulsory participation and preservation of funds is no longer an option but a must, considering the increase in coverage these changes will bring. A higher percentage of workers will be covered and this will relieve the state of some of the burden it is carrying at the moment of providing for people who would have been able to provide for themselves had the system allowed them to do so. Access to adequate protection and benefits will, among other things, protect and promote retirees' rights to equality and dignity. Retirement benefits serve an income replacement role for employees who are no longer able to earn a salary through employment due to old-age.<sup>179</sup> Retirement benefits also contribute towards reducing poverty within the families of the retired members and, in some cases, even within the communities in which retired members live.<sup>180</sup> It is therefore important for the system to provide adequate and appropriate benefits and for the system not to discriminate against anyone regarding coverage and payment of benefits. The preservation of retirement benefits should be enforced to achieve acceptable levels of replacement rates.

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<sup>178</sup> Section 10 of the Constitution.

<sup>179</sup> East *Social Security Law* op cit note 17 at 15-16.

<sup>180</sup> Ibid at 39-40.

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On the other hand, private savings must be encouraged and informal arrangements should be recognised and regulated to offer some protection to those who participate in them. State pensions should continue to be used to promote equality,<sup>181</sup> human dignity,<sup>182</sup> and social inclusion by extending coverage to all those who, for valid reasons, could not join and participate in any form of savings.

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<sup>181</sup> Section 9.

<sup>182</sup> Section 10.

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