

15 JULY 2023

NATIONAL TREASURY

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RE: COMMENTS ON DRAFT REVENUE LAWS AMENDMENT BILL, 2023 AND DRAFT REVENUE ADMINISTRATION AND PENSION LAWS AMENDMENT BILL, 2023

INTRODUCTION AND SUMMARY

1. We hereby submit our brief comments to the revised 2023 Draft Revenue Laws Amendment Bill and the 2023 Draft Revenue Administration and Pension Laws Amendment Bill, as published on 9 June 2023 (together, the “Draft Bills”). We submit these comments on 15 July 2023 as per the accompanying media statement.
2. In summary, our submissions are as follows.

2.1. We welcome and support:

- 2.1.1. the continued compulsory annuitisation of at least two-thirds of members’ savings upon retirement;
- 2.1.2. the proposed change that this two-thirds benefit earmarked for annuitization upon retirement, may not be accessed upon resignation or other form of pre-retirement leaving of service like retrenchment; and

2.1.3. that the total lump sum benefit available to beneficiaries upon the in-service death of members, appears to be unchanged – it remains the full available benefit and is not proposed to be reduced to, for example, the one-third savings component of the members’ benefit only.

2.2. However: We are concerned that the proposed fundamental shift in the purpose of retirement funds from predominantly long-term to dually long- and short-term, will harm pre-retirement preservation and result in unintended adverse consequences to members.

2.3. Instead, we would support a slightly more expanded “seed capital” benefit, but with hardship prerequisites. In our view, members ought not to be able freely to access their retirement savings as if it were a bank account, much less a whole one-third thereof.

3. We briefly explain Pension Justice’s role and purpose and then turn to address, in the main, our concern about reduced long-termism in pension fund investments as a result of the Draft Bills.

WHO WE ARE

4. Pension Justice is a non-profit organisation focused on public interest pension law. We support organisations and individuals in accessing and preserving pension and provident fund benefits. We are made up of a group of lawyers with combined experience in education, training, litigation, and who have specialised in labour, socio-economic rights and pension law.

5. Our work is premised on the beliefs that collective worker investment is a fundamental good, that workers or their beneficiaries must understand and be able to easily access these investments, and that there is relentless work required to ensure that the funds and employers operate for the benefit of workers and beneficiaries. We have, for example, provided training on dispute resolution before the Pension Funds Adjudicator to the Unclaimed Benefits Campaign.

6. Our core values are to support and educate pension fund members, pensioners and beneficiaries so as to enable them to optimise and access retirement benefits. We believe in the importance of pension funds as long-term investment vehicles and that short-termism undermines this purpose, and by extension, undermines optimal outcomes for members, pensioners and beneficiaries.

THE DRAFT BILLS: KEY ASPECTS

7. The Draft Bills propose to make extensive inroads into the fundamental long-term nature of retirement funds. It proposes to require pension funds to offer the following three benefits to members:

7.1. First, the proposed “Seed Capital”, which will permit pension fund members throughout South Africa to freely access – without any hardship or other qualifying criteria – the lesser of 10% or R25 000 of their savings¹ (the “Vested Component”) as at 29 February 2024, on that date or at any later point in time.

7.2. Second, the proposed one-third “Savings Component” which members can withdraw at will, and also without any hardship criteria, in respect of accumulated savings arising from contributions after 1 March 2024 at any point in time. For example, a worker-member who has contributed R300 000 to his pension fund from 1 March 2024 to 1 March 2034 when he is set to retire, can on the current proposed model, withdraw up to R100 000 plus 1/3rd of total growth, at any point in time during these 10 years simply when he wishes to do so. At present, the current 100% withdrawal benefit only applies to those workers who leave employment, who can as a result access all their benefits at date of exit. In terms of the Draft Bills, all worker-members in South Africa will now be entitled simply to withdraw up to one-third of their pension savings at any point in time without resigning or leaving employment. The only real limitation is that a worker-member may only withdraw once per year. They will then be taxed on these withdrawals at their ordinary personal income tax rate. This includes the withdrawal “at will” upon resignation or cessation of employment. In our view, this makes pension funds at least one-third equivalent to bank savings accounts which is anathema to funds’ long-term purpose.

7.3. Third, the proposed “Retirement Component”: From 1 March 2024, the remaining two-thirds of new contributions and returns are “locked-in” for retirement and must be annuitised if it totals more than R165 000. There will therefore be no one-third lump sum withdrawal option in respect of savings after 1 March 2024, unless the worker-member elected not to withdraw its Savings Component before retirement.

¹ We use simplified language herein as we focus in the key “in-principle” issues, and to make our submissions more accessible to all. We further focus on defined contribution funds only herein, though the principles raised apply equally to defined benefit and applicable retirement annuity funds.

8. As we explain below, our key concern lies with permitting members to access the large proportion of one-third of their post-March 2024 savings at will.

BACKGROUND AND CONTEXT: THE DIFFICULT REALITIES TO BE BALANCED

9. We appreciate that Treasury is attempting the very difficult balance of workers' financial needs in the short-term versus the long-term. Contributing pension fund members face several harsh, competing realities in South Africa in relation to their income and savings. These realities further directly invoke issues of race, gender, dignity² and income inequality – all key faultlines of South African society. It is a well-known reality that most workers do not earn a living wage and are unable to provide for their short-term financial needs, much less save a portion of their income for short, medium and/or long-term purposes. According to the Decent Standard of Living Report,³ only about 3% of people in South Africa earn enough income to support a decent standard of living. In addition, almost 30 years after apartheid officially ended, income is still starkly unevenly distributed along race, gender and other lines, as the Stats SA graphs attached as Annexure A hereto, demonstrate.
10. These realities have a direct connection to poverty and, by extension, the right to dignity, a link repeatedly emphasised by the Constitutional Court,⁴ among others.
11. Finally, we appreciate and acknowledge that COVID has worsened all these realities, including unemployment, wage levels, inequality and employers' ability to afford to continue to pay contributions. The latter is an important issue which the FSCA recognised in 2020 by rapidly approving

² See e.g. *Social Justice Coalition and Others v Minister of Police and Others* 2022 (10) BCLR 1267 (CC) par 26 (“the manifestation of poverty, its systemic nature, and the effect it has on human dignity and the equal enjoyment of rights and freedoms justified its recognition as a ground of discrimination”);

³ 2018, at p 45. Report by, amongst others, SASPRI (Southern African Social Policy Research Institute) and SPII (Studies in Poverty and Inequality Institute), 2018. Available at: https://dslnow.net/wp-content/uploads/2019/07/DSL_Report_2018.pdf.

⁴ See e.g. *Social Justice Coalition and Others v Minister of Police and Others* 2022 (10) BCLR 1267 (CC) par 26 (“the manifestation of poverty, its systemic nature, and the effect it has on human dignity and the equal enjoyment of rights and freedoms justified its recognition as a ground of discrimination”) *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) par 48 (“Economic, social and cultural rights, of which the right of access to social security is a part, are indispensable for human dignity and equality.”). The Supreme Court of Appeal recently confirmed that even access to occupational pension funds (i.e. not state pensions) invoke the worker-members' constitutional rights to social security. *Post Office Retirement Fund v South African Post Office SOC Ltd and Others* [2022] 2 All SA 71 (SCA) par 59 (“The purpose of the [monthly employer contribution payment] obligation was to enable SAPO to fulfil its employees' fundamental rights to social security in terms of s 27(1)(c) of the Constitution. By misappropriating a portion of its employees' salaries required to be paid on their behalf to the Fund, and using that money for other unauthorized purposes, SAPO perpetrated an obvious unfair labour practice, in contravention of s 23(1) of the Constitution, and did so on a grand and persistent scale.”)

pension fund rule amendments providing for contribution holidays for financially distressed employers.

12. It is then unsurprising that these difficulties extend to workers' long-term savings through pension funds. The trite statistic is that, pre-Covid, only 6% of South Africans could retire comfortably. While the lack of living wages is a critical issue, there is also a real and sustained crisis in respect of the severe insufficiency of retirement fund savings. Workers simply do not (and/or cannot) save enough for retirement.

THE IMPORTANCE OF PROTECTING LONG-TERM SAVINGS: CASE LAW

13. Our courts have emphasised the importance of long-termism, with reference to the current definition of "pension fund" in the Income tax Act, 1958 ("ITA") on a number of recent occasions in cases about "at will" elective transfers. In terms of these transfers, members would leave the fund on short notice and without an exit event occurring, possibly taking their accrued savings with them and requiring the transferor fund to have the required liquidity (and therefore less long-term investment) to enable these transfers:

13.1. In the *Ntabankulu*⁵ case, the Supreme Court of Appeal ("SCA") in 2019 upheld a fund rule which prohibited elective "at-will" in-service transfers, as constitutional. It accepted the fund's rationale for the rule, which included the need to maintain a long-term investment strategy aligned with the definition of a pension fund in the ITA:

"The fund points out that this requirement of the ITA, which is aimed at ensuring the stability of the fund's membership, is necessary for the long-term investment strategy of the fund. In terms of regulation 28 to the PFA, the fund is required to have asset-liability matching and to invest in corresponding long-term and therefore often illiquid investments, suitable for the fund's specific member profile, liquidity needs and liabilities."

13.2. The SCA made the same finding in the *Umzimkhulu*⁶ case at paragraph 34:

⁵ *Municipal Employees Pension Fund and another v SAMWU National Provident Fund and another* [2019] 3 BPLR 611 (SCA) at pars 36 – 40, especially par 37.

⁶ *South African Municipal Workers' Union National Provident Fund v Umzimkhulu Local Municipality and others* [2019] 3 BPLR 628 (SCA).

“The fund, however, correctly points out that this requirement of the ITA, which is aimed at ensuring the stability of the fund's membership, is necessary for the long-term investment strategy of the fund. In terms of regulation 28 to the PFA, the fund is required to have asset-liability matching and to invest in corresponding long-term and therefore often illiquid investments, suitable for the fund's specific member profile, liquidity needs and liabilities. This requirement cannot be satisfied by the fund in the manner suggested by the Municipality and the employees as long-term stability in the composition of the fund's membership, is required to enable the fund to fulfil these investment goals.”

13.3. These principles apply equally to the need for stability in terms of membership numbers.

13.4. Finally, in *Municipal Workers Retirement Fund*,⁷ three similar review challenges were successfully brought against an accreditation scheme sought to be enforced by bargaining council parties on pension funds in the local government sector through a collective agreement. The agreement sought to impose several requirements on pension funds in order to qualify for accreditation, including that funds must amend their rules to provide for elective, at-will member transfers. The full court held in 2023:

“The limit of the membership base together with the right of members to transfer periodically between funds have as their effect a deprivation on the part of a fund to engage in any long-term investment with the consequence that the investment income to be earned is likely to be materially affected. Of course, this is not in respect of a single emigration of members from a scheme but would be a material and ongoing factor that would have to be considered [...]

The very terms upon which accreditation is to be granted requires the applicants to acquiesce to rule changes. If these changes were to be registered, it would have the effect of divesting a board of its independence and imperiling management by limiting the ability to properly plan for any long-term investment, beyond the time periods which the amended rules would grant to employee members to make an election to transfer to a different fund from time to time ...”

14. These cases show in our view that Courts are concerned about attempts which, by intention or effect, undermine the long-term purpose of retirement funds which should be retained.

⁷ *Municipal Workers Retirement Fund v South African Local Government Bargaining Council and Others and Other Related Matters* [2023] 5 BLLR 465 (GP) pars 45; 60 (application for leave to appeal pending).

COMPARATIVE LAW SUPPORTS COMPULSORY PRESERVATION, NOT AT WILL EARLY ACCESS TO RETIREMENT FUNDS OR SIGNIFICANT PORTIONS THEREOF

15. We have considered the position of a number of other common law countries and found that none of them require or permit, unconditional elective “at will” early access to retirement savings as proposed in the Draft Bills. We briefly tabulate these jurisdictions below. We submit that this further supports our position that pension funds ought not to be used as savings accounts, not even in the partial manner proposed by the Draft Bills. One-third is simply too large a proportion.

COUNTRY	LEGAL FRAMEWORK	PERMITS AT-WILL EARLY ACCESS TO PENSION SAVINGS?
Ghana	Act 766 National Pensions Act, 2008	<u>No.</u> Section 99 provides that members’ benefits held in occupational pension schemes cannot be paid or disposed of other than as permitted in this act. Section 101 provides for the instances in which benefits may be paid to a member, including retirement or being unemployed at 50 years or older. It contains no at-will savings account. Only section 109 (which deals with the limited instance of permitting self-employed persons in the informal sector who are not covered under a mandatory pension scheme to voluntarily contribute to a pension scheme) permits these specific funds to split pension savings between a personal savings account, and a retirement account according to that fund’s rules.
Kenya	Retirement Benefits Act Chap 197; Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations, 2000	<u>No.</u> The Kenyan authorities took the opposite view to South Africa. In 2019, it passed a regulation amendment which requires compulsory pre-retirement preservation of 100% of pension savings if an employee leaves service in pre-retirement age. Previously employees could access 50% of their savings when they left service pre-retirement.
Nigeria	Pension Reform Act, 2014	Conditional. Section 16(1) prohibits any withdrawal from a “retirement fund savings account” before age 50. Sections 16(2) – (5) then provides that if an employee disengages from services and cannot find fresh employment within four months, they may access their retirement savings.
Botswana	Retirement Funds Act, 2022	<u>No.</u>

NO EVIDENCE THAT THE DRAFT BILLS WOULD IMPROVE PRE-RETIREMENT PRESERVATION AND LONG-TERM SAVINGS

16. Treasury's stated goal with these Draft Bills is to "*focus on pre-retirement preservation*".⁸ As we understand, Treasury has two key concerns which erode member savings before retirement:

16.1. First, the reality that workers are resigning to access their full retirement savings, which viewed on its own limits – if not entirely eradicates – pre-retirement preservation;⁹ and

16.2. Second, "*some households in financial distress have assets within their retirement fund(s) that are not accessible in case of emergencies or financial hardship. This has become more prominent since the onset of the COVID-19 pandemic, with numerous calls for financially distressed individuals to be given access to their retirement funds to alleviate their financial hardship*".¹⁰

17. The definition of "pension fund" in the ITA is now proposed to be changed from its long-term only or predominant purpose, to include a short-term purpose in respect of the one-third benefit from 1 March 2024. By adding to the purpose of retirement funds in section 1 of the ITA, the provision of the Savings Component, the long-term nature of retirement funds is fundamentally altered, in our submissions for the worse. (We however welcome the principle that at least the total one-third maximum withdrawal over the course of a pension benefit, is maintained.)

18. **We are concerned that there appears to be no empirical evidence that indicates that members' "at will" access to up to one third of their benefits will improve the stated goal of better pre-retirement preservation. For example, it is not known how many members elected a payout of their full pension savings upon resignation, dismissal or retrenchment. That number must be identified or estimated, and compared to the scenario where all pension fund members in South Africa withdraw their one-third benefit at will. While it is true that many workers resign to access their retirement benefit, many also do not do so, due to employment insecurity and other reasons. Those who would not, would now have easy, premature access to one-third pension savings. In sum, the reasons for the Draft Bills do not appear to be rationally connected to the stated purpose**

⁸ Ex Memo, Draft Pensions Bill par 1.2; 1.3; Ex Memo Draft Revenue Bill par 1.1 I – II.

⁹ Ex Memo, Draft Pensions Bill par 1.3.

¹⁰ Ex Memo, Draft Pensions Bill par 1.4.

– to improve pre-retirement preservation. The rational basis on which the Draft Bills are likely to improve retirement outcomes, is absent.

OUR PROPOSAL

19. We propose that:

- 19.1. Studies be undertaken to estimate the potential pre-retirement preservation benefits of the Draft Bills in respect of the one-third Savings Component, in particular.
- 19.2. The commencement date of 1 March 2024 be postponed indefinitely, pending the results of the above studies.
- 19.3. In the interim, a slightly expanded “Seed Capital” benefit be promulgated to help workers alleviate financial hardship, on motivation to their particular fund and not at will. For example, access to 5% or R15 000 every three years for a period of nine years.

20. In the alternative, should the Draft Bills be passed, we propose that specific duties on the parts of the boards, be promulgated to protect members’ pension savings through e.g. active discouragement of early access of their Savings Component.

21. We thank you for considering these submissions.

PENSION JUSTICE NPC

15 JULY 2023

ANNEXURE A: INCOME INEQUALITY BY RACE AND GENDER¹¹

Table 4.3.2: Labour market trends by population group (2011–2017)

Year	Black African				Coloured			
	NEA	Employed	Unemployed	Unempl. rate	NEA	Employed	Unemployed	Unempl. rate
2011	46,8	38,0	15,2	28,6	37,0	48,6	14,4	22,9
2012	46,2	38,6	15,3	28,3	36,3	48,3	15,4	24,1
2013	45,5	39,3	15,2	27,9	36,1	48,5	15,4	24,1
2014	45,1	39,5	15,5	28,1	35,0	49,4	15,6	24,0
2015	43,2	40,6	16,2	28,5	35,9	49,3	14,8	23,0
2016	42,8	40,0	17,3	30,2	36,6	48,9	14,5	22,9
2017	41,6	40,3	18,1	31,0	36,6	48,5	14,9	23,5

Year	Indian/Asian				White			
	NEA	Employed	Unemployed	Unempl. rate	NEA	Employed	Unemployed	Unempl. rate
2011	40,7	53,1	6,2	10,5	31,6	64,4	4,0	5,8
2012	41,1	52,7	6,3	10,6	32,3	63,8	3,9	5,8
2013	39,2	53,4	7,5	12,3	31,8	63,6	4,6	6,8
2014	41,3	51,7	7,0	12,0	32,4	62,6	5,0	7,4
2015	40,5	51,7	7,8	13,1	31,7	63,7	4,6	6,8
2016	40,6	52,2	7,2	12,0	32,3	63,0	4,7	6,9
2017	38,8	54,1	7,1	11,6	31,7	63,7	4,5	6,7

Source: QLFS (2011–2017)

Table 4.3.3: Labour market trends by sex (2011–2017)

Year	Male				Female			
	NEA	Employed	Unemployed	Unempl. rate	NEA	Employed	Unemployed	Unempl. rate
2011	37,2	48,5	14,2	22,7	51,0	35,6	13,4	27,3
2012	36,7	48,7	14,6	23,0	50,6	36,0	13,4	27,2
2013	36,6	48,7	14,7	23,1	49,6	36,9	13,4	26,7
2014	36,3	48,9	14,9	23,3	49,3	36,9	13,8	27,2
2015	34,9	49,9	15,2	23,4	47,9	37,7	14,4	27,7
2016	34,6	49,2	16,2	24,7	47,7	37,0	15,2	29,1
2017	33,9	49,1	17,0	25,7	46,4	37,7	15,9	29,6

Source: QLFS (2011–2017)

¹¹ STATS SA et al *Inequality Trends in South Africa* (2019) p 59 – 60. Available at <https://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf>