

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS AMENDMENT BILL

(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No 21845 of 1 December 2000) (The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B 22—2001]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Pension Funds Act, 1956, so as to clarify the position regarding the power of a registered pension fund to furnish guarantees in respect of housing loans granted to members by persons other than the fund; to extend the concept of ownership; to further regulate the amount of loans and guarantees; to extend the Minister's powers to make regulations; to provide for the deduction from deemed benefits in cases of default and transfers to other pension funds; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 19 of Act 24 of 1956, as amended by section 13 of Act 80 of 1959, section 9 of Act 58 of 1966, section 1 of Act 80 of 1969, section 2 of Act 23 of 1970, section 7 of Act 91 of 1972, section 23 of Act 101 of 1976, section 11 of Act 94 of 1977, section 11 of Act 80 of 1978, section 14 of Act 103 of 1979, section 39 of Act 99 of 1980, section 14 of Act 82 of 1982, section 20 of Act 46 of 1984, section 17 of Act 86 of 1984, section 11 of Act 50 of 1986, section 5 of Act 51 of 1988, section 8 of Act 53 of 1989 and section 11 of Act 64 of 1990

1. Section 19 of the Pension Funds Act, 1956 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for subsection (5) of the following subsection:

“(5) (a) A registered fund may, if its rules so permit and subject to the regulations, grant a loan to a member by way of investment of its funds or furnish a guarantee in favour of a person other than the fund in respect of a loan granted or to be granted by such other person to a member to enable the member—

(i) to redeem a loan granted to the member **[by a person other than the fund]** against security of, either a pledge by the member concerned to the fund of the benefit contemplated in paragraph (c)(ii), or immovable property which either belongs to the member or his or her spouse or the member and his or her spouse and on which a **[dwelling]** residence has been or will be erected which is occupied or, as the case may be, will be occupied by the member or a dependant of the member;

(ii) to **[purchase a dwelling, or to purchase land and erect a dwelling on it]** acquire immovable property on which a residence has been or will be erected, or to erect a residence on immovable property in

- respect of which, either the member or his or her spouse, or the member and his or her spouse, has or have obtained ownership or the right to ownership through a right of occupation, for occupation by the member or a dependant of the member; or
- (iii) to make additions or alterations to or to maintain or repair a [dwelling which belongs to] residence of which ownership or the right to ownership was obtained through a right of occupation by either the member or his or her spouse or the member and his or her spouse and which is occupied or will be occupied by the member or a dependant of the member, 5 10
- if the right of occupation of the immovable property or residence is secured by virtue of the operation of any custom or law, other than an agreement of lease or similar temporary measure, entitling such member, or his or her dependants, to the right of occupation of such immovable property or residence or any specified portion thereof. 15
- (b) A loan or guarantee by a fund, contemplated in paragraph (a), shall not be granted or furnished, respectively, after the commencement of the **[Financial Institutions Amendment Act, 1986]** Pension Funds Amendment Act, 2001—
- (i) unless secured by— 20
- (aa) a first mortgage on the immovable property in respect of which [it] the loan is granted; or
- (bb) a pledge by the member concerned to the fund of the benefits to which the member is entitled in terms of the rules of the fund; or 25
- (cc) both such mortgage and such pledge;
- (ii) in respect of immovable property if the member concerned is liable to the fund in respect of a loan or guarantee granted [to him] or furnished in respect of the member in respect of other immovable property; 30
- (iii) [at a lower rate of interest than that] unless, in the case of a loan granted by the fund, the rate of interest on the loan is equal to or exceeds the rate of interest which may from time to time be prescribed by regulation;
- (iv) in the case of a loan granted to the member by some other person in respect of which a guarantee has been furnished by the fund, or in respect of a loan by the fund to the member, unless the capital sum in respect of any such loan together with interest thereon, is redeemable over a period not exceeding 30 years in equal weekly or monthly instalments [which shall include the interest on the capital sum outstanding]: Provided that if such period in a particular case extends beyond the normal retirement date of the member concerned, the outstanding balance of the loan on that date must be able to be repaid out of no more than one third of the total value of the benefit due to the member at that date. 35 40 45
- (c) A loan or guarantee contemplated in paragraph (a) shall not exceed, where it is secured in accordance with—
- (i) paragraph (b)(i)(aa), 90 per cent of the **[market] fair** value of the hypothecated property concerned;
- (ii) paragraph (b)(i)(bb), the amount of the benefit which the member would receive if [he] the member were to terminate his or her membership of the fund voluntarily or the **[market] fair** value of the immovable property concerned, whichever is the lesser amount; or 50
- (iii) paragraph (b)(i)(cc), the amount equal to the aggregate of 90 per cent of the **[market] fair** value of the hypothecated immovable property concerned and the amount of the benefit which the member would receive if [he] the member were to terminate his or her membership of the fund voluntarily or the **[market] fair** value of the immovable property, whichever is the lesser amount. 55
- [(cA)](d)** The percentages referred to in subparagraphs (i) and (iii) of paragraph (c) may be increased to 100 per cent, subject to the furnishing to the fund by the employer of the member of an irrevocable guarantee in 60

respect of so much of the loan or the amount of the guarantee as may exceed 90 per cent.

[(d)](e) For the purposes of this section ‘immovable property’ includes a **[surveyed site in respect of which a right of leasehold is registered in terms of section 6A of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945)]** land tenure right as defined in section 1 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991).”;

(b) by the substitution for subsection (5A) of the following subsection:

“(5A) For the purposes of subsection (5) **[‘market’]** fair value’ means the price which would be obtained on a sale in the Republic between a willing seller and a willing purchaser (between whom there is no other direct or indirect connection), as estimated by a person appointed by the registered fund concerned for that purpose: Provided that—

(a) where a transaction for the purchase of an immovable property **[(other than vacant land upon which a dwelling is in the course of erection or about to be erected)]** is pending and a purchase price has already been agreed upon, or where such an immovable property was acquired by purchase not more than six months before the date on which the estimate is made, the **[‘market’]** fair value of the property shall not be fixed at an amount higher than the true purchase price of the property, as declared or to be declared by the parties concerned for transfer duty purposes **[plus, in the last-mentioned case, one hundred rand];** and

(b) where a transaction for the erection of, or additions or alterations to, or to maintain or repair a residence is contemplated, the estimate of the fair value of the immovable property shall not be fixed at an amount higher than the fair value contemplated in paragraph (a) plus an amount equal to the cost of such erection, additions, alterations, maintenance or repairs, as the case may be.”;

(c) by the substitution in subsection (5B) for the words preceding paragraph (a) and for paragraph (a), of the following words and paragraph, respectively:

“Notwithstanding anything to the contrary contained in the rules of a registered fund, such a fund shall not, directly or indirectly after the commencement of the **[Financial Institutions Amendment Act, 1986]** Pension Funds Amendment Act, 2001—

(a) grant a loan to, or furnish a guarantee in respect of, a member or make any of its funds available, whether by way of an investment or otherwise, to be utilised in any manner by the fund or someone else for a loan to a member or a guarantee on behalf of a member, other than—

(i) a loan **[for a purpose mentioned in paragraph (a) of]** contemplated in subsection (5) and which complies with the provisions of [paragraphs (b) and (c) of] that subsection; and

(ii) a guarantee contemplated in subsection (5) and which complies with the provisions of that subsection; or”.

Amendment of section 36 of Act 24 of 1956, as amended by section 18 of Act 103 of 1979, section 18 of Act 86 of 1984, section 9 of Act 53 of 1989, section 27 of Act 83 of 1992 and section 2 of Act 7 of 1993

2. Section 36 of the principal Act, is hereby amended by the insertion in subsection (1) after paragraph (bC) of the following paragraph:

“(bD) prescribing additional conditions under which a fund may grant a loan to a member or furnish a guarantee in favour of a person other than the fund in respect of a loan granted or to be granted by such other person for the purposes contemplated in section 19(5);”.

Amendment of section 37D of Act 24 of 1956, as inserted by section 14 of Act 94 of 1977 and amended by section 14 of Act 80 of 1978

3. Section 37D of the principal Act is hereby amended—

(a) by the substitution for paragraph (a) of the following paragraph:

“(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)[(a)]; or
- (ii) any amount for which the fund [is] becomes liable under a

guarantee furnished in respect of a member for a loan granted by some other person to [a] the member [for any purpose referred to] in terms of section 19(5)[(a)], from—

(aa) the amount of the benefit to which the member or a beneficiary [is] becomes entitled in terms of the rules of the fund [to an amount not exceeding the amount which in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act]; or

(bb) in the case of a transfer of the member to another fund, the amount of the benefit which the fund is so entitled to transfer, if the board of management of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee; or

(cc) in the case of default on the repayment of any such loan by the member concerned in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of membership on the date of default, if such a deduction is only effected as a last resort and if the board of management of the fund is satisfied that no other arrangement for the required repayment can be made;”;

- (b) by the addition of the following subsection, the existing section becoming subsection (1):

“(2) For the purposes of paragraph (a)(ii)(bb) and (cc) of subsection (1), the amounts so deducted shall be deemed to be a benefit to which the member becomes entitled on termination of his or her membership of the fund for reasons other than as a result of retirement or death arising at the date of the transfer or the default.”.

Short title and commencement

4. This Act is called the Pension Funds Amendment Act, 2001, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PENSION FUNDS AMENDMENT BILL, 2001

1. SCOPE OF THE BILL

The Bill proposes amendments to the Pension Funds Act, 1956 (“the Act”).

2. AMENDMENTS

2.1 Amendment of section 19(5)(a) of the Act

Currently a registered pension fund (“a fund”) may grant housing loans to its members if the rules so permit. It is now proposed that a fund may, in addition to lending money to a member, provide a guarantee to a person as security for that person to grant a housing loan to the member. It is proposed that the Minister be empowered to prescribe, by regulation if necessary, further conditions applicable to housing loans and guarantees.

The lending institution, being enabled to rely on the security of a guarantee from a pension fund for loans to members, will be in a position to offer the members favourable rates of interest. By being allowed to provide guarantees to institutions against a pledge of the member’s withdrawal benefit, the fund’s investment strategies will not be disrupted. Members without loans will not subsidise members with loans if the interest charged on loans is less than the income earned on investments. Specialised institutions like banks and mutual banks are usually better equipped to administer housing loans than funds.

2.2 Amendment of section 19(5)(a)(i) to (iii) of the Act

The Act provides in these provisions that a fund may grant a loan to a member against the security of immovable property belonging to such member in order to redeem an existing loan by a person other than the fund, or to purchase a dwelling or land and erect a dwelling on it or to make additions or alterations or repairs to a dwelling belonging to the member.

If the fund wishes to rid itself of the administration of loans, it is proposed that the fund be enabled to redeem the loan through a guarantee to an outside institution. The property may belong to the spouse of the member or to them jointly. To enable more members to qualify for housing loans, these loans are now proposed also to be allowed in respect of a property for which the member and/or spouse obtained a right of ownership through a right of occupation other than under a lease agreement or the like. Previously the property had to be registered in the member’s or dependant’s name in the Deeds Office before a loan could be obtained.

Funds wanted the option of giving guarantees for existing loans rather than to keep financing and administering these loans themselves. It will also not be fair to restrict housing loans to those members that own property registered in the Deeds Office. Every member should be able to apply for housing finance assistance from his or her fund in their particular circumstances. The Bill seeks to allow for that by extending the concept of home ownership to include the right to ownership through a right of occupation other than a lease agreement. A further safeguard is built in by authorising the Minister to prescribe conditions for loans and guarantees by regulation.

2.3 Amendment of section 19(5)(b) of the Act

A loan can only be granted on the conditions determined in the Financial Institutions Amendment Act, 1986. These conditions also include a minimum prescribed interest rate to be charged by the fund in equal weekly or monthly repayment instalments over a period not exceeding 30 years.

A fund will also be allowed to furnish a guarantee for a loan to be granted to the member by another institution. The conditions are to take effect after the date on which this Bill becomes an Act.

Interest on a loan by an institution other than the fund will not be subject to a minimum rate of interest as in the case of a loan by the fund.

The maximum period of 30 years for repayment of the loan is proposed to be made subject to a condition that the loan may not exceed one third of the total value of the member's benefits at retirement.

The benefits of allowing guarantees for housing loans have already been stated. By not prescribing a minimum interest rate for loans by members, better interest rates can be negotiated with the institution. Where a fund advances the loan, it was and still is necessary to prescribe a minimum rate of interest for a fund to prevent cross subsidisation by members without loans of members with loans.

The 30 years' period for repayment did not protect members sufficiently at retirement date as the fund could claim their entire benefit for the outstanding amount of a housing loan granted shortly before retirement. It is now proposed to protect two thirds of the pension benefits against a housing loan debt in order to secure income after retirement. It is also particularly necessary to limit the amount of debt in view of more lenient ownership conditions which will enable more members to acquire homes.

2.4 Amendment of section 19(5)(cA) of the Act

This section was renumbered section 19(5)(d) to follow on the previous paragraph and the proposed amendments will correct the gender references as well as allowing for guarantees.

2.5 Amendment of section 19(5)(d) of the Act

The section was renumbered section 19(5)(e) to follow on the previous paragraph and will also give effect to the replacement of the Blacks (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945), by the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991).

2.6 Amendment of section 19(5A) of the Act

The definition of "fair value" is proposed instead of "market value" of the property for the purposes of housing schemes and will be limited to the purchase price of the property purchased within six months of purchase. The definition will be extended to allow for the cost of erections, additions, alterations, maintenance or repairs to be added to the purchase price. It would only be reasonable to take the cost of the expenditure that improves the property into account for determining the fair value of the property for the purpose of security for the loan or guarantee.

2.7 Amendment of section 19(5B) of the Act

A fund may not grant a loan to a member for any purpose other than a housing loan. A fund will now, if approved, also be able to furnish a guarantee to an institution to grant a housing loan to a member. The prohibition of the granting of a loan for any purpose other than a housing loan will now also be extended to disallow furnishing guarantees for any purpose other than a housing loan.

2.8 Insertion of section 36(1)(bD) in the Act

It is proposed to empower the Minister to put a stop to abuses of pension monies obtained for housing loans not currently foreseen in legislation by way of prescribing conditions for loans and guarantees by way of regulation. This is particularly necessary as the concepts of home ownership and immovable property are sought to be widened by allowing structures other than bricks and mortar that can be removed from the fixed property to qualify as a residence. The concept of land ownership will be extended to include the right to occupy land rightfully other than by a loose or temporary arrangement such as leasing the property. Subsequent proposed amendments to section 19(5)(a)(ii) and (iii) of the Act will allow more members to qualify for assistance by their pension funds in obtaining houses through loans and guarantees.

2.9 Amendment of section 37D of the Act

It is proposed that a fund be allowed to deduct any amount due to it in respect of a housing loan granted to the member as well as any amount for which the fund is liable

under a guarantee given to another person for a housing loan from the benefit to which the member is entitled in terms of the rules of the fund.

It is proposed that the fund may so deduct from such benefit on the default of the loan by the member whilst still in service of the employer and a member of the fund. It is also proposed that the fund may deduct the outstanding amount when a member is transferred to another fund. This situation will only arise as a last resort if, in the opinion of the board of management of the fund, no other reasonable arrangement can be made to repay or transfer the loan or guarantee. It is proposed that income tax be deducted from this benefit.

The amendment is necessary to remove uncertainty and to make it clear that a deduction can be made from a benefit to which the member will become entitled to whilst he or she is still a member of the fund. Allowing the settlement of the housing debt through a deduction from a member's benefit whilst still employed, will make it unnecessary for the member to resign just in order to be paid all pension benefits so as to use a part thereof to settle the debt in order not to lose his or her house. This remedy does not preclude the fund from instituting legal proceedings against the member for the recovery of the debt. As a matter of fact the fund is expected to act responsibly and to consider all possible steps since the provision emphasises that a benefit deduction is a last resort.

The position will be untenable if lending institutions or the fund has to wait until the member withdraws from the fund due to resignation, dismissal, disability or retirement for the money to be collected. If the situation is not made clear and is allowed to continue, it will encourage members to stop repaying housing loans and burden institutions, funds and other members with their debt. It will also have a detrimental effect on providing finance for housing schemes if there is the possibility that institutions will have to wait for repayment of the loan until a member retires or exits the fund. The interest that accrues on the arrears may also erode the security of the loan. A further deterrent for default is that the benefit to be used for repayment of the loan will become subject to income tax.

3. CONSULTATIVE PROCESS

The following bodies were consulted:

- Afrikaanse Handelsinstituut;
- National African Federated Chamber of Commerce and Industry;
- South African Chamber of Business;
- Consumer Institute of S.A.;
- National Black Consumer Union;
- National Consumer Affairs Office;
- National Consumer Forum;
- Association of Retired Persons and Pensioners;
- Cosatu;
- Federation for SA Labour Unions (Fedsal);
- National Council of Trade Unions;
- National Health and Allied Workers Unions (Nehawu);
- Council of SA Banks (Cosab).

4. FINANCIAL IMPLICATIONS FOR STATE

The Bill does not have any financial implications for the State.

5. PARLIAMENTARY PROCEDURE

The Financial Services Board and the State Law Advisers are of the view that the procedure set out in section 75 of the Constitution should be followed with regard to this Bill since the Bill does not deal with a matter to which the procedure set out in section 74 or 76 of the Constitution applies.