

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS SECOND AMENDMENT BILL

*(As presented by the Portfolio Committee on Finance (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 41B—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 make new provision for the apportionment of actuarial surpluses and for minimum benefits; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 24 of 1956, as amended by section 21 of Act 101 of 1976, section 9 of Act 94 of 1977, section 10 of Act 80 of 1978, section 38 of Act 99 of 1980, section 20 of Act 54 of 1989, section 29 of Act 97 of 1990, section 14 of Act 83 of 1992, section 21 of Act 104 of 1993 and sections 1 and 6 of Act 22 of 1996 5

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

(a) by the insertion in subsection (1) before the definition of “actuary” of the following definition: 10

“ ‘actuarial surplus’, in relation to a fund which is—

(a) subject to actuarial valuation, means the difference between—

(i) the value that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and 15

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date together with the value of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator; 20

(b) exempt from actuarial valuation, means the difference between—

(i) the fair value of the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the sum of the values of all the accounts held for individual members, whether contributory or paid-up, plus any other liabilities plus the values of any investment reserve account set up to facilitate the smoothing of investment returns credited to member accounts and such contingency reserve accounts as the board deems prudent;” 25

- (b) by the insertion in subsection (1) after the definition of “board” of the following definition:
“ ‘commencement date’ means the date of commencement of the Pension Funds Second Amendment Act, 2001;”;
- (c) by the insertion in subsection (1) after the definition of “complaint” of the following definitions: 5
- “ ‘contingency reserve account’, in relation to a fund, means an account of the fund to which shall be credited or debited such amounts as the board shall determine, on the advice of the valuator where the fund is not exempt from actuarial valuations, in order to provide for explicit contingencies; 10
- ‘contribution holiday’, in relation to a—
- (a) defined benefit category of a fund, means payment by the employer of less than the difference between the contribution rate recommended by the valuator, taking into account the circumstances of the fund and ignoring any surplus or deficit, and the contribution payable by members; or 15
- (b) defined contribution category of a fund, means payment by the employer of less than the employer contribution rate defined in the rules prior to application of any credit balance in any employer reserve account as defined in the rules or employer surplus account. 20
- ‘conversion’, in relation to a category of a fund, means the change of the basis of the retirement benefit from defined benefit to defined contribution, or vice versa;”;
- (d) by the insertion in subsection (1) after the definition of “court” of the following definitions: 25
- “ ‘deferred pensioner’ means a member who has not yet retired but has left the service of the employer concerned prior to normal retirement date, as defined in the rules, leaving in the fund the member’s rights to such benefits as may be defined in the rules; 30
- ‘defined benefit category of a fund’ means a category of a fund other than a defined contribution category of a fund;
- ‘defined contribution category of a fund’ means a category of members in respect of whom the benefit on retirement has a value equal to the value of— 35
- (a) the fixed-rate contributions paid by the member and by the employer on behalf of the member, where such fixed rates are defined in the rules,
- (b) less such expenses as the board determines should be deducted from the contributions paid, 40
- (c) augmented by such investment returns and any share of actuarial surplus or transfer from a contingency reserve account as the board determines;”;
- (e) by the insertion in subsection (1) after the definition of “dependant” of the following definitions: 45
- “ ‘employer’, in relation to a fund, means an employer participating in the fund;
- ‘employer surplus account’, in relation to a fund, means an account of the fund to which shall be credited— 50
- (a) amounts allocated by the board in terms of section 15B, 15C and 15F for use by the employer;
- (b) such contributions as are specified in the rules to be credited to this account; and
- (c) investment return on the balance in the account from time to time at a rate determined by the board after taking account of the earnings of the fund, 55
- and to which shall be debited
- (a) any surplus utilised by the employer; and
- (b) any surplus transferred to any other account in the fund at the request of the employer;” 60

- (f) by the insertion in subsection (1) after the definition of “fund” of the following definition:
- “ ‘investment reserve account’, in relation to a fund which has a defined contribution category, means the difference between:
- (a) the value of the assets held in respect of the members’ individual accounts and for any smoothing of investment returns to be credited to such accounts, with allowances for expenses, and
- (b) the value of the balances in the members’ individual accounts.”;
- (g) by the insertion in subsection (1) after the definition of “member” of the following definitions:
- “ ‘member’s individual account’, in relation to an individual member of a defined contribution category of a fund, means the amount determined in terms of section 14B(1);
- ‘member surplus account’, in relation to a fund, means an account of the fund to which shall be—
- (a) credited—
- (i) amounts allocated by the board in terms of sections 15B and 15C to be used for the benefit of members; and
- (ii) investment return on the balance in the account from time to time at a rate determined by the board after taking account of the earnings of the fund; and
- (b) debited—
- (i) the cost of any benefit improvements funded from the account; and
- (ii) any expenses which would otherwise reduce benefits payable to members;
- ‘minimum individual reserve’—
- (a) in relation to a member of a defined benefit category of a fund, means the amount determined in terms of section 14B(2)(a); and
- (b) in relation to a member of a defined contribution category of a fund, means the amount determined in terms of section 14B(2)(b);
- ‘minimum pension increase’ means the amount determined in terms of section 14B(4).”;
- (h) by the insertion in subsection (1) after the definition of “officer” of the following definition:
- “ ‘pensioner’, in relation to a fund, means a person who is in receipt of a pension paid from the fund.”;
- (i) by the insertion in subsection (1) after the definition of “prescribed” of the following definition:
- “ ‘principal employer’, in relation to a fund, means the employer defined as the principal employer in the rules.”;
- (j) by the insertion in subsection (1) after the definition of “regulation” of the following definitions:
- “ ‘reserve account’, in relation to a fund, means a contingency or investment reserve account, as the case may be;
- ‘retrenchment’, in relation to a member, means dismissal from employment based on the operational requirements of the relevant employer.”;
- and
- (k) by the insertion in subsection (1) after the definition of “rules” of the following definitions:
- “ ‘stakeholder’, in respect of a fund, means a current member, including a pensioner and a deferred pensioner, a former member and an employer participating in the fund;
- ‘statutory actuarial valuation’, in relation to a fund, means an investigation by a valuator contemplated in section 16;
- ‘surplus apportionment date’, in relation to a fund, means the effective date upon which any actuarial surplus is apportioned in terms of section 15B.”.

Amendment of section 14 of Act 24 of 1956, as amended by section 15 of Act 81 of 1957, section 3 of Act 54 of 1991 and section 21 of Act 83 of 1992

2. Section 14 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

- “(c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition—
- (i) to the rights and reasonable benefit expectations of the **[persons concerned]** members transferring in terms of the rules of a fund **[concerned, and]** where such rights and reasonable benefit expectations relate to service prior to the date of transfer;
 - (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and
 - (iii) to the payment of minimum benefits referred to in section 14A,
- and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;”.

Insertion of sections 14A and 14B in Act 24 of 1956

3. The following sections are hereby inserted in the principal Act after section 14:

“Minimum benefits

14A. (1) Every registered fund shall provide the following minimum benefits to a member:

- (a) The benefit paid to a member who ceases to be a member of the fund prior to retirement in circumstances other than liquidation of the fund shall not be less than the minimum individual reserve;
- (b) the benefit paid to a member if the fund is liquidated in terms of section 28 or 29 shall not be less than the minimum individual reserve: Provided that, where the fair value of the assets of the fund after recovery of any debt owed by the employer in terms of section 30(3) is lower than the sum of the total of the minimum individual reserves for all members who are being included in the distribution of the assets after adjustment for any benefits paid previously and the cost of annuity policies which will provide equivalent pensions to all existing pensioners and deferred pensioners, the minimum individual reserve may be proportionally reduced in the ratio which the fair value of the assets bears to the total of all the minimum individual reserves adjusted for any benefits paid previously plus the cost of such annuity policies;
- (c) if a category of the fund is converted from a defined benefit category to a defined contribution category, the amount to be credited to the member’s individual account shall not be less than the minimum individual reserve: Provided that, where the fair value of the assets of the fund after recovery of any debt owed by the employer in terms of section 30(3) is lower than the sum of the total of the minimum individual reserves for all members after adjustment for any benefits paid previously and the cost of annuity policies which will provide equivalent pensions to all existing pensioners and deferred pensioners, the minimum individual reserve may be proportionally reduced in the ratio which the fair value of the assets bears to the total of all the minimum individual reserves adjusted for any benefits paid previously plus the cost of such annuity policies;
- (d) starting with the pension increase to be granted on the effective date of the first actuarial valuation following the commencement date, and at least once every three years thereafter, the pension increase to be granted to pensioners and deferred pensioners shall not be less than the minimum pension increase.

(2) (a) In respect of a fund which is registered on or after a date three months after the commencement date, subsection (1) shall apply on registration.

(b) In respect of a fund which is registered prior to a date three months after the commencement date—

- (i) subsection (1)(a) shall apply from a date 12 months after the surplus apportionment date; and
- (ii) subsections (1)(b), (c) and (d) shall apply from the commencement date.

(3) If the employer or the board exercises any right that the employer or the board has in terms of the rules to liquidate the fund, or to terminate participation of a particular employer in the fund, prior to the commencement date or to change the basis upon which future benefits accrue prior to the date from which subsection (1)(a) applies to the fund, the members may not seek redress against the employer or the board in respect of any increase in value of the benefits that would occur as a result of the application of minimum individual reserves to the fund.

Determination of member's individual account, minimum individual reserve and minimum pension increase

14B. (1) The member's individual account in relation to an individual member of a defined contribution category of a fund shall be determined by the board in accordance with the formula—

$$MC+EC-X+AS$$

where—

- (a) MC represents the fixed-rate contributions paid by the member;
EC represents the fixed-rate contributions paid by the employer on behalf of the member;
X represents such expenses as the board determines should be paid out of the contributions paid by and behalf of the member; and
AS represents any actuarial surplus apportioned to the account of the member; and
- (b) MC, EC, X and AS are augmented with such investment returns as the board determines having regard to the gross investment return earned by the fund on the assets backing the fund's liability in respect of the member and such expenses as the board determines should be paid out of the gross investment return: Provided that the board may elect to smooth these investment returns.

(2) In determining the minimum individual reserve of a member of a—
(a) defined benefit category of a fund, the board shall determine the greater of—

- (i) the fair value equivalent of the present value of the member's accrued deferred pension: Provided that
 - (aa) where there is not a uniform rate of accrual over the full period of membership of the fund, the accrued deferred pension shall be calculated assuming a uniform rate of accrual as if the member had remained in service until normal retirement date as defined in the rules of the fund: and
 - (bb) the fair value equivalent and the present value shall assume rates of increase in the pension before and after retirement, mortality rates and rates of discount as prescribed by the registrar by notice in the *Gazette*; and
- (ii) an amount equal to the value of the member's contributions, less such expenses as the board deems appropriate to deduct from the contributions, augmented as from the commencement date by interest at a rate which is reasonable in relation to the gross investment return earned by the fund on the assets backing the fund's liability in respect of the member, nett of such expenses as the board determines should be offset against the gross invest-

- ment return, plus such share of the employer contributions paid in respect of the member as has vested in the employee in terms of the rules of the fund, augmented with the same rate of interest: Provided that the board may elect to smooth the interest contemplated in this subparagraph; and 5
- (b) defined contribution category of a fund, the board shall 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. 10
- (3) (a) The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must— 15
- (i) aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board; and 20
- (ii) set the frequency with which increases will be considered in line with the policy: Provided that increases should be considered each year, with comparison to the minimum pension increase at least once every three years.
- (b) The policy contemplated in paragraph (a) must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed. 25
- (4) (a) In determining the minimum pension increase, the board shall increase pensions by a factor, P, where P is equal to the greater of the increase that the board would grant in terms of the pension increase policy established in terms of subsection (3) and— 30
- (i) the increase in paragraph (b), if the increase in paragraph (b) is less than the increase in paragraph (c); or
- (ii) the increase in paragraph (c), if the increase in paragraph (b) is greater than or equal to the increase in paragraph (c). 35
- (b) The board shall determine the increase that would result from—
- (i) accumulating the liabilities for pensioners at their dates of retirement and deferred pensioners at their dates of termination of service, adjusted to an equivalent fair value of assets less— 40
- (aa) pension payments;
- (bb) cash amounts paid on retirement;
- (cc) those expenses that the board deems reasonable, plus the liability in respect of any special increases that have been granted to pensioners which were funded otherwise than through the nett investment return earned by the fund on the assets backing the pensioner and deferred pensioner liabilities, where such liabilities in respect of special increases have been adjusted to an equivalent fair value of assets, and augmented by the gross investment return earned on the assets of the fund less such expenses as the board deems reasonable to deduct from such investment return, but the board may use the gross investment return earned on the assets backing pensioner and deferred pensioner liabilities instead of using the gross investment return earned on the assets of the fund if such assets have been invested separately from the other assets of the fund; and 45
- (ii) dividing the amount calculated in terms of subparagraph (i) by the present value of current pensions and deferred pensions after making allowance for mortality, expenses and future pension increases at the rate determined by the board, adjusted to an equivalent fair value of assets. 50 55 60

(c) The board shall determine the increase required to each pension to the pension payable in the month following retirement, nett of the commutation of any portion of the pension for cash or the deferred pension at the date of termination of service, multiplied by the change in the consumer price index from the date of retirement in the case of a pensioner, or the date of termination of service in the case of a deferred pensioner, to the effective date of the calculation of the increase. 5

(d) Where the board finds it impractical to derive the increases in paragraphs (a), (b) and (c) for each individual pensioner or deferred pensioner, the board may use an approximate method which will preserve the broad principles behind paragraphs (a), (b) and (c). 10

(5) For purposes of subsection (4), where the pension has arisen because of the death of a member rather than the member's retirement, any reference in that subsection to 'retirement' shall be construed as a reference to death." 15

Insertion of sections 15A to 15K in Act 24 of 1956

4. The following sections are hereby inserted in the principal Act after section 15:

"Rights to use of actuarial surplus

15A. (1) All actuarial surplus in the fund belongs to the fund.

(2) Once actuarial surplus is apportioned to either the member surplus account or the employer surplus account in terms of sections 15B and 15C, members and the employer acquire rights to such actuarial surplus as provided for in this section. 20

(3) After the commencement date, the only portion of the assets of the fund that may be utilised by, or for the benefit of, the employer is any credit balance in the employer surplus account: Provided that the employer may continue a contribution holiday, which the employer was already taking immediately prior to the commencement date, only if the value of any contribution holiday taken by the employer during any period between the commencement date and the surplus apportionment date, augmented by the gross investment return earned by the fund, nett of expenses, over the corresponding period is added to the actuarial surplus to be apportioned at the surplus apportionment date in terms of section 15B(5). 25 30

(4) Any credit balance in the member surplus account must be used for the benefit of members as provided for in section 15D. 35

Apportionment of existing surplus

15B. (1) (a) Subject to paragraph (b), the board of a fund shall submit to the registrar a scheme for the proposed apportionment of any actuarial surplus (in this section referred to as the scheme) as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date. 40

(b) The board shall submit the scheme not later than 18 months after the effective date contemplated in paragraph (a): Provided that—

- (i) if the board elects to apportion actuarial surplus at a date earlier than the effective date of the next statutory actuarial valuation, it may do so if the statutory valuation date is advanced to such earlier date; 45
- (ii) if the fund is liquidated in terms of section 28 or 29 at a date prior to the effective date of the next statutory actuarial valuation, the effective date of the liquidation shall be the surplus apportionment date; and
- (iii) if a category of members of the fund is converted from defined benefit to defined contribution and the effective date of the conversion is earlier than the next statutory actuarial valuation date, the effective date of the conversion shall be the surplus apportionment date. 50

(2) A scheme—

- (a) shall comply with such conditions as the registrar may prescribe by regulation; and 55
- (b) may involve—

- (i) the improvement of benefits to existing members;
 - (ii) increases to benefits or transfer values in respect of former members;
 - (iii) the crediting of an amount to the member surplus account;
 - (iv) the crediting of an amount to the employer surplus account; or
 - (v) any two or more of the matters contemplated in subparagraphs (i) to (iv).
- (3) The board shall appoint a person to represent the interests of former members in the development of the scheme and such person shall—
- (a) assist the board in—
 - (i) identifying former members;
 - (ii) communicating proposals to former members and to the funds to which former members transferred;
 - (iii) conveying proposals from former members, and the funds to which they transferred, to the board; and
 - (iv) collating any objections to the scheme from former members and the funds to which they transferred;
 - (b) be required to report, in writing to the board, on—
 - (i) the adequacy of the steps taken by the board to include former members in terms of subsection (4); and
 - (ii) where it was necessary for the board to apply its discretion with regard to the inclusion of former members and the apportionment of actuarial surplus to such former members, whether or not the exercise of such discretion was reasonable taking into account the demands of equity within the bounds of practicality and the circumstances of the particular fund:

Provided that such report must accompany the scheme when it is submitted to the registrar in terms of subsection (9).
- (4) The board shall determine who may participate in the apportionment of actuarial surplus, and shall include in such apportionment existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date: Provided that—
- (a) the board may exclude from participation former members in respect of whom the board satisfies the registrar that insufficient records are available to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps—
 - (i) to obtain such records from the administrator;
 - (ii) to construct such records from the records of the—
 - (aa) employer;
 - (bb) any fund to which former members transferred; or
 - (cc) a trade union or staff association active in the workplace during this period; or
 - (iii) if the steps in subparagraphs (i) and (ii) do not yield sufficient information, to obtain such records from the potential claimants themselves following an advertisement—
 - (aa) on a national basis and in the area where the former members used to work; or
 - (bb) on a more limited basis as approved by the registrar if representations by the fund satisfy the registrar that limited advertisement will be adequate,

inviting the former members to come forward with evidence to substantiate their claim, after which advertisement the board should wait at least six months but no longer than nine months before excluding any former members because of a lack of sufficient information to enable the calculations to be performed;
 - (b) rather than excluding former members whose individual benefits cannot be determined, the board may set aside a portion of the actuarial surplus in a contingency reserve account explicitly established to satisfy claims of former members in terms of subsection (5)(e).

(5) The board shall apportion the actuarial surplus between the various classes of stakeholders whom the board has determined shall participate in the apportionment in terms of subsection (4), following which such portion as is due to the employer shall be credited to the employer surplus account: Provided that—

- (a) the actuarial surplus to be apportioned shall be increased by the amount of actuarial surplus utilised improperly by the employer prior to the surplus apportionment date as determined in terms of subsection (6);
 - (b) former members shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of section 14B(2) as at the date when they left the fund, with such increase adjusted to the surplus apportionment date using the nett investment earnings of the fund over the corresponding period, and pensioners shall have their pensions increased to the minimum pension as determined in terms of section 14B(4), as a prior charge on the actuarial surplus to be apportioned: Provided further that, where the actuarial surplus to be apportioned is insufficient to permit such increases after being increased in terms of paragraph (a), the amounts shall be proportioned downwards until the total to be paid to former members and pensioners equals the actuarial surplus to be apportioned;
 - (c) after deducting the cost of the increases to former members and pensioners in terms of paragraph (b) the balance of the actuarial surplus shall be equitably split between existing members, former members and the employer in such proportions as the board shall determine after taking account of the financial history of the fund: Provided further that the registrar may prescribe certain methods which, if used, shall be deemed to be equitable;
 - (d) if the amount apportioned to the employer in terms of paragraph (c) is less than the actuarial surplus utilised improperly by the employer as determined in subsection (6), the difference between the amount—
 - (i) determined in terms of subsection (6); and
 - (ii) apportioned to the employer in terms of paragraph (c), shall represent a debt owed by the employer to the fund which the employer must redeem within a period to be agreed with the board: Provided further that the fund shall notify the registrar, in writing and in the prescribed manner, of the amount and terms of repayment of any such debt; and
 - (e) the board shall determine how, in the case of existing members and former members, the allocated portion of actuarial surplus shall be applied for their benefit, including the crediting of any portion to the members' surplus accounts or to the members' individual accounts, as the case may be: Provided further that the board may allocate a portion of the actuarial surplus to be used for former members to a contingency reserve account which will be used to satisfy the claims of former members—
 - (i) who have been identified in subsection (4)(a) but who cannot be traced; or
 - (ii) who did not substantiate their claim during the nine-month period following the advertisement in subsection (4)(a)(iii) but who do so after the end of this period.
- (6) Surplus utilised improperly by the employer prior to the surplus apportionment date shall consist of—
- (a) the cost of benefit improvements for executives in excess of the cost that would have applied had the executives enjoyed the benefits provided to other members;
 - (b) the cost of any additional pensions or deferred pensions granted to selected members in lieu of the employer's obligation to subsidise the medical costs after retirement of those members;

- (c) the cost to recognise prior pensionable service for selected members or for members transferred into the fund in excess of any amount paid into the fund in respect of such prior service; and
 - (d) the value of any contribution holiday enjoyed by the employer after the commencement date: 5
- Provided that the board may exclude from surplus utilised improperly by the employer any use of actuarial surplus which was approved by the members, or by trade unions representing the members, after a clear and comprehensive communication exercise as part of a negotiated utilisation of surplus by stakeholders. 10
- (7) At least 75 per cent of the members of the board duly constituted in terms of section 7A must approve the scheme.
- (8) Notwithstanding anything to the contrary in the rules, no person other than the relevant board or, in the event of referral to the special ad hoc tribunal referred to in section 15K, the special ad hoc tribunal, and the registrar may approve the scheme. 15
- (9) An apportionment in terms of this section shall be of no force or effect unless—
- (a) the scheme, including a copy of every actuarial or other statement taken into account for purposes of the scheme and the report by the person appointed in terms of subsection (3), has been submitted to the registrar; 20
 - (b) the registrar has been furnished with a certificate signed by the valuator stating—
 - (i) whether the valuator finds that the process of apportionment complied with the Act; and 25
 - (ii) where it was necessary for the board to apply its discretion, whether the exercise of such discretion was not unreasonable taking into account the demands of equity within the bounds of practicality and the circumstances of the particular fund, 30
 together with such additional particulars or such special report by the valuator as the registrar may deem necessary for purposes of this subsection;
 - (c) the registrar has been furnished with such additional report as he or she may require from an independent actuary appointed by him or her on such matters associated with the apportionment of the actuarial surplus as the registrar shall determine and including such information as may be prescribed: Provided that—
 - (i) the registrar shall require such report where there are complaints in respect of the apportionment of surplus which have not been resolved to the satisfaction of the complainants concerned; and 40
 - (ii) the costs resulting from the appointment of such independent actuary shall be borne by the fund;
 - (d) the employer, members and former members, together with any fund to which former members transferred, have been informed of the scheme in a manner which is clear and understandable to the members and former members and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the amounts of any actuarial surplus which it is intended to credit to the member surplus account and to the employer surplus account, 50 respectively, and the costs of any benefit improvements for members and former members: Provided that—
 - (i) the manner of communication and the type of information to be included in this communication may be prescribed and such prescription may include a requirement that the person appointed in terms of subsection (3), the independent actuary, if any, and the valuator shall certify that they are satisfied that the communication material is objective and contains sufficient information to enable any stakeholder to judge the reasonableness of the scheme; and 55
- 60

- (ii) the communication shall be explicit about how and where any complaint should be lodged;
 - (e) the employer, members, former members, and any fund to which former members have transferred have had 12 weeks after despatch of the communication in which to complain, in writing, to the board; 5
 - (f) the board has considered any objection contemplated in paragraph (e) before submitting the scheme to the registrar;
 - (g) the principal officer of the fund has furnished the registrar with details of all objections lodged with the board and the actions taken to address such objections; 10
 - (h) the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date; and
 - (i) the registrar has forwarded a certificate to the principal officer of the fund to the effect that all the requirements of this subsection have been fulfilled. 15
- (10) If the board fails to submit a scheme in terms of subsection (1) or if the registrar is not satisfied that the distribution is reasonable and equitable, or at the request of the board, the registrar shall require the board to refer the apportionment of the surplus to the special ad hoc tribunal referred to in section 15K, and such tribunal shall exercise the powers of the board in terms of this section, and any reference in this section to the board shall be construed as a reference to the tribunal. 20

Apportionment of future surplus

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15C. (1) The rules may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account.

(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board taking into account the interests of all the stakeholders in the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment. 30

Utilisation of surplus for benefit of members

15D. (1) Notwithstanding anything to the contrary in the rules of a fund but subject to subsection (2), any credit balance in the member surplus account may only be used by the board to— 35

- (a) improve benefits for existing members;
- (b) improve the benefits previously paid to former members or the amounts previously transferred in respect of former members; 40
- (c) reduce current contributions due from members; and
- (d) meet, in full or in part, expenses which would otherwise reduce the proportion of the members' contributions that are invested for retirement: 45

Provided that the employer appointed members of the board shall not have a vote in any deliberation over the use of any credit balance in the member surplus account unless the proposal before the board will increase the contribution rate payable by the employer. 50

(2) The credit balance contemplated in subsection (1) after the apportionment of actuarial surplus as at the surplus apportionment date must be used as specified in the scheme submitted in terms of section 15B(1) if the scheme makes provision for the use of such credit balance. 55

Utilisation of surplus for benefit of employer

15E. (1) Notwithstanding anything to the contrary in the rules a participating employer may request the board to use actuarial surplus allocated to the employer surplus account in terms of sections 15B, 15C and 15F for use by that employer for any of the following purposes, namely—

- (a) funding a contribution holiday;
 - (b) payment of pensions, or an increase in pensions in course of payment, so as to compensate members for the loss of any subsidy from the employer of their medical costs after retirement;
 - (c) meeting, in full or in part, expenses which the employer is obliged to pay in terms of the rules of the fund; 5
 - (d) improving the benefits payable to all members, or a category of members as defined in the rules, as determined by the employer;
 - (e) transferring part, or all, of the employer surplus account in terms of subsection (2) to the employer surplus account in another fund where the employer is a participating employer; 10
 - (f) on liquidation of the fund in terms of sections 28 or 29, payment in cash to the employer in terms of section 15I; and
 - (g) in order to avoid retrenchment of a significant proportion of the workforce, payment in cash to the employer in terms of section 15J: 15
- Provided that the members of the board who have been elected by members of the fund shall not have a vote in any deliberation over the use of any credit balance in the employer surplus account.
- (2) The registrar may approve the transfer of a portion of the employer surplus account from the fund to the employer surplus account in another fund, if the following conditions are satisfied, namely that— 20
- (a) the employer who has control of the employer surplus account in terms of the rules of the fund has similar control of the employer surplus account in the transferee fund;
 - (b) employees of the employer are members or former members of the fund to which the transfer is made; 25
 - (c) the employer applies to the registrar for approval of the transfer, giving such details and supporting reports as the registrar may require; and
 - (d) the registrar is satisfied that such transfer is necessary in order to achieve an equitable distribution of the surplus between the funds. 30

Existing employer reserve accounts

- 15F.** (1) On or after the commencement date, the board may apply to the registrar to transfer all or some of the credit balance in an existing employer reserve account as defined in the rules to the employer surplus account. 35
- (2) The registrar may approve such transfer if he or she is satisfied that the allocation of actuarial surplus to such account was negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C.
- (3) Any remaining portion of the credit balance in an existing employer reserve account shall be treated as actuarial surplus to be distributed in terms of section 15B. 40

Right to share in surplus accounts on exit

- 15G.** (1) Notwithstanding anything to the contrary in the rules, members who cease to be members of the fund should receive, as part of their transfer values or benefit payments, a share of any credit balances in the member surplus account, the investment reserve account and such contingency reserve accounts as the board deems appropriate, in the ratio that the liability of the fund in respect of the past service of the members leaving the fund bears to the liability of the fund towards all its members in respect of past service at that date: Provided that the board may use a reasonable alternative if there are sound administrative reasons why such a calculation cannot be performed. 45
- (2) Notwithstanding anything to the contrary in the rules, existing members and former members may not participate in the employer surplus account when they transfer out of a fund or when they become entitled to a benefit, unless the relevant employer so directs. 50 55

Use of contents of any surplus accounts to fund deficits

- 15H.** (1) If a fund has credit balances in the member surplus account or the employer surplus account and the fund is found to have a deficit following an actuarial valuation, including a valuation carried out for the purpose of distributing assets on liquidation of the fund, such credit balances shall be reduced in the same proportion by the amount of the deficit: Provided that no credit balance may be reduced by more than the amount to which the account was in credit. 5
- (2) If the deficit exceeds the credit balances in the member surplus account and the employer surplus account, these credit balances shall be applied in full to reduce the deficit and shall be reduced to zero. 10

Application of surplus accounts on liquidation of fund

- 15I.** On liquidation of a fund in terms of section 28 or 29, any credit balances in any reserve accounts, the member surplus account and the employer surplus account shall be applied in the following order of priority: 15
- (a) All credit balances in such accounts may be drawn upon to secure the rights and reasonable benefit expectations of the members participating in the distribution: Provided that the credit balances in any such accounts shall be reduced by the same proportion. 20
- (b) Any remaining credit balances in the member surplus account, any contingency reserve accounts and any surplus which has not been allocated to the member and employer surplus accounts, shall be used for the benefit of the members and former members of the fund, in such manner as the liquidator, acting on the advice of the valuator, shall determine. 25
- (c) Any remaining balance in the employer surplus account shall be paid to the employer unless the employer was liquidated prior to the commencement of the liquidation of the fund, in which case it shall be used in the following order of priority, namely— 30
- (i) to meet contributions deducted from members' earnings and not paid to the fund;
- (ii) to meet contributions due from the employer but not paid to the fund; and
- (iii) to be distributed amongst the members at the date of liquidation and such former members as are eligible in terms of the rules to participate in the distribution. 35

Use of employer surplus to prevent job losses

- 15J.** (1) A fund may apply to the registrar for permission to pay any credit balance in an employer surplus account to an employer where negotiations in terms of section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), have confirmed the need to retrench employees if additional capital is not obtained: Provided that an independent auditor may be required by the fund to certify such need. 40
- (2) The application must be made to the registrar in the prescribed manner. 45
- (3) The registrar may only grant an application, and issue a certificate to the applicant to the effect that the requested payment may take place, if the registrar is satisfied that—
- (a) members have had full disclosure of the current financial position of the fund and the proposed distribution to the employer, and the need of the employer for additional capital in order to maintain employment, together with the report of the independent auditor, if any, and any information that members may require to exercise their rights under the Labour Relations Act, 1995 (Act No. 66 of 1995); 50

- (b) members have had a reasonable opportunity to consider the proposal;
- (c) at least 75 per cent of the members currently in employment have approved the proposal, in writing; and
- (d) negotiations in terms of section 189 of the Labour Relations Act, 1995 (Act No. 66 of 1995), have confirmed the need to retrench more than 10 per cent of the membership of the fund at the previous financial year end will be retrenched if the payment is not made.

Specialist tribunal

15K. (1) When the board fails to submit a scheme for the apportionment of an actuarial surplus in terms of section 15B within the prescribed period, or if the registrar is not satisfied that the scheme submitted by the board in terms of section 15B is reasonable and equitable or if the registrar considers that unresolved complaints require investigation which may lead to a review of such scheme or if the board requests it, the registrar shall require the board to refer the scheme to a special ad hoc tribunal to perform the functions of the board set out in section 15B.

(2) The tribunal shall consist of at least three members who must all be independent of any stakeholder in the fund, and of whom—

- (a) at least one shall be a lawyer selected by the board from a panel approved by the registrar;
- (b) at least one shall be an actuary selected by the board from a panel approved by the registrar; and
- (c) at least two must have experience in retirement fund financing: Provided that the registrar may select the members of the tribunal, if the board fails to make their selection within three months of the request being made by the registrar.

(3) The tribunal shall make the apportionment within such period as may be determined by the registrar.

(4) Three members of the tribunal shall constitute a quorum.

(5) The tribunal shall elect a chairperson from amongst its members and such chairperson shall have a deliberative vote but no casting vote.

(6) At least two-thirds of the members of the tribunal must agree to any decision or step taken in the exercise of the powers contemplated in section 15B(10).

(7) The tribunal may follow any procedure which it considers appropriate in conducting an investigation, including procedures in an inquisitorial manner, and affording any stakeholder the right to a hearing.

(8) Notwithstanding section 22 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), the tribunal may obtain copies of any document or correspondence contained in the files of the registrar relating to a fund in connection with which the tribunal is conducting an investigation.

(9) (a) For purposes of an investigation, the tribunal may—

- (i) under the hand of the chairperson, summon any person who in the opinion of the tribunal may be able to give material information concerning the subject matter of the investigation or who is believed by the tribunal to have in his or her possession or custody or under his or her control any book, document, record or thing which has any bearing on the subject matter of the investigation, to appear before it at a time and place specified in the summons, to be questioned or to produce that book, document, record or thing, and may retain for inspection any book, document, record or thing so produced; and
- (ii) through the chairperson administer an oath to, or accept an affirmation from, any person summoned under subparagraph (i) and question that person and require the person to produce any book, document, record or thing in his or her possession or custody or under his or her control.

(b) A summons referred to in paragraph (a) shall be served in the same manner as a summons for the attendance of a witness at a civil trial in a magistrate's court.

(c) In connection with the questioning of any person summoned under this section or the production by such person of any book, document, record or thing, the law relating to privilege as applicable to a witness summoned to give evidence or to produce a book, document, record or thing in a civil trial before a court of law shall apply.

(d) (i) Any person summoned in terms of this section or who has given evidence before a tribunal shall be entitled to the same witness fees as if he or she had been summoned to attend or had given evidence at a civil trial in a magistrate's court held at the place where the investigation is held.

(ii) Any fees which may become payable in terms of subparagraph (i) shall be paid by the fund.

(10) The tribunal shall keep, whether in writing or by mechanical or electronic means, a permanent record of the proceedings relating to the determination of a matter before it, including the apportionment of actuarial surplus and any evidence given: Provided that such record shall be passed to the registrar once the tribunal has completed its determination.

(11) After the tribunal has completed an investigation, it shall send a statement containing its determination and the reasons therefor, signed by the members of the tribunal, to all parties concerned as well as to the registrar.

(12) Any costs arising from the work of the tribunal, including periodical allowances or compensation for personal expenses of the members of the tribunal, shall be recovered from the fund out of the surplus being apportioned if the tribunal satisfies the registrar that such costs were reasonably incurred in the performance of the required functions.

(13) Any member of the public may obtain a copy of the record from the registrar on payment of a fee determined by the registrar.

(14) The determination of the tribunal shall be binding on the stakeholders.

(15) The registrar must accept such determination as satisfying the requirements of section 15B(9) unless the registrar is of the opinion that the tribunal failed to exercise its discretion properly and in good faith."

Amendment of section 30 of Act 24 of 1956, as amended by section 17 of Act 103 of 1979 and section 25 of Act 104 of 1993

5. Section 30 of the principal Act is hereby amended by the addition of the following subsection:

"(3) If a registered fund which has not been exempted from actuarial valuation in terms of section 2(3)(a) is liquidated in terms of section 28 or 29 after the date from which minimum individual reserves are payable on cessation of membership, and the fair value of the assets of the fund, less any current liabilities, is less than the sum of the minimum individual reserves payable in respect of the existing members and former members who may participate in the distribution of the assets (with appropriate adjustment for benefits previously paid in the case of former members) and the cost of annuity policies which will provide equivalent pensions for the existing pensioners and deferred pensioners, the shortfall shall represent a debt payable by the employer to the fund: Provided that, where more than one employer participates in the fund, the shortfall shall be distributed amongst such employers in a manner deemed reasonable by the liquidator."

Amendment of section 30H of Act 24 of 1956, as inserted by section 3 of Act 22 of 1996

6. Section 30H of the principal Act is hereby amended by the addition of the following subsection:

"(4) The Adjudicator shall not have jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B which relate to the decisions taken by the board or any stakeholder in the fund or any specialist tribunal convened in terms of section 15K."

Short title and commencement

7. This Act is called the Pension Funds Second Amendment Act, 2001, and comes into effect on a date to be determined by the President by proclamation in the *Gazette*.