

**THE RETIREMENT FUNDS ACT, 2005**

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(Act No of 2005)



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MSWATI III

King of Swaziland

.....October, 2005

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AN ACT

entitled

An Act to make provision for the regulation and supervision of retirement funds and for matters incidental thereto.

ENACTED by the King and the Parliament of Swaziland.



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## PART I

### SHORT TITLE AND INTERPRETATION

#### *Short title and commencement*

1. This Act may be cited as The Retirement Funds Act, 2005, and shall come into force on such date as the Minister may, by Notice in the Gazette, determine.

#### *Interpretation*

2. In this Act, unless the context otherwise requires:

"actuary" means any fellow of an institute, faculty, society or chapter of actuaries approved by the Registrar;

"adjudicator" means the Retirement Funds Adjudicator appointed in terms of section 45 of this Act;

"annuity" means a series of equivalent payments payable either monthly, quarterly, bi-annually or annually;

"association" means any association of people;

"auditor" means a person who is registered as an auditor in terms of the Accountants Act, 1985;

"complainant" means:

- (a) any person who is, or who claims to be:
  - (i) a member or former member of a fund;
  - (ii) a beneficiary or former beneficiary of a fund;
  - (iii) an employer who participates in a fund;
- (b) any group of persons referred to in a (i), (ii) or (iii);
- (c) a management board of a fund or a member thereof; or
- (d) any person who has an interest in a complaint.

"complaint" means a complaint of a complainant relating to the administration of a fund, the investment of its assets or the interpretation and application of its rules, and alleging-



- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the interest of the complainant has or will be prejudiced as a result of the administration of the fund by any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen between the fund or any person and the complainant; or
- (d) that an employer who participates in the fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complaint.

"consolidate" for the purposes of this act means the incorporation of all alterations, rescissions or additions to a fund's rules into a bound set of rules of the fund and which rules have then been approved and endorsed by the Registrar.

"court" means the High Court of Swaziland having jurisdiction.

"dependant" means in relation to a member:

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance if such person-
  - (i) was in the opinion of the management board dependent on the member for maintenance;
  - (ii) is the spouse of the member and shall include a spouse as a result of any customary or religious union;
  - (iii) is a child of the member and shall include a posthumous child, an adopted child and an illegitimate child;
  - (iv) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.

"employer" means:



- (a) in the context of retirement funds referred to in paragraph (a) of the definition of retirement funds, a person representing the person or group of persons whose employees are members of the retirement fund or a person representing the governing body of an organisation whose employees are members of the retirement fund; or
- (b) in the context of retirement funds referred to in paragraph (b) of the definition of retirement funds, a person representing a business carrying on the business of a retirement fund;

"financial year" in relation to any person, means the 12 months, or such other period as approved by the Registrar, preceding a set day of the month in each calendar year as at which the person's financial statements are drawn;

"fund" means a retirement fund as contemplated in this Act;

"insurance and retirement benefit trust fund" means the fund established in terms of the Insurance Act, 2005;

"insurer" means a person registered in terms of the Insurance Act, 2005;

"life annuity" means for purposes of this Act an annuity payable during the lifetime of an individual or during the joint lifetime of an individual and any dependant nominated by the individual;

"management board" means the body as contemplated in section 8 of this Act which has been entrusted with control over the retirement fund ;

"market value" means the value of a fund's assets as determined in terms of the Regulations;

"member" means any person whose membership of the fund has been established in terms of the rules of the fund and has not yet been terminated in terms of the provisions of the rules and shall include a person entitled to or receiving a benefit under the rules of the fund;

"Minister" means the Minister responsible for Finance;

"officer" in relation to a fund means any member of the management board, any manager, principal officer, treasurer, clerk or employee and shall exclude any person appointed as auditor in terms of section 21 or any person appointed as valuator in terms of section 22 of this Act;

"pension" means an annuity payable under any law or under the rules of a pension fund, provident fund or retirement annuity fund;

"person" shall include a juristic person;



"principal officer" means the person referred to in Section 11 of this Act;

"Registrar" means the Registrar of retirement funds referred to in Section 4 of this Act;

"Regulations" means the Regulations made in terms of this Act;

"retirement fund" means:

- (a) any plan, fund or programme established for the purpose of providing an arrangement established with the purpose of providing annuities and or lump sum benefits for its members on their retirement or for the dependants of such members on the death of such members;
- (b) retirement benefits to individuals. The term includes but is not limited to any pension fund, provident fund or retirement annuity fund, as defined in the Income Tax Act, as amended from time to time; or
- (c) a business carried on with the purpose of providing annuities and or lump sum benefits for its members on their retirement or to the dependants of such members on the death of such members;

"rules" means the rules referred to in section 13 of this Act and which have been approved and endorsed by the Registrar in terms of section 13 of this Act;

"subsidiary" for purposes of this Act, means an associated organisation in which a person has an ownership interest exceeding at least 15% of that organisation;

"this Act" includes the Regulations and the forms and directives emanating from those Regulations;

"total interest" means:

- (a) in the case of a retirement fund where the member's benefit on retirement is a series of equivalent payment's which is or has been determined by a formula taking into account one or more of age, salary, length of service or otherwise, the value of the member's benefit determined by the fund's appointed valuator or the value determined on a basis supplied by the fund's appointed valuator-

Provided that the method of valuing the member's benefit shall be consistent with the basis used by the valuator to establish the fund's liabilities for purposes of this Act;



- (b) in the case of a retirement fund where a separate account is kept of each member's share of the fund for retirement purposes, and which account is made up of an accumulation of contributions and investment returns thereon, the total amount of the member's account and any other amount which the member may become entitled to from the fund;

"trustee" means a member of a management board;

"valuator" means an actuary who has been appointed in terms of Section 22 of this Act.

## PART II

### INTRODUCTORY PROVISIONS AND REGISTRATION OF RETIREMENT FUNDS

#### *Prohibition of unregistered retirement funds*

3. (1) After the expiry of a period of 12 months after the commencement of this Act, no person who was carrying on the business of a retirement fund at the commencement of this Act, shall carry on the business of a retirement fund unless he has been registered as a retirement fund in terms of section 5 of this Act.

(2) Every retirement fund which was in existence at the commencement of this Act shall, within 120 days after the commencement of this Act, apply to the Registrar for registration in terms of section 5 of this Act.

(3) Any retirement fund referred to in subsection (2) which fails to submit an application for registration in the allowed time, shall within 7 days of the expiry of the allowed time, show the Registrar proof to his satisfaction that it has decided to act in terms of section 40 of this Act, failing which, the Registrar shall act against the fund in terms of section 41 of this Act.

(4) The Registrar may extend the period for application for registration allowed in subsection (2), if an application for an extension is made to the Registrar in writing.

(5) No retirement fund which was established after the commencement of this Act shall commence operations until the Registrar has informed the fund in writing that its registration has been completed, or that its provisional registration has been approved and the Registrar has supplied the fund with a certificate of registration, or a certificate of provisional registration.

(6) After the commencement of this Act, no person shall carry on the business of a retirement fund after expiry of a period of 3 months from the date on which he has been advised by the Registrar that his application for registration has been refused, and the fund shall, within 7 working days of the expiry of the period of grace, show the Registrar



proof that it has commenced to act in terms of section 40 of this Act, failing which the Registrar shall act against the fund in terms of section 41 of this Act.

(7) After the expiry of a period of 12 months from the commencement of this Act, no person shall use the words "retirement" as part of the name of his association or business or use a name for his association or business which may convey the impression that he carries on the business of a retirement fund, unless he has been registered as a retirement fund in terms of section 5 of this Act.

(8) After the expiry of a period of 12 months from the commencement of this Act, no person shall use the word "retirement" as part of the name of any of his products or services, or use any other name for his product or services which may convey the impression that he carries on the business of a retirement fund or is an agent of a retirement fund, unless the product or services that he is offering is underwritten by an insurer registered in terms of the Insurance Act, 2005, or a retirement fund and he has been duly authorised in writing by that insurer or fund to be its representative.

#### ***Registrar of Retirement Funds and Retirement Funds Board***

4. (1) The person appointed as Registrar in terms of the Insurance Act, 2005, shall also be the Registrar of retirement funds and the powers vested in him and his office for purposes of insurance business shall also vest in him for purposes of retirement fund business as applicable.

(2) The Board created as the Insurance and Retirement Funds Board in terms of the Insurance Act, 2005, shall also be the Retirement Funds Board and the powers vested in that Board for purposes of insurance business shall vest in the Board for purposes of retirement fund business as applicable.

#### ***Registration of Retirement Funds***

5. (1) An application for registration of a retirement fund under this Act shall be made to the Registrar by the principal officer in terms of the Regulations and prior to submitting any such application to the Registrar for consideration the principal officer shall ensure that his application is complete in that his application complies with the Regulations, and any omissions have been explained by way of a note.

(2) The Registrar may request an applicant to provide further details which the Registrar considers necessary for him to make a decision regarding registration of the retirement fund and the Registrar may refuse to consider an application solely on the grounds of inadequate or incomplete information.

(3) If the Registrar is satisfied that the Fund has complied with the



Regulations, and he is satisfied with any other information that he may have requested in terms of subsection (2), he shall register the fund by issuing a certificate of registration and entering the details of the fund in the retirement funds register and endorsing the rules of the fund and returning a copy to the applicant.

(4) If the Registrar is not satisfied that the requirements of the Regulations have been complied with, or he is not satisfied with any other information that he may have requested in terms of subsection (2), he shall not register the fund and he shall provide the applicant in writing with the reasons for his refusal to register the fund.

(5) Notwithstanding the provisions of section 3 and of subsection (4) of this Act, if the fund has complied with such requirements as the Registrar has prescribed and he is satisfied that the registration of the fund is in the public interest, the Registrar may register the fund provisionally and forward to the fund a certificate of provisional registration:

Provided that:

- (a) the provisional registration shall be valid for a period of 3 years from the date of provisional registration;
- (b) the Registrar may if he is satisfied that it is in the public interest, extend the period of provisional registration for a period of twelve months at a time;
- (c) the period of extended provisional registration contemplated in subsection (5) (b) shall not exceed thirty six months in aggregate; and
- (d) the fund shall endeavour to complete the requirements for registration and shall at the request of the Registrar provide him with details of its efforts to complete the requirements for registration.

(6) The Registrar may attach any conditions not inconsistent with this Act to a fund's registration that he considers necessary, and he shall not issue a certificate of registration unless he has informed the applicant in writing of his conditions, and the applicant has agreed in writing that he will abide by the conditions.

(7) Every retirement fund shall become a juristic person on the receipt by its Principal Officer of written confirmation of its registration by the Registrar, and shall thereafter be capable of suing and being sued in its own name and doing all the lawful things in order to exercise the powers vested in it to carry out the functions ascribed to it in terms of its rules, and to carry out its duties in terms of this Act.

(8) A person who supplies false information to the Registrar with the intention



of fraudulently registering a retirement fund commits an offence, and shall, on conviction, be liable to a fine not exceeding E5 000 or a term of imprisonment not exceeding 1 year.

(9) No fund shall be registered or provisionally registered under this Act except as provided for in this section.

### ***Cancellation or suspension of registration***

6. (1) The Registrar shall cancel the registration of a fund:

- (a) on being provided with proof that the fund has ceased to exist;
- (b) on becoming aware that the fund's registration was based on false information; provided that, if the Registrar is satisfied that the false information was provided by mistake and not as part of a scheme to commit fraud, he shall suspend the registration in lieu of cancelling the registration, and he shall allow the fund to submit the correct information within 60 days of the suspension and he shall cancel the registration if the correct information is not supplied within this time, or is supplied but is not to his satisfaction.

(2) The Registrar may seek an order of the court authorising the cancellation or suspension of registration of a retirement fund:

- (a) if the fund has violated any provisions of this Act and has ignored any request by the Registrar to take corrective measures;
- (b) if any investigation carried out by the Registrar gives the Registrar cause for cancellation or suspension.

(3) The court may suspend the registration of a fund in a manner in which it thinks fit and the court shall determine the period for which the suspension shall apply, the conditions attached to the suspension, the conditions for reinstatement and the consequences of failing to comply with such conditions.

(4) The court may cancel the registration of a fund if it considers this to be in the public interest.

(5) On the suspension of a fund's registration its members and employer shall cease to benefit from any concessions granted by the Income Tax Act, but, it shall remain subject to the provisions of this Act except that the fund may not make any changes to its rules and must cease to accept new members and must cease any marketing.

(6) A fund whose registration has been cancelled shall within 30 days of being informed of the cancellation of its registration by the Registrar provide proof to the Registrar that it has decided to act in terms of section 40 of this Act, failing which, the Registrar shall act against the fund in terms of section 41:



Provided that, if the Registrar considers it to be in the members' interest, he may proceed to act against the fund in terms of section 41 immediately on the cancellation of its registration, in which case the Registrar shall inform the fund of his intention and the fund shall not take any action in terms of section 40, or it shall cease any action that it may have commenced in terms of section 40.

(7) The costs of any successful application to the court by the Registrar for purposes of this section shall be borne by the fund.

(8) A person who contravenes the provision of subsection (5) commits an offence and shall, on conviction, be liable to a fine of E50 000 or a term of imprisonment not exceeding 2 years.

### ***Retirement Fund Business***

7. A retirement fund may not carry on any other business other than the business of a retirement fund, where the business of a retirement shall be taken to mean the purpose of the retirement fund as implied by the definition of "retirement fund" in terms of section 2 of this Act.

## **PART III**

### **MANAGEMENT OF A RETIREMENT FUND**

#### ***Management Board of a retirement fund***

8. (1) Every retirement fund shall have a controlling body which shall be responsible for controlling the business of the retirement fund and which shall be referred to as "the management board".

(2) The management board shall consist of at least 4 persons, who shall be referred to as "trustees", and of whom at least 50% shall be elected by the members and the balance shall be appointed by the employer:

Provided that, on application from a fund, and on the receipt of adequate information to his satisfaction, the Registrar may:

- (a) grant a fund permission to have a management board consisting of less than four persons if this number is impractical or unreasonably expensive, provided that, the members' right to elect at least 50% of the trustees shall not be affected.



- (b) exempt a fund from the requirement that the members may elect at least 50% of the trustees if-
- (i) the members of the fund are persons who are employees of more than three different employers who are not subsidiaries of the same holding company; or
  - (ii) the fund is a retirement annuity fund.

(3) The rules of the fund shall state the constitution of the management board, the procedure for election of the trustees, the procedures at meetings, voting rights of members of the management board, the breaking of deadlocks and the powers of the management board.

(4) The management board shall be headed by a chairman who shall be elected by the trustees from amongst themselves.

(5) Any decision of the management board shall be carried in a resolution which shall be minuted and each resolution shall be signed by a majority of the trustees-

Provided that the chairman of the management board shall sign each resolution.

***Duties of the management board***

9. The management board shall ensure that:
- (a) records of the operations of the retirement fund that completely and correctly reflect the operations of the fund are kept;
  - (b) all minutes of meetings are maintained in such a manner that the resolutions of the management board are correctly reflected;
  - (c) the minutes of the management board meetings are kept in a bound book, such that it will not be possible to remove or replace pages of the minute book, or to insert pages into the minute book;
  - (d) members of the fund are informed of their benefits and rights;
  - (e) contributions are timeously paid to the retirement fund;
  - (f) the rules and operations of the fund are not in violation of this Act; and
  - (g) the fund is managed in accordance with its registered rules.



***Fiduciary responsibilities of the management board***

10. The management board shall ensure that the interest of members is protected at all times by:
- (a) acting with care, diligence and good faith;
  - (b) avoiding conflict of interest; and
  - (c) acting impartially.

***Principal Officer of a retirement fund***

11. (1) Every registered retirement fund shall have a principal officer who shall be a Swazi citizen resident in Swaziland.
- (2) The principal officer shall be appointed by the management board of the retirement fund.
- (3) If for any reason the Principal Officer is unable to fulfil any duty imposed on him by this Act, the management board may appoint another principal officer within 30 days of the principal officer becoming unable to perform his aforementioned duties.
- (4) The name of the principal officer shall be advised in writing to the Registrar on registration, and, a change of principal officer shall be advised in writing to the Registrar within 30 days of the change being effected.

***Duties of the principal officer***

12. The principal officer shall be responsible for:
- (a) receiving and processing all communication made to the retirement fund;
  - (b) ensuring that all decisions of the management board are implemented;
  - (c) ensuring that all returns required in terms of this Act are submitted timeously; and
  - (d) all other administrative functions required in terms of the rules of fund and applicable legislation.



***Rules of a retirement fund***

13. (1) The business of a retirement fund shall be governed by a set of rules which shall comply with the prescribed requirements in terms of the Regulations.
- (2) No rules shall be of any force unless those rules have been approved, and endorsed by the Registrar after consultation with the Minister.
- (3) Subject to the provisions of this Act, the rules of a retirement fund shall be binding on the fund and its members, employer and officers and any person who has a claim on the fund.
- (4) Every member of a retirement fund shall be entitled on request to inspect a copy of the rules of the fund.
- (5) Notwithstanding the provisions of subsections (2) and (3), if the rules of the retirement fund are found to be in conflict with the provisions of this Act on any aspect, then the provisions of this Act shall apply.

***Amendment of rules***

14. (1) A retirement fund may alter or rescind or make any addition to its rules provided that no such alteration, rescission or addition shall affect the rights of any creditor of the fund other than as a member.
- (2) All proposed amendments shall be submitted to the Registrar for approval within 60 days of the management board's resolution approving the amendment.
- (3) Any amendment to the rules which affect the financial condition of the fund shall be accompanied by a valuator's certificate certifying that the amendment will not render the fund financially unsound.
- (4) If the Registrar is satisfied that the amendment is not against the members' or employers interest, and not inconsistent with this Act, he shall register the amendment and he shall return an endorsed copy of the amendment to the fund.
- (5) The resolution of the management board must state clearly the date on which the amendment will come into force and also the reason for the amendment and the Registrar shall not register any amendment which does not state the aforementioned date and reason.
- (6) A fund may at any time consolidate its rules which shall take effect from a date decided by the management board: Provided that the Registrar is satisfied that the date will not prejudice the members' interest.



### ***Registered office of a retirement fund***

15. (1) Every retirement fund shall maintain an office in the Kingdom of Swaziland which shall be its principal place of business.
- (2) The address of the registered office shall be notified to the Registrar and any change shall be reported to the Registrar within 30 days of the change being effected.
- (3) Any notice emanating from legal proceedings may be served on the retirement fund by delivery to the registered office or if that office has ceased to exist by delivery to the Registrar.

### ***Contributions due to a retirement fund***

16. (1) All contributions due to a retirement fund in respect of its members shall be paid to the fund or to the person administering the fund's assets within 7 days of the expiry of the period for which it was due.
- (2) The management board shall ensure that all moneys received by the fund are deposited in the fund's banking account or are paid to the person administering the fund's assets by the end of the first working day following the receipt of the moneys.

### ***Retirement Fund Bank Accounts***

17. (1) A retirement fund which maintains custody of all or part of its assets shall maintain a banking account with a banking institution registered in terms of the Financial Institutions Order, 1975, or an institution registered as a banking institution in terms of the laws of the country where its head office is maintained, provided that the institution has been granted permission by the Government of Swaziland to operate as a bank in Swaziland.
- (2) Any accounts contemplated in subsection (1) shall be operated at a branch of the bank within the borders of the Kingdom of Swaziland.



## PART IV

### STATUTORY OBLIGATIONS OF A RETIREMENT FUND

#### *Retirement Fund assets*

18. (1) All of a retirement fund's assets shall be registered in its own name and the fund shall retain custody of all its assets.
- (2) Notwithstanding the provisions of subsection (1), a retirement fund's assets may be kept in the name of the retirement fund by one or more of the following institutions registered in a country approved by the Registrar in terms of the Regulations:
- (a) a stockbroker;
  - (b) an Investment Manager;
  - (c) an insurer; or
  - (d) a banking institution.
- (3) For purposes of subsection (2) "registered" means that the person has been duly authorised in terms of the laws of any of the countries mentioned, to carry on the business of stock broking, investment management, insurance or banking, as applicable, and the authorisation has not been revoked.
- (4) Notwithstanding the provisions of subsection (2), the Registrar may on application by an institution which does not qualify in terms of subsection (2), grant that institution permission to retain custody of a retirement fund's assets in the name of the retirement fund if the Registrar is satisfied that:
- (a) the institution is adequately supervised by the authorities of the institution's country of origin;
  - (b) the institution is financially sound; and
  - (c) the institution is not under investigation for any reason.

#### *Retirement Fund investments*

19. (1) A retirement fund's investment shall be invested in accordance with the Regulations.
- (2) A retirement fund may invest part of its assets in the business of an employer or in any subsidiary company or holding company of the employer



provided that the amount invested shall not exceed the amount prescribed by the Regulations from time to time.

- (3) A retirement fund shall not use any of its moneys nor shall the retirement fund be coerced or induced to:
- (a) grant a loan to a sponsor, employer or member of the management board of the fund;
  - (b) invest any of its moneys with any institution or organisation with a view to securing a loan at a preferential rate of interest or for securing any benefit monetary or otherwise for the benefit of the employer or any member of the management board or any other person; or
  - (c) use any of its assets as a collateral for a loan made by any institution or person to the employer or any member of the management board of the retirement fund.
- (4) Notwithstanding the provision of subsection (3), a retirement fund may grant a loan to a member as an investment, or issue a guarantee so that the member may obtain a loan, to enable the member:
- (a) to purchase a dwelling, or to purchase land and erect a dwelling on it, for occupation by the member or a dependant of the member, provided that the aforementioned land and dwelling shall be registered in the name of the member or his spouse;
  - (b) to make additions or alterations to or to maintain or repair a dwelling which belongs to the member or his spouse and which is occupied or will be occupied by the member or a dependant of the member;
  - (c) to erect a dwelling on land that the member or his spouse does not own but on which land the member or his spouse can exercise a right or privilege in terms of any customary or statutory law to build a dwelling for his own occupation or for occupation by his dependants.
- (5) If the loan or guarantee contemplated in subsection (4) is to be utilised for the purpose of building a dwelling on Swazi National land, then before granting the loan the fund shall ensure that the written permission of the official custodians of the land has been obtained.
- (6) A loan or guarantee contemplated in terms of subsection (4) to which the provisions of subsection (5) do not apply shall be secured by a first mortgage on the property being financed.



- (7) A loan or guarantee contemplated in subsection (4) and to which the provision of subsection (5) do not apply shall not exceed 90% of the market value of the property concerned.
- (8) A loan or guarantee contemplated in subsection (4) shall not exceed sixty percent of the value of the member's cash withdrawal benefit in the fund calculated as if the member has withdrawn on the date the loan was granted.
- (9) A loan contemplated in subsection (4) shall be repayable over a period not more than and at a rate of interest not less than prescribed by the Registrar in terms of the Regulations.
- (10) A person who contravenes any provision of this section commits an offence and shall, on conviction, be liable to a fine not exceeding E100 000 or a term of imprisonment not exceeding 5 years:

Provided that if the person convicted is not a juristic person, he shall be subject to both the aforementioned fine and prison sentence as the court decides.

### ***Financial Statements***

20. (1) Within 6 months after the end of the financial year of a retirement fund the principal officer shall submit to the Registrar a copy of the fund's audited financial statements.
- (2) The principal officer shall also submit to the Registrar any special report by the auditor that refers to the financial statements.
- (3) The principal officer shall supply the Registrar with any further information that he may request.
- (4) If the Registrar is of the opinion that any document furnished by a registered fund in terms of subsection (1) does not correctly reflect the revenue and expenditure or the financial position of the fund, he may reject the document, and
- (a) he shall notify the fund of the reasons for such rejection; and,
  - (b) the fund shall be deemed not to have furnished the said document to the Registrar:

Provided that in such event the Registrar may apply the provisions of section 71 of this Act, even though the



period concerned may have expired before application is made for extension.

- (5) When having the financial statements drawn up, the principal officer may take into account the provision of the Regulations.
- (6) A person who does not comply with the provisions of subsection (1) commits an offence and shall be liable to a penalty of E500 which shall be increased by an amount of E10 for every working day that the provision is not complied with.
- (7) A person who fails to comply with the provisions of subsections (2) or (3) commits an offence and shall, on conviction, be liable to the general penalty in terms of section 68 of this Act.

#### ***Appointment, powers and duties of auditor***

21. (1) Every retirement fund shall appoint an auditor for its business provided that such appointment shall be considered provisional and be of no force until the Registrar has approved the appointment in writing.

(2) An application for approval of the appointment of the auditor shall be made in terms of the Regulations within 30 days from the date of provisional appointment of the auditor.

(3) The Registrar may refuse to approve the appointment of an auditor or withdraw his prior approval if he considers this to be in the interest of the retirement fund:

Provided that the retirement fund may appeal to the Minister against a decision of the Registrar taken under this subsection.

(4) The Registrar shall not approve any director or employee of the employer or any other employer associated with the employer as an auditor except that where the employer is the Government of Swaziland, the Auditor General may be approved as the auditor.

(5) The auditor shall ensure that every financial statement of the retirement fund is properly drawn up and fairly reflects the financial position of the retirement fund.

(6) The auditor shall bring to the notice of the Registrar at any time any irregularity which in his opinion may lead to financial loss if not rectified.

(7) No person shall hinder the appointed auditor in the performance of his duties and for purposes of this subsection the withholding of information, the concealing of information, intentionally supplying wrong information and denial of access shall constitute hindrance in addition to any other act that a court decides constitutes hindrance.



(8) The auditor shall satisfy himself that the documents or statement of assets to be submitted in terms of the Regulations fairly reflect the financial position of the retirement fund.

(9) The auditor shall satisfy himself that the retirement fund's investments comply with the Regulations.

(10) If the appointed auditor does not satisfactorily fulfil any provision of this section where he is required to apply his skill or if any person contravenes the provisions of subsection (7), he commits an offence and shall, on conviction, be liable to the general penalty in terms of section 68 of this Act.

***Appointment, powers and duties of valuator***

22. (1) Every retirement fund shall appoint an actuary as a valuator provided that such appointment shall be considered provisional and be of no force until the Registrar has approved the appointment in writing.

(2) An application for approval of the appointment of a valuator shall be made in terms of the Regulations.

(3) No person shall hinder the valuator in the performance of his duties and, for purposes of this subsection, the withholding of information, the concealing of information, the supplying of false information and the denial of access shall constitute hindrance in addition to any other act that the court may decide constitutes hindrance.

(4) The appointed valuator shall be responsible for valuing the fund's liabilities and the fund's assets for actuarial purposes according to generally accepted actuarial practice and producing a report thereon.

(5) The appointed valuator shall bring to the Registrar's notice any practice or irregularity which he considers might harm the members' interest.

(6) A valuator shall on the termination of his appointment by the retirement fund bring to the Registrar's attention any irregularity that he is aware of which might prejudice the members of the fund.

(7) A person who contravenes any one or more of the provisions of subsections (3), (5) or (6), commits an offence and shall, on conviction, be liable to the general penalty in section 68 of this Act.

(8) If the appointed valuator does not satisfactorily fulfil any provision of this



section where he is required to apply his skills or if any person contravenes the provisions of subsection (3), he commits an offence and he shall, on conviction, be liable to the general penalty in terms of section 68 of this Act.

### ***Actuarial valuations***

23. (1) After the commencement of this Act the management board shall ensure that an actuarial valuation of the fund is carried out by the funds appointed valuator as at a date not later than the date of the fund's third financial year end since the commencement of this Act, and thereafter the management board shall ensure that an actuarial valuation of the fund is carried out at least once every three years.
- (2) A written report shall be issued by the valuator on the findings of the valuation.
- (3) Each actuarial report shall be deposited with the Registrar within 12 months from the date to which it relates.
- (4) The Registrar may, at his discretion, grant an extension of time in terms of section 71 of this Act for submission of the valuator's report.
- (5) The management board shall ensure that the report contemplated in this section is made available on demand to every employer whose employees are members of the fund.
- (6) The Registrar may direct that the management board cause an actuarial valuation to be carried out at any time if the Registrar is of the opinion that the financial condition of the fund needs to be investigated.
- (7) The administrator of a fund shall submit to the Registrar at the same time that the valuator's report is submitted a statement to the effect that, to the knowledge of the administrator, the data supplied to the valuator for the purposes of the valuation was complete and accurate in every respect.
- (8) If the Registrar is of the opinion that the report contemplated in subsection (1) does not correctly reflect the financial condition of the fund in any respect, he may reject the report and,
- (a) he shall notify the fund of the reasons for such rejection; and
- (b) the fund shall be deemed not to have furnished the said document to the Registrar:

Provided that in such event the Registrar may apply the provisions of section 71 of this Act even though the period concerned may have expired before application is made for extension.



### ***Amalgamation and transfer***

24. (1) The business or part of a business of a retirement fund may only be merged with the business of another retirement fund.
- (2) No such merger contemplated in subsection (1) shall be effected until the Registrar has given his approval in writing.
- (3) Every application for approval of a proposed merger shall be made to the Registrar in terms of the Regulations.
- (4) The parties to the proposed merger shall supply the Registrar with any further information that he may request and the parties shall carry out any special investigations that the Registrar may request and supply him with a report thereon.
- (5) If the Registrar is satisfied that the provisions of the Regulations have been complied with and that any additional requests made by him in terms of subsection (4) have been adequately carried out to his satisfaction, he shall issue a certificate approving the merger of the business for which approval had been sought.
- (6) A person who contravenes any provision of this section commits an offence and shall, on conviction, be liable to the general penalty in terms of section 68 of this Act.

### ***Impaired financial soundness of a retirement fund***

25. (1) If any return reveals in the Registrar's opinion that a fund is not in a sound financial condition, the Registrar shall request the management board to submit a scheme for the restoration of the fund to financial soundness.
- (2) The Registrar may ask the management board to make any alteration to any scheme contemplated in subsection (1).
- (3) If the Registrar is satisfied that the scheme contemplated in subsection (1), is reasonable, he shall authorise the scheme to proceed and the management board shall then implement the scheme.
- (4) If the Registrar is of the opinion that the financial condition of the fund is not repairable or if he is of the opinion that the management board is unable to effectively implement the scheme referred to in subsection (1) then he shall act against the fund in terms of section 35 or section 41 of this Act.



## PART V

### EXEMPTION FROM CERTAIN PROVISIONS OF PART IV OF THIS ACT

#### *Registrar's authority and allowable exemptions*

26. (1) The Registrar is hereby empowered to consider and grant a request from a retirement fund for exemption from certain of the provisions of Part IV provided that any request for exemption shall be limited to those exemptions specifically allowed by subsection (2).
- (2) The Registrar may only consider a request for exemption from the provisions of one or more of section 21, 22 or 23 of this Act.
- (3) A person desiring exemption shall supply the Registrar with all the information that the Registrar may need to the Registrar's satisfaction.
- (4) The Registrar may at any time withdraw any exemption that may have been granted by his authority in terms of this section or attach any additional conditions thereto.
- (5) The Registrar shall inform a retirement fund in writing of his decision to withdraw any exemption in terms of this section or to add any conditions thereto and the withdrawal or additional condition shall take effect 7 working days from the date of the Registrar's letter.
- (6) The Registrar shall only consider written applications for exemption desired in terms of this section.

#### *Exemption from the provisions of section 21*

27. (1) The Registrar may exempt a fund from the provision of section 21 of this Act if the fund satisfies all of the following conditions:
- (a) the assets of the fund are in their entirety maintained in the name of the retirement fund by one or more insurers;
- (b) all contributions, investment income and any other moneys from whatever source due to the fund shall be paid directly to one or more insurers;
- (c) the payment of any benefit from the fund and any other lawful disbursement shall be made by one or more insurers; and



- (d) the fund has entered into an agreement with a single insurer whereby that insurer has agreed to act as administrator for purposes of this Act.
- (2) An exemption granted in terms of this section shall be valid only as long as the conditions under which it is granted are met or until the Registrar withdraws the exemption granted.

***Alternative obligations for funds granted exemption in terms of section 27***

28. (1) A fund that has been granted an exemption in terms of Section 27 shall supply to the Registrar any other information that the Registrar may request in addition to any information requested in this section.
- (2) The fund shall, within 6 months from its financial year end, supply the Registrar with:
- (a) a certificate by the administering insurer stating that the fund has fulfilled the conditions for exemption as stated in section 27; and
  - (b) its financial statements drawn up by the administering insurer.

***Exemption from the provision of sections 22 and 23 of the Act***

29. (1) The Registrar may exempt a fund from the provisions of sections 22 and 23 of the Act if the fund satisfies the following conditions:
- (a) the member's benefits in the fund, other than those secured by an insurer, is an amount or is secured by an amount made up of actual contributions to the fund plus direct investment returns on those contributions. The investment return may be smoothed and withdrawal profits may be taken into account;
  - (b) the fund does not maintain in its books a liability for any pension that has been granted;
  - (c) the fund has not agreed to act as a guarantor in respect of any pension that has been granted; and
  - (d) the fund shall submit to the Registrar, at least once every three years or such shorter intervals as the Registrar may determine, a certificate by an actuary certifying that:
    - (i) the benefit structure according to the rules of the fund meets the requirements of paragraphs (a), (b) and (c);



- (ii) based on the information at his disposal he is satisfied that the provisions of paragraphs (a), (b) and (c) have been complied with and that he has no reason to believe that they are in danger of not being complied with;
- (iii) in his opinion the appointment of a valuator and triennials valuations as contemplated in section 23 are unnecessary;
- (iv) the method used by the fund in allocating the assets and investment income to the members is fair and equitable and that no individual member or group of members are given preferential consideration;
- (v) he has satisfied himself that if the fund uses a smoothed method of bonus allocation, any reserve that has been established for this purpose and any returns thereon have not been appropriated for any other purpose; and
- (vi) in his opinion, if the fund uses a smoothed rate of bonus allocation, the rate granted is reasonable in the light of the actual rates earned and the reserves being maintained by the fund for the purposes of bonus allocation.

(2) An exemption granted in terms of this section shall be valid only as long as the conditions under which it was granted is met or until the Registrar withdraws the exemption granted.

***Alternative obligation for funds that have been granted exemptions in terms of section 29***

30. (1) If the Registrar is satisfied that the financial methods adopted by a fund are such as to render periodical investigations by a valuator unnecessary, he shall, at the request of such fund, authorise the fund to prepare and furnish to the Registrar a statement of its liabilities and assets in lieu of causing its financial condition to be investigated and reported upon by a valuator in terms of section 23.

(2) Any statement prepared in terms of subsection (1) shall include the following particulars, namely:

- (a) the nature and amount of the liabilities and contingent liabilities of the fund;
- (b) a full description of each asset held by the fund together with such particulars in respect of each such assets as would enable an independent person to estimate the value of such asset on a sale between a willing seller and a willing buyer:



Provided that if a compliance with the requirements this paragraph would result in unduly voluminous returns, the fund concerned may group various classes of assets together, or otherwise abridge the statement in such manner as the Registrar may approve;

- (c) the basis of the valuation of each of the various kinds of assets adopted for purposes of the statement;
- (d) the aggregate value placed on the assets for purposes of the statement; and
- (e) particulars of any pledge, hypothecation or other encumbrance of the assets of the fund.

(3) The statement prepared in terms of subsection (1) shall be accompanied by a report by the auditor of the fund , and the auditor shall in his report state:

- (a) in what manner and to what extent he has satisfied himself as to the amount of the liabilities and contingent liabilities shown on the statement;
- (b) in what manner and to what extent he has satisfied himself as to the existence of the assets shown in the statement;
- (c) to what extent he has satisfied himself that the particulars of such assets which are shown on the statement are correct;
- (d) whether or not, in his opinion, the basis of valuation of each of the various kinds of assets adopted by the fund is financially sound;
- (e) whether or not, in his opinion, the fund in a sound financial condition;
- (f) if he is of the opinion that the fund is not in a sound financial condition in what respect the condition of the fund is in his opinion unsound; and
- (g) such other particulars as he deems relevant to the purposes of this Act.



## PART VI

### STATUTORY RESTRICTIONS ON THE DISPOSAL OF RETIREMENT FUND BENEFITS

#### *Retirement benefits not reducible, transferable or executable*

31. (1) Save to the extent permitted by this Act and the Income Tax Order, 1975, no benefit or right thereto which arose in respect of contributions made by or on behalf of a member of a retirement fund, shall be capable of being reduced, transferred, ceded, pledged or hypothecated or be liable to attachment or subject to any form of execution under a judgement or order of court or be capable of being taken into account in the determination of a judgement debtor's financial position.

(2) If a person attempts to transfer, cede, pledge or hypothecate a benefit or right thereto, the benefit shall, as the management board may direct, be withheld thereto or suspended:

Provided that the management board may direct that the benefit or part thereof be paid to one or more of the members dependants or to a guardian or trustee for the benefit of such dependants during such period as they may determine.

(3) A person who contravenes the provision of this section commits an offence and shall, on conviction, be liable to the general penalty in terms of section 68 of this Act.

#### *Allowable deductions from retirement benefits*

32. (1) A retirement fund may deduct an amount from the member's benefit in respect of a debt arising from a housing loan or guarantee granted to or in respect of a member in terms of section 19.

(2) A retirement fund may deduct an amount from the member's benefit in respect of:

- (a) an amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgement has been obtained against the member in a court or a written acknowledgement of culpability has been signed by the member and provided that the aforementioned written acknowledgement is witnessed by a person selected by the member and who has had not less than eight years of formal education;
- (b) an amount for which the employee is liable under a guarantee issued by the employer for purposes of obtaining a housing loan:

Provided that an original notarised document exists which confirms that the guarantee was made.



(3) If for any reason, except death, a member is unable or unwilling to acknowledge any debt contemplated in subsection (2) (a), then the employer shall apply to the court for an order authorising him to make a deduction from the member's benefit up to an amount equal to the debt.

#### ***Death of a retirement fund member***

33. (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund in respect of a deceased member, shall, subject to any guarantee issued or loan made in terms of section 19 of this Act, not form part of the assets in the estate of such a member, but shall be dealt with as in this section.

(2) If, within twelve months from the death of the member, the fund becomes aware of a dependant or dependants of the member, the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable by the management board.

(3) If the fund does not become aware of or cannot trace any dependant of the member within twelve months from the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or a specified portion of the benefit, the benefit or such portion of the benefit shall be paid to such nominee - provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, an amount of the benefit equal to the difference between the aggregate amount of debt and the aggregate amount of assets shall be paid into the estate of the member and the balance of the benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

(4) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or a specified portion of the benefit, the fund shall within twelve months from the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable.

(5) If the fund does not become aware of or cannot trace any dependant of the member within twelve months from the death of the member, and if the member has either not designated in writing to the fund a nominee or if the member has designated a nominee to receive a portion of the benefit, the benefit or the remaining only portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member, or, if no inventory in respect of the member has been received by the court, the fund shall pay the monies into the Insurance and retirement benefit trust account.

(6) For the purposes of this section, a payment by a registered fund to a dependant shall be deemed to include a payment made by the fund to a trustee for the benefit of a dependant contemplated in this section.



(7) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the management board may from time to time consider appropriate and in the best interest of such dependant or nominee- provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the management board may determine- provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

(8) A benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing:

Provided that:

- (a) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and
- (b) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(9) If the agreement contemplated in subsection (8) (a) is cancelled, the balance of the benefit shall be paid to the dependant or nominee in full.

### ***Insolvency of a retirement fund member***

34. Notwithstanding anything to the contrary contained in any law on the insolvency of a person, any benefit which arose as a result of that person's membership of a retirement fund shall not be considered as forming part of the estate of that person and may not be attached or appropriated by any person.

## **PART VII**

### **INSPECTION, JUDICIAL INTERVENTION AND WINDING UP**

#### ***Registrar's Powers of Inspection***

35. (1) The Registrar may cause an inspection to be made by an inspector appointed by him in writing, of the business of any retirement fund.

(2) The Registrar shall inform the fund in writing of his decision to cause an inspection to be made and the fund shall within 7 working days of the receipt of the Registrar's communication, ensure that it is ready to be inspected by ensuring that all its



documents, electronic records, correspondence, financial information and officers will be accessible to the inspector.

(3) The Registrar may use any power vested in him by the Insurance Act, 2005, and authorised for use for the purposes of this Act by virtue of section 4 of this Act.

(4) Notwithstanding any provision of the Insurance Act, 2005, a person who commits an offence in the circumstances contained in **Section 25** of that Act, commits an offence and shall, on conviction, be liable to the general penalty in terms of section 68 of this Act.

### ***Inspector's Report***

36. The inspector shall prepare a report for the Registrar on the entire business of the retirement fund and the report shall include:

- (a) the integrity of the management of the fund;
- (b) the financial condition of the fund, including compliance with deadlines for the submission of statutory returns;
- (c) the extent (if any) of the fund's non-compliance with the provisions of this Act;
- (d) recommendations on the course of action needed to rectify any malpractice discovered; and
- (e) recommendations on any criminal procedure that should be started.

### ***Registrar's course of action***

37. (1) The Registrar is hereby empowered to consider and implement any recommendation made by the inspector.

(2) The Registrar may take any course of action that he considers necessary in addition to the recommendations of the inspector and shall include one or more of the following:

- (a) act against the fund in terms of section 41.
- (b) initiate criminal proceedings against the officers of the fund, its employees, administrator, sponsor, auditor, valuator or any other person whom he considers liable as a result of the inspection.



- (c) apply to the high court for an order empowering him to appoint an interim administrator to run the business of the retirement fund; or
- (d) impose additional conditions on the continuing registration of the retirement fund.

#### ***Appointment of an interim administrator***

38. (1) The Registrar may apply to the court for an order empowering him to appoint an interim administrator to run the business of a retirement fund as a result of any inspection authorised by him and if he is of the opinion that this action serves the members' interest.

(2) The Registrar may apply to the high court for an order empowering him to appoint an interim administrator to run the business of a retirement fund if *prima facie* evidence exists which indicates that the interest of the members is being harmed, provided that, the Registrar shall within 14 working days of being granted the order appoint an inspector in terms of section 35.

(3) The appointment of the interim administrator shall remain of force until the Registrar terminates his appointment in writing.

#### ***Powers and duties of the interim administrator***

39. (1) The interim administrator shall be vested with all the powers that were vested in the management board and principal officer of the fund and the management board and principal officer shall thereafter for the duration of the interim administrator's appointment not exercise any of their powers or perform any of their duties unless requested by the administrator to do so.

(2) The Registrar may grant the interim administrator any additional powers that he considers necessary and amend any existing powers that may have been conferred on him by virtue of subsection (1).

(3) The interim administrator's appointment shall apply to the entire business of the retirement fund.

(4) The interim administrator shall run the business of the retirement fund in accordance with the provisions of this Act.

(5) The interim administrator shall assist the inspector in the carrying out of his duties.

#### ***Voluntary liquidation of a retirement fund***

40. (1) Subject to the provisions of this section, a registered fund may be liquidated in such circumstances (if any) as may be specified for that purpose in its rule and in the manner provided by the rules, and the assets of the fund shall,



subject to the said provisions, in that event be distributed in the manner provided by the rules.

(2) A retirement fund may be dissolved in circumstances and in the manner prescribed in its rules, if the Registrar has refused to register the fund, if the fund has not applied for registration or if the registration of the fund has been cancelled and the Registrar has not informed the fund that he wishes to start proceedings to liquidate the fund.

(3) Notwithstanding the provisions of subsection (1) a retirement fund whose registration has been refused or cancelled by the Registrar shall be liquidated in terms of the provision of this section:

Provided that:

(a) its rules (if any) for purpose of liquidation shall have the same force as the rules of a registered retirement fund; and

(b) the Registrar shall make any modifications to any part of the rules that he deems necessary.

(4) A liquidator shall be appointed in the manner directed by the rules, or, if the rules do not contain directions as to such appointment, by the board, but such appointment shall be subjected to the approval of the Registrar, and the period of liquidation shall be deemed to commence as from the date of such approval.

(5) During the liquidation the provisions of this Act shall continue to apply to the fund as if the liquidator were the board.

(6) The liquidator shall deposit with the Registrar the preliminary accounts prescribed by the Regulations, and signed and certified by him as correct, showing the assets and liabilities of the fund at the commencement of the liquidation and the manner in which it is proposed to realise the assets to discharge the liabilities, including any liabilities and contingent liabilities to or in respect of members.

(7) In discharging the liabilities and contingent liabilities to or in respect of members referred to in subsection (6) full recognition shall be accorded to-

(a) the rights and reasonable benefit expectations of the persons concerned; and

(b) additional benefits the payment of which by the fund has become an established practice.

(8) The Registrar may, in his discretion, direct the liquidator to furnish a



report, drawn up by an independent valuator or other competent person nominated by the Registrar, upon the preliminary account and preliminary balance sheet.

- (9) The preliminary accounts, preliminary balance sheet and report (if any) referred to in subsection (6) shall lie open at the office of the Registrar, and at the registered office of such fund, and where the registered office of the fund is in any district other than the district wherein the office of the Registrar is situated at the office of the magistrate of the district in which the registered office of the fund is situated for inspection by interested person for a period of thirty days.
- (10) The liquidator shall submit to the Registrar, a scheme for the liquidation and such scheme shall include:
- (a) the manner in which members' interest in the fund is to be addressed;
  - (b) the manner in which creditors' claims on the fund are to be settled;
  - (c) the manner in which any surplus assets are to be disposed of;
  - (d) the manner in which any shortfall is to be addressed; and
  - (e) whether all members have been treated equally or whether special considerations apply to certain individuals.
- (11) The liquidator shall at least 30 days before the liquidation is carried out, publish in the Gazette and at least two newspapers of general circulation in Swaziland, notice of the pending liquidation and he shall in the notice provide details of -
- (a) where the documents referred to in subsection (9) and the scheme of liquidation referred to in subsection (10) may be inspected;
  - (b) the date of the liquidation;
  - (c) the name, telephone number, postal and street address of the person who can be contacted for more information; and
  - (d) where objections can be lodged.
- (12) If no objection is lodged with the Registrar in terms of subsection (11), the Registrar shall direct the liquidator to complete the liquidation.
- (13) If objections are lodged with the Registrar in terms of subsection (11), the Registrar may, after considering the said objection, direct the liquidator to



amend the preliminary account or give such other directions relating to the liquidation as he thinks fit, provided such directions are not inconsistent with the rules of the fund or this section, and any such directions shall be binding upon the liquidator.

- (14) The liquidator shall, within fourteen days of the receipt by him of any direction of the Registrar in terms of subsection (13), post a copy thereof to every member, shareholders and creditor of the fund, and the liquidator or any other person aggrieved by any such direction of the Registrar may apply by motion to the court within twenty-eight days after such direction has been communicated to the liquidator, for an order to set aside the Registrar's decision, and the court may confirm the said decision or make such order as it think fit.
- (15) If the Registrar is satisfied that his directions, in so far as they have not been varied or set aside by the court, have been given effect to, he shall direct the liquidator to complete the liquidation.
- (16) The liquidator shall, within thirty days after the completion of the liquidation, lodge with the Registrar a final account and a final balance sheet, signed and certified by him as correct showing the assets and liabilities of the fund at the commencement of the liquidation and the manner in which the assets have been realized and the liabilities (including any liabilities and contingent liabilities to or in respect of members) have been discharged.
- (17) The provision of the Companies Act, 1912, shall apply to the dissolution of a fund in terms of this section, in so far as the said provisions relate to a voluntary winding-up in terms of the said Act, and in so far as the provisions are applicable and not inconsistent with any provisions of this Act.
- (18) All claims against the fund shall be proved to the satisfaction of the liquidator, subject to right of appeal to the court, and the liquidator may require any claim to be made on affidavit.
- (19) If the Registrar is satisfied that the said account and balance sheet are correct and that the liquidation has been completed, he shall cancel the registration of the fund and thereupon the fund shall be deemed to be liquidated.
- (20) No scheme for voluntary liquidation shall be implemented unless it has been approved by the Registrar.

#### ***Judicial winding up of a retirement fund***

- 41. (1) The Registrar may apply to the Court for an order directing the winding up of a retirement fund if:



- (a) he is of the opinion that the financial condition of a fund is irreparable;
  - (b) he has refused to register the retirement fund or he has cancelled the registration of the retirement fund in terms of section 6; or
  - (c) as a result of any inspection carried out by his authority in terms of section 35 he has found cause to have the fund wound up.
- (2) A creditor of the fund who has failed to obtain payment of a claim through the means provided by the law may apply for the fund to be wound up.
- (3) The provisions of the Companies Act, 1912, shall apply to the winding up of a fund under this section in so far as they are applicable and not inconsistent with this Act; provided that the court may modify the provision of the Companies Act, 1912, for purposes of the liquidation of the fund if the court is satisfied after considering the circumstances of the fund that such modification will not prejudice the interest of the members and creditors of the fund.
- (4) In giving any order or direction under this section the court shall have regard to any recommendation which may have been made by the fund's valuator, if any, and accord full recognition to the rights and reasonable benefit expectation of the persons concerned and to additional benefits the payments of which by the fund has become an established practice.
- (5) The Registrar may make recommendations to the court concerning the proposed winding up of the fund and the court may direct that those recommendations be adopted even if they are in conflict with the Companies Act, 1912, if the court decides that the members' interest are best served by the Registrar's recommendations.
- (6) The liquidator appointed in terms of subsection (3) shall give to the Registrar such information as the Registrar may require from time to time and shall, whenever he intends to apply to the court for instructions, inform the Registrar who shall be entitled to be heard personally or by a representative at any such application, and may himself make an application to the court with reference to the winding-up.
- (7) The liquidator shall, at least 30 days before the liquidation is carried out, publish in the Gazette and at least two newspapers of general circulation in Swaziland, notice of the pending liquidation and shall in the notice provide details of-
- (a) where the accounts and scheme for the liquidation can be inspected;



- (b) the date of the liquidation;
- (c) the name, telephone number and postal and street address of the person who can be contacted for more information; and,
- (d) the place at which objections may be lodged.

#### ***Special provisions relating to liquidation of Funds***

42. (1) In applying the provisions of the Companies Act, 1912, in terms of section 40 or 41, the members of the fund shall be treated as deferred creditors, and their claims against the fund in their capacity as members shall not be settled until the debts of ordinary creditors have been paid.
- (2) If a Fund has a share capital, the liability of a shareholder in the case of liquidation under the aforementioned sections shall either be limited to the amount (if any) unpaid on any share held by him, or if the rules so provide, his liabilities shall be unlimited.

### **PART VIII**

#### **CONSIDERATION AND ADJUDICATION OF COMPLAINTS**

##### ***Submission and consideration of complaints***

43. (1) Notwithstanding the provision of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in the fund within 30 days after the receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in the fund fails to reply within 30 days after the receipt of the complaint, the complainant may lodge the complaint with the Adjudicator.

##### ***Establishment of Office of Retirement Funds Adjudicator***

44. (1) There is hereby established an office which shall be known as the office of the Retirement Funds Adjudicator.
- (2) The function of the Office shall be performed by the Retirement Funds



Adjudicator.

***Appointment of Adjudicator***

45. (1) The Minister shall, after consultation with the Retirement Funds Board and in compliance with the laws governing the public service appoint a person as the Retirement Funds Adjudicator, hereinafter referred to as the Adjudicator.
- (2) No person shall be appointed as Adjudicator unless he is qualified to be admitted to practise as an advocate or as an attorney under the Legal Practitioners Act, 1964, and:
- (a) for an uninterrupted period of at least 10 years practised as an advocate or an attorney; or
  - (b) for an uninterrupted period of at least 10 years was involved in the tuition of law and also practised as an advocate or attorney for such period as renders him or her suitable for appointment as Adjudicator; or
  - (c) possess such other experience as renders him suitable for appointment as Adjudicator.
- (3) The Adjudicator shall be appointed for a period of three years and may be reappointed on expiry of his or her term of office.
- (4) The Adjudicator may at any time resign as Adjudicator by tendering his or her resignation in writing to the Minister:

Provided that the resignation shall be addressed to the Minister at least three calendar months prior to the date on which the Adjudicator wishes to vacate office, unless the Minister allows a shorter period.

- (5) The Minister may remove the Adjudicator from office on the ground of misbehaviour, incapacity or incompetence, after consultation with the Retirement Funds Board.

***Main object of Adjudicator***

46. (1) The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 43 of this Act in a procedurally fair, economical and expeditious manner.

***Disposal of complaints***

47. (1) In order to achieve his or her main object, the Adjudicator:



- (a) shall, subject to paragraph (b), investigate any complaint and may make the order which any court of law may make; and
  - (b) may, if it is expedient and prior to investigating a complaint, require any complainant first to approach an organisation established for the purpose of resolving disputes in the pension funds industry or part thereof, and approved by the Registrar.
- (2) Any complaint dealt with in terms of subsection (1) (b) shall be recorded by the Adjudicator and shall, for purposes of this section, be deemed to be a receipt of a complaint.
- (3) If the complaint, dealt with in terms of subsection (1) (b), is not resolved, the complainant may again lodge the complaint with the Adjudicator, who shall deal with it in terms of subsection (1) (a).

#### ***Opportunity to comment***

48. Where the Adjudicator intends to conduct an investigation into a complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations.

#### ***Parties to complaint***

49. The parties to a complaint shall be:
- (a) the complainant;
  - (b) the fund or person against whom the complaint is directed;
  - (c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;
  - (d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.

#### ***Jurisdiction and prescription***

50. (1) The Adjudicator shall, subject to section 51, investigate a complaint notwithstanding that the complaint relates to a matter which arose prior to the commencement of this Act.
- (2) The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.



- (3) Receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of any Act or the rules of the fund in question.

***Time limit for lodging of complaints***

51. (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator, may on good cause shown or of his or her own motion-
- (a) either before or after expiry of any period prescribed by this Part, extend such period; or
- (b) condone non-compliance with any time limit prescribed by this Part.



### ***Procedure for conducting investigation***

52. (1) The Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.
- (2) Notwithstanding any provision of the Insurance Act, [2003], the Adjudicator may obtain copies of any document or correspondence contained in the files of the Registrar.

### ***Legal representation***

53. No party shall be entitled to legal representation at proceedings before the Adjudicator except where the Adjudicator has given permission for the parties to obtain legal representation or where the Adjudicator has requested the parties to obtain legal representation.

### ***Record of proceedings***

54. (1) The Adjudicator shall ensure that a permanent record of the proceedings relating to the adjudication of a complaint, and the evidence given, is kept whether in writing or by mechanical or electronic means.
- (2) Any member of the public may obtain a readable copy of the record on payment of a fee determined by the Adjudicator.
- (3) The Registrar may, for purposes of the performance of his or her functions in terms of this or any other Act, rely on a copy of the record without the need of any further proof.

### ***Statement by Adjudicator regarding determination***

55. After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons therefore, signed by him, to all parties concerned as well as to the clerk or Registrar of the court which would have had jurisdiction had the matter been heard by a court.

### ***Interest on amount awarded***

56. Where a determination consists of an obligation to pay an amount of money, the debt shall bear interest as from the date and at the rate determined by the Adjudicator.



### ***Enforceability of determination***

57. (1) A determination of the Adjudicator shall be deemed to be civil judgement of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk, or the Registrar of the court, as the case may be.
- (2) A writ or warrant of execution may be issued by the clerk or the Registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 58 has been lodged.

### ***Access to court***

58. (1) A party who feels aggrieved by a determination of the Adjudicator may, within weeks after the date of the determination, apply to the division of the court which has jurisdiction, for relief, and shall at the same time give written notice of his intention so to apply to the other parties to the complaint.
- (2) The division of the court contemplated in subsection 58.1 shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.

### ***Powers of Adjudicator***

59. The Adjudicator may with the concurrence of the Registrar:
- (a) hire, purchase or otherwise acquire such moveable property as may be necessary for the performance of his or her functions and may let, sell or otherwise dispose of property so purchased or acquired;
  - (b) in order to perform his functions, enter into an agreement with any person for the performance of any specific act or function or the rendering of specific services;
  - (c) insure his Office against any loss, risk or liability which it may suffer or incur;
  - (d) employ persons to assist in the performance of his functions;
  - (e) obtain such professional advice in the performance of his functions as may be reasonably required;
  - (f) subject to such conditions as he may determine, delegate any of his functions contemplated in section 46, to an employee of his Office;
  - (g) in general, do anything which is necessary or expedient for the achievement of his or her objects and the performance of his functions.



### ***Expenses of the Adjudicator***

60. (1) The financial year end of the Office of the Adjudicator shall be the last day of February in each year.

(2) Before the commencement of each financial year, the Adjudicator shall submit to the Registrar an estimate of the expenditure of his office for the next financial year.

(3) The estimate contemplated in subsection (2) shall take into account any justifiable expenses that the Adjudicator might incur in the performance of the duties imposed on him in terms of this Act.

(4) The estimate shall be completed at least 60 days before the commencement of the next financial year and submitted to the Registrar for approval and the Registrar may ask the Adjudicator to make any adjustments that he considers necessary.

(5) After the Registrar had given his approval, the actual expenditure by the Office of the Adjudicator may not exceed the estimates without the Registrar's approval.

(6) The expenses of the Office of the Adjudicator shall be paid by the office of the Registrar of Retirement Funds.

(7) The Adjudicator shall ensure that any accounts payable are brought to the attention of the Registrar timeously.

### ***Remuneration and terms and conditions of employment of Adjudicator and employees***

61. (1) The remuneration and other terms and conditions of employment of-
- (a) the Adjudicator shall be determined by the Minister in consultation with the Retirement Funds Board;
  - (b) an employee of the office of the Adjudicator shall be determined by the Adjudicator with the concurrence of the Retirement Funds Board.

(2) Any remuneration of the Adjudicator and his employees shall be paid out of the state revenue fund which shall be reimbursed by the Registrar's levies account.

### ***Report of Adjudicator***

62. The Adjudicator shall each year within six months after the end of his or her financial year, submit a report to the Minister on his activities during the financial year.



### ***Offences and penalties***

63. A person who:

- (a) insults the Adjudicator;
- (b) anticipates a determination of the Adjudicator in any manner calculated to influence the determination;
- (c) wilfully interrupts any proceeding conducted by the Adjudicator or misbehaves himself or herself in any manner in the place where the proceedings are being held; or
- (d) in connection with a complaint does anything which, if done before a court of law, would have constituted contempt of court;

commits an offence and shall, on conviction, be liable to a fine of E5 000 or to imprisonment for a period not exceeding three months.

### ***Limitation of liability***

64. The Adjudicator, or any of his or her employees, shall not be liable in respect of anything done or omitted to be done in good faith in the exercise of a power or the performance of the duty conferred or imposed by or under this Act.

### ***Liquidation***

65. The Office of the Adjudicator shall not be placed in liquidation except by Act of Parliament.



## PART XI

### GENERAL PROVISIONS

#### *Administrators, custodians and investment managers*

66. (1) The trustees may, appoint an administrator for the fund from amongst the following:

- (a) an insurance company;
- (b) a registered insurance broker; or
- (c) any other entity approved by the Registrar.

(2) An administrator:

- (a) may not make any investment decisions for the fund, unless the administrator is also appointed as an investment manager by the trustees; and
- (b) shall maintain professional indemnity insurance and a fidelity guarantee in such amounts as the Registrar determines appropriate.

(3) The trustees may, in the manner provided in the retirement fund rules, appoint one or more investment managers for the fund from amongst the following:-

- (a) an insurance company;
- (b) a registered insurance broker; or
- (c) any other entity approved by the Registrar.

(4) An investment manager shall maintain professional indemnity insurance and a fidelity guarantee in such amounts as the Registrar determines appropriate.

(5) The trustees may, in the manner provided in the retirement fund rules, appoint an entity listed in subsection (3) as custodian for the assets of the retirement fund.

(6) Any administrator, custodian or investment manager shall exercise the utmost good faith and the care, skill, prudence and diligence that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. This obligation shall be in addition to any other obligations or duties of the administrators, custodians or investment managers that may arise under other law.



(7) The retirement fund shall notify the Registrar in writing of the appointment of the administrator and any custodian or investment manager and shall also notify the Registrar of any change in administrator, custodian or investment manager.

### ***Exemptions***

67 (1) the Registrar may exempt a foreign retirement fund from any or all of the provisions of this Act, other than the provisions of Sections 3 and 5, if the Registrar is satisfied that:-

- (a) the number of members who are ordinarily resident in Swaziland is not a significant proportion of the total membership;
- (b) the rules of the retirement fund are not less favourable to members ordinarily resident in Swaziland than to other members, taking into consideration differences in the conditions of service;
- (c) suitable arrangements exist for ensuring the financial soundness of the fund; or
- (d) through the furnishing of adequate security by the retirement fund or otherwise, the fund will pay in accordance with the rules the benefits promised to members ordinarily resident in Swaziland.

(2) A foreign retirement fund seeking exemption under this Section shall submit an application for exemption as part of its application for registration under Section 5.

(3) In addition to the information required under Section 5, the foreign retirement fund shall submit a certificate of registration or other evidence that the retirement fund has been authorised to operate or conduct activities by the entity responsible for regulation or supervision of retirement funds in the jurisdiction in which the retirement fund primarily operates or conducts its activities.

(4) A foreign retirement fund that is granted an exemption under this Section shall provide the Registrar with copies of all reports and other documents that are required to be deposited with the entity responsible for its regulation or supervision.

(5) The Registrar may exempt a retirement fund from any or all provisions of this Act, other than the provisions of Sections 3 and 5, if the retirement fund is established by statute.

(6) An exemption granted under this Section may be subject to any conditions the Registrar deems appropriate, taking into account the purposes of the Act.



- (7) The Registrar may at any time by notice in writing to the fund withdraw in whole or in part any exemption granted under this Section of this Act.

### ***Penalties***

68. (1) A person who contravenes any provision of this Act commits an offence and, if no specific penalty is provided elsewhere in this Act, he shall, on conviction, be liable to a fine not exceeding E25 000 or a term of imprisonment not exceeding 5 years or both.

### ***Power to make Regulations***

69. (1) The Minister may, in consultation with the Registrar and the Retirement Funds Board and any such other person or persons as he may in his discretion consult, by Notice published in the Gazette, make Regulations not in conflict with this Act, which may include the following:

- (a) prescribing ways in which formalities required in terms of this Act shall be executed and shall include the process of registration and approval of the valuator and auditor;
- (b) prescribing the manner in which information required to be submitted to the Registrar in terms of this Act will be submitted;
- (c) prescribing prudent investment guidelines;
- (d) prescribing the amount of fees and levies payable and interest thereon;
- (e) prescribing the manner in which a retirement fund shall maintain its records and the type of records to be maintained; or
- (f) empowering the Registrar to issue certain directives to the retirement funds.

(2) The Minister may either of his own accord, or if he is ordered by Parliament to do so, order the Registrar to withdraw or amend any directive issued by the Registrar.

### ***Registrar's decisions may be made an order of court***

70. If the Registrar makes any decision not inconsistent with this act, he may if authority is not granted elsewhere in this Act, apply to the court to make his decision an order of the court.



***Registrar may extend certain periods***

71. (1) Where any person is obliged in terms of any provision of this Act to perform an act within a specified period, the Registrar may at the request of such person extend that period from time to time.

(2) The Registrar may extend any such specified period after it has expired.

***Adherence to the provisions of the Act shall not constitute an offence***

72. A person who has, in good faith, supplied information to the Registrar or the Retirement Funds Board in accordance with the provisions of this Act shall not be guilty of an offence according to any law or shall not be subject to any form of sanction according to any code of practice or ethics or shall not be in breach of any agreement.

***Application of this Act***

73. This Act shall apply to retirement funds, pension funds, provident funds, and any other fund, institution, or organisation that the Registrar, in consideration of the objects of this Act has ordered to report to him.

***Funds established under the Public Service Pensions Order, 1993***

74. (1) Any fund established under the Public Service Pensions Order, 1993, shall be required to comply with the provisions of this Act.

(2) Notwithstanding any provision of this Act, the Registrar may exempt a fund established under the Public Service Pensions Order, 1993, from any of the provisions of this Act.

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