Addressing the challenge of withdrawal of lump sum retirement benefit payments in South Africa: lessons from Australia

*Motseotsile Clement Marumoagae**

Abstract
This paper discusses the South African government's approach in addressing its concern regarding members of retirement funds who are unable to care for themselves when they reach retirement. The paper highlights the challenge of such members' increased risk of not being able to keep the same standards of living as during their working life and outliving the retirement benefits which they received when they retired. This paper evaluates the impact of receiving lump sum payments either before reaching the retirement age or upon retirement on the ability of members to care for themselves during retirement. It further examines whether the government's intervention through the intended compulsory preservation of retirement benefits would lessen the risks of members outliving their retirement benefits. The paper argues that while the thought of introducing compulsory preservation seems sound, compulsion would not necessarily cater adequately for the varied needs of all retirement fund members. Further this paper argues, that South Africa should draw lessons from Australia and allow those members who are able to justify the need to be paid their entire benefit when they exit their funds, to receive their benefits in full.

INTRODUCTION

The lack of awareness of how much one needs for his or her retirement might lead to low levels of retirement savings. As a result of prevailing economic conditions, employees find themselves either being out of employment or moving from one employer to the other due to, among others, resignation, dismissal, and/or retrenchment. If the employee resigns, is retrenched or dismissed, the membership of his or her retirement fund will come to an end and this may well occur way before his or her retirement age. The fund credit that has built up in his or her name will become payable to him or her. At this time, most employees opt to withdraw their retirement benefits, which can affect their ability to care for and maintain themselves post-

* LLB, LLM (Wits); LLM (NWU); Dip in Insolvency Law and Practice (UP). Senior Lecturer, University of the Witwatersrand.

retirement. Some employees choose to take their entire retirement benefits in cash as a lump sum when they retire, which can affect their ability to take care of themselves if such money is exhausted during retirement.

This paper discusses the manner in which South African government intends to address the challenge relating to lump sum withdrawal of retirement benefits either due to early retirement or during retirement.[1] Some employees withdraw their retirement benefits entirely when they exit their employment, which significantly increases their financial vulnerability when they retire and forces them to depend on the state.[2] In order to decrease dependence on the state, government aims to force employees to preserve their retirement benefits either when they retire or exit their employment before retirement age.[3] On 24 December 2015, the President signed into law legislation which sought to introduce compulsory preservation in South Africa, the aim of which was to encourage employees to save for retirement. However, due to the influence of organised labour, the coming into effect of this requirement was postponed to 2018.[4] Notwithstanding the recognisable governmental purpose of ensuring self-sufficiency post-retirement, it will be argued that the proposed compulsory preservation of retirement benefits fails to cater for varying individual circumstances which might force employees to withdraw their benefits early. In this regard, it will further be argued that South Africa can draw lessons from Australia, wherein demonstration of financial hardships is one of the factors which would enable an employee to have early access to his superannuation benefits.[5] Furthermore, it will be shown that in an attempt to discourage early withdrawals, the South African government provides tax benefits to those who save and imposes harsh penalties on those who access their retirement benefits early.

THE SOUTH AFRICAN RETIREMENT FUND LANDSCAPE

Retirement funds provide meaningful social protection to citizens and contribute to economic development in many countries.[6] They contribute immensely to the economy because of their significant power in the

---

[1] National Treasury, 'Preservation, Portability and Governance for Retirement Funds' Technical Discussion Paper C (21 September 2012) <www.treasury.gov.za/comm_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%20 2012%20.pdf> accessed 24 March 2016.

[2] National Treasury, '2014 Budget update on retirement reforms' Policy Update (14 May 2014) 7 <//www.treasury.gov.za/publications/RetirementReform/20140314%20-%20 2014%20Budget%20Update%20on%20Retirement%20Reforms.pdf> accessed 24 March 2016.

[3] Anthony Katakuzinos, 'Retirement Reform Aims to Ensure Greater Preservation' *Money Marketing* (Johannesburg, 31 January 2014) 24.

[4] See the Taxation Laws Amendment Act 25 of 2015.

[5] See the Australian Regulation 6.19 A of the Superannuation Industry (Supervision) Regulations 1994 and Retirement Savings Accounts Regulations 1997.

[6] Mtendeweka Mhango, 'Constitutional Challenges in the Implementation of a Compulsory Pension Fund: The Case of Lesotho' (2014) 131 SALJ 408.

financial markets making them the largest reservoirs of capital, thus playing a crucial role in any country's social security set up. [7] They further prevent destitution in old age and in circumstances of unemployment or incapacity.[8] South African government has recognised the importance of retirement funds in pooling funds from employers and employees which are invested and provided to employees when they retire or become disabled or to their beneficiaries upon their death.[9]

The South African retirement industry is divided into public and private retirement funds. All private retirement funds are regulated by the Pension Funds Act[10] and some public retirement funds are regulated by their own legislation.[11] Generally, the retirement funding system in South Africa is made up of mainly four components: the Older Persons Grant, Defined Benefit Funds, Defined Contribution Funds and Retirement Annuity Funds.[12] While it is not a legislative requirement that employers provide their employees with retirement benefits, there are those who do.[13] A non-contributory old-age grant is paid to assist vulnerable older persons who have little or no income.[14] The Older Persons Grant in some cases is the only source of family income.[15] Qualification for an Older Persons Grant is dependent on an age requirement and a means test. Currently all South

7 Ayodeji Olaifa, *The Impact of Pension Fund Investments on Economic Development in South Africa* (2012 NMMU) 19.

8 National Treasury, 'Social Security and Retirement Reform' Second Discussion Paper (February 2007) 6 < www.treasury.gov.za/documents/national%20budget/2007/Social%20 security%20and%20retirement%20reform%20paper.pdf> accessed 24 March 2016.

9 National Treasury, 'A safer financial sector to serve South Africa better' Policy Document (23 February 2011) 49 <www.treasury.gov.za/documents/national%20budget/2011/A%20 safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> accessed 24 March 2016.

10 Act 24 of 1956.

11 See The Post Office Act 44 of 1958; the Transnet Pension Fund Act 62 of 1990 and Government Employees Pension Law of 1996. See also Lefuno Nevondwe, 'South African Social Security and Retirement Reform: A Long Journey Towards the Redrafting of the New Pension Funds Act' (2010) 15 Pensions: An International Journal 287, 289, who correctly argues that '[t]here are various retirement legislation in South Africa. These legislations are different and this creates a lot of confusion for the members of the pension funds'.

12 Sheshangai Kaniki and Miracle Ntuli, 'Determinants of Participation in Occupational Pension Funds by Private Sector Workers in South Africa' (2011) 2 The African Finance Journal 56. See also Kieran Godden, 'Pension Funds, Provident Funds and Retirement Annuities: Defining them and their Tax Implications' (2010) May/June TAXTalk 24, where it is stated that 'pension, provident and retirement annuity funds are forms of retirement funding. Their main objective is to save money now in order to provide a secure and comfortable lifestyle later on in life'.

13 Rosemary Hunter, 'Legislative Changes that Should be Made in Order to More Properly Reflect the Pension Promise that an Employer Makes to its Employees and to Better Protect Retirement Savings (a Personal View)' (Institute of Retirement Funds Conference, Cape Town September 2004) 1.

14 See Judith Geldenhuys, 'Social Security for an Ageing Population' (2008) 48 Codicillus 54.

15 Bryge Wachipa, 'Older Persons' Right of Access to Social Assistance: Is Age Differentiation Still Relevant in South Africa?' (2006) 7 ESR Review 6.

African citizens who are also resident in South Africa who are 60 years and older and permanent residents[16] are entitled to receive older person's grant.[17] The reality is that for those who did not save enough or save at all for retirement, attainment of retirement age marks the onset of dependence on the state and their significant others to provide for their social, health and financial needs.[18]

A defined benefit fund undertakes to provide its members with benefits defined in the rule of the fund: primarily (there are also other benefits) a pension expressed as a percentage of final salary and based on years of service.[19] Members' contributions are fixed and they are guaranteed benefits defined in the rules of the fund.[20] The purpose of a defined benefit fund is to guarantee the payment of a defined, quantifiable benefit.[21] The employer promises a specified monthly benefit on retirement that is predetermined by a formula based on the employee's earnings history, tenure of service and age, rather than depending on investment returns.[22] A defined contribution fund is a pension scheme where the rules of the fund define the contributions to be paid by both members and the employer. The employer's monthly contribution is also specified and guaranteed and future benefits depend on accumulated monthly contributions and investment earnings. As such, there is no guarantee of any particular benefit.[23] A retirement annuity fund is a retirement scheme which is set up by financial institutions for the benefit

---

16 See generally *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

17 This grant is payable in terms of the Social Assistance Act 13 of 2004. See also Kitty Malherbe, 'Retirement Reform in South Africa: The Influence of International Standards and Human Rights Instruments' in Marius Olivier, Ockert Dupper and Avinash Govendjee (eds), *The Role of Standards in Labour & Social Security Law: International, Regional and National Perspectives* (Juta 2013) 180.

18 Statistics South Africa, 'Profile of Older Persons in South Africa' (Census 2011) 55.

19 *Tek Corporation Provident Fund v Lorentz* [1999] 4 All SA 297 (A) para 4.

20 *Kuit v Transnet Pension Fund* (9865/01) [2006] ZAGPHC 1 (1 January 2006) para 6.

21 Ibid at para 25. The court further held that 'by virtue of this guarantee members are afforded the security of knowing that by law they are entitled to a predefined benefit which is not dependent upon the investment fortunes of the fund. It is exactly because of this guarantee of a defined benefit regardless of funding level, that it is necessary to put in place an employer obligation to guarantee the financial obligations of the Fund'. See also *ICS Pension Fund v S Sithole NO* (44886/07) [2009] ZAGPHC 186 (5 May 2009) where it was held that 'generally speaking, a defined benefit fund is a pension fund whose pension benefits are determined in accordance with a formula contained in the rules of the fund and which are underwritten by the participating employer. If the investments made by such a fund perform well, the members do not benefit proportionately. However, if the investments perform poorly, members have the advantage that their pension benefits remain guaranteed by the employer. The employer carries the risk of the investments and the members' pension benefits are secure'. (para 3).

22 National Treasury (n 9), 50.

23 *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* 2010 (2) SA 498 (SCA) para 7.

of individual investors.[24] Its object is to provide annuities or pensions to the member when he or she retires. However, should the member die, a lump sum would be paid to such a member's dependants. Unlike pension funds and provident funds, employment relationship is not a prerequisite for having a retirement annuity. Generally, a member of a retirement annuity fund cannot retire before the age of 55. Retirement annuities are often used as a retirement savings vehicle by self-employed people and by those wishing to make additional provision for retirement.[25]

The employment rate in South Africa is dismally low in that just over 40% of the working-age population is employed.[26] According to Statistics South Africa, by the end of 2015 'the working-age population was 36,3 million – 16,0 million employed, 5,2 million unemployed and 15,1 million not economically active, thus resulting in an unemployment rate of 24,5%, an absorption rate of 44,2% and a labour force participation rate of 58,5%'.[27] These figures are concerning because most of those who are unemployed, particularly those without skills which are market related, would find it difficult to attain employment, and thus depend on the state. Not all those who find themselves either in formal or informal employment are members of retirement funds and thus have retirement benefits plans. The South African government has proposed a 'mandatory participation in private occupational or individual retirement funds, for individuals with earnings above the threshold, ensuring that individuals at all earning levels have appropriate provision for insurance coverage and income replacement

---

24 Kieran Godden, 'Pension Funds, Provident Funds and Retirement Annuities – Defining Them and Their Tax Implications' (2010) May/June TaxTalk 24.

25 Godden (n 24) at 24.

26 OECD, 'Economic Surveys: South Africa, Overview' (*OECD*, March 2013) 19 <www.oecd.org/eco/surveys/South%20Africa%202013%2Overview%20FINAL.pdf> accessed 23 February 2016. See also Rulof Burger and Dieter von Fintel, 'Rising Unemployment in a growing economy: A Business Cycle, Generational and Life Cycle Perspective of Post Transition South Africa's Labour Market' (2014) 1 Journal for Studies in Economics and Econometrics 37.

27 Statistics South Africa, 'Quarterly Labour Force Survey Quarter 4: 2015' (Statistical Release P0211) <www.statssa.gov.za/publications/P0211/P02113rdQuarter2015.pdf> accessed 25 March 2016.

in retirement'.[28] This policy proposal remains controversial and it has been argued that it '[t]hreatens the business of many providers of retirement funding products and services to the low-income, formally employed market'.[29] Despite all the challenges this initiative might face, should it be properly implemented it will increase the much needed coverage of contributory pension arrangements leading to adequate income after employees have exited the labour market thus leading to less dependence on the state upon retirement.[30] Some employers define mandatory membership of retirement funds as an obligatory condition of employment. However, many people lack effective access to an affordable retirement funding plan due to the economic structure of the country. Nonetheless, government has observed that while there is an adequate participation and contribution rate in various retirement fund schemes, 'only about 10 per cent of South Africans are able to maintain their pre-retirement level of consumption after they stop working – primarily because preservation rates are low'.[31] Informal or irregular employment is one of the reasons which leads to low or lack of preservation. However, government is most particularly concerned about those who cash in their retirement benefits when they exit their funds before retirement age.[32]

---

28 National Treasury, 'Social Security and Retirement Reform' Second Discussion Paper (February 2007) para 13. See also Tim Rutherford, 'Is Compulsory Savings Viable in South Africa?' (2008) July Personal Finance Newsletter 1, where it is stated that 'experience in countries such as the United Kingdom (UK) and Australia illustrates that the introduction of compulsory retirement savings is very beneficial for the industry if an open model is adopted and members could gain from reduced administration costs so that more money is devoted to savings. This was very true for these markets, however there are two fundamental differences between the UK and Australian models and the model currently proposed in SA, namely the risk benefit underpin planned for SA and the fact that the UK and Australia already had a social pension underpin. If one looks at the first item, the SA model includes not only retirement fund savings but certain risk benefits such as death and disability. If SA opts for a model where anyone can opt out, and the healthy and/or wealthier members of the population elect to do so (which is highly probable, as they could potentially get better risk rates outside of the scheme, leaving more of their contribution available for savings), the risk cost to the scheme would then become more expensive as higher claims are received'.

29 Nevondwe (n 11) at 291. See also Lefuno Nevondwe and Makhubalo Ndaba, 'South African Social Security and Retirement Reforms: Recent Developments' (2012) Insurance and Tax Journal 18.

30 Kaniki and Ntuli (n 12), 74.

31 National Treasury, 'Strengthening Retirement Savings: An Overview of Proposals Announced in the 2012 Budget' Policy Paper (14 May 2012) 8 <www.treasury.gov.za/publications/RetirementReform/20120314%20-%20Strengthening%20retirement%20savings.pdf> accessed 26 June 2016.

32 Ibid.

LUMP SUM RETIREMENT BENEFITS PAYMENTS

Early withdrawal of retirement benefits

The Income Tax Act[33] generally provides a framework within which retirement funds should make payments to their members in accordance with the rules of such funds. In other words, the Income Tax Act outlines the portion and method of payment; and the rules of various retirement schemes outline the circumstances under which a member may withdraw his or her retirement benefits. In terms of this Act, pension funds and retirement annuity funds members are only entitled to receive one-third of their total benefits as a lump sum payment and the rest would be paid to them on a monthly basis during their period of retirement.[34] Members of provident funds are legally allowed to withdraw their entire retirement balance in cash when they retire, however, they are also allowed to purchase annuities if they so wish.[35] The rules of the fund should provide clarity to the member as to the circumstances under which he or she would be able to cash in his or her retirement benefits. In most instances, events such as retirement, resignation, dismissal, retrenchments, disability and death lead to payment of retirement benefits.[36]

In South Africa, there has been controversy regarding the ability of members of provident funds in particular to withdraw their entire benefits when they exit their funds. In 2014, the former Minister of Finance, Nhlanhla Nene, told Parliament that

> [t]he challenge is that even if South Africans save, mainly through their retirement funds, they are very quick to withdraw and spend their retirement

---

[33] Act 58 of 1962, as amended.

[34] Section 1 of the Income Tax Act. See also Jesse De Beer, 'Helping South Africans Achieve a Better Income in Retirement: A Critical Evaluation of the Impact of Treasury Proposals' (2015) 1 Journal of Economic and Financial Sciences 187, where it is stated that '[a]t retirement, South Africans are mandated to purchase some kind of annuity with two-thirds of their accumulated retirement savings. The main choice is to decide between living annuities or conventional annuities. Living annuities are essentially investment accounts provided by life insurance companies and offer investors several choices, such as how much income to draw down, what underlying assets to invest in and which provider to choose. As such, they are contracts geared to the needs of the relatively wealthy and individuals who have a fair degree of financial knowledge, and are generally not appropriate if the retirement amount is not very large and if the pensioner is completely dependent on the income. Conventional annuities, on the other hand, offer an income for life, determined at time of purchase. The decision to buy a conventional annuity is irreversible. In contrast to the living annuity, no decisions are required from the annuitant once the annuity is purchased. Living annuities are by far the more popular choice'.

[35] National Treasury, 'Enabling a Better Income in Retirement' Technical Discussion Paper B (21 September 2012) 9 <www.treasury.gov.za/comm_media/press/2012/Enabling%20a%20better%20income%20in%20retirement.pdf> accessed 2 June 2016.

[36] See General rules of the Municipal Employees Pension Fund (2013) and Sentimental Retirement Fund Rules (2013).

> savings when they change jobs. This leaves most of us vulnerable in our retirement as we would not have accumulated enough savings to retire comfortably.[37]

Government maintains that 'cashing out accumulated retirement savings prematurely erodes security in old age, undermines the alleviation of chronic poverty and increases reliance on others'.[38] The major concern regarding pre-retirement withdrawal of retirement benefits relates to members utilising amounts they cashed in to cater for their current consumption rather than as their source of retirement income. It is even more concerning for younger employees who are able to move from one employment to the next, given the fact that at times they may take some time before they secure another employment. Government has observed that individuals are generally poor long-term planners when it comes to their pension money and they undervalue the future relative to the present which makes them unable to afford to retire.[39]

It cannot be disputed that withdrawing retirement benefits before reaching retirement is risky and in particular denies the member of the retirement fund an opportunity of growing his or her savings which would have been compounded over a period of time for his or her wellbeing post retirement. However, it would be advisable that the factors which lead people to cash in their retirement benefits when leaving their employment before they retire are properly assessed. The reality of people carelessly resigning in order to cash in on their retirement benefits cannot be discarded.[40] It is submitted that while there might be those who are cashing in their benefits because they can, sight should not be lost of those who have legitimate reasons which force them to withdraw their retirement benefits.

Withdrawal of retirement benefits at retirement

Retiring employees have difficult financial choices to make when they retire relating to their retirement benefits. 'They need to decide on an appropriate amount to withdraw from their retirement investment and they need to 'optimise' between outliving their money and living below their means'.[41] They are more likely to outlive their retirement savings if there are urgent

---

[37] Nhlanhla Nene, 'Parliamentary Statement on Retirement Reforms and Rumours' Parliamentary Speech (4 September 2014) 3 <www.govservsa.co.za/wp-content/uploads/2014/09/retirement-reforms-speech-to-parliament-minister-nene-sept-2014.pdf> accessed 2 June 2016.

[38] National Treasury (n 1) at 3.

[39] Ibid at 11.

[40] See National Treasury, 'A Safer Financial Sector to Serve South Africa Better' National Policy document (23 February 2011) 52, where government noted that 'there are reported cases of individuals resigning from their jobs just to gain access to their pensions'.

[41] Eben Mare, 'Safe Spending Rates for South African Retirees' (2016) 1 South African Journal of Science 1.

financial needs which they need to take care of when they receive their benefits. According to the Sanlam Benchmark Survey '[a]lmost 60% of retirement fund members, who withdrew their benefits, took the full amount in cash. The bulk of the money was used to reduce short-term debt (51%) and fund living expenses (33%)'.[42] In terms of this study, after receipt of the lump sum payment members would among others purchase property, settle or reduce mortgage bonds, make home improvements, give a lump sum to dependants/family, travel, reduce short term debt, start their own business, pay for their children's education, invest in other 'non-retirement' savings or investment products, spend the money on living expenses, pay medical bills or use the full amount to buy an annuity, while others did not really know what to do with their benefits.[43] In other words, it seems like in most instances lump sum retirement fund payments are generally not utilised for what they were intended for, which is maintaining retirees post their retirement. It cannot be doubted that employees generally need financial, savings and investment education during their working days which would enable them to make decisions which will not affect their ability to care for and maintain themselves after their retirement.

Decisions taken during working days which lead to the accumulation of debts which can only realistically be extinguished by retirement savings affect the retirees' ability to care for themselves post retirement. As such, government cannot ignore the reality of members of provident funds who cash in their entire retirement savings in a form of lump sum payments when they retire and exhaust such amounts due to their daily consumption and bad financial and investment decisions. In order to address this challenge, government aims to force members of provident funds to preserve their retirement savings when they retire and only receive a small portion thereof while leaving the rest in the fund to purchase a pension which would be paid to them on a monthly basis.[44] Government has stated that '[t]he problem of insufficient retirement provision is not only a result of pre-retirement withdrawals but also the consequence of lump sum pay outs made from provident funds at retirement. The lack of annuitisation in provident funds means that many retirees may spend their retirement assets too quickly, and face the risk of outliving their retirement savings'.[45]

---

42 Sanlam, 'Research insights Report' (Executive Summary Report 2015) 47 <www.sanlambenchmark.co.za/executiveSummary.php> accessed 25 March 2016.

43 Ibid, 'Research insights Report' (Pensioners Databook Report 2015) 18.

44 See generally National Treasury (n 1).

45 Ibid at 5.

PRESERVATION OF RETIREMENT BENEFITS

South Africa

Preservation of retirement funds occurs when the retirement fund member and exits his or her retirement scheme through retirement, resignation, dismissal or retrenchment leaves his or her saving within that fund or puts it into another similar fund and in the process receiving tax related benefits.[46] South African government was inclined to introduce preservation because it realised that when employees change jobs or retire they tend to cash in their accumulated retirement savings in a form of a lump sum thereby running the risk of retiring with insufficient retirement benefits.[47] After various policy discussion papers by the National Treasury indicating the government's desire to introduce compulsory preservation of retirement funds in South Africa, in 2016 the legislature passed the Taxation Laws Amendment Act.[48] Other than introducing compulsory preservation for members of provident funds in line with pension funds and retirement annuity funds, among others, this Act was also intended to harmonise tax treatment of all forms of retirement fund schemes in South Africa. This Act made it compulsory for all the members of pension funds, retirement annuity funds and also provident funds to have access only to one-third of the total value of their retirement benefits through a lump sum payment. In terms of section 3 of this Act, the remaining two-thirds were to be paid in the form of an annuity (including a living annuity) except where two-thirds of the total value does not exceed R165 000 or where the employee is deceased.[49] In order to make compulsory preservation attractive, this legislation provides all retirement fund members with increased tax relief which would potentially reduce their taxable income. Through this Act, members would contribute up to 27.5% tax free of the taxable income which is capped at a minimum of R350 000 per year.[50] It is clear that these tax initiatives not only enable retirement fund members to save more for their retirement but also ensures that their take home pay is increased. This Act also provided for tax-free transfer portability between all tax approved funds, including transfer from a pension fund or pension preservation fund to provident fund or provident preservation fund.[51] This Act also increased the *de minimis* threshold for

---

46 Ibid at 3.

47 National Treasury, 'Tax Harmonisation and Retirement Reforms' Media Statement (3 December 2015) para 21 <www.treasury.gov.za/comm_media/press/2015/2015120301%20-%20QA%20Tax%20harmonisation-%2003%20Dec2015.pdf> accessed 28 June 2016; government has maintained that it will not introduce the 100% preservation requirement, meaning that retirement fund members will still be allowed to access some of their money before retirement.

48 Act 25 of 2015.

49 Section 3 of the Taxation Laws Amendment Act 25 of 2015.

50 Ibid.

51 Ibid.

annuitisation, which is the threshold above which members are required to purchase an annuity from R150 000 to R247 500 for all the retirement funds.[52] This simply means that all retirement fund members with retirement benefits less than R247 500 will in terms of this Act be able to take their entire retirement benefits as a lump sum without being forced to preserve any amount.

Organised labour in South Africa vehemently opposed the legislative compulsory preservation requirement. Such opposition was evident even before the 2015 Taxation Laws Amendment Act was passed. Before the promulgation of this Act, some employees even went as far as resigning from their employment believing that government was going to take their retirement benefits away from them on the basis that government aims to nationalise such benefits.[53] The government also vehemently rejected claims that it wished to nationalise retirement benefits and thus ensuring members of retirement funds that their 'provident funds are safe, and there is no need to resign from their jobs and cash in their pension and provident funds'.[54] After the promulgation of this Act, Numsa indicated its displeasure with the Act by issuing a section 77 (1)(*d*) of the Labour Relations Act[55] notice in protest against reforms relating to compulsory members affecting provident funds.[56] Numsa argued that their members have always made it clear that their preferred retirement fund vehicle was a provident fund because it allowed them to choose whether to take their benefits in full as a cash payment or use such benefits as a pension.[57] Cosatu also threatened to strike over the promulgation of this Act, arguing that there was no meaningful

---

52 See the definition of 'provident fund' in section 1 of the Taxation Laws Amendment Act 25 of 2015. See also the National Treasury, '2015 Tax Laws signed into law by the President' (Media Statement 12 January 2016), where it was clarified that '[t]he 2015 Taxation Laws Amendment Act increases the *de minimis* threshold for annuitisation from R150 000 (in the 2013 legislation, the Tax Laws Amendment Act 31 of 2013) to R247 500; and closes certain coverage gaps in the 2013 legislation'.

53 Getrude Makhafola, 'Mass resignations over pension reforms' *IOL* (Johannesburg, 13 August 2014) <www.iol.co.za/news/politics/mass-resignations-over-pension-reforms-1734945> accessed 28 June 2016.

54 See National Treasury (n 37) at 2, where the former Minister of Finance, Nhlanhla Nene, assured employees that rumours that government will nationalise retirement funds and that it has changed the law to force members of pension and provident funds to preserve are false.

55 Act 66 of 1995.

56 Ivin Jim, 'NUMSA Submits Section 77 Notice for Strike over New Tax Laws' *Politicsweb* (Johannesburg, 22 January 2016) <www.politicsweb.co.za/documents/numsa-submits-section-77-notice-for-strike-over-ne> accessed 26 June 2016.

57 Ibid. Numsa further argued that '[i]n a society in which the majority of working-class people spend their lives in poverty and debt – either unemployed or working for poverty wages – there is no way in which they can accumulate enough money in their retirement funds to provide them with an adequate pension when they retire'.

consultation before the Act was passed.[58] Both Cosatu[59] and Numsa[60] are influential players within the South African labour market interested in employees' rights and have the capacity to influence government's policy direction relating to retirement funds.

Due to pressure exerted by organised labour, government passed the Revenue Laws Amendment Bill[61] in order to among others provide for the postponement of compulsory preservation provisions of the 2015 Taxation Laws Amendment Act. Clause 1 of this bill specifically provides for the postponement of the annuitisation requirement for provident funds for two years, until 1 March 2018. This means that contributions made by provident fund members to their funds before 1 March 2018 will not require annuitisation.[62] Clause 5 of the Bill provides for the postponement of a tax-free transfer from pension fund to provident fund until 1 March 2018. Government issued a statement justifying these amendments by stating that it has noted the concerns that have been raised in respect of the retirement reforms relating to the requirement to purchase an annuity at retirement for provident fund members.[63] Further that the two years postponement will ensure that there is meaningful consultation with all the relevant stakeholders. The 2015 Tax Laws Amendment Act provisions relating to retirement came into force on 1 March 2016, but the annuitisation implementation date and

---

58 Karl Gernetzky, 'Cosatu Plans General Strike Against Retirement Law Reforms' *Business day Live* (4 February 2016).

59 The Congress of South African Trade Unions, which was launched in December 1985 after four years of unity talks between unions opposed to apartheid and committed to a non-racial, non-sexist and democratic South Africa. See Andre Mellet, 'Labour Union Voices in South Africa and Arguments to Scrap Inflation Targets – a Historical and 21st Century Debate' (2011) 61 New Contree 177, 178, who correctly refers to Cosatu as the largest labour federation in South Africa. See further Chitja Twala and Buti Kompi, 'The Congress of South African Trade Unions (COSATU) and the Tripartite Alliance: a marriage of (in) convenience?' (2012) 37 Journal for Contemporary History 171, where it is argued that 'the Congress of South African Trade Unions (COSATU) has played a significant role in shaping the political landscape of South Africa. The successes and challenges experienced by COSATU may be attributed to both its mandate as a union, representing the workers, as well as its role within the Tripartite Alliance'.

60 The National Union of Metal Workers of South Africa (NUMSA) is the biggest trade union in terms of membership in South Africa, established in May 1987. NUMSA was affiliated to Cosatu but withdrew their membership from Cosatu. See Devan Pillay, 'Workers' Control, Marxist-Leninism and the Revitalisation of Working Class Politics in South Africa' (2012) 45 Labour, Capital and Society 5, where NUMSA's resolution to leave Cosatu is discussed.

61 [B 4B—2016]. This Bill has passed through both Houses of Parliament and is due to be promulgated.

62 National Treasury, 'Explanatory Memorandum to Revenue Laws Amendment Bill, 2016' (16 May 2016) 2.

63 National Treasury, 'Tax Benefits Continue, Annuitisation Postponed' (2016) March Personal Finance News Letter 6. Government also assured members of all pension funds, including public servants who are members of the Government Employees Pension Fund (GEPF) that they are not adversely affected by the new laws and should not risk their jobs by resigning. Government confirmed that their hard-earned savings are perfectly safe, and accessible to them now and after 1 March 2016.

related provisions were postponed. This entails that the tax harmonisation reforms referred to above were implemented on 1 March 2016.[64]

Certainly, the government's desire for South Africans to preserve their retirement benefits in order to be able to care and maintain themselves post retirement is sound. However, government seems to be very paternalistic in the manner it wishes to roll out this initiative of forcing employees to preserve. Perhaps an ideal method would be to encourage rather than to force people to preserve. Indeed, government should be active to assist its citizens and save them from themselves at times, more particularly when there is a likelihood of taking decisions which are self-destructive, such as cashing out and misusing retirement benefits. Indeed, government is well within its rights to introduce initiatives which will ensure that fewer people become dependent on the state, more particularly those who were fortunate enough to have formal employment and retirement benefits. Government is justified in introducing initiatives which will assist such people to be financially dependent on themselves when they reach retirement age. However, sight should not be lost of the fact that not everyone who cashes out retirement savings is out to misuse them. There must be room to consider people who might desperately need to use their retirement savings due to the particular challenges which they may be facing at the time. Perhaps South Africa can draw some lessons from Australia in this regard.

Australia

There are various pieces of legislation and subordinate legislation that govern the operation of the Australian retirement industry which is commonly referred to as the superannuation system, the most important of which are the Superannuation Industry (Supervision) Act[65] (SIS Act), the Superannuation Act[66] and the Income Tax Assessment Act (ITA Act).[67] The SIS Act generally governs all the retirement funds which are regulated by the Australian Prudential Regulation Authority, which appears to be functioning in more or less the same manner as the South African Financial Services Board, regulating mainly private retirement funds or other funds which

64 Ministry of Finance, (n 64)
65 Act 78 of 1993.
66 Act 80 of 2005.
67 Act 27 of 1936.

choose to be governed by the SIS Act.[68] The Superannuation Act generally governs the public sector retirement scheme for government employees. The ITA Act determines the taxation and payment of retirement benefits in Australia. A member's retirement benefits may be accessed either as a lump sum, pension or both if permitted by the fund's rules.[69] Regulations made under the SIS Act[70] provide for the preservation of retirement money within retirement funds which members will be entitled to withdraw when they meet the conditions of release of such benefits. Probably the most important and common condition of release is when the member has reached his or her preservation date which enables him or her to retire.

In terms of regulation 6.18 (1) '[a] member's preserved benefits in a regulated superannuation fund may be cashed on or after the satisfaction by the member of a condition of release'.[71] Unless the condition of release is death, members are entitled to withdraw one or more lump sums, one or more pensions or purchase one or more annuities with their benefits.[72] Workers are allowed to take their lump sum retirement benefits from superannuation savings when they retire because there is no compulsory annuitisation in Australia.[73] According to the Australian superannuation policy for post-retirement, the population in Australia is changing in a sense that people are living longer and the share of the elderly is increasing.[74] It has been observed that the majority of workers in Australia convert their retirement benefits as income stream rollovers at the time of retirement.[75] However, government is concerned that as at 2015, about 16% of the workers took their benefits as lump sum payments, more particularly those

---

68 See the Australian Prudent Regulatory Authority's website, available at <www.apra.gov.au/Pages/default.aspx> accessed 10 May 2016, which states that the regulator 'oversees banks, credit unions, building societies, general insurance companies, life insurance, private health insurance, friendly societies and most members of the superannuation industry. APRA is funded largely by the industries that it supervises. It was established on 1 July 1998'. The South African Financial Services Board's website, available at <www.fsb.co.za/Pages/Homes.aspx> accessed 10 May 2016, states that the Financial Services Board 'act[s] as an independent institution, established by statute to oversee the South African non-banking financial services in the public interest, and [is] fully funded by the fees and levies imposed on this industry'. The websites of both institutions clearly indicate that these institutions oversee the financial sectors of their respective countries which include the retirement industry. In terms of s 19 of the SIS Act, retirement funds which are not regulated by this Act can apply to be regulated by this Act. In the South African context, in terms of s 4 of the Pension Funds Act, funds which are not regulated by this Act can also apply to be governed by it.

69 CCH Australia Limited, *Australian Master Tax Guide* (48 ed North Ride 2011) 682.

70 Superannuation Industry (Supervision) Regulations (Statutory Rules No. 57 of 1994) (SIS Regulations).

71 SIS Regulations

72 Reg 6.18 (3) of the SIS Regulations.

73 Taleitha O'Meara, 'Compulsory Annuitisation: A Policy Option for Australia?' (2013) 7 Australasian Accounting, Business and Finance Journal 5, 6.

74 Australian Government, 'Productivity Commission Research Paper' (2015) v at 3.

75 Ibid at 16.

with low savings and they ended up exhausting them, thus outliving their savings.[76] The major concern relates to the fact that lump sum payments are used to pay for the lifestyle that's being lived now instead of being put aside to provide income in retirement which ultimately will lead to reliance on government. In order to encourage preservation the government has provided a number of tax incentives for those who preserve their benefits and do not take them as a lump sum.[77]

In Australia, the basic rule is that workers cannot access their retirement benefits until they reach the preservation age; however, government has recognised that there might be justifiable reasons which necessitate such early withdrawal. In terms of regulation 6.19 A of the SIS Regulations, retirement benefits may be withdrawn early on compassionate grounds or instances where the worker experiences severe financial hardships. In order to consider releasing retirement benefits on compassionate grounds, factors such as the need for medical treatment, modifications necessary for the family home or motor vehicle due to severe disability, funeral expenses, foreclosure of a mortgage or the need to prevent the family home from being executed upon will be taken into account.[78] This indicates the legislature's awareness of circumstances which might prevail which might necessitate early release of retirement benefits. Members are provided a legislative tool which enables them to justify, based on their individual circumstances, the early release of their retirement benefits.

It is worth noting that before preservation age, workers cannot easily withdraw their benefits. In other words, while it is possible to access retirement benefits before preservation age, there are nonetheless conditions of release which must be met before the benefits are released. This is the flexibility which allows people who are in desperate need of financial resources not to suffer while their money is kept in their pension portfolios. Other than compassionate factors[79] which can be taken into account, the legislature has made provision for members to also indicate financial hardships as a condition which can justify the early release of retirement funds. In order to satisfy the financial hardship requirement, the member may amongst others prove that he or she is not gainfully employed and is currently unable to meet his or her family's reasonable and immediate living

---

76 Ibid, where it is stated that '[i]n addition to retiring debt (particularly housing debt) many individuals use their lump sums to modify their primary residence and/or invest in consumer durables to see them through their retirement years'.

77 Given the word limitation, the thorough discussion of this point is beyond the scope of this paper. See Income Tax Assessment Act (ITA Act).

78 The Parliament of The Commonwealth of Australia, 'Explanatory Memorandum' <www.legislation.gov.au/Details/.../4fa4429f-7177-4775-8bb5-9ad729c11965> accessed 20 April 2017.

79 Regulation 6.19 (1) of the SIS Regulations.

expenses.[80] The compassionate and financial hardship test is not applicable in all cases, but only used as an exemption having regard to the individual member's circumstances. This does not mean that every member at any time can make a request to his or her retirement fund for the early release of retirement benefits. Retirement funds are obliged to assess on objective grounds whether or not such a member is experiencing severe hardships. The trustees are empowered to enquire into the member's overall family position in order to establish the difficulties he or she is experiencing.[81]

It can be argued that this flexibility might to some extent defeat the purpose for which retirement funds are established, which is basically to provide income during retirement. However, the flexibility provided in Australia came as a result of the realisation that workers may struggle financially during their working days, and if the conditions of release are met, they should look to their retirement benefits for financial relief. This is the kind of flexibility which South Africa can draw lessons from. Indeed, while preservation of retirement benefits is ideal, it must nonetheless be implemented in a manner which does not prejudice workers generally, principally when they are experiencing financial difficulties. Strict implementation of preservation of retirement funds, more particularly when people are no longer active in the labour market, does not appear to be sound. There must be room for such workers to motivate and provide reasons why they should access their retirement benefits. A better approach would be that which is aligned to the Australian model which allows members to be able to justify why they should access their retirement benefits in full when they exit their retirement fund. Perhaps it might also assist to develop criteria which will enable the release of only the amount which the member needs at the time, and not necessarily the entire benefits. By so doing, the purpose of preservation will not be entirely defeated. Should there be a need to withdraw the entire amount, for instance where the preserved amount is insignificant, then when financial need is demonstrated, it will be justifiable to withdraw the entire amount.

Clearly, a person who is experiencing dire financial difficulties cannot be expected to endure such difficulties while he or she has financial resources available which can take him or her out of his or her difficult financial situation. It cannot be denied that the circumstances of retirement fund members are diverse. The way in which they hold their savings, the amount of retirement savings they have, and their expectations for retirement all differ. Treating them in the same way can lead to inequitable and unintended outcomes because a 'one size fits all' policy cannot reasonably be expected to suit all workers. Access to retirement benefits which should be preserved

---

[80] The Parliament of the Commonwealth of Australia, 'Early Access to Superannuation Benefits' 6 (January 2002) <file:///C:/Users/a0013494/Downloads/report_pdf.pdf> accessed 20 April 2017.

[81] Ibid.

for retirement should only be in the case of financial need and difficulty of the member.

CONCLUSION

In this paper, I have shown that the South African government desires to introduce compulsory preservation in South Africa which is intended to assist members of retirement funds to be self-sufficient post their retirement. However, the proposed compulsory preservation, even though well intended, does not recognise individual circumstance and fails to make room for members to access their retirement benefits when there might be justifiable reasons to do so. Should all retirement fund members be compelled to preserve without exceptions, there will be instances where members may face dire financial challenges which might force them into debts which they might have avoided had they been allowed to cash in their benefits.

It is submitted that, unlike in Australia, the proposed compulsory preservation of retirement benefits in South Africa is inflexible and thus fails to take into consideration different circumstances relating to individual members of retirement funds. In particular, it fails to appreciate that members are faced with different challenges which may demand that they have access to disposable cash in order to urgently address such challenges. It is undesirable to compel members to preserve money which they might be in urgent need of. Government should encourage preservation, but like in Australia, it would be ideal to allow workers to decide when they retire as to how they wish to deal with their benefits. Secondly, rather than enforcing compulsory preservation, it might be a good idea to implement the 'compassionate and severe hardships' test in South Africa. It is submitted further that while this test is applied only in regard to early withdrawals in Australia, it can nonetheless be implemented both during early withdrawals and when workers have reached retirement age in South Africa.

While there will be some form of compulsion to preserve retirement benefits, nonetheless, there will be room for deviation when circumstances permit similar to those in regulation 6.19 A of the SIS Regulations in Australia. This will curtail frivolous demands for lump sum payments and thus encourage preservation of retirement funds. Only those with justifiable reasons as to why they should access their benefits would be allowed to access them as lump sum payments. It is hoped that during the consultation sessions between government and relevant stakeholders regarding the South African position relating to compulsory preservation and the ills of lump sum payments, a proper balance would be struck between compulsory preservation advocated for by government and withdrawal of the entire benefits advocated for by organised labour. It is submitted that such a balance could be achieved by partial compulsion to preserve while being flexible enough to accommodate withdrawal based on good cause shown. I

am aware that there might be those who may question some of the reasons which retirement fund members may use to access their retirement funds early, however, it would be worthwhile to understand the circumstances which such members are living under. For instance, if a member is requesting to be paid his or her retirement fund benefits early because he or she wishes to pay up his or her home which is about to be executed upon, such will be a justifiable reason to access such money. Finally, the Australian approach provides a principled lesson to South Africa, that the law regarding retirement funds should be flexible enough to cater for specific circumstances of individual retirement fund members.