SABPP™
SA BOARD FOR PEOPLE PRACTICES
Setting HR standards

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FACT SHEET

PENSION LAW FOR EMPLOYERS

INTRODUCTION

The earliest of what is now known as “pension or retirement benefits” first appeared in Otto von Bismarck’s German promulgation of the Old Age and Disability Insurance Bill of 1889.[1]

“Bismarck was motivated to introduce social insurance in Germany both in order to promote the well-being of workers in order to keep the German economy operating at maximum efficiency, and to stave-off calls for more radical socialist alternatives. Despite his impeccable right-wing credentials, Bismarck would be called a socialist for introducing these programs, as would President Roosevelt 70 years later. In his own speech to the Reichstag during the 1881 debates, Bismarck would reply: “Call it socialism or whatever you like. It is the same to me.”

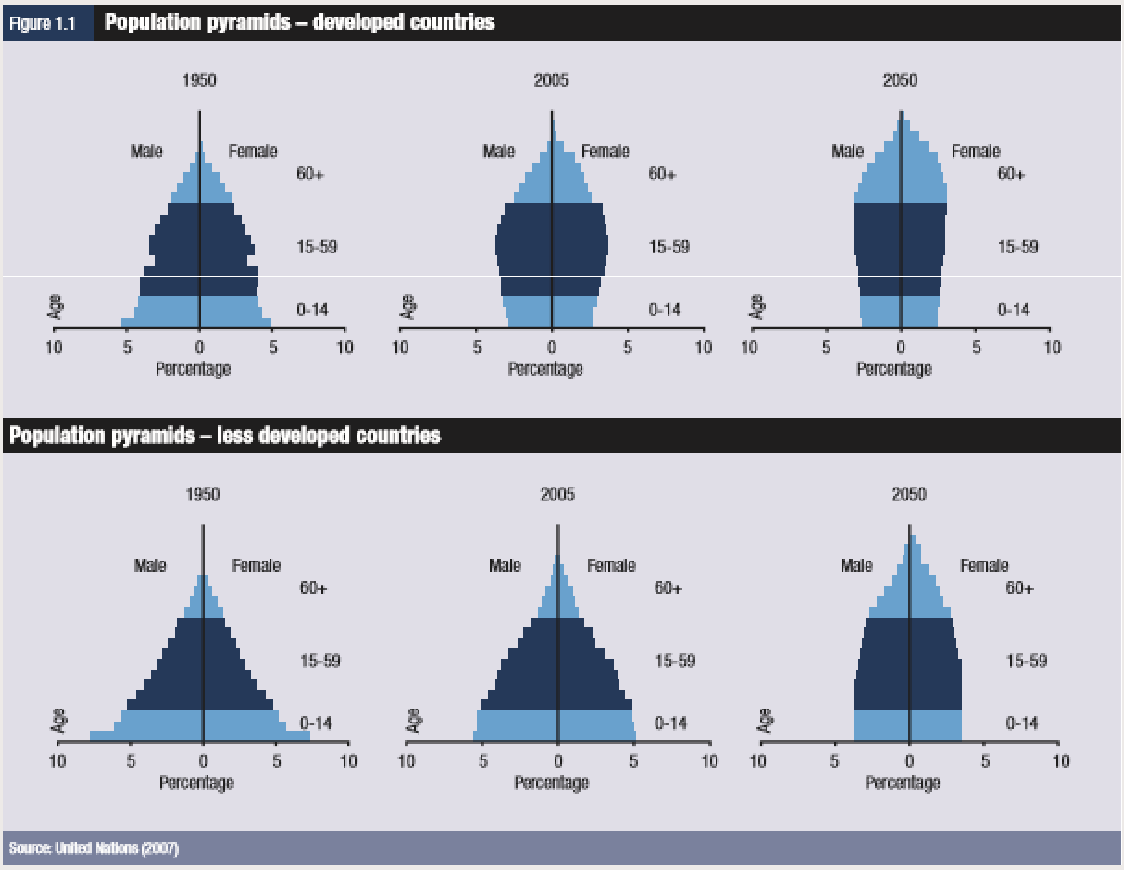
The German system provided contributory retirement benefits and disability benefits as well. Participation was mandatory and contributions were taken from the employee, the employer and the government. Coupled with the workers’ compensation program established in 1884 and the “sickness” insurance enacted the year before, this gave the Germans a comprehensive system of income security based on social insurance principles. (They would add unemployment insurance in 1927, making their system complete.)”

Source: https://www.ssa.gov/history/ottob.html

This was a hybrid of what we would now refer to as state social grant and occupational pension fund in its current form. These post-employment benefits spread throughout Europe and to the Americas at the beginning of 20th century. In South Africa, the passing of the Pension Funds Act, 24 of 1956[2] (PFA), formalised what was already a common practice by employers in the private sector and this legislation excluded state funds and funds created in terms of industrial agreements. The latter funds were later included with the PFA amendment of 2007. Our reference

1. **http://www.fampeople.com/cat-otto-von-bismarck_5**
2. **http://www.acts.co.za/pension-funds-act-1956/index.html**

Considering employment, the question is why is pension so important? There are various factors that are impacting the necessity for pension planning, and employees must be aware of these factors. The rapidly aging workforce, financial viability for retirement, health wellness and affordability for the rising cost of living. According to the United Nations (UN), predictions on the aging population in both developed and under-developed countries, "predicts that globally the percentage of people aged 60 years or older will double between 2007 and 2050. By 2050 one-third of the total population in developed countries will be 60 years or older, while in less-developed countries one-fifth will be over 60." [3]Due to the rapid decline in labour force, coupled with the aging population, pension and healthcare systems will face the challenge of maintaining financial sustainability. The impact is far greater is less developed populations, "poverty among the elderly due to the absence of universal or even widespread pension or healthcare coverage." [4]The population pyramids below and table 1.1 reflect the trend of an aging population.



[3] http://www3.weforum.org/docs/WEF_Scenario_PensionsAndHealth2030_Report_2010.pdf
[4] http://www3.weforum.org/docs/WEF_Scenario_PensionsAndHealth2030_Report_2010.pdf

Table 1.1 Demographic statistics and predictions in detail

	Population (millions)			Total fertility rate (per woman)			Life expectancy at birth (years)			% of total population age 60+			Median age (y	
	1950	2007	2050	1950	2007	2050	1950	2007	2050	1950	2007	2050	1950	2005
World	2519	6616	9076	5.0	2.5	2.0	46.6	66.5	75.1	8.2	10.7	21.7	23.9	28.1
Developed countries	813	1217	1236	2.8	1.6	1.8	66.1	76.2	82.1	11.7	20.7	32.4	29.0	38.6
Less developed countries	1707	5398	7840	6.2	2.7	2.1	41.1	64.6	74.0	6.4	8.4	20.0	21.4	25.6

Source: United Nations (2007)

Another aspect to support the importance of why pension is important, is work life extension. The factors of labour force participation, effective retirement and formal retirement supports the sustainability and informs the adequacies for retirement systems. As seen below, South Africa is at 19.2 which depicts retirement financing challenges.

COUNTRY	PILLAR 4: LABOR FORCE PARTICIPATION RATE (AGED 60-74) IN 2011 - ALL	PILLAR 4: EFFECTIVE RETIREMENT AGES	PILLAR 4: FORMAL RETIREMENT AGES
EMERGING MARKET AND DEVELOPING ECONOMIES			
Brazil	40.9	N.A.	N.A.
Chile	40.8	66.9	65.0
China	28.5	N.A.	N.A.
Hungary	8.3	60.0	60.0
India	35.8	N.A.	N.A.
Indonesia	N.A.	N.A.	N.A.
Mexico	40.2	72.2	65.0
Poland	28.7	61.7	65.0
Romania	N.A.	N.A.	N.A.
Russian Federation	11.9	N.A.	N.A.
South Africa	19.2	N.A.	N.A.
Turkey	N.A.	62.8	44.9

Source: http://www3.weforum.org/docs/WEF_FS_RetirementIncome_Report_2013.pdf

Who is responsible for pension in the workplace?

From the beginning, pension funds were created by the employers to create financial security for employees post their work life. Up to the late 90s, most occupational funds were created and managed by employer-appointed trustees, who in most cases were management of the employer. It is from this understanding that pension benefits were regarded as a "gratuitous" benefit to the employee for services rendered. To date, the PFA does not make pension benefits a compulsory benefit by the employer.

This non-compulsory aspect, however, excludes those industries in which bargaining councils (BC) and sectoral determinations (SD) apply. With the changing nature of employment, in that, employees were no longer expected to remain with a single employer for the duration of their working lives, the administration of pension funds became a full-time exercise. It is due to this and other changes that the professional administrator and the multiple employers (Umbrella) funds came into the picture.

When pension funds were an employer's responsibility, they fell under the domain of the human resource practitioner just like payroll administration, as it fell under the sphere of employee benefits. Consequential to the changes in the employment sector, what was previously understood as an employer's responsibility to its employees was then ceded to the administrators and the funds.

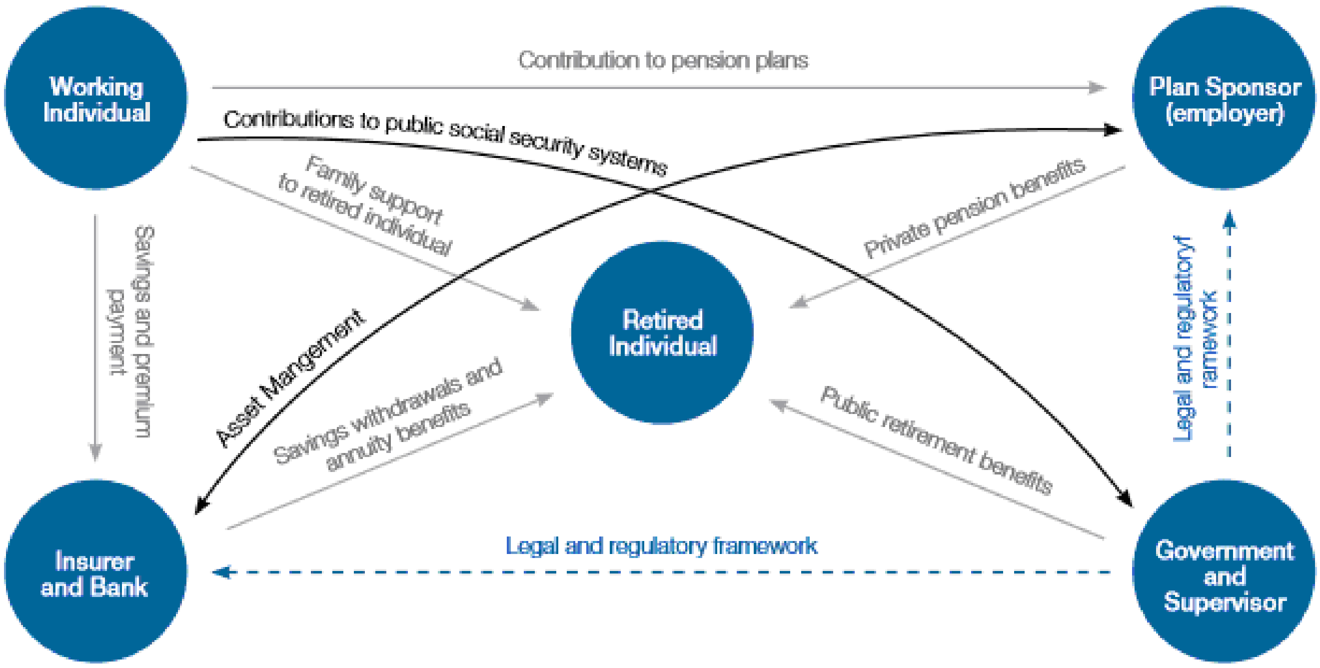
Table 1. The five pillars of modern retirement systems

PILLAR	ESSENTIAL CHARACTERISTICS
Pillar 0	Non-contributory minimal assistance to the poor; typically means-tested
Pillar 1	Public (government) pension (social security) schemes to provide for basic needs; contributory and redistributive and typically financed on a pay-as-you-go basis
Pillar 2	Private occupational pension schemes (sponsored by employers) to supplement pillar 1; can be voluntary or mandatory (i.e. required by the state) and can comprise defined benefit (DB) or defined contribution (DC) plans
Pillar 3	Individual savings to provide for future withdrawals and/or annuities in various forms; can be voluntary, but often enforced by the state
Pillar 4	A set of labour market policies to extend work life and enable more part-time work for the formally retired; informal family support as additional dimension

The report on "Developing Future Social Protection Systems Retirement Income" by the World Economic Forum, created pillars to reflect the "Sustainability, Risks and Challenges of Current Retirement Income Schemes". The report looks very carefully at the influence pension has on the employee/individual, their personal pension contribution and/or if there is an employer contribution, and the employer impact. The pillars are listed in Table 1.

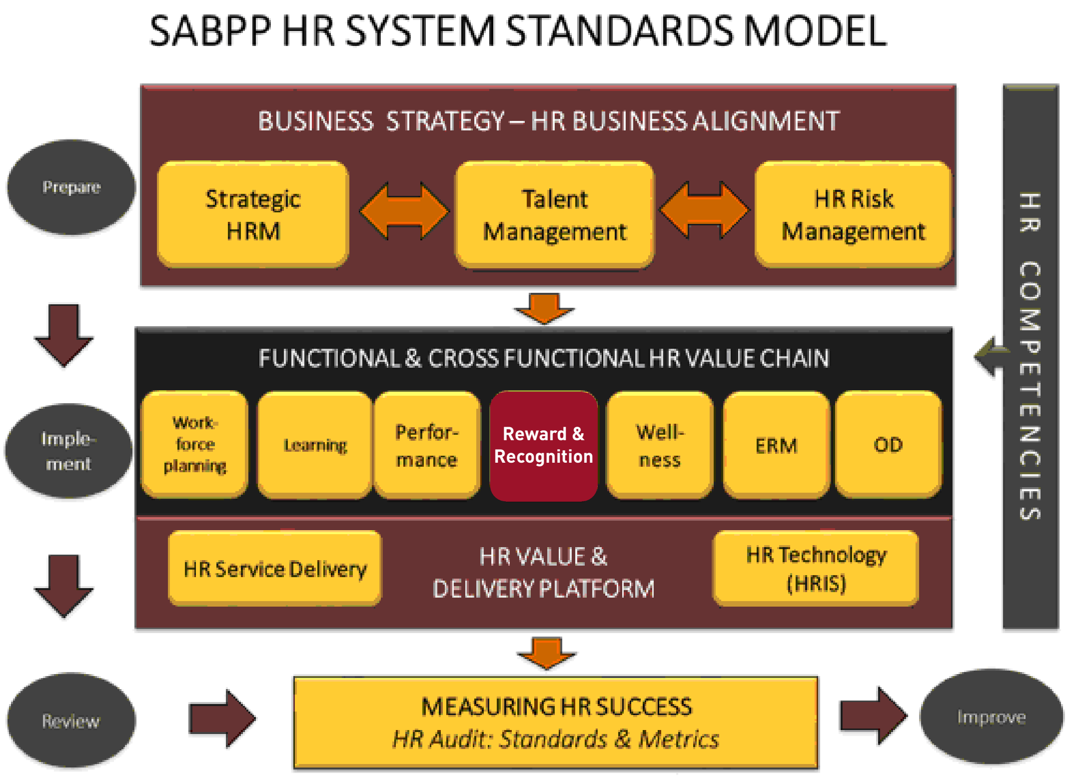
http://www3.weforum.org/docs/WEF_FS_RetirementIncome_Report_2013.pdf

Since pension still falls within the remuneration aspect of the employee's life cycle, the responsibility of pension still resides under HR. The purpose of this fact sheet is to enable the HR practitioner to distinguish the responsibilities that fall on the employer, as represented by the HR practitioner and those that fall on the different service providers. HR also should have a clear mapping of the employee's work life cycle, and how they assist in advising, planning and encouraging saving for retirement. The diagram[5] below is an example of this understanding and therefore maps the framework of engagement.



5 http://www3.weforum.org/docs/WEF_FS_RetirementIncome_Report_2013.pdf

The SABPP 2014 HR Management Standard of South Africa



The SABPP recognises pension under their HR Standard Element 7: Reward and Recognition, which is defined as:

Reward is a strategy and system that enables organisations to offer fair and appropriate levels of pay and benefits in recognition for their contribution to the achievement of agreed deliverables in line with organisational objectives and values.

Recognition is a related strategy and system that seeks to reward employees for other achievements through mechanisms outside the pay and benefits structure.

The acknowledgement of pension is within the benefits aspect of the definition and further encompasses the understanding of pension. "HR practitioners must be able to play an appropriate role in the following outputs"[6] :

- Rewards policy and systems
- Benchmarking
- Job Evaluation
- Salary structuring
- Salary and wage reviews
- Payroll
- Incentives
- Employee Conditions of Employment and Benefits

Employee Conditions of Employment and Benefits

Since pension is for the benefit of the employee, it is also imperative that the company understand the need to encourage saving and investment for the employee. In the South Africa Survey 2016[7], the "Saving and Investment" statistics show pension at a change of 18.2% (2009-13). This is concerning as it projects the sentiment of a "non-saving" culture of the population for retirement. Here it alludes to question the sustainability of the employee post retirement, and how they will survive after their work life.

Hence the responsibility falls into the HR area of control and influence, especially in managing the direction and outputs of employee benefits.

6. SABPP 2014 HR Management Standard of South Africa
7. South Africa Survey 2016, IRR

SAVING AND INVESTMENT

	Proportion of adults			Change
Type of savings or investment	**2009**	**2012**	**2013**	**2009-13**
Co-operative or village bank services	0%	0%	0%	0%
Deposit Account	5%	8%	7%	40.0%
Education policy/plan	2%	2%	4%	100.0%
Endowment policy	3%	1%	2%	-33.0%
Giving money to someone for safe keeping	2%	2%	1%	-50.0%
Investment/saving policy	5%	4%	4%	-20.0%
Investment and savings proucts - formal	11%	13%	13%	18.2%
Investment and savings products - informal	20%	18%	16%	-20.0%
Keep cash or savings at home	13%	9%	5%	-61.5%
Pension fund	11%	12%	13%	18.2%
Provident fund	8%	10%	12%	50.0%
Retirement fund	7%	9%	10%	42.9%
Savings book at the bank	3%	2%	2%	-33.3%
Shares on the stock exchange	0%	1%	0%	0.0%
Stokvel/savings club	8%	12%	12%	50.0%
Unit trust	1%	1%	1%	0.0%

Source: Stats SA 2016

The SABPP further supports the encouragement of directing and advising the employee to save, manage their personal finance and budget appropriately. In many aspects of HR, practitioners are faced with challenges that impact employees saving capability. The impact of the economy will have a fluctuating bearing on the individuals saving capacity, due to high inflation. This is an echoed sentiment in the Minister of Finance, Budget Speech of 2017, where Minister Gordhan mentioned that the "Economic growth is slow, unemployment is far too high and many businesses and families are under stress."[8] Saving then is not at its optimal. This does create potential risk for current retirement systems. HR practitioners should ensure that their knowledge is current and innovative, to assist in delivering the best solution to the employee. The WEF report on "Developing Future Social Protection Systems Retirement Income,"[9] tabulates the risks for employment below.

Category	Risks & Challenges	Possible Concequences	Impact	Likeli-hood	Pillar	Risk Migration
Employment	Increasing imbalance of income distribution against rising living costs	Increasing proportion of population without capacity to save	●	●	1,2,3	Increase progressive nature of benefits & taxations systems
	High unemployment rates (before and after retirement)	Insufficient old age protection for person with long unemployment history and inability to increase retirement income through work after retirement	●	●	1,2,3	Increase progressive nature of benefits & taxations systems
	Workers without coverage through not being forced to contribute	Insufficient old age protection for person that did have an income that supported a minimum living standard during their working life	●	●	1,2,3	Lower costs of formal work and introduce compulsory pension provision where absent
	Increasing flexibility of working life by choice or to meet childcare needs	increased difference between pension and employment income or challenge sustainability of Defined Benefit Schemes	●	●	1,2,3	Promote pension provision & communicate implications of work balance choices
	Multiple and unclaimed accounts	Retirees cannot claim their funded assets	●	●	1,2,3	Better legal foundations including bilateral and multilateral treaties to insure the portability of pensions between plans and across jurisdictions

King IV

The King IV Report on Corporate Governenace for South Africa 2016[10], under Principle 17, Part 6.4: Supplement for Retirement Funds, where "the governing body of an institutional investor organisation should ensure that responsible investment is practiced by the organisation to promote the good governance and the creation of value by the companies in which it invests." As a guiding principle of implementation, HR practitioners must understand the leadership under the King IV report on Retirement Funds.

The report positions retirement funds as an "important of the institutional industry, which consists of retirement funds, insurance companies as well as custodians, nominees and service providers who act under manadate in repsect of any investment decisions and activities. Retirement funds play an important role in the overall system of governance. They make investment decisions and have rights as shareholders, and the way in which these decisions are made and rights are exercised either reinforce or weaken the corporate governance of the companies that they invest in. Also, these funds owe fiduciary duties to their members.

8 **http://www.treasury.gov.za/documents/national%20budget/2017/speech/speech.pdf**
9 **http://www3.weforum.org/docs/WEF_FS_RetirementIncome_Report_2013.pdf**
10 **www.iodsa.co.za/?page=KingIV**

They therefore need to be well - governed and apply the principles of responsible investing in the quest for long -term, sustainable returns."[11]

The document further relates its principles and practices in compliance to relevant legislation and codes like:

- Regulation 28 of the Pension Fund Act;
- Code for Responsible Investing in South Africa (CRISA);
- Financial Services Board Circular PF 130 (FSB Circular PF 130);
- Income Tax Act, No 58 of 1962.

In order to ensure the proper governance is implemented with the execution of retirement funds, the principles and practices in King IV are tabulated below:

PRINCIPLE	PRACTICE
1. The board should lead ethically and effectively.	Ethical and effective leadership is exemplified by integrity,competence,responsibility, accountability, fairness and transparency.
2. The board should govern the ethics of the fund in a way that supports the establishment of an ethical culture.	In addition to setting an example through its own character and behaviour, the board should also ensure that the ethics of the fund is governed ethically.
3. The board should ensure that the fund is and is seen to be responsible corporate citizen.	Compliance with Regulation 28 of the Pension Funds Act and, in particular, the preamble stating that prudent investing "should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of the fund's assets, including factors of an environmental,social and governance character," should be seen as an integral part of the fiduciary duties of the board of a fund.
4. The board should appreciate that the fund's core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable elements of the value creation process.	The practices address the development and approval of the organisation's strategy, implementation thereof and organisational performance.
5. The board should ensure that reports issued by the fund enable stakeholders to make informed assessments of the fund's performance and its short, medium and long-term prospects.	Reports are a powerful means for a retirement fund to communicate meaningfully with its stakeholders, among others, members and regulators.

11 www.iodsa.co.za/?page=KingIV

PRINCIPLE	PRACTICE
6. The board should serve as the focal point and custodian of corporate governance in the fund.	The board's status as the focal point and custodian of corporate governance, is a natural consequence of its fiduciary duties towards the members of the fund.
7. The board should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively	This pertains to the election and appointment mechanisms of members of retirement fund boards.
8. The board should ensure that its arrangements for delegation within its own structures promote independent judgement, and assist with balance of power and the effective discharge of its duties.	This principle relates to the establishment of boards.
9. The board should ensure that the evaluation of its own performance and that of its committees, its chair and its individual members, support continued improvement in its performance and effectiveness.	The evaluation of the performance of the governing body, its members and committees as addressed by the principle and its associated practices, applies to retirement funds.
10. The board should ensure that the appointment of, and delegation to, management contribute to role clarity and the effective exercise of authority and responsibilities.	The key areas here relate to outsourcing, appointment of the principal officer, professional corporate governance services to the governing body.
11. The board should govern risk in a way that supports the fund in setting and achieving its strategic objectives.	Principles 11 – 15, which deal with specific governance functional areas, should be interpreted and applied in conjunction with industry or sector codes and guidance, applicable legislation and proportional considerations.
12. The board should govern technology and information in a way that supports the fund setting and achieving its strategic objectives.	Principles 11 – 15, which deal with specific governance functional areas, should be interpreted and applied in conjunction with industry or sector codes and guidance, applicable legislation and proportional considerations.

PRINCIPLE	PRACTICE
13. The should govern compliance with applicable laws and adopted, non-binding rules, codes and standards in a way that supports the fund being ethical and a good corporate citizen.	Principles 11 – 15, which deal with specific governance functional areas, should be interpreted and applied in conjunction with industry or sector codes and guidance, applicable legislation and proportional considerations.
14. The board should ensure that the fund remunerates fairly, responsibly and transparently so as to promote the achievement of strategic objectives and positive outcomes in the short, medium and long term.	Principles 11 – 15, which deal with specific governance functional areas, should be interpreted and applied in conjunction with industry or sector codes and guidance, applicable legislation and proportional considerations.
15. The board should ensure that assurance services and functions enable an effective control environment, and that these support the integrity of information for internal decision-making and of the fund's external support.	Principles 11 – 15, which deal with specific governance functional areas, should be interpreted and applied in conjunction with industry or sector codes and guidance, applicable legislation and proportional considerations.
16. In the execution of its governance role and rsponsibilities, the board should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the fund over time.	This principle addresses stakeholder relationships.
17. The board should ensure that responsible investment is practiced by the fund to promote the good governance and the creation of value by the companies in which it invests.	This principle invokes the application of the principles and practices of responsible investing as advocated in CRISA, and which should be applied by all retirement funds as a matter of good governance.

Source: King IV Report on Corporate Governance for South Africa 2016

Why fund administration left employers

There is no doubt that the demands of the fund administration may have become too onerous for the employer due to the changing spheres in the employment sector and the legislation governing pension funds. Thus, outsourcing the administration of pension funds to professional administrators was necessary due to the level of expertise and the time it demanded from the HR practitioner. This was more prevalent within the small to medium size businesses. Indeed, the result of the outsourcing led to the administration of pension funds to be more streamlined and in compliance with the ever-changing legislative needs.

Regrettably, what also happened during the outsourcing transition, employers' rights, responsibilities and legal duties towards their employees were also passed over to the administrators and fund trustees. That is, in any contract regarding the outsourcing of services, there remains a responsibility on the employer to ensure that it gets the best and most suitable deal for employer and its employees in the open market. In most cases regarding pension benefits, this is not happening as a single entity is often the administrator, the fund provider and the employer advisor, all in one.

Advantages of outsourcing

As in any transitions, there will always be advantages and disadvantages that will be considered. Some of the noted advantages of outsourcing pension benefits are:

- Fund management skills could not be supplied internally.
- Employers could focus on their core business.
- Where fund administration was haphazard it is more streamlined.
- Costs of administration reduced.
- Professional administrators can keep up with legislative changes.

Disadvantages of outsourcing

The disadvantages are also notably acknowledged and are as follows:

- Employers lost interest and basic understanding of what was happening in the funds in which they participate.
- Employers are unable to provide meaningful information to employees about funds without referring to service providers.
- Due to lack of knowledge, employers are unable to advance their interests as against funds and administrators.

The nature of pension funds

There are two types of occupational pension funds described in terms of the way contributions are made and the benefits paid. These are (a) defined benefit funds and (b) defined contributions fund. At times, there is a possibility of a combination of the two. Another recent type of fund available to employers is what was previously exclusive to individual members, and that is, the retirement annuity (RA) fund which is now being used as an occupational fund.

A defined benefit (DB) fund as its name indicates, is a fund in which a specified formula is used to determine the benefits payable to a member on exit (termination, retirement or death). A defined contribution (DC) fund, is a fund in which the contributions made on behalf of the member determines the benefits payable when the member exits the fund. The main difference between the two, is that, the contributions are made on behalf of the member in both types of funds, in a

DC fund, what will be payable to the member is as per the formula which considers among others the period of employment, the age of the member, the member's average salary in the period prior to termination, return on the investments of the fund and others. Whereas, in a DC fund it is the contributions made on behalf of the member together with the investment returns earned on the contributions that determine what the member receives on exit.

This difference is often simplified for the employer as follows:

- In a DB fund, the risk is borne by the employer and in a DC fund, the risk is borne by the member.
- In a DB fund, if the return on investments fails to meet the benefits of the members in terms of the pay-out formula, the employer should top up the payment to make the difference of what was achieved and what is due.
- Instead, in the DC fund, regardless of how the fund investments perform, the member receives just that and the contributions.

The reason why a retirement annuity (RA) is not truly an occupational fund, is that the retirement contract is between the employee and the fund usually in the form of a policy issued by an insurance company. The benefits received from an RA, are by way of annuities paid by the insurer on retirement dependent on the returns on investments achieved. This policy requires the employee to contribute monthly in the form of premiums and instead, the employer pays the contributions to the insurer. The difference of the RA from the normal occupational fund is that in the DB and DC funds the termination of employment with the employer also terminates the member's participation in the fund. In contrast in an RA, as the retirement agreement is between the member and the retirement fund, the member can continue to contribute to the fund even after leaving the services of the employer without any changes. Due to the limited responsibilities of the employer in an RA fund, our focus is going to be on the true occupational funds, the DB and the DC.

[18] Legislation.gov.uk, The Modern Slavery Act (2015), **http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted**

The pension position

The pension fund industry occupies an unusual position between the financial industry and the legal industry. It is within the financial industry due to the volumes of funds that are contributed and invested by fund administrators and investment experts and it is within the legal field due to the laws, rules and regulations that govern funds. This unique position of the pension industry straddling the two fields has had the unfortunate effect of bringing with it the financial and legal jargon into the pension vocabulary.

The result is an exclusionary language meant to be understood only by the role players. It is, therefore, imperative for any person venturing into this topic to have a glossary of the basic words and phrases used to fully understand the intended meaning. For example, in terms of the PFA, the word pension fund organisation is defined to include what we commonly understand as pension, provident, preservation and beneficiary funds. It is, therefore, important to follow the context when the word is used to understand its intended meaning.

Another act that refers to pension is the Divorce Act. Here the act defines 'pension interest' to mean a non-member spouse's share of a member spouse's interest in a pension fund. To fully understand any discussion on pensions, one needs to be aware of these definitions and words that perverse the ordinary meaning of words.

Similarly, the PFA has created different role players to carry out specific duties in the management of funds, it is, therefore, imperative to be able to distinguish a principal officer from a trustee and an administrator from and investment manager. There are also the different statutory functionaries such as the Registrar of pensions and the pension funds Adjudicator, each with a specific mandate.

The laws regulating pension funds

As stated in the introduction, pension law in the private sector in South Africa is regulated primarily in terms of the PFA. This is distinguishable from those funds in the public sector, such as the Government Employees Pension Fund (GEPF), the Transnet Second Defined Benefit Pension Fund and others, which are created and regulated in terms of their founding legislations. Our focus is on the private sector funds. The other two primary acts in the regulation of pension funds in the private sector pension are, the Income Tax Act, 58 of 1962, which regulates the taxation of benefits payable to members and Financial Services Board Act, 97 of 1990 which creates the office of the Registrar of Pension Funds whose main responsibility is to register and regulate pension funds in the private sector. There is other secondary legislation referred to in the PFA, such as the Divorce Act, 70 of 1979, Maintenance Act, 99 of 1998, the Labour Relations Act, 66 of 1995, Long Term Insurance Act, 52 of 1998 and others.

South Africa

Africa's largest pension fund, the Government Employees Pension Fund (GEPF), has more than 1.2 million active members, some 318,000 pensioners and beneficiaries, and assets worth R700bn ($85.5bn). It is a defined benefit fund set up in 1996 by consolidating 10 funds for public servants with an asset base of R127bn. The government-owned Public Investment Corporation (PIC) manages the investments along with some 35-other public-sector pension, provident, social security, development and guardian funds. The GEPF aims to be a leader in socially responsible investment in Africa. The PIC invests GEPF assets in equities, fixed-income investments and retail, corporate and industrial properties across South Africa. It also has put funds in the Isibaya Fund, which invests in black economic empowerment.

FINANCIAL HOLDINGS AS PERCENTAGE OF NATIONAL ASSETS

Country	*Commercial banks*	*Pension Funds*
Botswana	40	17.4
Central African Rep.	68.5	21.1
Congo, Rep of	89.8	3
Ghana	50.9	15.1
Namibia	38.1	75
Nigeria	90.5	0.6
Rwanda	53	20.6
Seychelles	87.1	5
South Africa	25.3	62
Tanzania	78	13
Zambia	59.6	16.7
Zimbabwe	76.6	2

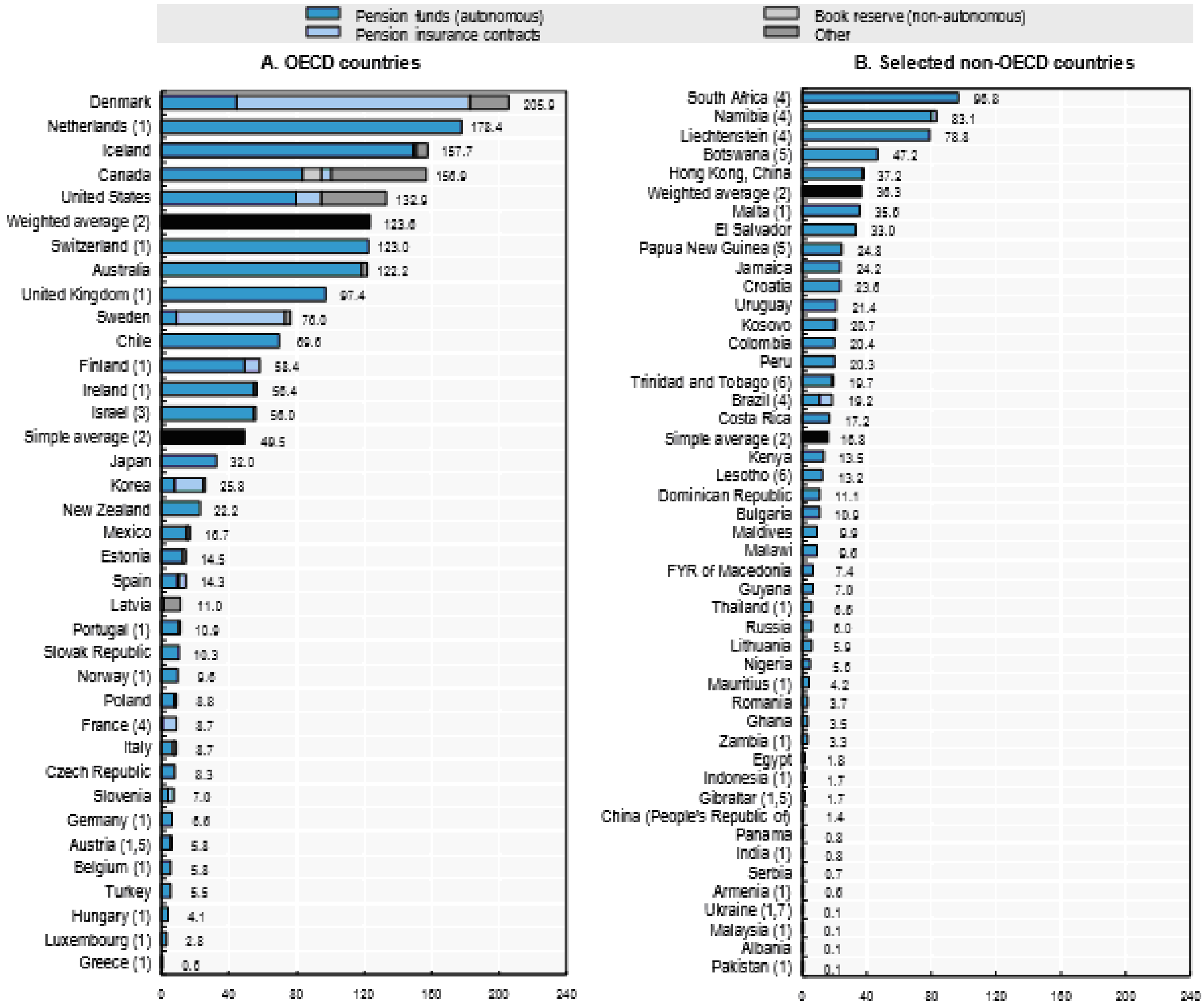
SOURCE: INTERNATIONAL MONETARY FUND, AFRICA DEPARTMENT, "COUNTRY PROFILES DATABASES" AND CALCULATIONS

As per the Organisation for Economic Co-operation and Development (OECD) Pension Markets in Focus Report 2016[12], pension funds were seen to manage the "biggest share of private pension assets in most countries."[13] The figure below highlights this and includes South Africa in its statistics.

12 http://www.oecd.org/daf/fin/private-pensions/Pension-Markets-in-Focus-2016.pdf
13 http://www.oecd.org/daf/fin/private-pensions/Pension-Markets-in-Focus-2016.pdf

Figure 3. Importance of private pension investment compared to the size of the economy, by type of financing vehicle, in the OECD and selected non-OECD countries, 2015

As a percentage of GDP



Note: Please see the section on methodological notes at the end of the report.

Source: OECD Global Pension Statistics.

Apart from the legislation, the other important document in the regulation of pension funds is the fund rules. This deals with the appointment of the board of trustees of the fund, the fund's governance, the contributions payable by the members and the benefits payable to the members.

The common law is the unwritten law which evolved over time through practice and customs, and has been accepted by our courts as part of our law. In South Africa, this is comprised of Roman-Dutch Law and the customary law of the indigenous groups.

The application of common law often arises in the interpretation of the different statutes. In line with the South African common law, there are decided court cases which follow the stare decisis principle. This means that a legal issue decided by a high court is settled law on the issue until it is overturned by the same court or another court of a higher jurisdiction. This principle is important for the consistency and certainty of the law.

Since we are a constitutional state all these laws operate under the shadow of the Constitution of the Republic of South Africa (the Constitution) and any of the laws that do not meet the basic legislative requirements of the Constitution are outlawed for its unconstitutionality.

GOVERNANCE

LEGISLATION

FUND RULES

REGISTRARS CIRCULARS AND DIRECTIVES

CONSTITUTION

The starting point regarding the governance of a pension fund is to remember that a pension fund is a separate entity from the employer that created it, or to any fund to which it contributes. From this understanding, it will follow that the fund and the employer being independent parties their interests will not always be aligned. As the employer has its board and management to run its business, the fund has its board of trustees and in most cases an administrator to manage the affairs of the members. As stated above, the rules of the fund together with the PFA determines what the trustees and the fund administrator can and cannot do.

This is evident in the Supreme Court of Appeal as it cemented the importance of the rules in the matter of Telkom v Blom[14] when it stated that, if it is not in the rules then the fund cannot do it.

For the employer, it is always important to remember that although it may have created the fund for the benefit of its employees, their relationship should be at an arm's length. It is often difficult for the employer to separate its interests from those of the fund especially in those cases where the fund appointed trustees are part of the management of the employer. That is, they merge the employer's interest with those of the fund, in most cases to the disadvantage of the fund. Trustees of pension funds whether they are appointed by the employer or employees directly or the union, they often must wear different hats in their different roles.

Employees appointed as pension fund trustees, should always remember when wearing their trustee hats that the only interest that they represent at that time, are those of the members, pensioners and beneficiaries of the fund and not of the parties that appointed them as trustees.

[14] **TEK Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at para 28**

In order for a fund to start operating, it must be registered with the Registrar of pension funds in terms of the PFA and before the Registrar can allow the fund to operate, he would have scrutinised and approved the fund's rules for compliance with legislation and regulations. Similarly, any amendment of the fund rules must also be approved and registered before they can operate. The registrar also issues regulations and circulars clarifying issues arising from legislation and providing direction and guidance on how such issues are to be dealt with by the funds.

As is often the case in complex relationships like that created among pension funds, their members and the participating employers, disputes do arise. Although there is always an option to approach the courts, the PFA has created the office of the pension funds adjudicator to deal with disputes arising from pension funds. The advantages of the adjudicator's office as contrasted to the courts is that parties do not need to be legally represented and that the procedures are simplified to accommodate lay complainants.

Contrary to the common misconception that the adjudicator's office is only to serve members and their beneficiaries, the PFA stipulates that any person, including the employer, the fund or a trustee thereof may complain to the adjudicator regarding the administration of the fund, the investment of its funds or the interpretation and application of its rules alleging a violation of that person's rights by any person in charge of the fund's assets, which will financially prejudice the complainant. It is, therefore, important for the employer to remember, that it is not only a contributing bystander in the pension relationship but that it is a full participant with rights and responsibilities and whoever violates its rights can be held accountable.

Contributions

The primary purpose of a pension fund is to save for the member's retirement and savings are determined by what you put in, in contributions. What the contributions to a fund are going to be is agreed at the onset and specified in the rules of the fund including the increases. As mentioned there is a difference in how the contributions to a DB fund are structured to those of a DC fund. This will also be specified in the rules in accordance with the nature of the fund.

Furthermore, the rules must also indicate what portion of the contributions are to come from either the member, the employer or both. For the employer, it is important to be clear and consistent in that what appears in an employee's contract of employment as contributions to the fund, should be same as what appears in the monthly salary advice and reflected in the annual benefit statement received from the fund.

It should also be kept in mind by both the employer and the employee that the total of what is paid to the fund as contribution is not solely utilised for retirement savings for the member, from these contributions will be deducted costs for the administration of the fund, premiums for insured benefits (death and disability) and any other costs and levies authorised by the rules and the PFA. Disputes often arise regarding whether the retirement benefit is properly computed due to the misunderstanding of what parts of the contributions go to a member's retirement savings.

Example of a typical contribution rates as a percentage (%) of salary:

Employer 7%	Employee 7%	Retirement Savings 7%
Deductions: Admin costs: 2.5% Levies: 0.5% Risk Insurance: 1%		

For the employer, its main responsibility is to pay contributions to the fund every month in accordance with the provisions of the PFA. Failure to pay contributions to the fund timeously has dire consequences for the employer and the legal implications beyond what may be anticipated. Experience has shown that when employers fall into financial difficulties, pension contributions are a soft target for default. This is a fatal error of judgement as not only is the employer going to be liable for the outstanding contributions, instead, the employer is also liable for interest on the contributions and where the fund benefits are insured, the employer will be liable for those benefits that became due but could not be paid as a result of the default on the premiums. It is for this reason that the PFA has extended the level of accountability to the employer for the responsible person to be held personally liable for the default on contributions. This responsibility starts from the pay roll officer and extends all the way to members of the company's board who were aware of the default.

Benefits

What is the use of having a pension fund if there are no benefits? The main purpose of the fund is to pay out benefits, to the members when they are no longer able to work either due to age or disability or to their beneficiaries where they died before reaching retirement.

At face value, it appears that there are no benefits derived by an employer from participating in a pension fund. That picture is inaccurate, in most instances for an employer to attract the best candidates in its field of operation it needs to offer the best benefits other than salary and among those benefits is the provision of pension benefits. Over and above the pension benefits, for most employers, the risk benefits offered by funds such as insured death and disability would also not be available to the employees had it not been through the funds. These benefits ensure that should an employee get disabled or die prematurely, enhanced benefits should be paid by an insurer to augment the benefits from the fund. The peace of mind and the future financial security of the employee is for the benefit of the employer. Any seasoned HR practitioner will at one time or another, have been approached by the family of a deceased employee seeking the deceased's (undefined) benefits. Should the employer not be a participant in a pension fund, the family's disappointment usually ends up becoming accusatorial that the deceased's funds were embezzled by someone from the employer.

Benefits paid by funds:

- Retirement;
- Death;
- Disability;
- Withdrawal;
- Transfer;
- Termination.

The types of benefits provided may vary from fund to fund, however, these are basics across the board depending on the nature of the fund. All pension funds provide a retirement benefit and a death benefit for when a member dies before retirement. However, the manner of payment and when the payment is made is not always the same. This is where the distinctions among the types of funds contained in the Income Tax Act, come into play. If a member of a provident fund as defined in the Income Tax Act retires, the full benefit can be paid as a lump sum, whereas a member of a pension or retirement annuity fund can only receive up to a maximum of one-third (1/3) of the benefit in the fund as a lump sum, the two-thirds to be paid as an annuity to the member.

One of the most controversial aspects of the PFA is section 37C which specifies how a deceased's member's benefit is to be distributed to the member's beneficiaries. One of the unique features of a pension benefit is that, until it is paid to the member, the benefit does not form part of the estate of that member. For this reason, any creditors of the member who may want to attach the member's income, such as would happen if the member was to be sequestrated during insolvency, would not be able to access the pension benefit.

Similarly, the PFA grants the board of trustees of a fund, exclusive powers to distribute a deceased's member's death benefit. This is although the deceased member may have nominated preferred beneficiaries and specified the percentages for the distribution. The board of the fund is not bound by such a nomination form. The board's discretion to distribute the benefit to the beneficiaries is not unrestricted, it is to allocate the benefit within the narrow prescripts of the PFA after investigating the needs and financial abilities of the identified potential beneficiaries. If the board fails to abide by the strict requirements stipulated in section 37C of the PFA when conducting its investigation, to identify and in allocate the benefit, it can be challenged by the beneficiaries and its distribution may be reversed by the Adjudicator or a judge if the matter is taken to court.

It does happen that due to injury or sickness an employee becomes permanently incapacitated to an extent that he/she is no longer able to fulfil the duties for which he/she was employed for. In those instances, a disability benefit becomes payable. This is usually a percentage (often 75%) of the salary that the employee was earning at the date of incapacitation. This is often insured and is therefore paid by the insurer. The main aim of this benefit is to prevent the employee from using the retirement benefit before reaching retirement age. Therefore, the insurer pays both the member a disability benefit and contributes on behalf of the member to the fund until the member reaches retirement age. The disability benefit stops when the member reaches retirement and a pension benefit is paid.

In most cases, an employee terminates employment due to, resignation, retrenchment or dismissal before reaching retirement age. In such instances, the employee receives a withdrawal benefit from the fund. Unfortunately, this is the most common type of benefit paid by funds and the result is that often, the benefits are squandered before retirement. A disadvantage of this type of benefit is that it is taxable as income to that employee for the year. Attempts are being made by the legislature to remove this type of benefit by imposing a compulsory preservation until retirement.

In some cases, an employee who terminated his/her employment, joins another employer with a similar type of fund, that employer can have the pension benefit transferred instead of receiving a withdrawal benefit. Alternatively, if the new employer has no similar fund or no fund at all, the member can transfer the benefit to a preservation fund to have it preserved until the employee reaches retirement. This option has the advantage that the benefit is not taxed.

Due to the poor individual savings record in the country and the attrition rate of pension benefits following early withdrawals, Treasury introduced legislation to compel compulsory preservation in 2015 which was to come into effect on 1 March 2016.

The purpose of the change was to make all contributions paid into pension or provident funds from 1 March 2016, automatically preserved, even if a member had terminated employment prior to retirement. However, the President had to suspend the introduction of this clause on compulsory preservation due to challenges from the labour movements that there was insufficient consultation with the stakeholders before the legislation was passed. Although the legislation remains, its implementation has been suspended until 1 March 2018.

At the same time to encourage members of pension funds to contribute more, Treasury increased, with effect from 1 March 2016, the non-taxable rate of contributions to pension or provident funds from 14% to 27.5% up to a maximum of R350 000.00 per annum.

Why HR practitioner needs to understand pension law

According to the CIPD[15], "Employee benefits offer a way to motivate employees and contribute towards improving well-being and enhancing engagement. However, there are a number of factors to consider when introducing a benefit or a benefit package to ensure that's valued by employees, while also supporting HR practices and aligning it with wider business goals."

The role of HR is essential in creating beneficial value for employees, whilst also managing the expectations of the employer. What happens when the employee retires, or cannot work any longer? How do they sustain themselves and their families?

The sad reality is that HR professionals themselves do not understand the financial implications of poor financial planning. How are the HR professionals expected to drive a project that is even complicated for them?

Let's ponder on these scenarios:

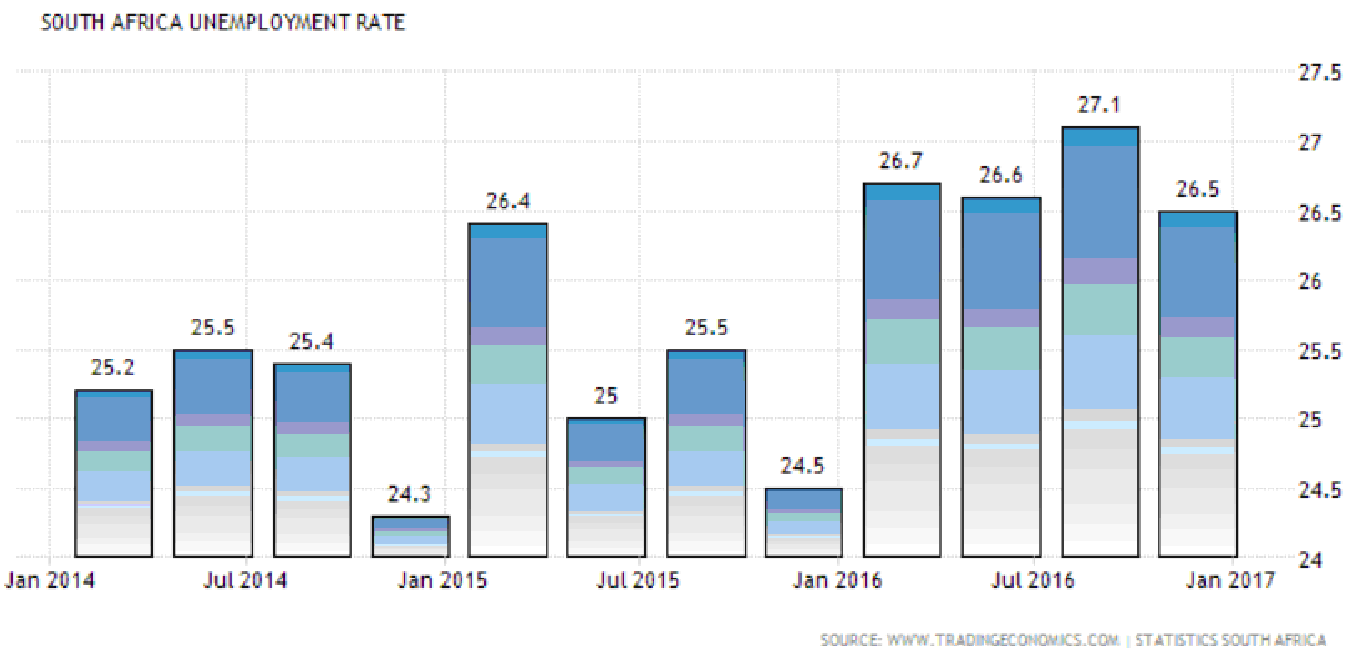
1. What will happen to employees if they are retrenched and they have limited or no savings at all?
2. Imagine a widow coming to the HR office because the husband, a staff member died. Then the HR professional must inform the widow that there is no death benefit.
3. An employee has reached the retirement age and is reluctant to retire because there are no benefits. If he continues working at that advanced age imagine the fall in productivity.
4. Employees might resign just to access their pension meagre benefits.
5. Employees productivity might plunge because workers are stressing and getting sick as a result of financial stress.

15 **https://www.cipd.co.uk/knowledge/fundamentals/people/benefits/factsheet**

Therefore, HR professionals cannot afford to ignore the impact of pension and its related laws to the well-being of the assets that they look after Human Resources. HR professionals need to upskill themselves about pension the same way, if not more than they upskill themselves about recruitment, training and all HR facts. The cost of not doing so will always be higher.

> "The best time to start thinking about your retirement is before the boss does."
>
> Author Unknown

With the current unemployment in South Africa sitting at 26.5%, many parents close to retirement still have the responsibility of taking care of children (who are unemployed) and grand-children. Proper health care is expensive, and most who are nearing retirement suffer from diabetes, heart disease, cholesterol etc. Their health care needs itself can prove to be unaffordable. Hence HR needs to step up to its responsibility in ensuring that employees are well guided for their pension benefit.



Here is why HR must understand pension law:

- To serve the employer effectively;
- To be able to identify the most suitable retirement vehicle for the employees;
- To be able to make an appropriate selection of other benefits provided by retirement funds;
- To provide the employees with the accurate and up to date information regarding their pension funds;
- To be able to negotiate the best deals for the employer with fund administrators, funds and other service providers in the pension industry;
- To avoid costly and punitive legal blunders for the employer and one's self.

Tips for the HR Practitioners

- Get to know the law on pension. It is important for HR practitioners to understand the legislation and implement accordingly.
- Workforce plan: HR practitioners must know their numbers of aging work force and how this impacts their benefits and saving plans for the employee.
- The transfer of knowledge and skills must ensue and the sensitisation to the retiring employee is vital for continuity of business, preparation for change, and acceptance of the inevitable event.
- Understand the expectations of the employee regarding their pension benefit. Be in a position to assist in information and calculations where necessary.
- Design retirement programmes for employees close to retirement age. This will assist in their understanding of the law and requirements.
- Promote pension counselling and financial planning programme to assist employees with their retirement and finances.
- Create accessible platforms for legislation, policies and procedures. Employees can access these documents before coming to HR.
- Be available and proactive in implementing beneficial pension policies that benefit the employer and employee.
- Be prepared to implement change management initiatives and manage risks.

Pen down .... you're a pensioner!

It is inevitable that our work life has a shelve date. Time is not in our mere mortals control, and the aging workforce is growing. Since SA is noted for its strong legislative structures, the retirement age will be enforced. Employees who plan for their retirement must still contend with the rising cost of living, health care and family responsibility. Due to these variables, pension funds may not be able to sustain their living costs or employee contributions may be at the minimum or unaffordable. However, it is always better to plan for retirement and pension in the years to come, and ensure a safety net post one's work life.

The HR talent strategy (aligned to the Reward and Recognition strategy) must incorporate and assist employees to plan for their pension and retirement. Employees need to be guided and advised on their pension benefits and what (and how) they need to plan for. The topic of pension is a serious and important part of any individual's life span, and it should start at the earliest point of the individual's career. That clearly points towards HR as the principal of the journey!

This Fact Sheet was written by Adv Makhado Ramudzuli Ramabulana with contributions and editing by Lathasha Subban of the SABPP. Adv Ramabulana is specialist in pension law, with over 12 years of experience. He has gained his expertise advising and training on pension law.

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