

A FULL COMMENTARY ON THE PENSIONS AND PROVIDENT FUNDS BILL 2019:

Submissions to the Parliament of Zimbabwe

Nobert Musa Phiri

Partner: Muvingi & Mugadza Legal Practitioners (Member of the Alliot Group)

Member of the Pension Lawyers Association of South Africa

phiri@mmmlawfirm.co.zw/+263772551352

Sir Mackenzie Chalmers argued as follows, “It is cheaper to legislate than to litigate; moreover, while a moot point is being litigated and appealed, pending business is embarrassed.”¹

Muvingi & Mugadza has a full Insurance & Pensions Law practice group. **Muvingi & Mugadza** is a proud member of the **Alliot Group** (the world’s 6th Largest multidisciplinary alliance). **Alliot Group** (www.alliotgroup.net) is an award-winning international association (‘alliance’) of independent accounting and law firms that need deeper levels of cross border resources to develop reputation, visibility and new business. Visit www.alliotgroup.net or www.mmmlawfirm.co.zw

¹The author of the English 1906 Act, Sir Mackenzie Chalmers, was aware that codification had both advantages and disadvantages. In 1901, during the twelve years it took for his Bill to become law, he said that while men of business would probably prefer a code, lawyers would feel constrained by it, given that no code can provide for every case: M D Chalmers CSI and D Owen, A Digest of the Law of Marine Insurance (1901), at viii, quoted by Lord Justice Longmore in the Pat Saxton Memorial Lecture, An Insurance Contracts Act for a New Century, 5 March 2001, at para 29

Background

The Pensions and Provident Funds Bill (the Bill) is a proposed law that will repeal the existing Pensions and Provident Funds Act [Chapter 24:09]. The Bill seeks to modernise the regulation and supervision of the pensions sector. An improved legal and regulatory framework can also support broader objectives in the financial sector, including ensuring that the sector grows in a more transformed and inclusive manner.

In order to appreciate and comprehend the Pensions and Provident Fund Bill, the role of the Justice Smith Commission of Inquiry² must be acknowledged. The Commission report notes as follows;

‘A number of recommendations are made in order to unleash the potential role of the Sector in economic development. These include policy macro-economic stabilisation, policy reforms, the adoption of a comprehensive social insurance scheme, strengthening the legal and regulatory regimes and promoting good governance practices, as well as consumer protection, among others.’

A study of the Bill will in fact show that the Bill is premised on the recommendations of the Commission of inquiry report.

The Pensions Bill should provide for a legal framework for the prudential regulation and supervision of insurance business in Zimbabwe that is consistent with the Constitution and promotes the maintenance of a fair, safe and stable insurance market. Any process of reform must be guided by the desire to balance the interests of the insurer and the insured. Reform should never lead to over regulation of the Pensions industry and at the same time over protection of the consumers.

In this commentary I highlight some on the main issues identified with the Bill and review some of the provisions in the Bill and make recommendations thereto;

² Report of the Commission on Inquiry into the Conversion of Insurance and Pension Values from the Zimbabwean Dollar to the United States Dollar: March 2017

Main issues identified with the Pensions and Provident Funds Bill

1. Aligning with Constitution of Zimbabwe

The adoption of The Constitution of Zimbabwe Amendment (No.20) Act 2013 has brought with it great optimism and should have an enormous impact on the Insurance and Pensions Industry. Below we note some of the important provisions of the Constitution which the Bill may have been addressed or require further attention

i). Section 71: Property Rights

Section 71 (4) reads: Where a person has a vested or contingent right to the payment of a pension benefit, a law which provides for the extinction or diminution of that right is regarded, for the purposes of subsection (3), as a law providing for the compulsory acquisition of property.

The Bill makes no attempt to enshrine the proprietary rights of a pension and the Bill should be reviewed to ensure the below

- Protection of Pension Benefits from Transfer, attachment or exection
- Protection of Pension Benefits on Insolvency
- Protection Pension Benefits on Death

(presently such rights can only be afforded through regulations by the Minister in section 36)

lii). Section 68 Right to administrative justice

Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate,

The Bills carries with it the principles as enshrined in the Constitution particularly with the duties of IPEC as a regulator.

2. CONSUMER PROTECTION

The Justice Smith Commission of inquiry identified the principle of Treating customers fairly as an important pillar of financial soundness. The report advocates for the protection of rights of policyholders and pensioners. The Consumer Protection Act which came into operation in December of 2019 is the principal legislation dealing with Consumer rights. The Bill does not make any reference to the principal legislation on Consumer rights and though it is clear that there are provisions enhancing consumer rights; it should clearly legislate that IPEC has a further mandate beyond the general consumer rights and should be empowered to come up with Policy holder protection rules.

4. Fund Governance

The daily operations of a fund are directed controlled and overseen by a Board of trustees. The duties, responsibilities, fit and and proper requirements of Trustees are a welcome development towards enhancing governance in the Bill. These enhancements are also coupled with the fit and proper requirements of the principal officer which brings Zimbabwe in line with other jurisdictions regarding governance of pension and provident funds. These provisions enhance consumer rights.

5. TECHNOLOGY,INSURTECH, ARTIFICIAL INTELLIGENCE IN THE INSURANCE INDUSTRY; RISING TO THE REGULATORY CHALLENGE

Technology shows its transformative and disruptive impact on virtually every economic field. The pensions industry market is no exception and can no longer remain closely reliant on its conventional operational tools³.Many countries, and international standard-setting bodies, are carefully considering their approach to technology. The law and, in particular, regulation of pensions business, will need to keep pace. Regulatory issues of concern that arise include market development, promotion of access to pensions, consumer protection and privacy and data issues.

The earliest use of InsurTech in Zimbabwe appeared in 2010 when Econet launched a Life Assurance product known as Ecolife.To harness InsurTech all the while protecting the financial system, the consumers and their needs, regulatory clarity and dialogue with the industry is essential.

³ Palin Baysal and Muzaffer Atar: Interpretation of Big Data by InsurTechs, IBA Insurance Newsletter 2018

New regulatory frameworks need to be sufficiently flexible to encompass the fast-paced changes in digital technologies; to create an enabling environment for delivering economic benefits while lowering operational costs, enhancing competition by encouraging innovation, advancing financial inclusion and delivering more convenient financial services.⁴ *Kenya, has seen an embracing of change and embracing of collaboration whereby innovation is perceived as part of the regulatory culture. Consequently, the regulator is familiarised with new trends and their implications and potential future scenarios are identified and*

⁴ Microinsurancenetwork.org; Insurtech promise for micro insurance-rising to the regulatory Challenge 2018

1. Review of the Sections in the Bill

The following provides a section by section review of the Bill.

- *Overall, the Bill is a response to the Justice Smith's commission of inquiry*
- *The intention of the Legislature in the Bill is welcome and designed at aligning our legislative and regulatory framework in line with global regulatory standards. The Bill also carries with it enhanced provisions dealing with corporate governance of Pension Funds. However the intention of the Legislature is compromised by the Drafting style that has been adopted. The drafting style in the current Act is simpler and easier to follow as opposed to the present Bill. The manner in which new legislation and regulations are written and enforced should minimise disruption and promote certainty, rather than introduce confusion. It is also intended to make it simpler for financial consumers to access the law.*
- *The Insurance & Pensions Commission (IPEC) has been given a more robust and intrusive role in this Act which giving clarity to its mandate which will improve the regulation and supervision of the industry*
- *While the Bill carries provisions dealing with Consumer rights, it is important to firstly acknowledge the that the Consumer Protection Act is the principal legislation dealing with Consumer rights. The Bill should also ensure further rights of a consumer of pensions products and services*
- *There is need for further clarity on the Pension Protection fund administered by IPEC. This fund involves public funds and therefore, there must be scrutiny on how IPEC administers the fund. The same*

expectations on the industry must be made on IPEC who must lead by example.

- ***Transition and implementation of the new law are key provisions that will ensure that legislative provisions are just not replaced but the new law will build a consistent and effective framework. it is important to ensure that consumers responsibilities are also well-understood, and the role of financial education in this regard is important.***
- ***Currently the State controlled Pension Funds and other industry owned pension funds (LAPF, MIPF, CIPF, UCPF,) are subject only to their dedicated laws. The scope of application of the Bill in relation to all pensions Funds is not addressed. The attempt to legislate that it is superior to all other laws (in section 3 subsection 3) does not address the fundamental problems with the current conflict of laws between the Pensions Act and other enactments establishing pension funds. Given the large number of Zimbabwe contributing to these pension funds, including many lower-income earners, fund members should arguably be subject to the same member protection as those regulated through the Pensions Bill.***

Reference number	New inclusion	Pension and Provident Fund Bill	Comments
1	Definition of Actuarial surplus	Defined in section 2 of the bill	This concept has been adopted as modified from South African Law. It is not clear whether this concept as modified will serve our jurisdiction well
2	Definition of Valuator	Defined in section 2 of the Bill	The definition requires more attention. It is

			worrying to note a valuator can also be another person as designated by the Commissioner. There is too much discretion given to the Commissioner
3	Definition of Existing Fund	Section 2 does not define an Existing Fund	The Bill must include the definition in section 2 as the term appears in section 19 (4) and section 49. The definition in section 49 is misplaced.
4.	Definition of Actuary	Defined in section 2	The definition allows the Commissioner a wide discretion in designating an individual as Actuary. The Bill must only allow the Commissioner to designate after Gazetting same. Definition of Actuary must also be restricted to natural persons.
5.	Definition of Stakeholder	Defined in section 2	The Bill must restrict the definition as it is currently too broad. The definition must be restricted to founding members, current members, deferred pensioners and employer participating in the fund
6.	Definition of Spouse	Not defined in section 2	We propose that a spouse be defined in the Act for the

			purpose of determining beneficiaries in line with section 26 of the Constitution and the new Marriages Bill.
7.	Definition of Liquidator	Not defined in section 2	The Bill must provide for a definition of a liquidator considering the crucial role
8.	Definition of unclaimed benefits	Not defined in section 2	The Bill must provide for a definition of unclaimed benefits. Unclaimed benefits should be regulated and dealt with in the principal Legislation
9.	Objects of the Act	Was captured under sections 3(Objects of the Act) and 6 (Additional functions of the Commission under the Pensions Act) of the Pensions bill;	These provisions should be removed from the Bill. These objects are already provided in section 4(Functions and powers of Commissioner) of the IPEC Act and it would be better to retain the objects in the current Act and perhaps strengthen those. The IPEC act is appropriate for the broad duties and responsibilities of IPEC as IPEC regulates both Insurance and Pensions. Further the scope of Application of the Act is not defined. The Act should

			provide that it applies to all Pension Funds in all its provisions, including Pension Funds established under other enactments.
10.	Performance of functions by Commission	Throughout the bill, the powers conferred to Commissioner have been conferred to the Commission. New Section 4 gives the Commissioner the responsibility to carry out the provisions of the bill and to exercise the functions and powers conferred upon the Commission in terms of the bill.	Section 5 to 7 should be removed from the Bill if one reads the IPEC Act. The duties and responsibilities are in the principal Act being the IPEC Act
11.	Contravention of the Requirement for Registration	This is dealt with under section 8 of the Bill.	The penalty provisions are similar to present Act
12.	Dissolution of Fund Definition of 'Court'	Covered in section 12 of the Bill	The Bill must define 'Court' in section 2. Further the definition of 'Court' should be the Commercial Division of the High Court (The Commercial Court). The complexity and specialised nature of the nature of pensions industry requires a Superior

			Court, with expertise and which is not limited in powers
13.	<p>Rules of the Fund PART III</p> <p>Electronic receipt of Documents by Commission</p> <p>Payments to Fund</p> <p>a) Qualifications and experience for appointment as a Trustee</p> <p>b) the Board of trustees is responsible for formulating the pension fund's investment policy and is the custodian of assets; and</p>	<p>Section 16 (2) (c)</p> <p>Section 17 (7)</p> <p>provided in section 25 of the Bill</p> <p>It is provided for in section 24 of the bill.</p>	<p>Some of the provisions in this part regarding rules of Fund such as section 14 to 16 should be left to the regulations.</p> <p>The provision should be reviewed as it is misleading regarding electronic receipt of Document by IPEC</p> <p>This section should be reviewed. The principal remedy for payments to the fund should be civil in nature such as allowing Fund to garnishee payments against employer as opposed to criminal sanction.</p> <p>These provisions are welcome and enhance corporate Governance. Provision for exemption in 5 (g) needs to be removed.</p> <p>This section is a welcome development. It empowers the board of the fund to</p>

			formulate policies to further the objectives and purposes of the fund.
14.	Fund's Communication with Stakeholders summary of the rules of the fund upon joining and, furnishing of accounts, meetings	It is provided for in section 15(1) (a) of the bill.	This provision is in line with ensuring Consumer rights
15.	Cancellation of Registration Establishment of an Appeals Board	This is provided Section 13 of the Bill	This section requires an addition. Section 51 of the Bill deals with Appeals against any decision of the Commission and should be mentioned in section 13
16.	Board of Trustees a) IPEC shall prescribe and approve, upon registration and on an on-going basis, criteria for fitness and probity tests of trustees on the Board.	It is provided for in section 25 of the bill.	These provisions are welcome for corporate governance
	f) a trustee who resigns from the Board must furnish IPEC with the reasons for his or her resignation;	It is provided for in section 26(4).	This is a welcome provision in the law.
12	Protection of Disclosures	It is not provided for in the bill.	
13	Principal Officer	It is provided for in section 28 of the bill.	This is a welcome development which enhances governance of Funds

14	Pension Fund Records Keeping a) given the long-term nature of pension business, all funds, to maintain robust record-keeping systems on members' contribution records, investment returns and benefit payments;	It is provided for in section 14(1) (b) (xx) of the bill.	This is a welcome development, However the Bill should be further reviewed to enhance the Treating Customers Fairly and Section 48 of the Consumer Protection Act to deal with Privacy and data protection.
	b) with respect to a failed or liquidated pension fund	There is no provision that mandates IPEC to takeover and maintain records of its regulated entities after liquidation.	The Bill should make provision that the Regulator should take over and maintain the records of the fund
15	Accounts and Holding of Assets	This is provided for in section 32 of the bill.	This section improves governance of Funds.
	Submission of end of year audited financial statements within 3 months	It is provided for in section 32(4) of the bill.	This section is a welcome development.
16	Actuarial Valuation of Pension Funds	This is provided for in section 34(1)	This section provides that IPEC shall prescribe methods of establishing solvency of pension funds
17	Treatment of Actuarial Surpluses	In terms of section 21, it is owned by the fund	This is a new development in the legislative framework which provides for who owns the surplus, application for approval of use of the surplus and how it is calculated.

18	Investments Prescription of prescribed assets by the Minister in regulations	This is provided for in section 35 of the bill.	The section makes provision on investments
19.	Powers of Inspectors	This is provided in section 37 to to 39	These provisions enhance the regulatory functions of the Commissioner. However section 37 (b) should be removed as only employees of IPEC should be inspectors. Section 39 should be amended regarding contravention
19	Investigation of the Affairs of Pension Funds	This is in section 40 of the bill	Once again this section is welcome development regarding the regulatory functions of the Commission. However the appointment of Inspectors should be gazetted and they should not possess powers as wide as a Commission of inquiry. Their powers should be restricted.
20.	Additional powers of Commission	This is provided in section 43 of the Bill	This section is misplaced and poorly drafted. Should rather have been powers of commission in section 3 to section of the Bill

21.	Amalgamations and Transfers Time Frames	This is provided in section 47	This provision is exhaustive and welcome development
22	Appeal Process	This is provided in section 51 of the Bill	The section is a welcome development allowing Appeals against decisions of the Commission
23	Annual Reports by the Commission	This is provided in section 54 of the Bill	This allows for oversight of the operations of IPEC by Legislature
24	Regulations	This is provided for in terms of section 63	This provision is meant to enhance the regulatory effectiveness of IPEC, where the Commission may make Regulations to provide for the standards and requirements for expenses to be observed by fund and fund administrators. Presently the practice of issuing Orders leads to regulatory challenges
25	Contribution to Pension protection Fund	This is provided in section 64	This provision should be removed from the Bill as it introduces a new levy or Tax which did not previously exist