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LEGAL UPDATE FAW 3/2009: PARTICIPATION OF SUBSIDIARIES OR ASSOCIATED COMPANIES OF A PARTICIPATING EMPLOYER IN AN UMBRELLA FUND UNDER THE NAME OF THAT PARTICIPATING EMPLOYER

Background

We are often asked whether subsidiaries or associated companies of a participating employer in an umbrella fund may participate in the same umbrella fund under the name of that "main" participating employer. In other words, is it acceptable to allow a separate legal entity (be it a company, close corporation, partnership etc) to participate in an umbrella fund under the name of another legal entity?

Although the Pension Funds Act 24 of 1956 ("the Act") does not specifically deal with this issue, a purposive interpretation of certain provisions contained in the Act, Regulations and Board Notices confirm that the Registrar of Pension Funds will not allow such subsidiaries or associated companies to participate jointly with the main participating employer under the same participation or sub-fund number. These provisions are discussed in more detail below.

Regulation 30(2)(t)

Regulation 30(2)(t)(i) and (ii) to the Act provides as follows:

"(2) the rules of a pension fund shall furthermore not be inconsistent with the Act and these regulations, and shall also, subject to sub-regulation (3), provide for the following matters:

(t) a specific indication of the participation in the pension fund so as to differentiate between pension funds established for the benefit of –

(i) employees of a principal employer and its subsidiaries;

(ii) employees of various employers that do not fall within the ambit of sub-paragraph (i) above;".

Sub-paragraph (i) refers to a stand-alone fund while sub-paragraph (ii) refers to an umbrella fund. The phrase *"employees that do not fall within the ambit of sub-paragraph (i) above"* suggests that sub-paragraph (ii) is applicable to employers other than a principal employer and its subsidiaries. It also does not relate to employers who are associated with the principal employer, in that while they may not be subsidiaries of the principal employer, they may still be closely related to the business of the principal employer. Paragraph (ii) therefore envisages participation of a principal employer under an umbrella fund without its subsidiaries and/or associated companies.

Board Notice 36 of 2003

Board Notice 36 of 2003 lays down the conditions for a surplus apportionment in respect of each participating employer in an umbrella fund. "Umbrella fund" is defined as follows:

"umbrella fund means a fund in which-

- (i) more than one employer participates;*
- (ii) the assets and liabilities in respect of the members employed by each participating are maintained separately from those in respect of members employed by other participating employers; and*
- (iii) the financial position is determined separately in respect of the members employed by each participating employer."*

The above suggests that employers must participate separately in an umbrella fund. Since the assets and liabilities of each participating employer must be maintained separately, and each employer's financial position is determined separately, subsidiaries or associated companies may not participate jointly with the principal employer in an umbrella fund.

Section 28 of the Pension Funds Act, 1956

Section 28 (1) of the Pension Funds Act ("PFA") provides for the voluntary dissolution of a fund and provides as follows:

"(1), a registered fund may be terminated or dissolved, whether wholly or in part, in the circumstances In such an event, the assets of the fund, or, in the case of the partial termination of the fund, those assets of the fund attributable to the members connected to the participating employer whose withdrawal from the fund has caused its partial termination (as the case may be), shall, subject to the provisions of this section, be distributed in the manner provided by those rules."

This section makes provision for a partial termination in

- (i) a stand alone fund where the employer, subsidiary or associated company is dissolved, and
- (ii) an umbrella fund where a participating employer is dissolved.

Where a participating employer in an umbrella fund is liquidated, all the assets in respect of that participating employer are realised and liabilities discharged.

This means that if a subsidiary or associated company of the principal employer is allowed to participate in the umbrella fund, under the name of the principal employer, the voluntary dissolution of one of these employers would effectively mean the liquidation of all of the employers. The PFA only allows for a partial liquidation within the umbrella fund itself and not a partial liquidation of the participating employer in the umbrella fund.

Conclusion

It is therefore clear from the provisions above that each employer must participate separately in an umbrella fund and that the definition of “employer” in an umbrella fund must conform to these principles.

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