



***GOOD GOVERNANCE BY  
RETIREMENT FUNDS- A  
CRITICAL PERSPECTIVE FROM  
THE OPFA***

***PRESENTATION TO PENSION LAWYERS  
ASSOCIATION***

***By MAMODUPI MOHLALA  
PENSION FUNDS ADJUDICATOR***

- **The current presentation will take the following format:**
  - 1 The definition of good governance
  - 2 Good governance with respect to the OPFA
  - 3 Good governance with respect to the member
  - 4 Collective strategy to ensure increased accountability with respect to good governance

## **1 DEFINITION OF GOOD GOVERNANCE**

### **WHAT IS GOVERNANCE**

- *In terms of PF No. 130 it is defined as :*
- *“the fundamental principle is that the board shall at all times act with the utmost good faith towards the fund and in the interest of all members”*
- *Mervyn King defines it as:*
- *“Good governance is summed up as involving fairness , accountability , responsibility and transparency on a foundation of intellectual honesty”*

## ***2 GOOD GOVERNANCE BY TRUSTEES WITH RESPECT TO THE OPFA***

- A Number of unresolved matters – referred as complaints;
- B Failure to provide complete and accurate responses and information timeously ;
- C Failure to acknowledge the impact and effect of decisions of the OPFA.



## ***A Number of unresolved matters – referred as complaints***

- To date the number of current open files that are in the OPFA are **10182** of which **4208** are PSSPF matters;
- We on a monthly basis receive **400 complaints** as a minimum and in the next financial year(April 2008/March 2009) are likely to receive **4800** files;
- Current total – **10 182 and** Prospective total for 2008/2009 financial year- **14 982** of complaints on matters most of which have not been resolved by funds and their administrators.

- Were Funds and trustees of such funds taking their role and responsibility towards their members with the required attention and attempting to resolve complaints as best they can then there would be **less matters for the OPFA to have to deal with**
- Currently we are dealing with complaints of **a nature that can be disposed of at Fund level** such as:
  - requests for benefit statements
  - or computation of withdrawal benefits



- The **settlement rate after referral to the OPFA is 17.6%**. A lot of these matters are settled before determinations are prepared, when little or nothing has happened between the point of denying the claim and referral to the OPFA other than the fact that the OPFA has commenced its investigation.
- Therefore in figurative terms of the 4800 receive per annum **960 or more could be settled without referral to the OPFA** .
- This indicates that there is clearly **room to settle these matters long before they come to the OPFA**.
- Does delaying in resolving a complaint by a complainant without justification amount to acting in the best interests of the member or the fund?

- The current status of the sector gives rise to the impression that **trustees are more often that not abdicating their responsibility to the OPFA;**
- The Trustees need to take their responsibility laid out seriously in terms of section 30A(2) more seriously in that when :
- “a complaint is lodged it shall be **properly considered and replied to** in writing by the Fund or the employer who participates in the Fund within 30 days after receipt thereof”

- The question then becomes how do we ensure that we **arrest this situation** of the growing number of complaints?
- We **could employ a lot of staff** but that is not going to solve the problem.
- We need to put in place a **preventative measure** so as to ensure settlement and resolution of matters at the point when they are with the Fund prior to referral to the OPFA.

## ***B Failure to provide complete and accurate responses and information timeously***

- In terms of the provisions of **section 30F** of the Pension Funds Act the OPFA has an obligation to when we intend to conduct an investigation into a complaint :

*“**shall** afford the fund or a person against whom the allegations contained in the complaint are made , the opportunity to comment on the allegation”*

(the amount of time identified as reasonable with respect to OPFA is thirty days of referral.)

- This provision tends to at times be a serious limiting factor in the investigations of the OPFA in the process of resolving complaints in the following respects:
  - There are those funds who respond timorously and those who **choose not to respond timorously or not at all**;
  - To exemplify this we have had two complaints which were referred as far back as **April 2006** , a period of close to two years has passed and there are responses but they are insufficient and the complainants complaint is delayed.



- Further with respect to our standard letter we request a copy of the **rules of the Fund** be attached to a response
- However in **nine cases out of ten** complaints the rules are not provided because Funds argue that the rules of the Fund are cumbersome
- However if we are to be provided with the correct rules timeously and on request, then the OPFA can work from rules provided by the Fund ,this reduces the possibility of the OPFA being accused of making a determination based on the wrong rules and then once again delay the complainants claim.
- lastly **electronic rules** are not expensive to provide



- Further at times the **responses provided are not comprehensive and are lacking in fundamental respects** and therefore require that there be correspondence sent back and forth between the OPFA and the fund or the administrators which in itself is time consuming .

- This approach by the Funds and their administrators has a three fold effect :
  - Affects the turn around times for finalisation of matters
  - and also causes delays of access to addressing a complaint.
  - Justice delayed is justice denied.

- The issue here is to accept that **we are not at cross purposes** but rather that **in view of the ethos of good governance** all that is done is done with the best interests of the complainant/member in mind and those of the Fund.
- Therefore it is important at all times to ensure that the funds and their administrator undertake their duties accordingly amongst which is to **ensure that when the OPFA requests responses to complaints these are supplied.**

- However in view of the large numbers complaints we are dealing with and unacceptable delays in resolving complaints due to delayed responses or inadequate responses the PFA now intends to issue **default determinations** where **after three reminders** after the official request for a response there is still no response.
- A complainant can not be expected to wait indefinitely this would not be in line with **section 30 F.**

***C Failure to acknowledge the impact and effect of decisions of the OPFA – section 30 O***

On this aspect in the limited time that I have been Adjudicator the challenge on this aspect has been with respect to the determination in the ***Cocroft vs Mineworkers Pension Fund***

- **The principle and gist of this determination is the following:**
- Provide for a clear interpretation of section 37D;
- Allows for the accrual of the benefit to the non member spouse as at date of divorce and does not make it dependent on an uncertain or contingent future event;
- Applies to all divorces even those that occurred prior to 13 September 2007;
- Interest is payable from the sixtieth day after the election should the Fund not pay within the sixty day period after election of the member.

- The issue that is of concern is that even with this clarity there are still matters referred to the OPFA wherein Funds or administrator are stating that **they do not understand the import of the decision and the retrospective nature of the interest payable.**
- On a proper read of the section 37D and the Cocroft determination ,how such misinterpretation and misinformation can occur is unclear to me.

- Were the funds that are unwilling to comply with the determination to consult or get a **mandate** from their members in line with the principle of **accountability** members would provide an interesting input.
- Dealing with determinations on such a clear cut matters is a **waste of resources and unnecessary delay in the processing of beneficiaries complaints.**
- This is more so because the **Mineworkers Pension Fund** against whom the Cocroft determination was issued has not raised concerns and we have also ascertained that **Liberty Life** has also paid out to non – member spouses in terms of the policy held by their members.



- But in relation to the trustees fiduciary duties these are **not in line with what is expected by their membership** for failure to acknowledge the impact and effect of decisions of the OPFA can not be in line with the fiduciary duties.

## **2 GOVERNANCE IN RELATION TO THE MEMBER OF THE FUND**

The aspects to be dealt with in this context will be addressed with respect to recent determinations I have finalised recently under the following headings:

- A .Trustees failure to give **effect to election of a member**
- B.Negligent failure to **interpret rules of the Fund** properly to give effect to members election.
- C . *Failure to properly assess financial status of caregiver prior to **placing minors benefit in Trust***

## ***A Trustees failure to give effect to an election by a member***

### **Kaniewski vs GlenRand MIB Benefit Services (PTY)Ltd and Krupp Engineering Pension Fund**

#### **Facts**

The complainant was employed by Thyssenkrupp and therefore a member of **Krupp Engineering Pension Fund**.



- The complainant completed and submitted an **investment switch form** with an instruction to the administrator of the Fund to change her investment option from the **conservative portfolio to a balanced portfolio**.
- On the **01 January 2004** the fund administrator provided her with a **benefit statement** that indicated that her investments had indeed moved to the balanced portfolio.
- However the following year the first respondent then **changed her investment back to the conservative portfolio from the balanced portfolio**. The reason for the change back in 2005 was due to the fact that the **benefit statement** that had been provided the previous year had a *typing or typographical error*.

- The complainant asserts that due to the Trustees failure to act in accordance with her directive this has **caused her loss as a consequence of negligent or innocent misrepresentation** reflected in the benefit statement resulting in financial loss in the amount of R 50 000.00
- The Trustees denied ever having received the request for transfer.
- **Held**
  - **Benefit statement issued and dated 01 January 2004** indicating that the benefit had been changed from **conservative to a balanced portfolio** was proof enough the request for transfer had been made received and effected,

- Therefore the complainant was awarded the damages suffered due to the fund administrators failure to give effect to the members instructions this being the difference between the balanced portfolio and conservative portfolio as at 01 January 2004
- ***Implications on good governance***
- Funds failure to effectively administer the Fund to the financial detriment of a member indicates failure by the Trustees to effectively manage the administrators on delegation of powers and responsibilities.

- Trustees failure to intervene to **resolve matters when this could have been easily done** in view of the fact that it was common cause that there was a so called mistake or typing error that had been made but instead they justify it and alleged no loss.
- The culture of having Funds and Trustees **use typographical mistakes on benefit statements** as an excuse for failure to provide a service that is expected by members will be looked at closely.



- The practise of not giving effect to members requests or providing benefit statements with self – confessed errors **without looking at the implications for the complainant on the one hand and the obligations on the Fund to give correct information to a member on the other hand falls short of the requirements of good governance.**
- Further **Kaniewski** like so many other complainants rights are affected in that she had to **wait since 2005 to date of determination in 2008** when this could have been resolved as far back as 2005 when the administrator and the Fund detected the so called error and when the complainant raised a concern.



## ***B. Negligent failure to interpret rules of the Fund properly to give effect to members election***

***CM BASSON vs South African retirement annuity Fund, Old Mutual Life assurance company and Investec Investment Link Retirement Annuity Fund***

### ***Facts***

- Complainant elected a retirement date;
- Prior to retirement date complainant elected that upon maturity date to transfer the retirement benefit to another fund from which he believed his benefits would yield a better return;



- The fund informed the complainant that she could not transfer as the fund rules did not provide for transfers as at date of election.
- ***Held***
- As per the submission of the administrator of the fund that the Fund should not have refused the transfer as per the rules, for as at date of request of transfer, the Fund could have effected the transfer;
- Therefore the suggestion that the rules as at date of request of transfer did not allow transfer is not valid;

- The trustees and the fund were ordered to **put the complainant in the position he would have been in had they given effect to his election**
- They were therefore ordered to pay the complainant the amount of **R 12 755.69 plus interest thereon at the rate of 15.5% per annum .**
- ***Implications on good governance of the Fund***
- The trustees unlike the administrators **failed to interpret the rules** of the Fund correctly to the detriment of the member.



- The most concerning issue about the conduct of exhibited by the trustees who as the custodians of the rules cannot interpret the rules correctly when requested by a members.
- What hope does a member who is supposedly not an expert have relying on the trustees ability to ensure that their interests are properly protected.
- This is clear breach of their fiduciary obligation as Trustees to the members and clearly not good governance.

- Why was the matter not settled as soon as the administrators realised the mistaken interpretation or even subsequent to approval of the rule amendment?
- What has to be acknowledged is that an attempt to settle was made with the complainant but failed. However the Fund and its administrators should have done all in their power to resolve the matter earlier .
- Clearly it is not good governance to realise that a mistake has occurred but still proceed and refer a matter to the Adjudicator.



- ***Failure to properly assess financial status of caregiver prior to placing minors benefit in Trust***
- ***Kowa vs Corporate Selection Retirement Fund and Liberty Life***
- ***Facts***
- Complainant was the Mother of the deceased member who passed away on 25 November 2005.
- Deceased was employed by Paul Muesli CC from 01 November 2000 and as a consequence was a member of the corporate selection retirement fund until death



- Upon the death of the complainants son a benefit of R 62 158.47 became available for distribution.
- After completing investigation on circle of beneficiaries the trustees decided to pay the complainant R 3000.00 and the balance was paid into a trust for the benefit of the deceased's minor child
- The complainant lodged a compliant with the OPFA requiring that the benefit due to the minor child be paid to her as the minors caregiver ,in a lump sum as opposed to in monthly instalments of R300 as this was not sufficient to meet the minors daily needs



## ***Held***

- The Board must not follow a **rigid policy to** place benefits in trust but rather take into account of the personal circumstances of each beneficiary and of the prevailing situation.
- When paying a benefit to a minor, the benefit is normally paid to the guardian of the minor unless there are cogent reasons for depriving the guardian of the duty to take charge of her/his minor child's financial affairs



- The guiding principle on allocation of a benefit is best interests of the minor child ;
- However in the present matter the minor child was not survived by any legal guardian as both of his parents passed away;
- The deceased's minor child is being cared for by the complainant who is his **grandmother, however even though she is a caregiver and not a legal guardian,** she is taking care of the minors daily needs the same way as a guardian;
- The matters was referred back to the trustees for reconsideration of the allocation of the minors benefit into a trust.



- ***Implications on good governance of the Fund***
- There is a very onerous duty on the board to carefully consider the facts of each case before depriving any person who is acting as a guardian of a minor child to administer the financial affairs of the minor child.
- The board fettered its discretion by automatically placing the minor child's share in a trust without investigating the ability of the complainant to administer the affairs of the deceased's minor child and as such once again failing to act in the best interests of the member the deceased's minor child or beneficiary



- Further, the amount involved and the cost implications of placing the minor child's share in a trust, vis-à-vis those other suitable options, are highly relevant considerations that the board of trustees should take into account (see *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at paragraph 23).
- *In casu*, the only reason advanced by the board for its decision to place the minor's share in a trust was because the complainant is not a legal guardian of the minor.



#### ***4. Collective strategy to ensure increased accountability with respect to good governance***

- Therefore from the preceding there is a clear need to put in place some mechanism of ensuring that not only do *trustees exercise good governance but also that there is clear accountability to the member and that the OPFA work in relation to speedily resolving complaints* is not hampered by industry practises.



- We therefore as the OPFA have decided to put in place a two pronged strategy:
  - Stakeholder interaction meetings
  - Sector Scorecard



## ***1 Stakeholder interaction meetings***

- **The OPFA intends to proactively contact most of the funds and undertake the following:**
  - Arrange regular meetings – bi – monthly
  - Discuss issues of common concern with respect to service provided by each party.
  - Discuss requirements for documents i.e. responses and rules.
  - Such meetings recorded in order to protect objectivity of process.
  - Should complainant wish to be present will be invited or informed about meeting.

## 2. Scorecard

- Industry scorecard
- **Custodian** of the scorecard OPFA and capture information from our perspective with respect to various issues;
- **Contributors** are the pensions industry from data captured by the OPFA.
- **Beneficiaries** are members, dependants and nominees of members of Funds.



***THE PERFORMANCE INDICATORS SHALL AMONG OTHERS INCLUDE:***

- For instance the number of complaints lodged with respect to a given Fund,
- Nature of complaints received from a given fund,
- Number of complaints settled prior to investigation by OPFA,
- Number of complaints settled subsequent to commencement of investigation ,



- Number of relief and dismissal matters with respect to each Fund,
- Response time to complaints forwarded for response by OPFA
- Nature and quality of the responses received from the Funds
- and amount of response time to queries and requests by OPFA such as requests for Rules

- *The objectives intended to be achieved by having the scorecard in place are the following :*
- Improves transparency
- Affects investment decisions
- Review annually
- Preparation of the score card is at an advance stage



- The modalities and elements of the score card will be unveiled at the tenth anniversary celebrations for the OPFA later on this year.
- On that note it is important to state that next year one will be able to give a proper progress report on the extent of achievements and progress on the measures proposed above



**KE YA LE BOHA BAGAYESHU  
FOR LENDING ME YOUR EARS**

***THANK YOU!***