

# LIABILITY OF FUND ADVISORS

## INTRODUCTION

Pension funds engage the services of a number of professional advisors. Some are engaged due to statutory requirements other because the trustees lack the necessary expertise to make decisions without their input. For instance, pension funds engage auditors and actuaries because they are required to do so in terms of the Pension Funds Act 24 of 1956, as amended (“the PF Act”). They engage administrators whose role is defined by statute. They furthermore engage investment managers and lawyers, whose expertise they may require from time to time.

What all of these service providers have in common is that they are professionals. Although there is no definitive authority as to what constitutes a professional it is generally accepted that what characterises an occupation as a profession are the following main features: Work of an essentially intellectual nature where knowledge and skill is required, an ethical element, collective organisation and status.<sup>1</sup>

As Adv Gauntlett SC correctly pointed out:

*“Clients have high expectations of professionals. They are expected to serve with excellence, with speed, with fidelity, but also detachment. While dependent on their clients for livelihood they must be both honest and confident enough to warn their clients not only about others, but also themselves. And the expectations run far: in delict at least, third parties too are increasingly quick to claim for losses which they say they have suffered as a consequence of the failure of a professional, discharging a contractual duty to quite another party, to have acted duly.”<sup>2</sup>*

The following extract from an English case quoted by Adv Gauntlett SC in his paper, is useful regarding the level of skill required in law of a professional:

*“Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill.”<sup>3</sup>*

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<sup>1</sup> Adv JJ Gauntlett SC **Professional Liability: General Introduction UNISA Seminar 1996** 4

<sup>2</sup> Adv Gauntlett SC *supra* 5

<sup>3</sup> *Lampier v Phipos* 1838 8 C & P 475

The purpose of this paper is to look at the duties that the law places on the abovementioned professional advisers and the legal consequences and ramifications should these professionals depart from the level of care and skill required by law.

### **TRUSTEES ARE ENTITLED TO SEEK EXPERT ADVICE**

Although trustees bear the ultimate responsibility for the affairs of the pension fund, we cannot ignore the fact that in the daily administration of the fund they are constantly engaging the assistance and enlist the expertise of various professionals. Section 7D (e) of the PF Act provides that:

*“The duties of a board shall be to obtain expert advice on matters where board members may lack sufficient expertise”.*

The Trustee Code of Conduct states in relation, to expert advice and delegation that:

*“The board is entitled and, in fact is, obliged to obtain advice from professionals such as lawyers, actuaries and auditors in matters where its members lack sufficient expertise. Board members should give the advice due consideration, make decisions based on assessment of the advice obtained.*

*Where the management, administration and investment functions of the fund are delegated, Board members remain responsible for the actions of those to whom these functions are delegated. The mandates in terms of which these functions are delegated must clearly set out the delegated responsibilities and the rights of recourse by the Board or the Fund against those to whom these responsibilities have been delegated. There must be a process of regular reporting to the Board by those to whom the responsibilities have been delegated. Where the investment function has been delegated, the Board should ensure that there are appropriate benchmarks for performance and that the risk profile of the investments matches the risk profile of the members of the fund, where appropriate.”*

## ARE FUND ADVISORS LIABLE IN DELICT OR CONTRACT?

Instances of professional liability usually involve liability to a client with whom the professional is in a contractual relationship.<sup>4</sup> Trustees acting on behalf of pension funds will invariably enter into contracts with fund advisors. Like any other contract should the fund advisor not fulfil its obligation in terms of the contract or breach its obligations in terms of the contract, the trustees on behalf of the fund would be able to rely on their contractual remedies, namely, to claim specific performance or cancel the contract and sue for damages. The fund advisor, as a result of the breach could be liable in delict as well, provided all the elements of a delict are satisfied. The question of whether a breach of contract can also give rise to delictual liability between the parties to the contract, has been considered in a number of court decisions.

In *Van Wyk v Lewis*<sup>5</sup> negligent conduct by a medical practitioner contrary to his contractual duties to a patient was held to be "...actionable under the Aquilian procedure...". In *Lillicrap, Wassenaar and Partners v Pilkington Brothers*<sup>6</sup>, which also concerned the question whether the breach of contractual duties to perform professional work, was actionable in delict, the majority of the court confirmed that "...our law...acknowledges that the same facts may give rise to a claim for damages *ex delictio* as well as one *ex contractu*". From the *Van Wyk* and *Lewis* cases it is thus apparent that in principle, the liability of fund advisors to a fund for loss caused by conduct in breach of the former's contractual duties can be based on their breach of contract or delict.

Whether an action is based in delict or contract, the fund advisors are subject to certain duties prescribed by their profession's code of conduct, statutes, common law and contracts with their clients. It follows that should a fund suffer loss, a breach of any of the duties (set out in more detail below) can be used in court to evidence a commission of a delict or breach of contract.

In general it can be stated that the liability of fund advisers to a fund or to the members of a fund shall depend upon:

- The common law (delict),
- The statutory duty of the professional adviser to the fund; or

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<sup>4</sup> Prof A van Aswegen **Professional liability to clients: the implication of concurrence**, UNISA Seminar 1996  
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<sup>5</sup> 1924 AD 438

<sup>6</sup> 1985 (1) SA 475 (A)

- Non-compliance of the advisor of his duty or the breach of his duties stated in the contract.

## DUTIES OF PROFESSIONAL ADVISORS

Each one of the categories of professional advisor engaged by a fund will have their duties regulated by statute and if not by statute, duties will be imposed by common law.

### Actuaries

So for instance, actuaries are appointed in terms of sections 9 and 9A and have their duties regulated by section 16 and section 12(3) of the PF Act. They are also governed by the guidance notes of the Institute of Actuaries and which provide for instance as follows:

*“It is the professional responsibility of all actuaries to consider the potential for clients to suffer loss as a result of any breach of their duty of care and to ensure that appropriate arrangements are, maintained, firstly to minimise the risk of breach of their duty of care, and, and secondly, to provide compensation for loss in the event of any breach.”<sup>7</sup>*

The code of conduct of actuaries imposes a duty on actuaries to third parties. If the actuary has reason to believe that advice he gives will be relied on by a third party, the code of conduct requires the actuary to ensure that his authorship and responsibility are acknowledged to the third party. The implications of the advice must be explained to the third party concerned.<sup>8</sup> The code also requires the actuary to provide *“the best possible service and advice”*.<sup>9</sup>

An actuary who performs a function that would fall under the Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS Act”) but which is “incidental to the actuarial advice given” can be exempted from being subject to the FAIS Act, but an actuary who performs such functions or gives such advice routinely is subject to the FAIS Act and the relevant code of conduct under the FAIS Act.<sup>10</sup>

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<sup>7</sup> Guidance Note GN30 “Compensation for Professional Shortcomings” (Institute of Actuaries, 1997) [It should be noted that GN30 applies to local Actuaries with UK qualifications.]

<sup>8</sup> **The Guide to Professional Conduct of the Actuarial Society of South Africa (1995)** Paragraph 3.3

<sup>9</sup> *supra* Paragraph 1.1

<sup>10</sup> J Andrew, **Exemption of Actuaries from the Financial Advisory and Intermediary Services Act 37 of 2002**, 2003

### Auditors

A registered fund is required to appoint an auditor under section 9 of the PF Act. In addition, administrators are also required to appoint independent auditors to oversee some of the administrator's functions.<sup>11</sup>

Similar to other professionals, auditors are bound by their profession's code of conduct. The duty to perform their services with reasonable care and diligence also emerges from the auditor's code of conduct.<sup>12</sup>

Members of the auditing profession are required to be vigilant and to be capable of detecting irregularities in the affairs of institutions that they audit. Should an auditor have reason to believe that a material irregularity is taking place, which irregularity might have an adverse effect to the institution or its members, the auditor must send a written report detailing the irregularity to the person in charge of the institution.<sup>13</sup> Auditors can also be potentially liable to third parties for negligent advice that they give if it is proved that the auditor concerned should have foreseen that the information could be relied on by a third party and if he represents that the advice is correct knowing or being reasonably expected to know that the third party would rely on such information.<sup>14</sup>

### Lawyers

Lawyers are no exception when it comes to the degree of care and skill required by law in the provision of their services. This was confirmed by the court in *Honey & Blackenberg v Law*<sup>15</sup> "...if, therefore, he [attorney] causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damage by his client." The court came to similar conclusion in *Mouton v Die Mynwerkersunie*<sup>16</sup>.

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<sup>11</sup> Section 5 of the Conditions Determined in Respect of Administrators Acting on behalf of Pension Funds

<sup>12</sup> Clause 13(c) of the Code of Professional Conduct (The South African Institute of Chartered Accountants), 1998

<sup>13</sup> Section 20(5)(a) of the Public Accountants' and Auditors' Act 80 of 1991

<sup>14</sup> Section 20(9) of the Public Accountants' and Auditors' Act 80 of 1991

<sup>15</sup> 1966 (2) SA 43 (R) 46

<sup>16</sup> 1977 (1) SA 119 (A)

The issue of an attorney's liability towards third parties was dealt with in *Arthur E Abrahams & Gross v Cohen*<sup>17</sup> where the court held that the plaintiff must prove that the possibility of a loss could reasonably have been foreseen by the defendant and that, under the circumstances, he has a legal duty to prevent the loss from taking place.<sup>18</sup>

### **Administrators**

Prior to the administrator acting in such capacity, the Registrar of Pension Funds must grant approval to act as a benefit and investment administrator.<sup>19</sup>

Administrators are required to observe, with regard to the assets of the fund, the utmost good faith and exercise proper care and diligence.<sup>20</sup> Administrators are further required to adhere to the directions contained in the agreement between the fund and the administrator and not to deviate from such directions.<sup>21</sup>

It follows that an administrator will be liable in contract for breach of any of the duties prescribed in the written contract between the administrator and the fund and a liability towards members in delict for any damage suffered by them as a result of the administrator's negligence.<sup>22</sup>

### **Investment Advisers**

Investment advisers are also required to observe, with regard to the assets of the fund, the utmost good faith and exercise proper care and diligence.<sup>23</sup> They are further required to adhere to the directions contained in the agreement between the fund and the administrator and not to deviate from such directions.<sup>24</sup>

Regulation 28 to the PF Act prescribes certain investment guidelines or limits which must be adhered to by the fund and the fund's investment advisers. These investment guidelines were

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<sup>17</sup> 1991 (2) SA 301 (C)

<sup>18</sup> Midgley **Professional Liability** 91

<sup>19</sup> Section 13B of the Pension Funds Act

<sup>20</sup> Section 2(a) of the Financial Institutions (Protection of Funds) Act 28 of 2001

<sup>21</sup> Section 4(1) of the Financial Institutions (Protection of Funds) Act 28 of 2001

<sup>22</sup> V du Plessis, September 2003 Pensions World

<sup>23</sup> Section 2(a) of the Financial Institutions (Protection of Funds) Act 28 of 2001

<sup>24</sup> Section 4(1) of the Financial Institutions (Protection of Funds) Act 28 of 2001

intended to protect funds against making imprudent investments which might result in loss of the assets of the fund.

To the extent that the investment adviser is a financial service provider as contemplated in the FAIS Act, the Act, its regulations and the applicable code of conduct will apply to such investment advisers.

### LIABILITY BASED IN CONTRACT

Traditionally, the contract between the professional and the client is the principal document used by the courts to exercise control over the conduct of professionals.<sup>25</sup> The professional agrees to render certain services with reasonable skill and care in return for which the client agrees to pay a specified or reasonable fee.<sup>26</sup> The contract between the fund and the fund advisor may contain express or tacit terms defining the nature of the assignment. The importance of a specific obligation set out in the contract is that the professional will be held liable if he does not comply with such obligation regardless of the skill or care which he has otherwise exercised.<sup>27</sup>

The services of many professionals are not regulated by specific contractual terms. In the absence of express terms to the contrary there however is a tacit obligation on the professional to carry out his instructions with reasonable skill and care.<sup>28</sup>

Although there is in theory a clear distinction between obligations in contract and in delict in that the first mentioned are imposed by an agreement between the parties and the latter by force of law, the breach of a contractual obligation is often, also a breach of a delictual obligation, with the result that the plaintiff may often choose whether he wishes to rely on delict or contract.<sup>29</sup>

It would however appear that when it is necessary for the plaintiff to rely on the actual terms of the contract he should litigate on the grounds of the contract.<sup>30</sup> If it is not necessary for him to rely on those terms, he is free to litigate either on the ground of the contract or on the ground of the delict.<sup>31</sup>

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<sup>25</sup> SA Law Commission **Working Paper 51** 7

<sup>26</sup> *supra*

<sup>27</sup> *supra*

<sup>28</sup> *supra*

<sup>29</sup> SA Law Commission **Working Paper 51** 8

<sup>30</sup> *supra*

<sup>31</sup> *supra*

A notable difference between the two courses of action being the fact that if the fund elects to sue the advisor in contract, the advisor would not be able to rely on the Apportionment of Damages Act. Authority for this proposition can be found in *Thoroughbred Breeders' Association v PriceWaterHouseCoopers*<sup>32</sup>. In this case the appellant sued the defendant (an auditing firm) for damages for breach of contract. The appellants alleged that the respondent had been negligent in the performance of its duties. The court a quo found that the respondent had been negligent in aspects of conduct of audit and hence in breach of its contract with the appellant. However, the court a quo found that the appellant itself had been careless in failing to properly supervise the activities of a financial manager despite its awareness that he had previously been convicted of theft. In the court a quo opinion both sets of carelessness contributed to the loss. The SCA on appeal disagreed and held that the Apportionment of Damages Act was not applicable to a claim for damages for breach of contract and was therefore not available to the respondent to counter or curtail the appellants claim for damages. However when sued in delict it appears that the advisor would be able to rely on the Apportionment of Damages Act and raise the fact that the fund or its trustees contributed to the loss suffered by the Fund.

The case of *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd*<sup>33</sup> is a good illustration of a case of where a fund represented by a curator sued based on contract. The appellant was an attorney who acted in his capacity as the curator of the business of the CAF Pension Fund ("the Fund"). The appellant had instituted action in the court a quo against the respondent ("Old Mutual") to recover damages suffered by the Fund after Old Mutual paid the pension funds assets to Corporate Acceptances Finance Pty Ltd ("CAF") on the instructions of the employer (AMK). The appellant alleged that Old Mutual had breached its contractual obligations to the Fund by paying the assets of the fund to CAF in breach of the policy conditions. The court considered whether Old Mutual acted in breach of the policy. For as long as the Fund remained registered as an underwritten fund the terms of the exemption and the rules required it to operate exclusively by means of an insurance policy. The fund's moneys could not be invested in any other manner. The court found that AMK's instruction to Old Mutual to pay the credit balances to CAF was not a valid directive and could not bring about discontinuance of the policy. In making the payments Old Mutual breached the provisions of the Policy. Old Mutual should have refused to pay because the instructions given required it to act in breach of its contractual obligations. As a consequence it was held liable for damage sustained by the Fund.

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<sup>32</sup> 2001 (4 ) SA 551 (SCA)

<sup>33</sup> [2001] 4 All SA 250 (A)

## LIABILITY BASED IN DELICT

The mere fact that a person has caused another to suffer damage is, insufficient to constitute a delict for which he may be held liable. To render the party liable in law the following elements of a delict have to be satisfied:

- an act;
- wrongfulness;
- fault (which may consist of intent or negligence);
- damage; and
- causation.

It is beyond the scope of this paper to analyse each of the requirements or elements. However, it is worth examining how negligence will be examined and determined in the context of a professional. In this regard, a person is blamed for an attitude or conduct of carelessness, thoughtfulness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him.<sup>34</sup> The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable man.<sup>35</sup> The defendant is negligent if the reasonable person in his position would have acted differently, and according to the courts the reasonable person would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable.<sup>36</sup>

The test for negligence found in *Kruger v Coetzee*<sup>37</sup> can be summarised as follows: Negligence arises if a reasonable person in the position of the defendant would have foreseen the reasonable possibility of his conduct causing damage to another, would take reasonable steps to guard against such occurrence, and the defendant failed to take such steps.

The application of the reasonable man test can be affected in cases where the individual concerned possesses a certain skill or expertise. The general test for negligence that of the hypothetical reasonable man in the position of the wrongdoer cannot be applied in considering the conduct of the defendant where such conduct calls for expertise.<sup>38</sup> Thus in the case of an expert

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<sup>34</sup> Neethling **Law of Delict** 128

<sup>35</sup> *supra*

<sup>36</sup> *supra*

<sup>37</sup> 1966 (2) SA 428 (A) 430

<sup>38</sup> Neethling **Law of Delict** 135

such as an actuary, lawyer, auditor the test for negligence in regard to the exercise of the expert activity is the test of the so-called reasonable expert.<sup>39</sup>

The reasonable expert is identical to the reasonable man in all respects, except that a reasonable measure of the relevant expertise is added.<sup>40</sup> The standard of expertise is described as reasonable because regard is had not to the highest degree of expertise in the relevant profession or occupation but to the general or average level of such expertise.<sup>41</sup>

In *Van Wyk v Lewis*<sup>42</sup>, for example, reference is made to “the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.” It follows that each particular advisor will be judged according to the standards of the profession to which he belongs. In *Durr v ABSA Bank*<sup>43</sup> (a case dealing with an investment broker) the Supreme Court of Appeal approved of the approach in *Lewis* and emphasised that the decision of what is reasonable under the circumstances is for the court. It will pay much attention to the views of the profession but is not bound to adopt them.<sup>44</sup> In regard to the facts before it, the court held that the appropriate standard was not that of the average typical broker of modest accomplishments since the acceptance of such a standard would allow a definition chosen by a witness (for the defendant) for his own purpose to dictate the result, making the enquiry as to what was required of a particular kind of broker pointless.<sup>45</sup> In this case the appropriate standard was that of the regional manager of the broking division of a financial institution professing investment skills and offering expert advice.<sup>46</sup>

It is also worth examining which third parties can institute action based on negligent advice given to the fund. It is generally accepted that an advisor can only owe a duty of care to third parties if it can be shown that a ‘reasonable fund advisor’ in the position of the fund advisor would have foreseen that his conduct might cause damage to such third party.<sup>47</sup> It follows that if the third party proves that the damage to him or her was reasonably foreseeable, then the advisor can be said to owe a duty of care to the third party. However, a duty of care alone is not sufficient, the third party

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<sup>39</sup> *supra*

<sup>40</sup> *supra*

<sup>41</sup> *supra*

<sup>42</sup> 1924 AD 438

<sup>43</sup> 1977 (3) SA 448 (SCA)

<sup>44</sup> Neethling **Law of Delict** 136

<sup>45</sup> *supra*

<sup>46</sup> *supra*

<sup>47</sup> *Cape Town Municipality v Paine* 1923 AD 207 126

must prove that there was a breach of the duty of care by showing that a 'reasonable advisor' would have taken steps to prevent the damage. Neethling makes the point that unless the plaintiff can prove that he is someone who was owed a duty of care, he has no action; a duty of care is owed only to the so-called foreseeable plaintiff.<sup>48</sup>

### CAN MEMBERS OF THE FUND INSTITUTE ACTION?

Up until this point we have examined whether a pension fund could institute action. We have concluded that if the fund suffers loss as a consequence of a breach of contract or negligence on the part of a professional advisor the fund can institute action if it can establish that the loss has been occasioned by the breach or negligence. The question arises as to whether the member of the pension fund can sue the professional advisor.

In most instances there will be no contractual nexus between the member of a fund and professional advisor. The contract is between the fund and the advisor. This does not preclude the member from suing the professional advisor in delict. In order to succeed the member would need to demonstrate that the professional advisor owed the member a duty of care and should have foreseen that the member may be prejudiced by his advice and that the loss an individual member sustained was occasioned by that advice.

One of the major difficulties facing a member is establishing that in fact they have suffered loss. While a member remains a member of the fund and has no entitlement to a benefit, by virtue of his ongoing membership, a member does not suffer a loss. Only when the member leaves the fund, and does not get what he was promised in terms of the rules as a consequence of the negligence, can it be said that he sustained a loss. In these circumstances the member would have a cause of action based on contract against the fund for non-compliance with its rules. It is accordingly more likely that a member would institute action against the pension fund based on the fact that he did not obtain what was promised in terms of the rules.

There are instances where members have sued the fund and its administrators for losses where they received what they were entitled to in terms of the rules but they purportedly suffered a loss as a result of maladministration by the fund or the administrator. In *Hellawell and Another v Boart Longyear Pension Fund and Others*<sup>49</sup> the pension fund administrator misquoted transfer values to members considering exiting the fund. The Adjudicator on the facts found this to constitute a

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<sup>48</sup> Neethling **Law of Delict** 147

<sup>49</sup> [1999] 10 BLPR 150 (PFA)

misstatement. The question was then whether this constituted a negligent misstatement and after examining the elements of delict, the adjudicator found that the administrator had indeed made a negligent misstatement and was therefore liable in delict to the Complainants.

In *Pieters v Schindler Lifts Defined Contribution Fund and Others*<sup>50</sup> the employer invited employees to notify it of their willingness to be considered for voluntary early retirement or retrenchment. The Complainant expressed his interest in response to the invitation. After a written estimate of his benefit was given to him, he accepted voluntary early retirement. However, he was subsequently informed by the fund's administrators that the quote previously provided was incorrect. The actual amount payable to the Complainant significantly deviated from the original quote. The Complainant argued that his decision to accept the package was based on the original quote received by him, the complainant alleged that had he known that the benefit was to be that much less, he would not have terminated his employment. The court held that the question for determination was whether the misstatement made to the complainant constituted the delict of negligent misstatement. Apart from proving maladministration of the fund, the Complainant would also have to allege and prove that he had sustained prejudice in consequence of such maladministration.

A delictual claim for damages based on negligent misstatement is available to a plaintiff who can establish (i) that the Defendant made a misstatement to the plaintiff, (ii) that in making this misstatement the person acted (a) negligently and (b) unlawfully; (iii) that the misstatement caused the plaintiff to sustain loss, and (iv) that the damages claimed represent proper compensation for such loss. The Adjudicator found that the administrators had been negligent in providing incorrect figures for the quote to the Complainant. The issue was then whether the misstatement caused the Complainant to suffer loss. The Adjudicator did not believe that the Complainant would have acted any differently had he received an accurate and correct representation of the amount of his pension prior to making his decision. The complaint was dismissed on the basis that the incorrect quotation therefore could not be the cause of any loss sustained by the Complainant.

In *Crone v Southern Life Association Ltd & Others*<sup>51</sup> the administrator cancelled the complainant's cover due to non-compliance with rules requiring member's details to be furnished to the administrator by the employer. The adjudicator found that that the Administrator's failure to put the employer on terms or request information amounted to maladministration therefore the administrator was liable to compensate member for prejudice suffered.

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<sup>50</sup> [2003] 3 BPLR 4493

<sup>51</sup> [1999] 9 BPLR 1 (PFA)

In *Long v Krisch Provident Fund and Another*<sup>52</sup> the complainant argued that he had been misled into believing that he could continue his membership with the fund after leaving the company, only to find after handing in his resignation that this was not permissible in terms of the rules of the fund. The second respondent argued that the complainant had been advised on numerous occasions that he would not receive any monies from the fund should he resign prior to the said ten year period, however, that he did have the option to continue with the death and disability cover through the continuation of the life assurance benefit. The adjudicator held that on the evidence before him, he could not make a finding that a misrepresentation had been made to the complainant as there was no apparent or probable reason why the consultant would have advised one course of action when he knew full well that this was not permissible. The adjudicator also found that he could not find fault with the manner in which the consultant had executed his duties.

The duties of trustees and administrators in situations where investment advice is sought and/or investment decisions have been delegated is set out in some detail in *Twerefoo v Liberty Life Association of SA Ltd & Others*<sup>53</sup>. In this case the complaint related to an alleged shortfall in the lump sum payment received by the Complainant on his retirement. A conclusion that can be drawn from this case is essentially that delegation of powers does not mean an abdication of all responsibility. Trustees retain some residual powers to appoint or choose prudently a suitably qualified person to obtain the advice from or to delegate the function to, and they also have a duty to monitor the performance of that person. Both the administrator and the trustees were found to have breached their respective duties but because there was no loss, there was no liability.

#### **WHAT IF THE TRUSTEES WILL NOT ACT TO RECOVER DAMAGES CAUSED BY AN ADVISOR TO THE FUND?**

In the event that the trustees of the fund do not bring an action to recover damages caused by an advisor to the fund, Section 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 ("the FI Act") grants the Registrar of Pension Funds the power on good cause shown to apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of the fund. The court with its wide reaching powers can under section 5(5) of the FI Act can, *inter alia*, make an order with regard to the powers and duties of the curator. It appears that the court's power under section 5(5)(b) would include the power to grant the curator powers to pursue any claim on behalf of the fund or the members resulting from the loss caused by a fund advisor. If the trustees fail to pursue any action

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<sup>52</sup> [1999] 12 BPLR 370 (PFA)

<sup>53</sup> [2000] 12 BPLR 1437 (PFA)

on behalf of the members or the fund, the registrar can intervene and on good cause shown seek the appointment of curator who will be empowered to investigate any claim that the fund or the members of the fund might have.

In the *Pepcor Retirement Fund and Another v Financial Services Board and Another*<sup>54</sup> the Supreme Court of Appeal, *inter alia*, considered the issue of *locus standi* of the Registrar of Pension Funds (“the Registrar”) and the Financial Services Board (“the FSB”). The appellant’s disputed the plaintiffs’ *locus standi* to seek the relief claimed of setting aside a decision the Registrar which approved a section 14 application. The Court found that the arguments by the appellants that the Registrar had not been prejudiced and that it had to be left to those prejudicially affected by his decisions to take them on review, was without merit. The general public interest required that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve those objects. That was the whole purpose which underlay the Pension Funds Act. The Court held that the Registrar had *locus standi* in terms of section 6A(1)(b) of the Financial Institutions (Investment of Funds) Act 39 of 1984 to compel the fund and the first appellant to claim the repayment of the R9,2m and to cease contraventions. In respect of the *locus standi* of the FSB, the court held that the FSB was empowered by section 3(a) of the FSB Act, read with the definition of the term ‘financial institution’ in section 1 thereof, to supervise the exercise of control, in terms of any law, over the activities of pension funds. The FSB had an administrative interest, on behalf of the public, in the proper exercise of the control vested in the Registrar.

It is apparent from this case that the Registrar has a interest in the affairs of a pension fund which is recognisable in law and in the event that members are prejudiced by or suffer loss as a result of the negligence of a professional advisor to the fund and the trustees do not pursue the claim, the Registrar in his capacity as such could bring a claim under section 6(1) of the FI Act, the registrar could approach the court for the appointment of a curator to bring a claim on behalf of a fund (section 5 of the FI Act) alternatively the registrar could compel that fund (the trustees) to bring the claim (section 6(2) of the FI Act).

The legal consequences of not complying with the FI Act are far-reaching. In terms of section 10 of the FI Act a person who contravenes or fails to comply with provisions of the FI Act is guilty of an offence and on conviction is liable to a fine or imprisonment for a period not exceeding 15 years. The court may at its discretion in addition to a fine or imprisonment order such person to pay the institution or principal concerned for any profit he or she has made and order such person to

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<sup>54</sup> 2003 (6) SA 38 (SCA)

compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure.

## **CONCLUSION**

It is clear from the above that the law does expect fund advisors to exercise a fair degree of skill and care in the performance of their duties. Failure to do so which results in a loss to the fund could render fund advisors liable in delict or in contract. If the trustees fail to institute action for whatever reason, it appears that the Registrar in his capacity as such can bring the claim on behalf of the fund, alternatively the Registrar could approach the High Court for the appointment of a curator to bring the claim. Members of the Fund, if they can prove that they suffered a loss as a consequence of the conduct of an advisor, and that the advisor should have foreseen the possibility of harm to the member and guarded against it, can institute action against the advisor in delict.

**GRAHAM DAMANT AND NDUMISO NCUBE**