JOINT AND SEVERAL LIABILITY OF TRUSTEES OF PENSION FUNDS

JOHN NEWDIGATE

1. INTRODUCTION

Whether or not the trustees of a pension fund are to be held jointly and severally liable for loss caused by the wrongful actions of each other is a question with potentially significant practical consequences, for pension funds, their members and for trustees themselves. A few hypothetical examples will demonstrate this point. A trustee misappropriates the funds of a pension fund, and disappears. Are the remaining trustees to be held jointly and severally liable for the loss? A trustee is not present at a meeting of trustees at which a foolish investment decision is taken, resulting in financial loss to the pension fund. Is the absent trustee to be held jointly and severally liable for the loss, notwithstanding the fact that he did not participate in the decision? A proposal is tabled at a meeting of trustees which would result in certain persons (say, directors of the employer company) receiving benefits unlawfully at the expense of the pension fund. The proposal is carried by the vote of a majority of the trustees. Are the remaining trustees, i.e. those who voted against the proposal, nonetheless jointly and severally liable for loss caused to the pension fund by the decision?

There is no South African statute or reported decision which provides a definitive answer to this question. In the course of this discussion, the type of

considerations which would influence a decision on this question will be considered, and an opinion on the way in which it would be answered by our courts will be ventured.

2. PRIMARY LIABILITY OF ERRANT TRUSTEE

The core duties of the trustees of a pension fund are reflected in Section 7C(2) of the Pension Funds Act[1] as follows:

"**In pursuing its object the board shall –**

(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times. …

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interests;

(d) act with impartiality in respect of all members and beneficiaries."

Apart from the provisions of Section 7C of the Pension Funds Act, the trustees of a pension fund also have common law duties arising from the fiduciary

[1] No. 24 of 1956, where trustees are referred to as members of the fund's board.

relationship between the trustees, the fund and its members. Brand JA said the following in this regard in **Meyer v Iscor Pension Fund**[2]

"The general proposition that the trustees of the fund are under a fiduciary duty to act in the best interests of the members appears to be supported by authority. (See, for example, *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 898 H – I). I accept that the trustees' fiduciary duty towards its members includes a duty of impartiality, that is an obligation not to discriminate between members unfairly."

The Financial Institutions (Protection of Funds) Act[3] contains particular provisions which are applicable to the trustees of a pension fund. Section 2 provides that a director, member, partner, official, employee or agent of a financial institution who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property must, with regard to such, observe the utmost good faith and exercise proper care and diligence. "**Financial institution**" is defined as including "**any person or institution referred to in the definition of `financial institution' in Section 1 of the Financial Services Board Act**", which in turn defines "**financial institution**" as including any pension fund organization registered in terms of the Pension

[2] **2003 (2) SA 715 (SCA), at 730 C - D**
[3] No. 28 of 2001

Funds Act. The trustees of a pension fund will therefore fall within the ambit of Section 2 of the Financial Institutions Act. [4]

It can therefore be accepted as uncontroversial that the errant trustee who negligently or intentionally acts in breach of the duties described above, and who thereby causes the fund or its members to suffer loss, will be liable in damages for such loss. This proposition would seem to follow as a matter of general principle. It is also supported by authority in South Africa and elsewhere.[5]

What though is the position of the remaining trustees? In particular, are they to be held jointly and severally liable for the loss so caused?

3. **CONCEPTUAL CLARIFICATION**

Joint and several liability exists where any one of a number of debtors is liable for the whole of a debt.[6] It therefore creates a liability which is more onerous for debtors than, for example, that of joint liability, where each debtor is liable only for a proportionate share of the debt. [7] Joint and several liability may, of course,

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[4] Section 10 of such Act contains particular provisions dealing with the sanctions which may be imposed in the event of a breach of such duties. Section 10(1) deals with the criminal law consequences of such a breach, and section 10(2) provides that the court may, in addition to the imposition of a criminal sanction, order that a person who contravenes the provisions of the Act pay to the financial institution or principal concerned any profit he or she made, and compensate the institution or principal concerned for any damage suffered as a result thereof.

[5] See, e.g., **Van Wezel v Gencor Pension Fund and Others [2001] 2 BPLR 1668 (PFA) 1676**, and the reference there to the decision of the New Zealand High Court in **Jones v AMP Perpetual Trustee Co NZ Ltd [1995] PLR 53**, and the decision in the United States in **Stark v United States Trust Co of New York 445 F SUPP 670 (1978).**

[6] De Wet & Van Wyk, Kontraktereg & Handelsreg (5th Ed.; Vol. 1) 131

[7] De Wet & Van Wyk, op cit, 130

be accepted (or excluded) contractually. In the present context, there would appear to be nothing preventing the members of a pension fund from modifying the rules of their fund in order to deal expressly with this issue. The more difficult question will arise when there is nothing in the rules of a pension fund which deals with the issue.

In this context, it would appear to be convenient to deal with the circumstances in which joint and severally liability might arise in two sections. The second section will relate to circumstances in which loss is jointly caused by the fault of the particular trustees: they would then be regarded as joint wrongdoers, and accordingly be held jointly and severally liable for the loss caused by them.[8] The first section will relate the question whether a trustee is to be held liable for loss caused by the wrongful actions of another trustee, notwithstanding that the firstmentioned trustee was not at fault and did not cause the loss.

4. JOINT AND SEVERAL LIABILITY WITHOUT FAULT

4.1. OUR COMMON LAW

There is a long and weighty line of authority in our common law to the effect that persons who jointly administer the affairs and property of another are jointly and severally liable for loss caused by mal-

[8] The Apportionment of Damages Act, No. 34 of 1956

administration by each other. Dealing with the position of "curators" (i.e. trustees) in insolvency, Voet says as follows:

"***Case where curators more than one*. – So far is this so that, if more than one curator has been appointed, they can each sue and be sued for the whole, and not in shares. It is an exception if they were appointed by areas, perhaps one for the property in Italy and another for that in the provinces, for in that case each ought to keep to his own area.**" [9]

The same point is made more fully by Voet elsewhere:

"***Joint curators can be sued each* in solidum *whether each acted or not, if appointed voluntarily*. – But since not only a single curator, but also more than one can be put in charge of the single estate of an embarrassed debtor, it makes a difference whether such persons when more than one have managed their charge jointly or with divided duties. If they administered jointly an action lies against each in whole for the rendering of accounts of their administration and for other things connected with those accounts, a right of choice being given to the plaintiff as to which of them he wishes to sue for the whole. So much is this so that he can even sue one who perhaps touched nothing, since he ought to have touched and managed, when**

[9] Voet, Commentary on the Pandects 42.7 (Gane's Translation (1956) at 391)

he was appointed not against his will but with his consent; and [the jurists] would have it that the sole point to be regarded is what was realized from the goods of the embarrassed person, and not what has come into the hands of a single curator."[10]

The same legal principles are applied to co-guardians. In this regard, Voet states as follows:

"If all guardians administered undividedly, each could be sued for whole, subject to benefit of division. – **If all guardians have managed the guardianship, then we must investigate to see whether they administered in divided or in undivided shares. If in undivided shares, they can with the best of right be sued each for the whole at the discretion of the ward. Nevertheless they will enjoy the benefit of division if the remaining guardians are solvent at the time when suit could be brought on the guardianship on account of the duty of administration having ended. This is so although certain of their number have later ceased to be solvent owing to delays of the minor failing to bring his suit. A flaw due to the inactivity of one person ought not to cause loss to another person**." [11]

[10] Voet, *op cit*, section 12(a)
[11] Voet 27.8.6 (Gane's translation: 559 / 560)

The same point is made, in similar contexts, by other Roman-Dutch law writers and commentators. [12]

This general trend in Roman-Dutch law was recognized by Corbett CJ in **Gross & Others v Pentz**. [13]

It would accordingly appear that, on the basis of our common law, it could be argued that the trustees of a modern-day pension fund are in a position analogous to that of persons administering the affairs of another in the types of institutions of the Roman-Dutch law described above, and that they should therefore be held liable in the same types of circumstances. The matter has, however, become somewhat more complicated because of certain recent developments in our law in relation to another analogous institution, namely that of trusts.

4.2. DEVELOPMENTS IN TRUST LAW

In the fourth edition (1992) of **Honoré's South African Law of Trusts**, it is stated that those persons who were trustees at the time of a breach of trust are, in the absence of a provision in the trust instrument to the contrary, jointly and severally liable, and that they are co-principal debtors

[12] See, e.g., Huber, The Jurisprudence of My Time 1.18.37 (Gane's translation: 9); Van der Keessel, Praelectiones 3.2.26 (Gonin's translation, Vol. 5, 237); Lee, An Introduction to Roman-Dutch Law (5th Ed., 1953) 111)

[13] 1996 (4) SA 617 (A), 629F – 630D

in solidum. [14] Authority for this proposition is reflected as consisting of certain older South African decisions, including **Boyce N.O. v Bloem**[15]**.**

However, in **Gross and Others v Pentz**, [16] Corbett CJ said that the "**precise position in our law in regard to the liability of co-trustees for a breach of trust occurring during their term of office is not altogether clear**". [17] He referred to the fourth edition of Honoré, but also referred to the different position in English law which is to the effect that a trustee is only liable for his own acts or defaults. Corbett CJ said that –

"**(i)t may be that a re-evaluation of our law could result in a relaxation of the rule as to joint and several liability in cases where the mal-administration was the sole work of one trustee and the other trustee had been innocent of any wrongdoing or neglect"**. [18]

However, the point was not decided in that case as it was unnecessary to do so.

In 1999, writing in the Stellenbosch Law Review, Professor M J De Waal, in a careful analysis of the authorities cited in Honoré's fourth edition, concluded that they did not support the proposition that trustees should,

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[14] At 308
[15] **1960 (3) SA 855 (T)**
[16] **1996 (4) SA 617 (A)**
[17] At 629C
[18] At 330 H

without more, be held jointly and severally liable for the actions of each other. He referred to the Roman-Dutch authorities dealing with the legal position of functionaries administering the affairs of others, but pointed out that they do not apply directly to the trust, which is not a legal institution known in Roman-Dutch law. He referred to the position in English law, in which co-trustees are not held jointly and severally liable for each other's actions. Ultimately, he concluded that an "innocent" trustee should not be held liable for the actions of other trustees.

(**M J De Waal, "The Liability of Co-Trustees for Breach of Trust" (1999) 10 Stellenbosch LR 21**)

In the fifth edition of Honoré (published in 2002) the authors (who now included Professor De Waal) have done an about face. They follow the analysis of Professor De Waal, and moreover deal with the statutory position under English law, in the United States of America and also in Scotland, where, in general, the position is that trustees are only liable for their own wrongful acts or defaults. They conclude, ultimately, that trustees are not, without more, jointly and severally liable for the actions of each other. [19]

[19] Cameron, De Waal and Wunsh, Honoré's South African Law of Trusts (5th Ed.) 375 and following)

4.3. **TRUSTEES OF PENSION FUNDS**

What, then, would a court make of this question if and when it were to arise in the context of pension funds? On the one hand there is the line of Roman-Dutch authority described above, which would support, at least by analogy, the argument that the trustees of a pension fund should be held jointly and severally liable. On the other hand, there is the position in relation to the law of trusts, which would appear to lead, again by analogy, to a different conclusion. I would suggest that a court would be likely to follow the trust analogy, and to hold that trustees of a pension fund are not, without more, jointly and severally liable for the actions of each other; and particularly that an "innocent" trustee is not liable for the actions of his co-trustees. I hold this view for the following reasons:

(i) The strength of the argument based on the position in Roman-Dutch law should not be over-estimated. Albeit that the institutions of "curatorship" in insolvency and guardianship have certain similarities to that of a pension fund, they are not the same institutions, and there can therefore not be a direct application of Roman-Dutch law to the present issue. Moreover, there would generally be significant differences between the circumstances in which the trustees of a pension fund operate, and those which would have faced curators or guardians operating under the Roman-Dutch law in previous centuries. Generally speaking, it

can be accepted that the trustees of a pension fund would have to deal with issues having greater complexity and on a larger scale.

(ii) The trust is, of course, an institution of English origin. Nonetheless, the writings of Professor De Waal, and those found in the latest edition of Honoré, provide persuasive material for the conclusion that, in similar circumstances, there should be no question of joint and several liability. Their writings reflect concerns about an issue arising in the context of modern commercial realities.

(iii) The trustees of a pension fund do not, in general, choose who their co-trustees will be. At least half of them are elected to their positions by the members of the fund.[20] These circumstances differ from others in which joint and several liability is found to exist without fault on the part of the "innocent" party, for example in the case of partnerships, or where an employer is held vicariously liable for the actions of an employee.

(iv) The liability which may attach to directors of a company is dealt with in certain provisions of the Companies Act,[21] for example in section 424 which deals with personal liability for reckless or fraudulent conduct. Apart from liability dealt with in particular

[20] Section 7A of the Pension Funds Act.
[21] No. 61 of 1973

provisions of the Companies Act, a director may be held personally liable where his or her fraud or negligence has resulted in patrimonial loss. However, the mere fact that a person is a director of a company does not in itself render him or her liable for the wrongful actions of a co-director.[22] Although there are differences between the position of a director of a company and that of a trustee of a pension fund, there are also significant similarities. This analogy would lend further weight to the argument that the trustees of a pension fund should not be held jointly and severally liable, without more, for the wrongful acts of each other.

(v) Ultimately, one is left with the instinctive reaction that, to hold an "innocent" trustee liable for the wrongful actions of his co-trustee is unfair, and that a trustee should only be held liable where he has himself acted in breach of his duties. Fault is, after all, one of the basic components justifying liability; and legal rules which result in a person being liable where he is not himself at fault have invariably been justified on the basis of legal policy.[23] There do not appear to be any compelling reasons of policy which would

[22] Joubert (ed), The Law of South Africa (First re-issue; Vol 4, Part 2; s.v. "Companies"), para 163

[23] See, e.g. the remarks of Nienaber JA in **Midway Two Engineering & Construction Services v Transnet Ltd 1998 (3) SA 17 (SCA), 22 B – 24 A** regarding the justification for the vicarious liability of an employer.

justify a trustee being held liable where he or she is not personally at fault.

5. TRUSTEES WHO ARE CO-WRONGDOERS

As indicated above, where two or more trustees act in breach of their duties and thereby cause loss, they will be jointly and severally liable for such loss as joint wrongdoers. A word of caution should, however, be sounded in this regard to trustees. It is unnecessary, for persons to be held jointly and severally liable as joint wrongdoers, that they should have equal degrees of fault. Where one trustee, for example, is the more active perpetrator of a breach of duty, another trustee may nonetheless be jointly and severally liable where his degree of fault is substantially less. Such breach of duty may, for example, consist of his concurrence in the actions of the other trustee, or his adoption of a supine attitude when the circumstances require that he take positive steps. In the context of trust law, the authors of the fifth edition of Honoré refer to the remarks of Goldstone JA in **Howard v Herrigel** [24] which deals with the liability of a director of a company whose fellow-directors are guilty of reckless or fraudulent conduct. In this regard, Goldstone JA states as follows:

"… (E)ven in the absence of some positive steps by him in the carrying on of the company's business … (h)is supine attitude may, I suppose, even amount to concurrence in that conduct. Whether such an inference could properly

[24] 1991 (2) SA 660 (A) 674H

be drawn will depend upon the facts and circumstances of the particular case". [25]

Where the culpable actions of one trustee have caused loss to a pension fund, it may readily be predicted that the legal representatives of the fund will scrutinise the particular facts and circumstances relating to the actions or omissions of the other trustees at the time, in order to determine whether the remaining trustees also acted culpably and in breach of their duties, and accordingly whether they could, on this basis, be held jointly and severally liable for the loss.

[25] Honoré, op cit, 382