

“To be or not to be” ... a Trustee

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“TO BE OR NOT TO BE”

- The opening phrase of a soliloquy in the "Nunnery Scene" of Shakespeare's play : Hamlet.
- In the speech, a despondent Hamlet contemplates death and suicide.
- Hamlet bemoans the pains and unfairness of life but acknowledges the alternative might be still worse.
- THE LIFE OF A RETIREMENT FUND TRUSTE



Introduction

Recent PFA determination

- IF Umbrella Pension and Provident Fund
 - July 2013
 - Personal liability
 - Delictual breach of fiduciary duties
 - Amount of liability R 19m

THE PENSION FUNDS ACT

- Section 7F



The Duties of the Board of Management

- Pension Funds Act No. 24 of 1956 (“**the PFA**”)
- Section 7C of the PFA

“The **object** of a board shall be to **direct, control and oversee** the **operations of a fund** in accordance with the **applicable laws and the rules of the fund**.”

In pursuing its object the board shall—

- (a) take all **reasonable steps** to ensure that the interests of membersare **protected** at all times....;
- (b) act with **due care, diligence and good faith**;
- (c) avoid conflicts of interest;
- (d) act with impartiality in respect of all members and beneficiaries.



Duties of Trustees : FIDUCIARY DUTY

- The Nature of fiduciary duty
 - Highest standard of care
 - Relationship of loyalty and trust
 - Manage and protect property and money of another
- Who do the Trustees owe it to?

□ Why?



The duty of Good Faith

- Section 7C of the PFA

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To whom is it owed?

Members

Participating Employer



The Duty of UTMOST Good Faith

- Where does the duty of UTMOST good faith arise?
- Section 2 of the *FI(POF) Act*
- “*A director, member, partner, official, employee or agent of a financial institutionwho invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution.....must, observe **THE UTMOST GOOD FAITH....**”*



Which entities are subject to the FI (POF) Act

- Which entities are “*financial institutions*” to the FI(POF) Act?
 - Section 1 of Financial Services Boards Act No. 97 of 1990

“*financial institution*” means—

- (i) *any pension fund organisation registered in terms of the Pension Funds Act, 1956, or any person referred to in section 13B of that Act”*



Good faith

- **Good faith**
 - formulation non-specific
 - duty to act in a honest manner without having any regard to self-interest
 - encapsulate nature of fiduciary duties generally?



UTMOST good faith

- **Utmost good faith**
- Insurance context
- *uberrima fides*
 - Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality
 - “*alien, vague [and] useless . . . without any particular meaning in law*”, “
 - “*there are no degrees of good faith*”,
 - “*it is entirely inconceivable that there could be a little, more or most (utmost) good faith*”
 - **duty of good faith generally, not exaggerated good faith**
 - may, however, be relevant in determining “*wrongfulness*” element of delictual claim



To whom are these duties owed

- Fund (FIDUCIARY DUTY)
 - If maladministration, loss suffered by Fund and not by Members
- Members (DUTY OF GOOD FAITH)
- Participating Employer (DUTY OF GOOD FAITH)
 - Remedies of Participating Employer and Members, if any?
 - Section 30 of PFA



What is a breach of a duty?

- **“FAILURE TO ACT WITH CARE AND DILIGENCE”**
- Negligence based
- TEST
 - “REASONABLE TRUSTEE”
 - ISSUES
 - Are all trustees the same
 - Section 7B
 - **Wait and see.....**



Negligence

Negligence

- “a failure to exercise that degree of diligence which the law requires under the circumstances of each case....whether that persons conduct is what a **SPECIALIST** or reasonable man would exercise under similar circumstances” **Jameson’s Minors v CSAR**
- “the failure or the omission to take proper care, and proper care is the care, which, according to our law, a diligent paterfamilias or, as it is expressed in English Law, a prudent and reasonable man, would take under the circumstances. The law **PRESUMES** that a person who exercises any calling or who does any particular act, will exercise that calling or do that act with skill, with knowledge and the requisite experience “ **Hammerstrand V Pretoria Municipality**



GROSS NEGLIGENCE

- “An *EXTREME* departure from the standard of a reasonable person which must demonstrate *COMPLETE OBTUSENESS OF MIND* or a *TOTAL FAILURE TO TAKE CARE*” **Transnet t/a Portnet v The Owners of the MV “Stella Tingas” and Ano**

NEGLIGENCE v GROSS NEGLIGENCE

- Reasonable trustee ?
- Is a trustee a specialist ?
- Knowledge, skill and requisite experience.... Minimum requirements?
- **TOTAL FAILURE TO TAKE CARE**



Duties when appointing Administrators

- **Administrators**
 - 13B of PFA
 - Benefit and Investment
 - Included in the definition of “*financial institution*”
 - Also subject to a duty of “*utmost good faith*”
 - despite contractual nature of appointment
- **What are Trustees duties when Administrators are not performing?**
 - Are acts committed by administrators deemed to be acts committed by Trustees?
 - Contractual remedies? BN 24
 - Reporting obligations?
 - Fire? New administrator..... !!!!



Section 7B exempt funds : PROBLEMS

- Sponsor “crowds” board with representatives
- Interests of sponsor appointed Trustees aligned with Sponsor
 - Direct contravention of duty of good faith?
 - Rules should allow for “independent trustees veto / casting vote.
- MINUTES AND THE IMPORTANCE THEREOF



THE AFFIRM MARKETING DETERMINATION

- Citation
 - Affirm Marketing (Pty) Ltd and others v IF Umbrella Pension Fund and others (First and Second Determination)
 - July 2013
- Facts
- Extracts from the determination



THE AFFIRM MARKETING DETERMINATION

- WHO COULD HAVE?
- WHO SHOULD HAVE?
- WHO DID?
- WHY?
 - Options
 - Liquidation and / or curatorship
 - What would the liquidators / curators have to do?
 - Increased costs
 - Between the devil and the deep blue sea
 - TO BE OR NOT TO BE



THE AFFIRM MARKETING DETERMINATION

- What has been learnt?
- The importance of “*independence*”
- **The importance of minutes**
- The importance of “*directing, controlling and overseeing*”
- Be diligent *vis-à-vis* the ADMINISTRATORS
 - Once appointed – do not stop checking
 - How?
 - 13B Licence
 - AFS – systems audit
 - PI claims
 - Wait and see.....



NEWS FLASH SECTION 7F

- In latest amendment to PFA
- **“Liability of board member”**
 - “7F(1) *In any proceedings against a board member ito this Act, other than for wilful misconduct or wilful breach of trust, the court MAY relieve the board member from ANY liability, either wholly or partly, on terms that the court considers JUST, if it APPEARS to the court that:*
 - » (a) *board member acted INDEPENDENTLY, HONESTLY AND REASONABLE OR,*
 - » (b) *having regard to the circumstances of the case.....it would be FAIR to excuse the board member”*



Section 7F

- Date of commencement?
- INDEPENDENTLY, HONESTLY AND REASONABLY
 - How to demonstrate?
 - Importance of minutes
 - Importance of reporting
 - Independence
- HAVING REGARD TO THE CIRCUMSTANCES EXCUSE THE BOARD MEMBER.
 - What does this mean?



“TO BE OR NOT TO BE” reviewed

- Amendment to PFA
- Provide more protection
- See how the Courts interpret.
- Must be read with other amendments
- QUESTIONS



Thank you



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