

LABOUR LAW AND PENSION LAW

PJ Pretorius SC



PENSION LAWYERS
ASSOCIATION

1. TOPIC

1. Duty of Good Faith
Fiduciary Duty
2. The competing jurisdictions of the PFA and CCMA/Labour Court
3. Recent amendments to the LRA extending the provision of benefits



2. DUTY OF GOOD FAITH AND FIDUCIARY DUTY

- Trustees of funds owe a fiduciary duty to their funds and a duty of good faith to all stakeholders.

Sauls

v

Ford South Africa Pension Fund and others (unreported)

- But we are here dealing with the employer's duties.



3. DUTY OF GOOD FAITH AND FIDUCIARY DUTY

- “The Trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries ... The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries”.
- See; Tek Corporation Provident Fund and others v Lorentz 1999 (4) SA 884 (SCA)



4. FIDUCIARY DUTY

- A legal duty to act solely in another party's interest
- Trustee duty in a trust
- Acting as a fiduciary means setting aside one's own interests



5. DUTY OF GOOD FAITH (and fair dealing)

- “Each party will deal with the other fairly, honestly and in good faith” (a mutual duty)
- Implied term of trust and confidence (in contract)
- Procedurally fair (in exercising a discretion)
- Without ulterior motive (in exercising a discretion)
- Acting with regard to self-interest permissible



6. DUTY OF GOOD FAITH

Imperial Group Pensions Trust Limited

v

Imperial Tobacco

[1991] 1 WLR 589



7. DUTY OF GOOD FAITH

Scally

v

Southern Health and Social Services Board

[1992] 1 AC 294



8. DUTY OF GOOD FAITH

University of Nottingham

v

Eyett

[1991] 1 All ER 437



9. DUTY OF GOOD FAITH

IBM Pensioners Action Group

v

IBM SA (Pty) Ltd

(2000) 21 ILJ 1467 (PFA)

- ... In which the *adjudicator* held that an *employer* is entitled to withhold its consent to pension increases for the purpose of placing pressure on the *board* of the *fund* to agree to the conversion of the *fund* because it is entitled to protect and promote its own financial interests.



10. DUTY OF GOOD FAITH

Harris

v

AECI Pension Fund

[2000] 7 BPLR 737 (PFA)

- ... In which he held that the *employer* had not acted in breach of its duty of good faith when it refused to approve a discretionary enhanced retirement *benefit* in the context of the choice offered to the employee of either a generous retrenchment package or an enhanced retirement *benefit*.



11. DUTY OF GOOD FAITH

Phillips

v

Johannesburg Municipal Pension Fund

[2001] 11 BPLR 2745 (PFA)

- ... In which he held that the *employer* had breached its duty of good faith towards its employee by failing to advise him of the options available to him on retirement.



12. DUTY OF GOOD FAITH

Wilson

v

Orion Fixed Benefit Pension Fund and others (1)

[1999] 9 BPLR 89 (PFA)

- ... In which he found that the *employer's* refusal to exercise its discretion in favour of approving an enhanced withdrawal *benefit* for a *member* was not reasonable and justifiable in the context of the large surplus in the *fund* and the poor withdrawal benefits provided for in terms of the *fund's rules*.



13. DUTY OF GOOD FAITH

Negash

v

Rhodes University Pension Fund

[2000] 11 BPLR 1275 (PFA)

- ... In which he held that an *employer* has a duty to make pertinent information in relation to the retirement *fund* of its employees available to them in a clear form.



14. DUTY OF GOOD FAITH

- BUT ...

SA Maritime Safety Authority

v

McKenzie

2010 (3) SA 601



15. DUTY OF GOOD FAITH

Council for Scientific and Industrial Research

v

Fijen

1996 (2) SA 1

“... In every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.”



16. DUTY OF GOOD FAITH / UNFAIR LABOUR PRACTICE

Apollo Tyres SA (Pty) Ltd

v

CCMA and others

[2013] 5 BLLR 434 (LAC)



17. FIDUCIARY DUTY

- Amendment to section 7C of the LRA

‘9. Section 7C of the principal Act is hereby amended by the addition to subsection (2) of the following paragraphs:

[The Board of a Fund must]

“(e) act independently;

(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act; and

(g) comply with any other prescribed requirements”.’

(own emphasis)



18. FIDUCIARY DUTY (OF EMPLOYER)

- Where the employer is dealing with the employee's money in procuring retirement or other benefits, a fiduciary duty may arise on its part.



19. COMPETING JURISDICTIONS

Armaments Development and Production Corporation
of South Africa Limited

v

Murphy NO and others

[1999] 3 All SA 589 (C)



20. COMPETING JURISDICTIONS

Walter Hermann Heinrich Hoffmann

v

Pension Funds Adjudicator and others

[2012] 2 All SA 198 (WCC)



21. COMPETING JURISDICTIONS

Mtyapha

v

South African Municipal Workers' Union National Provident Fund

[2013] 2 BPLR 197 (PFA)



22. COMPETING JURISDICTIONS

Smith (obo Tygerberg Auto Electric Group)

v

Motor Industry Retirement Fund and another

[2013] 3 BPLR 424 (PFA)



23. LRA AMENDMENTS

- S198A “Temporary Services”
- S198B “Fixed Term Contracts”
- S198C “Part-time Employees”



Thank you



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