

THE PRINCIPAL OFFICER: WHAT ARE HIS STATUTORY AND COMMON LAW DUTIES

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Appointment of PO

- S8 Pension Funds Act
 - “Every registered fund shall have a principal executive officer”
 - *Fund must appoint PO (but on condition that appointment can be terminated by Registrar) and give Registrar written notice of appointment (see Directive PF No. 5)*
 - Also see Circular PF No. 130
 - *PO must be SA resident; not absent or indisposed for more than 30 days; fit and proper person; and holding office must be in public interest*

Statutory duties – Pension Funds Act

Whistle blowing:

- S8(6)(a) and para 6 of Directive PF No. 5
 - *Report to Registrar on perceived reasons for termination of appointment within 21 days of termination of appointment (other than where terminated by Registrar)*
- S8(6)(b) and para 7 of Directive PF No. 5
 - *Inform the Registrar in writing of “any matter relating to the affairs of the pension fund which, in the opinion of the principal officer, may prejudice the fund or its members”*

Statutory Duties – PFA cont.

Procedural:

- S12, regulation 24 and circular PF No. 81
 - *Sign and submit rule amendment (2 copies plus signed certificate) to Registrar within 60 days*
 - *together with explanatory statement and applicable fees*
 - *accompanied by valuator's certificate or fund statement re: financial soundness of fund (if rule amendment may affect financial condition of fund)*
 - *Inform members of rule amendments within 6 months of fund's financial year end*
 - *Submit consolidation of rules to Registrar*

Statutory Duties – PFA cont.

- S13A and regulation 33
 - *report on late payment of contributions (unless another authorised person appointed by board of fund)*
- S14 and Directive PF No. 2
 - *Together with trustees and valuator, PO must sign scheme for amalgamation or transfer of business*
 - *PO must disclose to Registrar if transfer could result in members being worse off on resignation immediately after transfer*
 - *PO, valuator or auditor must apply for cancellation of registration of fund after full transfer*

Statutory Duties – PFA cont.

- S15
 - *annual financial statements*
 - *sign statement of responsibility re: confirm lodging of all returns, statements, documents and other information required of fund by Pension Funds Act ; or details of non-compliance*
- S15B and Directive PF No. 3
 - *Submit surplus apportionment scheme including details of objections and actions taken to address such objections; or*
 - *Submit nil scheme in terms of S15B(11)*

Statutory Duties – PFA cont.

- S16
 - *sign certificate to accompany valuation report submitted to Registrar , stating:*
 - *Information submitted to the valuator was correct and complete*
 - *Copy of report sent to every participating employer*
- S18
 - *Submit scheme of arrangement to bring fund into financially sound condition or eliminate deficit indicated in fund return*
- S20 and regulation 20
 - *sign all documents that fund required to submit to Registrar, and certify if a copy*

Statutory Duties – PFA cont.

- Section 33 and Information Circular No. 6 of 2008
 - *Sign application for extension of time for submission of*
 - section 14 transfer application,
 - annual financial statements, or
 - statutory valuation report

Statutory duties – Directive PF No. 5

- Boards of trustees and PO's have ongoing duty to inform the Registrar of anything that might adversely affect the status of the PO
 - *e.g. anything that may affect the assessment of a PO as a fit and proper person (see list in S8(5)(c) of Pension Funds Act)*
- PO must have relevant qualifications and expertise relating to the management and oversight of retirement funds, specifically to the particular office and type of fund in question

Statutory Duties – Financial Institutions

- Financial Institutions (Protection of Funds) Act, 2001
 - *Observe the utmost good faith and exercise proper care and diligence*
 - *Includes keeping members properly informed (duty to speak)*
 - *Warner v Old Mutual Staff Retirement Fund [2000] 7 BPLR 804 (PFA)*
 - *Murphy held PO had duty to disclose to complainant debate re: entitlement to benefits of demutualisation shares and that resignation could prejudice him (in response to his specific query)*
 - *Notwithstanding confidentiality and board decision not to communicate to members until final decision*
 - *Held: failure to disclose relevant information = breach fiduciary duty and maladministration of fund*
 - *Complainant entitled to damages (quasi-delictual liability)*

Governance – Circular PF No. 130

- Best practice guideline
- Board of trustees assisted by PO is responsible for governance of fund
- PO owes fiduciary duty to fund so should avoid conflicts of interest
 - *Fiduciary duty is only aspect where common law of use*

Common law duties

- SA common law
 - *historical sources (Roman-Dutch and English)*
 - *augmented by and developed through case law (judicial precedent)*
 - *and, to a lesser extent, customary law*
- No specific reference to or development of PO duties
- Fiduciary duties dealt with re: trustees generally
 - *S7A to E (introduced into Pension Funds Act in 1996) created statutory duties that overlap pre-existing common law fiduciary duties of board of trustees*
 - *omission re: PO*

Common law – Fiduciary duty

- The trustees are entrusted with the control of property with which they are bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations.

PPWAWU National Provident Fund v CEPPWAWU 2008 (2) SA 351 (W) at para 20

- Fiduciary duties include:
 - *Duty of impartiality (obligation not to discriminate between members unfairly)*
Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA)
 - *Duty to exercise independent judgment*
PPWAWU National Provident Fund supra

Other Duties - PF 130 cont.

- PO's functions include:
 - *Ensuring that decisions of the board are executed*
 - *Ensuring that the fund complies with the formal requirements of the law, including directives from the Registrar, SARS and other relevant regulatory authorities*
 - *Liaising on behalf of the board with service providers to the fund (unless direct contact between board and service provider)*
 - *Contributing at board meetings even though PO has no voting rights*
 - *Ensuring that governance of fund complies with applicable legislation*
 - *Meeting regularly with the chairperson of the board of trustees to enable the chair to monitor the operations of the fund*

Conclusion

- 2010 annual report of the Principal Officers Association records:
 - *“We want the Principal Officer to be recognised as a top-notch professional who is an expert in governance, risk management, legal issues and administration”*

THE END

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