



Bowman Gilfillan
John & Kernick • Findlay & Tait

TRUSTEE LIABILITY:
WHEN AND HOW?

by
Samantha Davidson (Shepstone & Wylie)

Tashia Jithoo (Bowman Gilfillan)

THE NATURE OF A PENSION FUND



- Incorporated in terms of section 4B(1)
- Section 5(1)(a): fund becomes "*a body corporate capable of suing and being sued in its corporate name*"

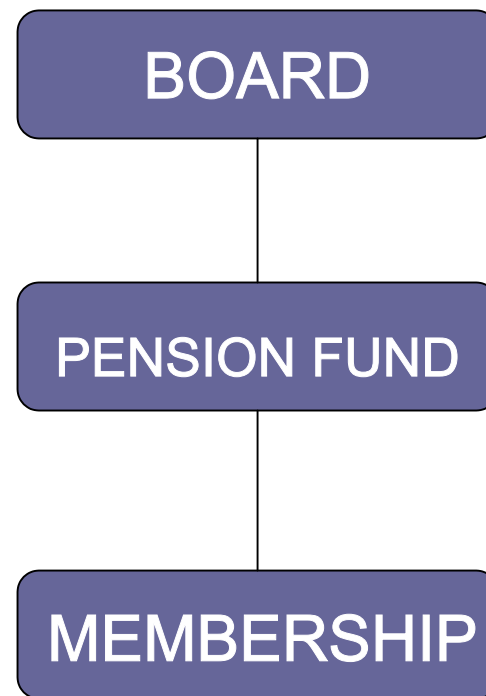
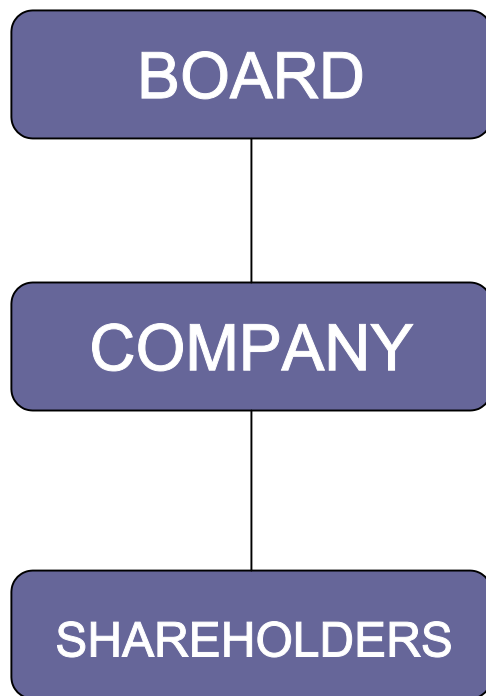
THE NATURE OF A PENSION FUND (continued)



- Not a trust
- Board not actually “trustees”
- *Venter v Protektor Pension Fund* [2000] 3 BPLR 340 (PFA)

“Contrary to the popular perception to the effect that a pension fund in law constitutes a trust, I am of the view that a pension fund at common law is a universitas personarum – a voluntary association with corporate personality An universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of his members, which are required or incurred for the body as a whole, and not for the individual members.”

THE NATURE OF A PENSION FUND (continued)



TRUSTEES DUTIES AND OBLIGATIONS



The Legislative Framework

- The Pension Funds Act – Sections 7C and 7D
- The Financial Institutions (Protection of Funds Act) – Section 2
- Code of Conduct for Trustees

TRUSTEES DUTIES AND OBLIGATIONS (continued)



Fiduciary Duties

- Act with impartiality and protect the interests of the members and the fund
- Duty to act with care and diligence and in good faith
- Avoid conflict of interests

TRUSTEES DUTIES AND OBLIGATIONS (continued)



The duty to act with care, diligence and in good faith

- What does this duty entail?

Connery v Old Mutual Life Assurance Co. (SA) Ltd and Another [2002] 6 BPLR 3544 (PFA)

Moreover, the duty to act with care and diligence requires the fund and administrators not to act carelessly and without diligence. The Concise Oxford Dictionary, 10th edition, defines the word "carelessly" as meaning "without giving sufficient attention or thought to avoiding harm or mistakes.

van Wezel v Gencor Pension Fund and Others [2001] 2 BPLR 1668 (PFA)

As regards the duty to act with due care, a board of management is required to act honestly and prudently, taking all those precautions which an ordinary prudent man of business would take in the managing of similar affairs of his own.

- Required level of skill ?

TRUSTEES DUTIES AND OBLIGATIONS (continued)



Trustee Obligations

- Keep proper records and ensure proper control systems
- Convey adequate and appropriate information
- Ensure payment of contributions
- Obtain expert advice
- Ensure that rules comply with all relevant laws

THE NATURE OF TRUSTEE LIABILITY



- Fund liability vs Personal liability
- Joint and Several liability
- Personal liability
 - Statutory
 - *Knight v Mitchell Cotts* [2002] 8 BPLR 3765 (PFA) – accepted that the Financial Institutions (Investment of Funds) Act 39 of 1984 creates personal liability at a statutory level

PERSONAL LIABILITY



Section 9 of the Financial Institutions (Investment of Funds) Act:

"A person who contravenes any provision of this Act or fails to comply with any provision ... is guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 10 years or to both ..., and is in addition liable to the financial institution, trust beneficiary or principal concerned for any profit made by him and for any damage suffered by the institution, trust, beneficiary or principal as a result of the contravention or failure.

..."

PERSONAL LIABILITY (continued)



- Personal liability as a statutory remedy continued under the Financial Institutions (Protection of Funds) Act 28 of 2001
- Section 10 of the FIA
 - "(1) A person who contravenes or fails to comply with any provision of this Act is guilty of an offence and on conviction liable to a fine or imprisonment for a period not exceeding 15 years.*
 - (2) A court may, in addition to any penalty it may impose in terms of subsection (1), order that such person –*
 - (a) pay the institution or principal concerned any profit he or she made; and*
 - (b) compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure."*

PERSONAL LIABILITY (continued)



- *"pay the institution or principal concerned any profit made"*
"compensate the institution or principal concerned for any damage suffered"
- *"the institution" is defined as including:*
 - (a) *a financial institution (which includes a pension fund);*
 - (b) *any person, partnership, company or trust which has or had a direct or indirect interest in a financial institution or unregistered person, or in the business of a financial institution or an unregistered person;*
 - (c) *a participating employer in a pension fund organisation;*
 - (d) *any person, partnership, company or trust that controls, manages or administers*
the affairs or part of the affairs of a financial institution or an unregistered person; or
- *"institution" can be the fund, member, co-trustee or administrator*

PERSONAL LIABILITY (continued)



Common Law Delictual Claim

- To claim compensation for patrimonial loss must show that sustained harm which was wrongfully and culpably caused by the trustee
- Wrongfulness – Breach of a duty
- Culpable – Intent or Negligence
- Patrimonial Loss – Must have been loss suffered
- Causation – The harm must be the cause of the loss

PERSONAL LIABILITY (continued)



Common Law Delictual Claims

Van Huysteen v Times Media Ltd Fund [2003] 4 BPLR 4613 (PFA)

Naude v Eskom Pension and Provident Fund & Another [2002] 8 BPLR 3782 (PFA)

Warnerv Old Mutual Staff Retirement Fund [2000] 7 BPLR 804 (PFA)

PERSONAL LIABILITY (continued)



Statutory Remedy

- Breach + Loss = Liability
- Question of whether duty owed to member or fund does not arise

Common Law Remedy

- Breach + Loss = Liability
- Is duty owed directly to the member or only to the fund?

TO WHOM DO TRUSTEES OWE DUTIES?



- Fund and/or Members?
- Some duties and obligations are owed specifically to members:
 - “protect the interests of members”
 - “act with impartiality in respect of all members and beneficiaries”
 - “ensure that adequate information is communicated to the members”

TO WHOM DO TRUSTEES OWE DUTIES? (continued)



- *Vally v Federal Mogul Pension Fund* [2002] 2 BPLR 3122 (PFA)
- *Dlvana & Another v Shoprite Checkers Employees Retirement Fund & Others* [2002] 4 BPLR 3354
- *Hilton Hotel Employees v Trustees of the Liquor and Catering Trade (Pietermaritzburg) Provident Fund & Another* [2000] 5 BPLR 511 (PFA)

WHO COULD BRING A CLAIM AGAINST TRUSTEES?



- The Board?
- The Employer?
- The Members?

WHO COULD BRING A CLAIM AGAINST TRUSTEES? (contd.)



- Using the mechanism of a curator

- Section 5 of the FIA:

(1) The registrar may, on good cause shown, apply . . . for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.

(6) The curator acts under the control of the registrar. . . and may apply to that registrar for instructions.

WHO COULD BRING A CLAIM AGAINST TRUSTEES? (contd.)



- Section 6 – Powers of the Registrar

(1) *The registrar may institute proceedings in the High Court. . . in order to-*

. . .

(b) *compel any institution to comply with any law;*

(c) *compel any institution to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law; or*

DELEGATION OF POWERS AND EXPERT ADVICE



Code of Conduct for Trustees

"The Board is entitled and, in fact is, obliged to obtain expert 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, and make decisions based on the assessment of the advice obtained."

DELEGATION OF POWERS AND EXPERT ADVICE (continued)



Code of Conduct for Trustees

"Where the management, administration and investment functions of the fund are delegated, Board members remain responsible. . . .The mandates . . .must clearly set out the delegated responsibilities and the rights of recourse. . . .There must be a process of regular reporting. . . ."

DELEGATION OF POWERS AND EXPERT ADVICE (continued)



Code of Conduct for Trustees

"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...."

DELEGATION OF POWERS AND EXPERT ADVICE (continued)



Administrators

- *Pieters v Schindler Lifts Defined Contribution Pension Fund & Others* [2003] 3 BPLR 4493 (PFA)
- *Crone v Southern Life Association Ltd & Others* [1999] 9 BPLR 1 PFA
- *Long v Krisch Provident Fund & Another* [1999] 12 BPLR 370 (PFA)

DELEGATION OF POWERS AND EXPERT ADVICE (continued)



Investment Decisions

- *Twerefoo v Liberty Life Association of SA Ltd & Others* [2000] 12 BPLR 1437 (PFA)
- *Van Wezel v Gencor Pension Fund & Others* [2001] 2 BPLR 1688 (PFA)

Obtaining Advice

- *Jandruballie v Tongaat-Hullet Pension Fund* [2000] 6 BPLR 606 (PFA)

LIMITATION OF LIABILITY



- Exoneration / Indemnity clauses
- Fidelity Cover