

PENSION LAWYERS ASSOCIATION AMPLATS GROUP PROVIDENT FUND V OTHERS Insurance Considerations

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An authorised financial services provider

FSB Licence no.: 7784

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Directors: MS Duncan, S Fatouros, K Groenewald, M Pienaar

The Facts

- Applicant:** The Amplats Group Provident Fund and others
- 1st Respondent:** 14 affected board members personally (previous board)
- 2nd Respondent:** Mr Vivian Cohen (independent actuary)
- 3rd Respondent:** Sanlam Life Insurance Limited

Common fact Mr Cohen made a unit pricing error in the opening balance of one of the funds balanced portfolios for a period of 4 months in 2012. Certain members benefits were inflated with some receiving inflated withdrawals.

Quantum: R40 500 100 plus interest

The allegations

Against the First Respondents

- Abdication of fiduciary duties under S7(D) of the Act
- Failing to maintain proper care and control over the operation of the fund
- Failed to ensure the funds officials carried adequate E&O insurance
- Maladministration of the Fund

Against the 2nd Respondent

- Negligent performance of his professional services as an Actuary
- Failure to act reasonably and with the skill and care expected of him
- The error caused a loss to the fund

Against the 3rd Respondent

- Breach of the SLA – the Administrator should have verified the unit pricing when updating member records

The Employers Insurance

- **Commercial Crime** (covers loss of the employers own money or under its care custody and control following theft/fraud by an employee)
- **Professional Indemnity** (covers loss of third parties caused by the negligence of employees)
- **D&O** (covers the directors and officers (and sometimes trustees) personally for breach of duty)
- A global trustees policy
- No allegation of fraud against the trustees
- No claim against the employer
- Possibly – Trustees exclusion is typically standard
- Very rare

The Funds Insurance – The “Fidelity Insurance”

The Fund is covered against loss of fund assets as a result of:

- Errors and omissions
- Theft and fraud
- Third party computer crime

} Committed by
an officer

Trustees, Committee Members and Principal Officers are covered for their:

- personal liability cover in the event of, inter alia, breach of their fiduciary duties

What is covered?

- **Loss** to the Fund as a result of a **Wrongful Act** by an “**Officer**” of the Fund.
- *Damages, judgments, settlements, costs and expenses awarded against the Insured*
- *Legal costs*
- *All costs and expenses incurred require **written consent of the Insurer***

The Actuaries Insurance

- No compulsory PI cover – but Actuaries Association Practice Note on PI
- Typical E&O – legal liability and legal costs arising from a claim for damages from a third party due to actual or alleged negligence, error or omission whilst providing advice services to such third party in the scope of their profession or business for a fee.
- “to indemnify **You** for **Your** legal liability to pay **Compensation** to a **Third Party** as a result of a **Claim** first made against **You** during the **Contract Period** up to the **Limit** subject to the **Deductible**, including **costs and expenses**”
- Actuary had R1m in cover – wholly inadequate

The Administrators Insurance

- S13(B) Administrator requires both Fidelity Guarantee and Professional Indemnity Insurance
- Sanlam comprehensive FI Insurance program including:
 - Commercial Crime
 - Third party Computer Crime
 - E&O (legal liability)
 - Legal and other defence costs
 - D&O
 - Cyber

NB – the claim was based on breach of the SLA and not on negligence

Takeaways

- Third Party costs extension (10%) sub-limit
- No Insured V Insured exclusion
- Claims made nature of the policies
- Claims notification and insurers consent
- Retroactive date
- Other Insurance clause.
- Adequacy of level of cover – LIMIT tool for Funds
- Subrogation rights of insurers
- Policy exclusions – conduct (deliberate acts or fraud), contractual exclusion

Takeaways

- Trustees must understand the scope of their duties
- Minutes of meetings
- Trustees must understand all role players insurances
- Vetting of SLA's particularly the indemnity wording
- Vetting of annual insurances for quality and quantum

