

PENSION LAWYERS ASSOCIATION AMPLATS GROUP PROVIDENT FUND v OTHERS Insurance Considerations

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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 Employer's Insurance

- **Commercial Crime** (covers loss of the employer's 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 Fund's 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 Administrator's 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.
- 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

Practical issues arising for trustees

- **Issue 1 – What actions of trustees and officers should be covered?**

- Regulation 30(2)(u) requires the rules must provide for “a *policy of insurance effected to indemnify the fund against losses owing to the **dishonesty or fraud** of any of its officials or such other indemnification as the Registrar may allow*” [bare minimum].
- Section 7F of the Pension Funds Act: “*In any proceedings against a board member in terms of 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) *the board member has acted independently, honestly and reasonably; or*
 - (b) *having regard to all the circumstances of the case, including those connected with the appointment of the board member, it would be fair to excuse the board member.*”

Practical issues arising for trustees cont...

Examples of insurance provisions in fund rules

- **Fund 1** – Trustees must ensure “*that the Fund is insured against any loss resulting from the negligence, dishonesty or fraud of any of its officers*” – compliant with Reg 30(2)(u). Trustees and all officers indemnified against all “*proceedings, costs and expenses incurred by reason of any claim in connection with the Fund not arising from their negligence, dishonesty or fraud*”.
- **Fund 2** - Same as Fund 1 in respect of indemnification however obligation to insure is limited to only dishonesty or fraud. Also confirms that the Fund must ensure that third parties have adequate insurance.
- **Fund 3** - Trustees must insure the Fund against negligence, dishonesty or fraud of any of its officers (same as Fund 1) and ensure that other parties “*to the Fund*” have insurance in respect of negligence, fraud and dishonesty (same principle as Fund 2 but more stringent requirements) however no general indemnification of trustees by the Fund.

Practical issues arising for trustees cont...

Examples of insurance provisions in fund rules

- **Fund 4** – Same as Fund 1 however “*negligence*” is replaced by “*gross negligence*” in both instances – implications?
- **Fund 5** - Board shall insure the Fund, the trustees and **any service provider** and the assets of the Fund against such risks as it deems desirable – does not include officers but does include service providers (compliant with reg 30(2)(u))? Trustees and PO not liable for acts and omissions made in good faith save for wilful or fraudulent wrongdoing.

Practical issues arising for trustees cont...

Summary – what actions of trustees and officers should be covered?

- Should the Fund's indemnity policy cover only dishonesty and fraud as per regulation 30(2)(u)? Should it be extended to gross negligence? Or even negligence?
- Should the Fund provide an indemnification in favour of trustees and officers? Should the indemnification mirror the provisions of the policy? Should the policy cover only the Fund or also the trustees and officers?
- Should the rules specify that Third Party Service Providers must have indemnity cover and the extent thereof (should it be specified)?

Practical issues arising for trustees cont...

- **Issue 2 – Does the policy of insurance cover the costs of litigation and when does that kick in?** For example, what if there is a claim of negligence but trustee is found to be grossly negligent – trustee reimburses fees? Or if insurer deems there is no negligence and a court reaches a different finding – fees covered retrospectively?
- **Issue 3 – Cybercrime cover:** should it be extended to cover actions of completely independent third parties? What if a member suffers the loss and not the Fund?
- **Issue 4 – What is the appropriate level of cover?**

