

Member's rights and trustee duties, where should the emphasis be?

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Abstract

The article looks at the member' rights and trustees duties and determines whether the emphasis should be. It is determined in this article whether the trustees owe fiduciary duties to both the fund and members and further determines whether the trustees should advance the interests of the members. The article further looks at the governance of the retirement funds and argues that the proper governance of these funds protects the interest of the members. The duty to disclose of information to members is of paramount importance to ensure that members are able to make well informed decisions. The article considers the issues of disclosure of information from other countries, United Kingdom, United States and Malawi. The articles argues that trustees must be persons who are trustworthy and have the best interest of the members at heart and must therefore familiarize themselves with the laws that regulate their duties

Keywords: Trustees, members, pension, retirement annuity, investments and governance

1. Introduction

According to Marumoagae "section 7C(2) of the Pensions Fund Act¹ (hereinafter referred to as the Act) outlines the general duties of the boards of retirement funds.

¹ Act, 24 of 1956.

Over the years there has been much debate in the retirement fund industry as to whom the board, as the managing body of the retirement fund, is accountable.² However, South African courts and tribunals adjudicating pension fund-related disputes and the retirement industry at large seem to share the view that the board of trustees is accountable to both the fund and its members, meaning that the board is required to act in the best interest of the fund and its members”.

Members of the pension funds contribute to pension, provident or retirement annuity funds and some people save enough in this way to be able to live adequately in retirement.³ When the members have contributed in this way, the Act⁴ provides them with particular rights towards their specific fund, for example, members of the fund have the right to elect at least 50% of the members of the board of trustees.⁵ Whilst the rights of members exist, the boards of trustees, on the other hand, are entrusted with a duty to properly administer the pension funds on behalf of members. Trustees are expected to act in good faith and protect the interest of the members.

The trustees are confronted with many difficult decisions on a regular basis and required to have knowledge and understanding of the legal framework in which they operate under as well as the rights of the members under that particular legal framework. At the core of the Act, lie the rights of the members and trustee duties, which are two fundamental aspects and play a significant role for the proper administration of the fund and protection of member’s interest. Often these two aspects are in conflict with each other and thus become necessary, for the development of the pension law jurisprudence, to determine whether the trustees’ duties supersede the

²Marumoagae MC, Do boards of trustees of South African retirement funds owe fiduciary duties to both the funds and fund members? The debate continues, Potchefstroom Electronic Law Journal, 2012 (15) 2, p554. See also *Tex Corporation Provident Fund v Lorentz* 1999 4 SA 884 (SCA) para 15 and *Marais v Momentum Life Pension Fund* Case No

PFA/GA/1459/01/CN (unreported) para 26.

³ Nevondwe L, “South African Social security and retirement reform a long journey towards the redrafting of the New Pension Funds Act”, *Pensions an International Journal*, Palgrave Macmillan Publishers, UK, Vol 15, issue 4, November 2010, p298.

⁴ Pensions Funds Act 24 of 1956.

⁵ Section 7A of the Act.

member's rights or whether member's rights supersede trustee's duties. It is evident that these two aspects complement each other, but the cardinal question that remains is that where should emphasis be when these aspects are in conflict with each other.

2. Rights of the members

Member rights have been explicitly outlined in the Act in various sections. In most instances the custodians of these rights are not aware of their existence. The Act however places a duty on the trustees to inform members of their rights, benefits and duties in terms of the rules of the fund.⁶ However in some determinations it has been found that the trustees have not acted in the best interest of the members as they are required by the Act.⁷ This is often perpetuated by the fact whilst the trustees are aware of their duties as conferred by the Act they are also enlightened that members are not aware of their rights under the Act, hence they find it easy to disregard members' rights and therefore act for their own personal gain or other ulterior motive.⁸

The knowledge and understanding of members' rights is crucial. In terms of the Act the members are entitled to have access to the rules of the fund, to elect 50% of the board of trustees, to use of actuarial surplus in terms of section 15A of the Act, to be informed quarterly or annually of the interest borne on their investments and to have the pension benefits paid to them timeously. If a member is aware of his or her rights it becomes much easier for the latter to lodge a complaint against board of trustees if they have not acted in his or her best interest.

⁶ Section 7D(c) of the Act.

⁷ Section 7C(2)(a) of the Act.

⁸ For example in 2007 the Fidentia scandal was exposed where the Fidentia Trust misused the trust accounts which were invested on behalf of minors. It was reported that an estimated R689 millions of client funds were unaccounted for. See The Fidentia scandal rolls on into 2008, 16 January 2008, online http://www.fanews.co.za/article.asp?People_and_Companies~12,News~1163,The_Fidentia_scandal_rolls_on_into_2008~3646 accessed 18 January 2013.

The core of the members' rights lies with the governance of the fund. It is when the board of trustees administers the fund properly that the rights and the interests of the members are protected. The board of trustees demonstrates only good faith towards the members of the fund by keeping them informed of the interests they have in the fund and also by ensuring that members are not prejudiced when the board is performing its functions.⁹

It therefore becomes necessary to determine what remedy is available for the member who has been prejudiced by the decisions of the trustees simply because members need to be assured that pension laws in South Africa are intact and thus provides penalties to trustees who are in breach of their fiduciary duties. It is imperative for the members to note that trustees are personally liable for any loss caused by the actions of the board, being jointly and severely liable with the other trustees even where they were not individually involved in the 'wrongful act' causing the loss.¹⁰

The member who wants to enforce his rights may do so by lodging a complaint to the Office of the Pensions Funds Adjudicator (OPFA). A complaint lodged with the Adjudicator should contain the following information:

- Full personal details, including all contact details
- Full details of the employer/fund/respondent, including all contact details
- History of employment and membership of the fund
- Full specifics of the complaint, with particular reference to the definition of a complaint, contained in section 1 of the Act
- Proof that the respondent had been approached prior to the submission to the Adjudicator (this could either be a copy of the letter, a fax confirmation sheet or a copy of proof of registration of the document)

⁹ Marumoagae MC, "Do boards of trustees of South African retirement funds owe fiduciary duties to both the funds and fund members? The debate continues", Potchefstroom Electronic Law Journal 2012 Volume 15 No 2, p559.

¹⁰ See in *Knight v Mitchell Cotts Pension Fund* [2002] 8 BPLR 3765 (PFA) the Adjudicator stated that the duties of a trustee are onerous with potential personal liability attaching to a failure to comply with those duties.

- A copy of the respondent's response, if available
 - All relevant (and only relevant) documents in support of the allegations/dispute
- Details of the remedy sought.¹¹

In South Africa, an interested person may make a complaint relating to the administration or investments of the fund or the interpretation and application of its rules, alleging that decisions were in excess of powers or an improper exercise of powers or that the complainant sustained or may sustain prejudice in consequence of the maladministration of the fund or that a dispute of fact or law has arisen.¹²

The Act provides a procedure which the member must comply in order to lodge a complaint. This procedure is regulated by section 30A of the Act. Accordingly, the complainant has to lodge a written complaint to the fund.¹³ The board of the fund has to consider the complaint and, the board of the fund or the employer must respond in writing to the complainant within 30 days from date of receipt of the complaint.¹⁴

If the fund or the employer who participates in the fund does not respond within the 30 days period or the complainant is not satisfied with the response, the complainant may lodge a complaint, in writing, with the OPFA.¹⁵ This includes electronic mail and fax. The complainant may submit his or her complaint in any language and the OPFA will, if necessary, obtain a translation of such communication. The office's documentation on how to submit a complaint has also been translated into various languages commonly used in South Africa. Personal and telephonic contact is usually conducted in the

¹¹ See online www.pfa.org.za under 'procedures' accessed on 18 January 2013.

¹² Hayton D, The extent of pension trustees' obligations in South Africa, p3, online, <http://www.pensionlawyers.co.za/downloads/files/DAVID%20HAYTON%20TRUSTEES%20S%20aFRICA.pdf>, accessed 20 January 2013.

¹³ Section 30A(1) of the Act.

¹⁴ Section 30A(2) of the Act.

¹⁵ Section 30A(3) of the Act.

complainant's preferred language. The OPFA has also placed the procedures on how to lodge the complaint in the website.¹⁶

The trustees are entrusted with the duty of protecting the interest of the beneficiaries, It is therefore imperative that the trustee must refrain from engaging in conduct where their interests are conflict with their duties towards their members.¹⁷

3. Duties of the trustees

The board of trustees is the managing and controlling body of the fund and should operate independently of the employer, members and other stakeholders of the fund. The board of trustees retrieve their duties under the Act and the rules of the fund.¹⁸ Both the Act and the rules of the fund are binding on the fund and its members.

Section 7C of the Act provides the objects of the board. Accordingly, the objects of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.¹⁹ In pursuing its object the board shall-

- take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;²⁰
- act with due care, diligence and good faith;²¹
- avoid conflicts of interest;²²

¹⁶ The OPFA website is www.pfa.org.za.

¹⁷ Marumoagae MC, *opcit*, p562.

¹⁸ See also Marumoagae MC, *op cit*, p562.

¹⁹ Section 7C(1) of the Act.

²⁰ Section 7C(2)(a) of the Act.

²¹ Section 7C(2)(b) of the Act.

- act with impartiality in respect of all members and beneficiaries.²³

In *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood & Allied Workers Union*,²⁴ the Court remarked that section 7C of the Act created statutory duties that overlap with the pre-existing common law fiduciary duties of the board.²⁵

Section 7D of the Act on the other hand contains the duties of the board. Accordingly, the duties of a board shall be to-

- ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;²⁶
- ensure that proper control systems are employed by or on behalf of the board;²⁷
- ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;²⁸
- take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;²⁹
- obtain expert advice on matters where board members may lack sufficient expertise;³⁰
- ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001³¹ and all other applicable laws.³²

²² Section 7C(2)(c) of the Act.

²³ Section 7C(2)(d) of the Act.

²⁴ (2007) 28 ILJ 2701 (W).

²⁵ (2007) 28 ILJ 2701 (W) at para 21.

²⁶ Section 7D(a) of the Act.

²⁷ Section 7D (b) of the Act.

²⁸ Section 7D(c) of the Act.

²⁹ Section 7D (d) of the Act.

³⁰ Section 7D (e) of the Act.

³¹ Act 28 of 2001.

³² Section 7D (f) of the Act.

From the above statutory mandate, it can be deduced that the Act ensures that the best interest of the members are at the heart of the board. It cannot be disputed that the members of pension funds are amongst the major stakeholders in their respective funds and that they have interests vested therein.³³ However, it has been argued that the board of trustees is not obliged to advance interests of the members but only take all reasonable steps to protect such interest as reflected in terms of the rules of the fund and the provisions of the Act.³⁴

The question that needs to be asked is whether the board owes a fiduciary duty towards both the fund and its members? The board has been held to owe a fiduciary duty to the fund and to its members and other beneficiaries.³⁵ In other words, as a fiduciary, under the common law the board may not exceed its powers; exercise its powers for an improper or collateral purpose; and fetter its discretion. In addition, board members may not place themselves in positions in which their personal interests may possibly conflict with those of the fund.³⁶ It has however being argued that the board of trustees owes fiduciary duties only to the fund it serves and not to members of the fund this is because a fiduciary duty arises in the context of a fiduciary relationship, which relationship is based on the principle of loyalty.³⁷ According to this argument, it would seem that at the very best the board owes a duty of good faith towards the members of the fund rather than fiduciary duty.

According to Marumoagae "having been entrusted with the duty of protecting the interest of the beneficiaries, the trustee is not supposed to make a secret profit at the beneficiaries' expense or to place himself in a position where his interests conflict with his duty to the beneficiaries".³⁸ In *Doyle v Board of Executors*³⁹ the court held that a

³³ Marumoagae MC, *op cit* at page 564.

³⁴ Marumoagae MC, *op cit* at page 564.

³⁵ See Mdluli SM, "The Role of the Board of a South African Defined Contribution Pension Fund that Offers Investment Choice", *The South African Mercantile Law Journal* (2011) 23, p251.

³⁶ *Ibid.*

³⁷ Marumoagae MC, *op cit* at page 555.

³⁸ Marumoagae MC, *op cit* at page 563.

trustee undoubtedly occupies a fiduciary office which imposes upon a trustee the duty of utmost good faith towards all beneficiaries, whether actual or potential.⁴⁰ As far as trusts are concerned, the trustees owe fiduciary duty to the beneficiaries of the trust. However, the position is different with regard to retirement funds, which possess independent legal personality under South African law.⁴¹

The trustees' duties need to be linked with the duties of the directors under the new Companies Act⁴² and King III report and its code of conduct. The King III preaches the principles of good corporate governance and these principles needs to be accepted by the Board of Trustees of retirement funds and these will go a long way to addresses the challenges faced by trustees to act in the best interests of their members and act in good faith.

According to Nevondwe "the King III Report was prompted by changes in international governance trends and the changes and reforms implemented by the Companies Act. One of the very purposes of the Companies Act is to encourage transparency and a high standard of corporate governance as a means of promoting the development of the South African economy. The King III Report, which sets out a number of key corporate governance principles, must be read together with the Code, which sets out best practice recommendations on how to carry out each principle. The Code regulates directors and their conduct not only with a view to complying with the minimum statutory standard, but also to seek to adhere to the best available practice that may be relevant to the company in its particular circumstances. The Institute of Directors in Southern Africa issues Practice Notes to the King III Report. These notes are intended to provide guidance to entities on implementing the key principle and should be read

³⁹ 1999 2 SA 805 (C) 813A-B.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Act, 71 of 2008.

together with the principles contained in the King III Report". The trustees need to anchor these principles which have already been accepted by the government".⁴³

Nevondwe and Mhlaba suggests that "the discussion paper issued by National Treasury titled Social Security and Retirement Reform which was issued in 2007 also recommends the strengthening of the governance of retirement funds. This paper proposed that the trustees need to protect its member's retirement savings from erosion by risk premium costs by setting minimum allocations of contributions to retirement savings, compulsory preservation and portability, regulated minimum early withdrawal benefits and restricted deductions".⁴⁴

3.1. Governance of retirement funds

Policymakers around the world have robustly debated the efficacy of a retirement fund governance model which relies heavily on the expertise of pension fund trustees.⁴⁵ In a financial world of increasing complexity that demands high levels of expertise, it is widely believed that many trustees may lack the competence to make investment decisions consistent with the best interest of beneficiaries (members).⁴⁶ Another problem is conflicts of interest in the way that trustees discharge their duties to the beneficiaries of the fund.⁴⁷

Pension fund failures do not occur often, but when they do, the consequences can be disastrous, especially for members who have spent their entire lives contributing, only to find their benefit compromised. A severe loss in fund asset value may arise from many causes for example poor investment performance, defective fund management,

⁴³Nevondwe L, Corporate governance principles: lessons to be learnt, *The Thinker*, Volume 44, October 2012, p16.

⁴⁴ Nevondwe LT and Mhlaba MW, *Judicial Activism and Socio-Economic Rights in South Africa* (2012), p223.

⁴⁵ National Treasury Presevation, Portability and governance for retirement funds, 21 September 2012, p25.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

or even fraud. In almost all cases, however, there is an underlying failure to exercise appropriate and sufficiently rigorous standards of fund governance.⁴⁸

Good corporate governance of pension funds is essential for pension fund trustees to comply with their fiduciary duties and other obligations. It minimises risks and maximises efficiency.⁴⁹ Good governance of pension funds coupled with compliance with fiduciary duties will ensure that the standard of managing pension funds by pension fund trustees improves in the future; this will greatly benefit all concerned in the retirement industry and at the same time limit the exposure of pension fund trustees to personal liability.⁵⁰

Governance regulations should also aim at controlling the potential conflicts of interest that can arise between the entities involved in the administration of the pension fund, on the one hand, and the plan members and beneficiaries on the other.⁵¹ It has been proposed that there is a need to improve supervision so as to address fraud, conflicts between the interests of those responsible for managing retirement savings and their duties to the funds and their members and the exposure of members to excessive risk.

In order to protect the rights of the members the board should communicate aspects of the fund, including the performance of the fund's investments, which are of relevance to members and which will assist the membership of the fund to assess the credibility and trustworthiness of the administration of the delivery of benefits. The fund should establish a communication policy reflecting the board's commitment to this and other aspects of disclosure decided by the board, which should be made available to the membership of the fund.⁵²

⁴⁸ National Treasury, Retirement Fund Reform a discussion paper, December 2004, p 7-8.

⁴⁹ Sigwadi M, "The Personal Liability of Pension Fund Trustees for Breach of Fiduciary Duties" The South African Mercantile Law Journal (2008) 20, p342.

⁵⁰ *Ibid.*

⁵¹ Yermo J and Marossy A "Insurance and private pensions compendium for emerging economies: Pension Fund Governance", 2001 at para 93.

⁵² PF 130 Circular, Principle 10, para 61.

All communication with members, beneficiaries and the stakeholders should be responded to promptly by or on behalf of the board and with thoroughness and respect. In particular complaints by members or any other person, which are directed to the fund, should be treated seriously at least and noted by the board.⁵³

Where a fund offers member investment choice, the details of the investments in respect of which members may make an election should be described setting out the severity of any associated risk and the performance benchmarks, as well as the underlying type of investments.⁵⁴ Members should be able to make an informed decision from the information. Members should also be reminded periodically of the need to review the investment choices made by them. In a defined contribution arrangement with individual investment choice, it should be made clear that the member bears the investment risk.⁵⁵ In certain cases the fund may require that basic training be provided by the fund to ensure that the members understand the operations of the fund and investments.⁵⁶

The fund's investment performance, the average costs per member and also, in respect of any fund which has independent board members, the fees and disbursements paid to or in respect of them, must be communicated to members at least once a year. Members should also be aware of who the service providers of the fund are.⁵⁷

For pension fund governance to be effective, suitability standards are essential to ensure integrity and professionalism in managing pension funds. Given the pivotal fiduciary role that trustees play, it is critical that they have appropriate professional qualifications and experience to deal with the complexities surrounding pension funds.⁵⁸

⁵³ *Ibid*, para 62.

⁵⁴ *Ibid*, para 63.

⁵⁵ *Ibid*, para 63.

⁵⁶ *Ibid*, para 63.

⁵⁷ *Ibid*, para 65.

⁵⁸ National Treasury Presevation, Portability and governance for retirement funds, 21 September 2012, p26.

The Government reissued Regulation 28 in 2011, which sets out the prudential framework under which retirement funds must invest their assets.⁵⁹ The regulation establishes principles by which trustees are required to determine their investment policies, and sets maximum permissible limits for investment by asset class and by issuer to ensure that funds are adequately diversified.⁶⁰

Trustees are required to invest assets in the best interests of the members of the fund. In addition, they are now required to consider the environmental and social factors underlying investments.⁶¹ This gives trustees the opportunity, where they deem it in the best interests of their members, to align their investment policies more consistently with national goals, such as contributing to infrastructure development⁶²

3.2 Organization for Economic Co-operation and Development (OECD) guidelines on pension fund governance.

Principles of Corporate Governance provide a useful general framework for pension fund governance. According to the OECD, the governance regulations must also address various governance mechanisms:

- internal controls to address conflicts of interest, ensure adequate incentives through performance reviews and appropriate compensation, and ensure efficient communication channels within the pension fund.
- disclosure of relevant information to pension fund members on a timely and clear manner.

⁵⁹ National Treasury, Strengthening savings, an overview of the proposals announced in 2012 budget, 14 May 2012, p15.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

- redress mechanisms for pension plan members and beneficiaries to discipline mismanagement by those responsible for the operation and oversight of the pension fund.

The overriding responsibility of the governing body of a pension fund should be to serve the interests of the members and beneficiaries of the pension plan.⁶³ The best interest of plan members and beneficiaries is normally identified with their best financial interest.⁶⁴ In order to be effective in protecting the interests of plan members as beneficiaries or owners, governance regulations must identify clearly those responsible for the administration of the pension fund with this exclusive aim and hold them accountable for their actions. Accountability over governance functions is particularly important in order to allow the supervisory authority and the plan members and beneficiaries to sanction or discipline the governing body in case of bad management. One form of accountability that can give significant sanctioning power is personal liability.⁶⁵

The OECD further puts a lot of emphasis on the duty placed on the governing body to disclose information to the members. Accordingly, the duty of disclosure of accurate and relevant information to pension plan members and beneficiaries in a clear and timely manner is a basic responsibility of the governing body, irrespective of the type of fund.⁶⁶

The cardinal question is what information eligible to be disclosed to pension plan members without the breaching a fiduciary duty? All pension plan members should receive, on joining the plan, the fund by-laws, statutes, or rules and related documents. These documents should state clearly the objectives of the pension fund (including a

⁶³Yermo J and Marossy A “Insurance and private pensions compendium for emerging economies: Pension Fund Governance”, 2001 at para 54.

⁶⁴ *Ibid* at para 62.

⁶⁵ *Ibid* at Para 75.

⁶⁶ *Ibid* at para 99.

simplified, easy to understand description of the investment policy of the fund) and the rights of plan members and beneficiaries. Material changes in these objectives or rights should be reported to pension plan members and beneficiaries in a timely manner.⁶⁷

Members and beneficiaries have legal right to basic information about the pension plan, including adequate information regarding their rights of access, anticipated contribution and/or benefit accrual rates, vesting schedules, other rights and obligations, investment policy, the names and manner of contacting responsible parties for plan administration and governance, and claims processes or procedures.⁶⁸ In addition, where members direct their own investments in an occupational pension plan, they have the right to a number and diversity of investment choices sufficient to permit them to construct an appropriate investment portfolio in the light of their own individual circumstances and in the context of the particular pension programme.⁶⁹

Members should also be provided with complete information regarding investment choices that is standardised and readily comparable. At a minimum, this information should include disclosure of all charges, fees and expenses associated with each investment choice, as well as portfolio composition and historical investment performance data.⁷⁰ This is the approach that the United States has taken.⁷¹

4. Lessons to be learnt from other countries

4.1. The position in the United States of America (USA)

⁶⁷ *Ibid* at para 100.

⁶⁸ OECD, “Guidelines for the protection of rights of members and beneficiaries in occupational pension plans” at p11.

⁶⁹ *Ibid* at page 13.

⁷⁰ *Ibid* at page 13.

⁷¹ Mdluli SM, “The Role of the Board of a South African Defined Contribution Pension Fund that Offers Investment Choice”, *The South African Mercantile Law Journal* (2011) 23, p 259.

The Employee Retirement Income Security Act⁷² (ERISA) defines a fiduciary as anyone who exercises discretionary control or authority over plan management or plan assets, anyone with discretionary authority or responsibility for the administration of a plan, or anyone who provides investment advice to a plan for compensation or has any authority or responsibility to do so. Plan fiduciaries include, for example, plan trustees, plan administrators, and members of a plan's investment committee. ERISA protects plans from mismanagement and misuse of assets through its fiduciary provisions.⁷³

The primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses.⁷⁴ Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses. In addition, they must follow the terms of plan documents to the extent that the plan terms are consistent with ERISA. They also must avoid conflicts on behalf of the plan that benefit parties related to the plan, such as other fiduciaries, service providers, or the plan sponsor.⁷⁵

ERISA provides for penalties to fiduciaries that do not follow the principles of conduct accordingly such fiduciaries may be personally liable to restore any losses to the plan, or to restore any profits made through improper use of plan assets.⁷⁶

The disclosure of information to members of the fund regarding investment choices is significant in the United States and this forms part of good governance of pension funds. Where a fiduciary provides incorrect information or without good cause fails to

⁷² Employee Retirement Income Security Act of 1974. ERISA was enacted into law in 1974 and protects the assets of millions of Americans so that funds placed in retirement plans during their working lives will be there when they retire. This federal law sets minimum standards for pension plans in private industry.

⁷³ Sections 403, 404 and 409, 29 USC 1103, 1104, and 1109. See also United States Department of Labor, What protections do the fiduciary rules of ERISA provide? online http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html, accessed on 02 February 2013.

⁷⁴ United States Department of Labor, What protections do the fiduciary rules of ERISA provide? online http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html, accessed on 02 February 2013.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

provide relevant information, this would constitute a breach of fiduciary duty.⁷⁷ The plan sponsors must allow members the opportunity to make investment decisions and to prevent them from being misled or misinformed. This however does not require a plan sponsor to guarantee that all material facts are conveyed to members. Rather, ERISA prohibits the plan sponsor from concealing facts, and requires it to speak truthfully when it chooses to do so.⁷⁸

4.2. The Position in the United Kingdom (UK)

In the UK the composition of pension boards is regulated by the UK Pension Act 2004. Similar to the South Africa and United States, Pension fund trustees in the UK manage billion pound investment funds. They negotiate with corporate sponsors over funding of occupational pension plans on behalf of the membership.⁷⁹ Thus their elite profile is increasing as they are seen as increasingly powerful figures controlling major financial resources within the business community.⁸⁰ The trustees continue to owe fiduciary duties towards the members and this encompasses the duty to act in their best. These fiduciary duties are said to override all other aspects of trusteeship.⁸¹

Similar to South Africa, the UK provides penalties for trustees who breach their fiduciary duties. Accordingly, all appointed, elected or independent trustees are personally and collectively liable for losses from any breach of duty or misuse of scheme assets.⁸² Trustees must be able to demonstrate that they are able to act impartially without their decisions being tainted by actual or perceived conflicts.

⁷⁷ Mdluli SM, *opcit* at page 260.

⁷⁸ *Ibid.*

⁷⁹ Sayce S and Mustafa O, Pension trusteeship and diversity in the UK: A new boardroom recipe for change or continuity? at p5, online, <http://eid.sagepub.com/content/early/2012/10/17/0143831X12462489.full.pdf>, accessed, 18 February 2013.

⁸⁰ *Ibid* at page 5-6

⁸¹ *Ibid* at page 6.

⁸² *Ibid* at page 6.

The challenge in the UK is that Pension fund members who enquire about an ethical issue often encounter the seeming paradox of being told that their views must be ignored because of the trustees' fiduciary duty to act in their best interests. But are trustees legally restricted to interpreting this duty only in terms of financial best interests?⁸³

Any discussion of what is in beneficiaries' 'best interests' inevitably raises the question of who decides what those best interests are.⁸⁴ Historically, the fiduciary relationship has been assumed to be a more or less paternalistic one, where trustees are left to decide what will serve beneficiaries' interests with minimal regard for the views of beneficiaries themselves. But is this still appropriate?⁸⁵

It has been submitted that it is difficult to maintain the argument that members and beneficiaries should have no say at all in how their money is managed, moreover, with the shift towards DC arrangements; they increasingly bear the investment risk.⁸⁶ In the premise, it has been suggested that there is a need to clarify the extent to which members' views may be taken into account by trustees if it has not been possible to ascertain the views of all members, and to guarantee members an adequate level of disclosure and consultation.⁸⁷

4.3. The position in Malawi

Prior to the Pension Act, 2011 pension in Malawi was offered voluntarily through privately managed occupational schemes. The pension schemes were registered with the Commissioner of Taxes of the Malawi Revenue Authority. However, no regulatory

⁸³Berry C, "Protecting our best interest: Rediscovering fiduciary obligation", March 2011at p5. Online, www.fairpensions.org.uk, accessed 18 February 2013.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at page 6.

⁸⁷ *Ibid* at page 6.

framework existed before.⁸⁸ The Third Schedule of the Taxation Act⁸⁹ did not make it mandatory for pension funds to furnish members with fund information to ensure that members are informed about their rights and benefits and responsibilities. Pension members and their beneficiaries enjoyed no express right of access to information, such as benefit statements, audited financial statements, fund rules, and so on, concerning their pension rights and benefits.⁹⁰ This was a problem when one considers that access to such information is important to ensure that members are able to make informed decisions and to protect their rights.⁹¹ The ability to have access to information assists members to exercise their rights adequately and make informed decisions. This definitely was prejudicial to members because even if their benefits are misused they wouldn't know. They would just accept what is given to them.⁹² The enactment of the Pension Act was an important development in the financial services sector reforms which began a few years ago in Malawi.⁹³

According to this Act, members of the fund have a right to be provided with fund information as soon as they become members. Fund information includes

- The fund's investment strategy;
- The fund's investment performance and financial position;
- Fees and charges payable by, or borne by, members or beneficiaries in relation to the fund;
- The rights and entitlements of members or beneficiaries under the fund rules and otherwise in relation to the fund;
- The obligation of members to pay contributions under the fund rules; and

⁸⁸ International Organizations of Pension Supervisors, Country Profile: Malawi, October 2011, page 3.

⁸⁹ The Third Schedule of the Taxation Act of 1998 was the only legislation that offered any meaningful regulation of private pension funds in Malawi. See Mhango M and Thejane P, "The Malawi Pension Act: a general commentary on some of its core mandatory provisions with specific reference to sections 9, 10 and 15", *The South African Law Journal* (2012) 129, p761.

⁹⁰ Mhango M and Thejane P, *op cit* at page 762.

⁹¹ *Ibid.*

⁹² See further discussion Mhango M and Thejane P, *op cit* at page 762.

⁹³ Mhango M and Thejane P, *op cit* at page 762.

- The obligations of members to pay contributions under the fund rules and to provide life insurance under the requirements of the Act or as specified by Registrar's Directive.

Members are entitled to receive pension benefits under the following conditions:

- upon reaching retirement age which may be set between 50-70 years;
- on the basis of years of service; currently set at 20 years of continuous service with one employer;
- retired on medical grounds;
- upon leaving Malawi permanently.

5. Conclusions

The question arises whether pension fund trustees in South Africa are sufficiently competent to safeguard all the moneys belonging to members. This question is particularly compelling as there are cases in which trustees have been found not to be acting in the best interests of the members, but for their own personal gain and other ulterior motives.⁹⁴ It is therefore evident that trustees must be persons who are trustworthy and have the best interest of the members at heart. It is recommended that the trustees must familiarize themselves with the provisions of the Act and rules of the fund in order to take informed decisions that protect the interest of the members.

The use of Trustee Toolkit is welcomed and should be encouraged as it helps trustees to be well acquainted with governance of retirement funds, which in turn protects the interests of the members. Acting in the best interest of the fund and its members is the foremost responsibility of the trustees, and often they have to make some very

⁹⁴ Sigwadi M, *op cit* at page 331. See also the See The Fidentia scandal rolls on into 2008, 16 January 2008, online http://www.fanews.co.za/article.asp?People_and_Companies~12,News~1163,The_Fidentia_scandal_rolls_on_into_2008~3646 accessed 18 January 2013.

challenging decisions.⁹⁵ It is therefore vital for the trustees to have access to online mechanisms which provides a certain level of knowledge and understanding of the Act, Regulation and rules of the fund as well as circulars issued on governance of the fund.

It is evident that the disclosure of information to members is of paramount importance. The trustees must be in good possession to know which information must be disclosed to members and may be in breach of the fiduciary duty if without good cause refuses to disclose relevant information to members. We therefore opine that trustee duties do not supersede the rights of the members, After all if there were no members there wouldn't be any duties bestowed on a trustee. Trustees must therefore aim to protect the interest of the members by complying with the Act, circulars and relevant regulations when exercising their duties.

⁹⁵ Trustees may collectively and individually be held liable for any breach of governance which results in any loss to the fund, members or beneficiaries.