



Retirement Funds and Administrative Law

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Agenda

1. Introduction
2. Can the fiduciary obligation apply simultaneously with administrative law requirements?
3. What is the nature of the board's function?
4. Does the board exercise a public power or perform a public function?
5. Does legislation applicable to retirement funds give any guidance on the issue?
6. Is it more beneficial, from the aspect of the member or beneficiary, for the board to owe them a fiduciary obligation rather than be subject to administrative law requirements?

Introduction

Case law has conflicting decisions:

- Administrative law applies: Titi v Funds at Work Umbrella Pension Fund (death benefit) (1728/2010) ECD)
- Administrative law does not apply: Gerson v Mondi Pension Fund 2013 JDR 1465 (GSJ) (decision of trustees not to recognise a pensioner spouse), Moropa v CINPF unreported case 10068/2020 Gauteng (termination of administrator appointment)
- No consensus as to whether administrative law applies (PSA v GEPF [2020] 4 All SA 710 (SA))

Usually around whether audi alterem partem and functus officio apply.

Can the fiduciary obligation apply simultaneously with administrative law requirements?

- There are different requirements for each:-
 - Administrative law requires-
 - Procedural fairness (*audi alterem partem*, right to make representations)
 - Discretion must be exercised correctly
 - Can require reasons
 - Fiduciary obligation requires-
 - Must apply the Fund rules
 - Must act with “*the care, diligence and skill that can reasonably be expected of a person who manages the affairs of another*” ie in the best interests of the person to whom duty owed
 - Must exercise an independent discretion, act in best interests of beneficiary
 - Must give an account
 - Avoidance of any situation, relationship that conflicts or perceived to conflict with duty

Can the fiduciary obligation apply simultaneously with administrative law requirements (cont)?

- There are different consequences for an incorrect/invalid decision:-
 - Administrative law –
 - *Functus officio* once decision made even if not yet carried out
 - Decision may be voidable if incorrect
 - Fiduciary obligation-
 - *Functus officio* does not apply if decision not yet carried out
 - Person affected has a claim for damages in delict (duty of care applies automatically)

Can the fiduciary obligation apply simultaneously with administrative law requirements (cont)?

- There are different remedies for a breach of each:-
 - Administrative law –
 - PAJA applies, with time limits
 - Decision may be voidable if incorrect
 - If set aside decision is remitted back to decision maker or is in certain circumstances made by court
 - Fiduciary obligation-
 - *Functus officio* does not apply if decision not yet carried out
 - Person affected has a claim for damages in delict (duty of care applies automatically)
 - Personal liability of trustees

The answer is “No”, at least in respect of each function of the board

What is the nature of the board's function?

In general terms the board:

- Ensures contributions are received
- Invests the assets of the Fund
- Manages the expenses of the Fund
- Adheres to regulatory requirements
- Exercises a discretion iro benefits (surplus, death benefit, withholding of benefit, etc)
- Communicates with stakeholders

In all of these it exercises a discretion.

Does the board exercise a public power or a public function?

In general terms the need for a body of administrative law is necessary in a democratic state to balance the coercive power of the state.

Without administrative law a citizen has very little rights against capricious, arbitrary and irrational acts and decisions of state functionaries.

Thus the prerequisite that there must be the exercise of a public power or a public function for the requirements of administrative law to apply.

Does the board exercise a public power or a public function? (cont)

It is not only an organ of state that can exercise a public power or a public function, but also a private entity (JSE, a private voluntary regulator of micro finance)

Some relevant questions to see if the board of a fund exercises a public power or public function (compare with FSCA in **bold**)-

- Do the board's powers derive from statute or the rules?
 - *The rules – see Tek v Lorenz [2000] 3 227 (SCA): what trustees can and cannot do is circumscribed by the rules. The fact that the PFA imposes restrictions on those powers is beside the point; see also s 13 PFA*

Does the board exercise a public power or a public function? (cont)

- Do the board's powers derive from statute or the rules (cont)?
 - *The fact that a fund, which would otherwise exist as a legal entity in a different way (universitas), is required to be registered under the PFA does not in itself mean its powers derive from statute (cf private company)*

FSCA - clearly derives its powers from statute

Does the board exercise a public power or a public function? (cont)

Some questions (cont)-

- Do the fund's rules (from *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2006 (11) BCLR 1255 (CC)*)-
 - Apply to the public in general or to a section of the public –
 - *Only to a section of the public* **FSCA – to the public in general**
 - Amount to a coercive arrangement (eg you can only be a microlender to the public if you will adhere to these rules)
 - *The nature of fund rules is different: their purpose is to provide a protective framework for savings. **FSCA powers are clearly coercive***

Does the board exercise a public power or a public function? (cont)

Some questions (cont)-

- Do the fund's rules-
 - Relate in any way to a legislative framework and purpose?
 - *They are the result of, not the means through which is achieved, the legislative framework*
 - FSCA structure and rules are related to a clear framework and purpose**
- Is membership established by contract (ie private arrangement)?
 - *Yes, retail funds have voluntary membership; occupational funds as a consequence of choosing employment with a particular employer*
 - FSCA – no private contractual arrangement**

Does the board exercise a public power or a public function? (cont)

Some questions (cont)-

- Do retirement funds carry out a constitutional obligation of the state (social security), especially as they are incentivized by the state through tax breaks?
 - *It is not compulsory to save for retirement*
 - *The tax breaks are an incentive not to become dependent on the state after retirement, when the constitutional obligation would apply*
 - *There is in any event social security albeit that it is very limited, just as there is a public health care system which those who can afford to choose not to benefit from*

FSCA carries out a constitutional imperative to regulate capital markets and oversee institutional savings

Does legislation applicable to retirement funds give any guidance on the issue?

- S 7C(2)(f) of the PFA –

The board has a *“fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act”*

- S 2(b) of the Financial Institutions (Protection of Funds) Act –

Must observe the utmost good faith and exercise the care and diligence of a trustee (repeated in s 37 of COFI Bill)

Is it more beneficial, from the aspect of the member or beneficiary, for the board to owe them a fiduciary obligation rather than be subject to administrative law requirements?

- Fiduciary requirements-
 - Appear more onerous in relation to members and beneficiaries cf slide 3
 - Have more serious consequences for trustees if breached cf slide 4
 - Are less onerous in relation to process, and thus less expensive for fund:
 - Compare for eg death benefit process as administrative process
 - Other functions of board cf slide 6, how is the administrative process applied iro investment decisions, appointment of service providers, etc

Is it more beneficial, from the aspect of the member or beneficiary, for the board to owe them a fiduciary obligation rather than be subject to administrative law requirements? (cont)

- Fiduciary obligation is more flexible, by extension of the test in *Phillips v Fieldstone Africa (Pty) Ltd [2004] 1 AllSA 150 (SCA)*, by imposing greater obligations on the board where the members and beneficiaries are more vulnerable
- What does categorising board's function as a public power or public function, and thus subject to administrative law requirements, add for the benefit of members and beneficiaries that they do not already have in terms of the fiduciary obligation?

Conclusion

- The fiduciary obligation is a well developed body of law in SA, which is found in at least most common law countries. Its fundamental purpose is to protect financial interests of persons who are vulnerable. There are significant corresponding rights enjoyed by persons to whom the duty is owed.
- By contrast administrative law is primarily about balancing the power of the state by giving rights to individuals.
- Retirement savings are fundamentally private in that they belong to the member.
- It is not conceptually possible for the fiduciary obligation to apply to a function which is subject to administrative law requirements
- The fiduciary obligation is able to cover better, from the aspect of the member, every function of the board and is backed by existing legislative provisions



THANK YOU

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