

Liberty Corporate

The Fiduciary Duties of Retirement Fund Trustees



Inside this brochure

- Trusts and trustees
- General and specific fiduciary duties
- Individual investment choice
- The effect of the Constitution's Bill of Rights on retirement funds



*Only morality in our actions
can give beauty and dignity
to our lives.*

Albert Einstein

Introduction

Are you ...

- an employer who operates a retirement fund for your employees?
- a director of such an employer?
- a member of a board of management or an appointed trustee of a retirement fund?
- “in charge” of, or an employee of such a fund?
- a director, official, employee or agent of an insurer, a bank, a trust company or firm of administrators which deals with retirement funds and/or their assets?
- a member of a fund and about to be appointed as a trustee of the fund?

Or do you just work with retirement funds?

If the answer is yes to any of these questions, then you are probably a “trustee” and don’t even know it, in which case, this could become the most important book that you read all year.

If you have been involved in the management of retirement funds for some time, much of the content of this book will probably be old news. However, you may be surprised to learn what the position you have occupied for so long requires of you, or that because you are regarded as a “trustee”, certain duties are expected of you.

If you are such a person, this book should prove valuable in performing your duties as a trustee with all the honour, diligence and competence which is required.

Some of what you will read in this book may appear daunting, but as long as you administer your fund in accordance with the fund rules and always act in good faith, what may make you apprehensive at first will soon follow naturally. Let your conscience be your guide, tackle your duties with enthusiasm and pretty soon you will be reaping the rewards of a job well done.

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Preface

Questions regarding the fiduciary duties of trustees and the degree of care which the law expects them to exercise in their handling of the affairs of the trust property under their control, are never completely certain, yet they invariably arise with monotonous regularity.

As the law of trusts and trustees in South Africa is based largely on common law which is subject to interpretation by our courts, and because questions of right and wrong in respect of trusteeship are fundamentally contingent upon circumstance, the contents of this book should be regarded only as a very general guide to the principles involved.

Liberty has always taken pride in our contribution towards the continued advancement and dissemination of knowledge in our industry. The aim of this book is to continue this tradition and provide trustees of retirement funds, people employed in the retirement funds industry and other interested persons, with a general understanding of the responsibilities entrusted to and expected of trustees, with emphasis on the law as it relates to trustees of retirement funds.

NOTE:

For ease of reference, a trustee has been referred to throughout this book in the male gender. However, this reference automatically includes the female gender.

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We all live with the
objective of being
happy; our lives are
all different and
yet the same.

Anne Frank



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Chapter 1

Trusts and Trustees

1.1 The concept of trusts and trustees

A trust is a legal vehicle used to hold certain assets which have been set aside for the use by, or benefit of, one or more beneficiaries at some future date. Such benefit is usually dependent on the occurrence of some or other defined event. Trust assets are not owned by the trust, but are held usually by trustees in the name of the trust or by the beneficiaries. However, the assets of pension funds, as defined in the Pension Funds Act No. 24 of 1956, are capable of being held by the fund (the trust) itself because the fund is, in terms of section 5 of this Act, a separate entity, capable of holding its own property. As such, it is legally distinct from the employer, the employees and any trustees.

Trust assets, the rules relating to their use and other conditions governing the trust, are generally defined in a deed of trust or some other trust instrument, such as the rules of a fund. The persons controlling or “in charge” of the trust, as well as certain other persons, are trustees. These trustees stand in what is known as a fiduciary relationship to the trust.

This fiduciary relationship and the manner in which the trustees are to deal with the trust and its affairs, including its assets, are regulated by:

- The requirements and provisions contained in the trust instrument (fund rules).
- Statute.
- Common law.

The concept of trusts in South Africa combines aspects of English, Roman-Dutch and South African law. It is important to understand that one must distinguish between trusts and trustees in the narrow sense of the word and trusts and trustees in the wide sense. Trustees in the narrow sense stand in a fiduciary relationship to the trust precisely because of their appointment as trustees, while trustees in the wide sense are regarded as trustees because, for some or other reason, they stand in a fiduciary relationship to the trust. While this may sound confusing, the distinction will soon become apparent.

Where there is more than one trustee, such trustees must, in general, act jointly and make decisions unanimously. They are further liable in solidum for their actions. This means trustees are liable jointly for the actions of their co-trustees. A trustee cannot disclaim liability for the actions of the trustees as a whole, on the grounds that the actions were those of his co-trustees alone.

1.2 What is a trust?

There are many different types of trusts set up for many different reasons and with many different objectives.

A trust can be defined as:

“An arrangement through which the ownership of, or the control of, property of one person is, by virtue of a trust instrument, made over to, bequeathed to, or controlled by another person, the trustee, for the benefit of another or others.”

From this definition, it is clear that the property in question, trust property, must be administered or used according to the provision of the trust instrument for the benefit of the person or class of persons, called beneficiaries, designated in the trust instrument.

One should keep in mind, however, that a deed of trust or other “trust instrument” is not a legal requirement for the establishment of a trust. Trusts can be inferred from the circumstances and need not be in writing. Similarly, in any situation whereby a person, the “trustee”, is charged with the control and/or administration of the property of another, such



“trustee” would still be bound by the appropriate fiduciary duties, notwithstanding the lack of any written document.

Retirement funds and their assets (which constitute trust monies) fall under the definition of a trust and sometimes have their own specific “trust instrument” (usually called a “deed of trust”). Even if no specific deed of trust exists, the fund’s rules constitute a trust instrument. The fund and its assets would then be an example of “any other situation whereby a person is charged with the control and/or administration of the property of another”, in other words, trust property. The persons so charged would be deemed to be trustees, with the consequent fiduciary duties. Where a fund does in fact have, in addition to its rules, a separate deed of trust, this is regarded by the Registrar of Pension Funds (the Registrar) as forming part of the fund’s rules and must be registered along with the fund’s rules.

1.3 Who is a trustee?

A trustee can be widely described, as per Stratford JA in *Zinn NO v Westminster Bank NO*, 1936 AD, as “one who is entrusted with the affairs of another”. The word “trustee” describes, in this wide sense, a person or persons who keep or administer property for someone else. “Trustee” is defined in the Income Tax Act as, inter alia,

“... every person appointed or constituted as such by act of parties, by will, by order or declaration or court or by operation of law ... and any person having the administration or control of any property subject to a trust ... or acting in any fiduciary capacity ...”

This definition clearly indicates that any person “acting in any fiduciary capacity” is regarded as a trustee.

For the purposes of the Pension Funds Act, the members of the “Board of Management” or the “person managing the business of the fund” easily falls into one of these definitions and is therefore a “trustee”, no matter whether he or she is called a trustee, member of a management committee or anything else. These trustees are appointed as such and are often called “the trustees”. The duties and responsibilities of such “trustees” are not affected by the title by which they are known. Amendments to the Pension Funds Act in fact

provide specifically that all trustees shall comply, inter alia, with certain fiduciary duties.

There is also a very broad range of persons, not appointed as trustees and not usually referred to as such, who are regarded in law as standing in a fiduciary relationship to the fund and who have consequent fiduciary duties. These persons would be trustees in the wider sense, those who are not appointed trustees, but who are, at some or other time, “entrusted with the affairs of another”. These “trustees” shall be referred to as “deemed trustees”.

The mere fact that these deemed trustees stand in a fiduciary relationship and have fiduciary obligations to the fund does not, however, make them the appointed trustees.

Examples of deemed trustees in this wider sense would be:

- A person keeping money for someone else, even as between friends.
- A person who looks after a friend’s assets during his or her absence.
- A person who looks after another’s business affairs during such person’s absence.
- A person who borrows a friend’s car.
- A person holding, or administering, even if only for a short while, the assets of a retirement fund.
- Accountants, actuaries, lawyers, employees or administrators, and so on, employed by the fund to perform certain functions.


One does not often think of a person who borrows a friend’s car as being a trustee, but such a person has a duty to “look after” his or her friend’s car; a fiduciary duty.

The Financial Institutions (Protection of Funds) Act provides that where a financial institution, (such as an insurer or pension fund organisation), holds property in trust in its capacity as trustees, then any director, official, employee or agent of the financial institution who invests, keeps in safe custody or otherwise controls or administers any trust property held by the institution for any beneficiary, is regarded as a trustee with consequent fiduciary duties. This Act therefore not only confirms the common law duties of trustees, it also

broadens the incidence of fiduciary duties to include persons who may not normally be affected.

In fact, the combination of common and statutory law definitions of “trustee” are wide enough to embrace virtually every person who has any duty towards, or controls in any way, the assets or affairs of retirement funds.

Pension fund administrators, anyone “managing the business of the fund”, and the directors, officials, employees or agents of financial institutions falling under the abovementioned Act, and anyone holding or dealing with fund assets, even only temporarily, are therefore either appointed trustees or regarded in law as trustees and charged with fiduciary duties.



*Life is like a coin.
You can spend it any
way you wish but you
only spend it once
Lillian Dickson*

Powers and Duties of Retirement Fund Trustees

There are, no doubt, people who will disagree with the premises that deemed trustees should be referred to as “trustees”. However, it is submitted that there are compelling arguments to support this contention; more specifically:

- Our courts, as we have seen, have defined trustees very widely.
- No matter what you call them, certain persons, according to law, have fiduciary responsibilities even if they are not specifically appointed as trustees.
- By not referring to persons who have fiduciary duties (and who are in law deemed as trustees) as “trustees”, there exists a danger that such persons may lose sight of their fiduciary responsibilities.

Section 7A of the Pension Funds Act makes it compulsory for all funds to appoint trustees (Boards of Management) to manage the affairs of the fund. This Board of Management must consist of at least four trustees. The members of each fund are entitled to appoint at least 50% of the trustees and the employer the other trustees. If the members of the fund do not exercise their right to elect trustees, the employer may appoint the trustees. In such a case it is important that

the members were given the opportunity to elect 50% of the board of management.

Appointment of a board of management will not, however absolve other persons, who may owe the fund a fiduciary duty, from liability for failing to exercise their fiduciary duties.

Funds may be exempted from the requirement to have at least four board members. The fund must apply to the Registrar and will have to prove that it is impractical or unreasonably expensive to have four or more board members. In addition certain classes of fund may be exempt from having member elected trustees, such as Umbrella Funds and Retirement Annuity Funds. However, such funds must have trustees who are independent of the sponsor, administrator and investment manager.

Where a life insurer undertakes the functions of the valuator, administrator or investment manager, the incumbent fiduciary duties also fall on the life insurer. Again, this does not remove the duty of monitoring investment performance and so on, for which the trustees would be liable.



1.4 Appointing trustees

An employer who wishes to establish a fund for his employees, is usually the same person who has the power to appoint some of the trustees thereof. This power is one which must be exercised in GOOD FAITH. This means the employer has a fiduciary duty to appoint, as trustees, the most suitable person or group of persons available. In making this appointment, the employer is required to select properly qualified and honest people, those who can be trusted to perform the sometimes difficult duties which will be thrust upon them, who will ensure that the members' interests are properly protected, and who will have the courage to remain independent, notwithstanding their appointment by the employer.

In theory, the ideal situation is for every fund to have a body of trustees who are totally independent of any of the parties involved with the fund. In practice, however, this is seldom possible and the trustee body will usually consist of members of the management of the employer and representatives of the employees.

Such a body of trustees will generally consist of four or more persons and have representatives of both the employer and the employees. This practical arrangement of representatives by the employer and the employees in the management of a fund is acceptable, provided that the parties concerned must fulfil their trustee duties efficiently and totally independently of their duties as employer or employee, as the case may be.

Although the members are entitled to elect 50% of the board of management, this does not mean that a board member, elected by the fund members, must be chosen from their own ranks; he could be any competent person. An employer may not provide fund members with a choice of alternatives for this purpose, although the employer should make any reservations known regarding the inappropriateness, for whatever reason, of the person or persons nominated for appointment by the fund members.

The procedure for the election of trustees by the fund members is not prescribed by the Pension Funds Act. The procedure may be stipulated in the fund's rules and must have a degree of popular acceptance by the members, otherwise it will not stand the test of

time and may well create labour dissatisfaction. Such procedure must ensure that all members have an opportunity to carry out their election freely and in a fair and proper manner. Should the employees not nominate anyone to be elected as member-elected trustees, the employer may appoint the board of trustees. It is important, though, that the employees had an opportunity to nominate members to be elected as trustees.

The position of the member-elected trustee needs specific attention. In some ways, the requirement of representation by a member-elected trustee is anomalous because all trustees, no matter who appoints them, must adhere to the fiduciary duties of fairness, impartiality and independence. Just as it is improper for the employer elected trustees to favour the employer of the fund, it is improper for the member-elected trustee to favour the members. If the Board of Management does its job properly, there would be no need for trustees to be appointed from any particular sector.

The trustee who is elected by the members is not simply a token appointment. He or she will be required to fulfil precisely the same duties and will have the same obligations as the other trustees. For this reason, nominated persons who are not willing or capable of accepting the responsibilities which accompany appointment as a fund trustee, must decline acceptance of the nomination or appointment.

The members of the fund would also be well advised to exercise their choices in electing a trustee wisely. After all, he or she will be dealing with their retirement monies. They should elect only those capable of doing the job properly. The employer, in turn, should allow the member-elected trustee, if he is also an employee, time off from his normal duties to attend trustee training courses to further his education if necessary.

Membership of a Board of Management, and the trusteeship which goes with it, is a team game and all the trustees, no matter by whom they are appointed, must pull together to ensure proper management of the fund. It is not appropriate for employer-appointed and member-elected trustees to consider themselves as occupying different "sides of the fence". The attendance by all trustees at trustee training seminars and so on is

a good way of building the necessary team spirit and motivation. A well-trained Board of Management will enhance the status of the fund and contribute greatly to harmonious labour relations.

1.5 Who may be appointed as trustees?

Depending on the requirements, set out in the trust instrument, or in the fund's rules the following may be appointed as trustees:

- All persons of full legal capacity.
- Minors, if they obtain the necessary consent of their guardian. However, their legal disabilities may cause problems in practice.
- Prodigals, insolvents and other persons subject to certain legal disabilities may be trustees in principle, but their legal disabilities (as with minors) would create practical difficulties. For example, the prodigal's curator would be required to act on his behalf.
- Persons of unsound mind may not be appointed as trustees, because they lack the necessary legal and mental capacity to conduct the affairs of the trust.

While, in theory, insolvents, minors and other people subject to legal disabilities may be appointed as trustees, their disabilities may bring into question their suitability as trustees.

Persons guilty of crimes of dishonesty such as theft and fraud can never be suitable trustees.

1.6 Accepting appointment as a trustee

Persons who are not properly experienced or qualified to accept the sometimes onerous duties expected of a trustee and to perform the administrative and/or managerial function which the trustee will need to perform, or who lack the necessary integrity, should not accept an appointment as a trustee.

A trustee should ensure that his appointment is valid in terms of the fund's rules, because should his appointment not be valid, he could be personally liable for payments made by him from fund assets or any other losses suffered by the fund or its members.

While the **Trust Property Control Act** sets out the legal requirements regarding the appointment of trustees, which most trustees must comply with, registered funds

are exempt from its provisions in terms of section 38 of the **Pension Funds Act**.

The trustee, before accepting appointment, should take the trouble of studying a copy of the fund's rules as registered with the Registrar of Pension Funds, as well as reviewing the minutes of previous trustee meetings. He should not rely on company pamphlets or hearsay about such matters.

He must determine:

- How the fund operates.
- The fund's administrative procedures.
- How many members there are.
- How much money is involved and how it is invested.
- The extent of his powers and duties as set out in the fund rules, and the extent to which the fund is able to indemnify him for losses which the fund may suffer, for which he may be responsible.

The trustee should investigate and clarify any suspicious circumstances, which may indicate previous irregularities and require that all his queries be adequately answered. Should he fail to do so, he could find himself left with the difficult task of having to put right the failings of his predecessor and even, possibly, be liable therefore.

Remember that legal drafting techniques which often seem so long-winded and complicated are actually meant to make such documents unambiguous and easier to understand. The trustee should be meticulous when reading the fund's rules and, in particular, make sure he understands the meaning ascribed to words in the definition section. He may find that words, for the purposes of the document he is reading, do not have the same meanings he has always given them. The trustee must always be extremely thorough and never take anything for granted.

The words "may" and "shall" as contained in a trust instrument or fund rules also have special meanings, which must be remembered. "Shall" indicates that a trustee must do as directed, he has no discretion. The word "may", however, suggests that the trustee has discretion and can act or refrain from acting in whatever way he considers appropriate.

Accept no one's definition
of your life, but define
yourself.

Anonymous

1.7 Some points regarding the contents of a trust instrument

As the law imposes some rather onerous obligations and restrictions on trustees, there are some matters which, if specifically covered in fund's rules, can ease these obligations or restrictions. For this reason, the draftsman of the fund rules should be properly conversant with all the relevant aspects and principles regarding fund's rules. The rules must confer on the trustees very wide powers of investment for instance. Failure to do so may result in the inability of the trustees to consider certain, possibly attractive, types of investment, simply because they are not given the necessary authority.

The following matters should also be considered when drafting fund's rules (this list is by no means exhaustive and persons requiring a trust instrument should have it drawn up by an expert. The extra cost involved will be well worth it):

- The appointment and removal of trustees and member-elected trustees and the conditions thereof.
- Indemnification of the trustee from personal liability should his appointment prove not to be valid.
- Rules regarding meetings of trustees, quorums and the majority required for carrying decisions.
- Exempting the trustee from having to furnish security.
- The trustee's remuneration.
- The trustee's powers, inter alia, to invest the

assets of the fund.

- The trustee's powers to appoint additional trustees/ alternates and employ experts.
- Payment of experts' fees by the fund.
- Provision relating to the indemnification of the fund from losses caused by the negligence, fraud or dishonesty of the trustees and those deemed trustees, by way of fidelity guarantee insurance.
- Indemnification of the trustee from liability for any damages suffered by the fund due to any breach of fiduciary duty, except such breach committed knowingly or intentionally.
- Indemnification of the trustee from liability for any negligent act or breach of fiduciary duty committed by his co-trustees and other persons for which he must take responsibility.

Where retirement funds are concerned, regulation 30 of the **Pension Funds Act** stipulates the minimum requirements as regards the contents of fund rules.



Chapter 2

Fiduciary Duties

2.1 What is a fiduciary duty?

As discovered above, fiduciary duties arise as a consequence of a fiduciary relationship existing between two entities.

With regard to the definitions of trust and trustee, it is clear that the assets of retirement funds constitute trust property. Any person “holding” or “administering” the property of the fund is a “trustee” and, as such, stands in a fiduciary relationship to the fund and owes what is known in law as a fiduciary duty towards that fund. This remains so even if other persons are specifically appointed as the fund’s trustees.

Most of the fiduciary duties and the principles involved have developed from, and are to be found in, the common law. However, there are certain duties which have been laid down by statute, specific examples of which will be referred to where applicable.

A fiduciary duty can be defined as the duty conferred upon a person or group of persons (usually when they control the assets of another), which requires that the person or group of persons, to whom certain powers are given, exercise their powers (as director or trustee for example), for the benefit of the trust and to avoid a conflict between their own interests and those of the trust, never to abuse the power given to them and, at all times, to act in good faith towards the trust. This means a trustee must ALWAYS act in the best interest of the trust, even if it means sacrificing some personal advantage or gain. If a trustee is faced with a conflict of interest and is not prepared to make such sacrifice, he would have to resign as trustee or risk breaching his fiduciary duty.

Fiduciary duties are imposed not only on trustees but also on directors of companies in respect of their dealings with the company for example. As company directors owe the company a fiduciary duty, they can also be regarded as deemed trustees.

While the principles regarding the fiduciary duties of all persons under such duty are very similar, the precise extent and nature of the fiduciary duty will differ and be determined by, inter alia:

- The position held by the trustee.

- The trustee’s role and obligations in relation to the trust.
- Any specific provisions contained in the trust instrument.
- The intention behind the trust.

The fact that a fund is either “underwritten” or “self-administered” is of no consequence regarding a trustee’s fiduciary duties. Some minor differences in the way things are done may result from such a distinction, but otherwise the fiduciary duties are the same. Further, the fact that defined contribution funds are similar in concept to defined benefit funds, does not reduce or affect the fiduciary duties owed by the trustees, neither does it mean that proper trustee management is any less important.

As a trustee’s fiduciary duties are imposed on him by law, he cannot contract out of them.

Sections 7C and 7D of the Pension Funds Act stipulate the fiduciary duties and general duties that trustees have in respect of their fund.

In terms of section 7C:

“(1) The object 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.

(2) In pursuing its object the board shall –
(a) 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;

(b) act with due care, diligence and good faith;

(c) avoid conflicts of interest;

(d) act with impartiality in respect of all members and beneficiaries.”

In terms of section 7D, the duties of a board shall be to

“(a) 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;

(b) ensure that proper control systems are employed by or on behalf of the board;

(c) 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;

(d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

(e) obtain expert advice on matters where board members may lack sufficient expertise;

(f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Investment of Funds) Act, 1984 (Act no. 39 of 1984) and all other applicable laws.”

In addition, the Registrar’s PF Circular 130 expands on these duties and provides principles of good governance that trustees of funds should observe (see Appendix B).

*If you cannot be a
poet, be the poem.*

Anonymous



Chapter 3

General Fiduciary Duties

As mentioned before, the fiduciary duties imposed on a trustee will vary according to the role the trustee has to play in the administration of the fund. The general fiduciary duties discussed in this chapter apply to all trustees.

Of the specific duties mentioned in the following chapter, all will be applicable to the appointed trustee and some, not all, to deemed trustees, such as the fund actuary or accountant, whose fiduciary duties will relate largely to their own particular function. The actuary, for example, would not be under a duty to take control of the fund assets, but would certainly be under a duty to remain impartial and to take care to ensure his calculations are based on sound actuarial principles.

One should bear in mind that although the discussion that follows concentrates on the position regarding both the appointed and elected trustee, trustees in the wider sense (deemed trustees) will also be bound by some or all of the duties discussed. However, it is impossible to categorise each particular trustee's fiduciary duties, as these are dependent upon the circumstances in which the trustee, at any particular time, finds himself.

3.1 Good faith

Of the principles governing the fiduciary duties imposed on a trustee, the overriding duty and golden rule is that the trustee must at all times and in all circumstances act with the **UTMOST GOOD FAITH** towards the trust and always in its best interests. Acting in good

faith means doing the right thing for the right reasons. It also means, amongst other things that generally trustees must not and cannot be allowed to benefit personally by dealing with trust property.

All benefits arising from such dealings must accrue for the benefit of the trust, trust beneficiary or person on whose behalf, or for whose benefit, the trustee holds or administers the trust property. This is so even if a trustee has acted in good faith. The common law rule of equity insists that those who make a personal profit, by the use of their fiduciary position, are liable to pass that profit on to the trust for its benefit, even if the trust could not derive such profits by itself.

The inability of the trustee to profit from his position or from the use of trust property, removes much of the temptation to act improperly. As far as retirement fund trustees are concerned, a particular concern may arise in this regard where such trustee is also a member of the fund and entitled to benefits from it. Once it is remembered, however, that benefits payable to such a trustee are due as a result of his membership of the fund and not his trusteeship, it immediately becomes clear that receipt of benefits, in terms of the rules, due to membership, does not constitute any personal profit made as a result of occupying the office of trustee. It is of course quite a different matter, and a serious breach of fiduciary duty (not to mention a criminal offence), if a member trustee pays himself benefits greater than those to which he is entitled in terms of the rules.

The duty to act with the utmost good faith also means that the trustee must at all times prevent a conflict of interest from arising between himself personally and the trust. Where he cannot do so, such conflict must at the very least be disclosed.

The duty to act with good faith means that whatever a trustee does or refrains from doing, he must do honestly and without ulterior or sinister motive. In determining good faith, the trustee's conscience should be his guide in telling him whether his actions are proper in the circumstances.

Acting in good faith does not mean doing the popular thing or doing things which make the trustee feel good! In some cases, acting in good faith may well make the trustee feel terrible, for example, where benefits payable to a deceased member's dependants are not



adequate or as large as may have been anticipated.

The most effective policeman of good faith is publicity. If the trustee always makes known his actions and never conducts trust business in secret, then it is difficult to act in any manner other than in good faith and it will be even more difficult to accuse him otherwise. It is for this reason that proper disclosure to fund members regarding contribution payments, benefits payable, fund investment performance, eligibility, and so on, are very important, not only for the dissemination of information to the members, but also for the protection of the trustees themselves.

3.2 Give effect to the trust instrument

The trustee must at all times carry out the specific duties contained in the trust instrument. He must do or cause to be done, all that is necessary in order to give full and proper effect to the trust instrument or the intentions of the founder of the trust (in so far as they are lawful), and act in accordance with the spirit of the trust. For this purpose, the trustee must fully acquaint himself with the trust instrument or intention of the founder. To be able to do this properly, the retirement fund trustee must be fully conversant with the rules of the fund, relevant laws and the basic principles governing retirement funds and their purposes.

A trustee may never do anything which is not provided for in the rules of the fund. Similarly, he may not refrain from doing something which is specifically required by the rules. If it is decided that any action which is contrary to the provisions of the rules, is required, suitable amendments to the rules should be made and registered first.

3.3 Act as a prudent and reasonable man (*bonus et diligens paterfamilias*)

It is not sufficient that a trustee acts in good faith. He must also act with due care and diligence as a *bonus et diligens paterfamilias*, i.e. as a reasonable man. To suggest that this means a trustee must act with the same degree of prudence, care and responsibility in respect of the affairs of the trust as he would in respect of his own affairs is certainly valid, but also misleading in that, in the same circumstances, he must often be

more careful and prudent with the affairs of the trust than he would be with his own affairs.

It has been held that "a trustee must use greater care in handling trust property than he would in dealing with his own property" (as per Kotze JA in *Sackville-West v Nourse & Another*, 1925 AU 516).

An example of this greater care is that a trustee (subject of course to the provisions of the trust instrument) must not normally expose trust assets in any way to any business risk. Taking business risks in respect of his own affairs, however, will often be reasonable. Obviously, the extent of this requirement differs depending on the nature, purpose and intentions of the trust. In certain circumstances (such as making investments for a retirement fund), it will be permissible to subject the trust and its assets to acceptable business risks. It is conceivable that in a situation such as that faced by retirement funds, failure to assume business risks could in fact constitute a breach of fiduciary duty.

Section 2 of the Financial Institutions (Protection of Funds) Act has similar provisions but specifically states that the requirement is to act as a reasonable TRUSTEE. Thus, "trustees" in terms of these Acts are compelled to act with more care than the reasonable man and to act as reasonable trustees, which is a higher standard than that of the reasonable man.

The degree of care and skill required of the trustee will be dictated by the particular circumstances prevailing, the specific directives contained in the trust instrument, as well as the underlying reason or intention behind the trust.

While not required to be an expert, the trustee must acquire the necessary knowledge and skill in order to properly fulfil his duties as trustee.

3.4 Exercise his own discretion

A trustee must always exercise independent discretion (which, as we have seen above, must always be done with due care and diligence). There is no fixed list of appropriate decisions which should be made; what is appropriate will depend on the circumstances. Where there are several methods of achieving a desired result it is up to the trustee to exercise his discretion

independently and decide for himself what the best course of action in the circumstances happens to be.

If a trustee exercises his discretion in good faith and with due care and consideration, and chooses one of several appropriate courses of action, he will seldom be criticised if his choice turns out not to be the optimum one. The trustee will be criticised, however, if he fails to exercise the necessary care and skill, or acts negligently and thereby makes a wrong or inappropriate decision.

While a trustee's discretionary powers will normally be very wide, and while the rules of the fund and the law often appear to grant trustees unhampered discretion, the Pension Funds Adjudicator or the courts can intervene to reverse or amend a trustee's decision if it is found that he has exercised his discretion in bad faith, arbitrarily or without properly applying his mind to the problem.

It is of course permissible and in fact necessary, if the proper care and diligence is to be exercised, that the trustee, where he himself does not have the necessary skills, employ the services of independent experts such as actuaries, investment managers, attorneys and accountants.

Provided the trustee was not expected to have the necessary skills himself (if he was himself an attorney for instance), the cost of employing such an expert would be a charge against the trust. Even where the trustee does have the necessary skills, he may want an independent opinion although, in such a case, the trustee would be liable for such expert's fees unless the rules of the fund nonetheless provided for the payment of the expert's fees.

The trustees of a fund will typically require expert legal opinion on matters such as interpreting legislation and drafting rule amendments, while medical advice would be necessary for assessing evidence of insurability, determining claims for early retirement on grounds of ill health, and so on.

The trustee should receive expert advice formally and in writing so that there can be no misinterpretation or disagreement at a later stage. Further, such advice should be circulated to interested parties and properly discussed at trustee meetings. The trustee must

never accept advice which does not come directly from the expert concerned. Accepting someone else's version of the expert's advice can lead to ambiguity, misunderstanding and wrong decisions.

Employing such experts does not relieve the trustee of his duty to exercise independent discretion. After studying all the expert advice he has requested, the duty of deciding on a particular course of action still, as always, rests finally with the trustee, and he may have to request additional opinions if he is still uncertain about what decision to make.

If a trustee, having properly brought his mind to bear on a problem and having considered his expert's opinion (and found no reasonable cause to consider it incorrect), decides on a course of action which is subsequently proven to be incorrect, he should not be overly perturbed, he will have done all that was reasonably expected of him. What a trustee cannot do is simply adopt his expert's opinion without applying his mind to the matter.

The trustee must exercise his discretion by way of active mental process and not simply allow situations to occur as a result of inaction. Trustees must exercise their own discretion and come to their own decisions; simply "rubber stamping" other peoples' decisions is not enough.

If a trustee does not understand what an expert, such as an investment manager, is saying, he should question the expert until he does. If an expert gets impatient about explaining himself, the trustee should object; after all, the expert is the trustee's employee. Remember, the trustee's discretion cannot be delegated and he will ultimately remain liable for the actions of the expert.

In terms of the Financial Institutions (Protection of Funds) Act, any alienation of fund assets by trustees who have not exercised the proper care and diligence would be a contravention of the Act. PF Circular 130 also expands on the need to take expert advice for good fund governance.

People know you for what you've done, not
for what you plan to do.

Anonymous



Chapter 4

Specific Fiduciary Duties

While for the sake of convenience an attempt has been made to place specific duties under headings, fiduciary duties do not always fall readily into one or other category. Some duties will fall under no specific category, while others may fall under several categories.

It could well happen that a circumstance may arise which will require that a new, as yet unknown, duty be imposed on the trustee and that a decision be taken for which there are no historical guidelines. In such a case, what should a trustee do? How should he act? The answer is, of course, that he must simply act as a reasonable trustee! While this answer begs the question, experience and common sense should guide the trustee to the correct course of action.

If a trustee is worried about a particular course of action, he should take note of his conscience and seek legal advice. It is stressed that examples included in this work are by no means exhaustive, but it is hoped that they will give the reader an understanding of the type of care, diligence and good faith expected of a trustee.

4.1 Duty to conduct the trusteeship in an efficient and businesslike manner

This duty is closely linked to the requirement that the trustee act as a *bonus et diligens paterfamilias*. Many duties falling under this heading are, in addition to the common law, imposed on the trustee by statute.

The Pension Funds Act provides, inter alia, that:

- The trustee must have a registered office (section 7) and the trustees must ensure the appointment of a Principal Officer (section 8).
- Unless appropriately exempt, the trustees must appoint an auditor and valuator (sections 9 and 9A) and ensure that the necessary financial reporting to the Registrar in terms of section 15, and investigations and reporting by the valuator in terms of section 16, are properly conducted and carried out.
- A fund shall be prevented from carrying on any other form of business (section 10) or may be prevented from practising an irregular or undesirable method of business (section 32A).

- Loans may only be made to members in certain restricted circumstances (section 19).
- No person or persons shall operate an unregistered retirement fund (section 31).
- The fund must conform to the prudent investment guidelines (regulation 28).

The regulations to the Act also contain certain specific requirements regarding fund business, for instance:

- Regulation 12 prescribes the financial returns, trustees', and auditor's reports, etc., which must be provided to the Registrar annually.
- Regulation 24(d) prescribes certain reporting requirements to be complied with in respect of members, essentially that they must be advised of any changes made to the fund's rules.
- Regulation 31 prescribes the registers containing certain information, which all funds must keep, including a minute book recording all resolutions passed at trustee meetings.

There are various other important provisions in the Pension Funds Act, all of which the trustee must comply with.

4.1.1 Managing a fund

More often than not, trustees will have an administrator to take care of the day to day administrative duties. The trustee must be able to have complete confidence in the administrator to do the job at hand competently. If a trustee loses confidence in his administrator, he should replace it. The trustee is responsible for the acts of his administrator and, if the administrator acts incorrectly and it can be shown that the trustee had reason to doubt its competence, the trustee will be accountable.

Much will be needed from a trustee in order for him to manage a fund, for instance:

- A trustee must keep or ensure that the administrator keeps proper records and maintains a working accounting system. He must at all times know the financial situation of the fund and be able to answer the Registrar's queries in this regard.
- The trustee must arm himself with the necessary skills and business acumen and familiarise himself with all matters relating to the fund, such as

investments, valuations and administrative and accounting procedures.


- He must enter into, and exercise control over, any contracts or agreements between the fund and the employer, its actuary, accountant, investment managers, insurer and any other third parties.
- He must ensure that, where necessary or desirable, the fund's obligations are properly insured, making certain that the terms of the insurance policy regarding risk and benefit payments accord with those contained in the fund's rules, and that definitions of various words are the same in both documents. Should this not be the case, the fund might find itself under an obligation to pay benefits for which no similar obligation rests with the insurer, resulting in losses to the fund for which the trustee, if he has not acted with the necessary care, skill and diligence, could be personally liable.
- The trustee must have a thorough knowledge of the rules of the fund. If a trustee is not familiar with the fund's rules and the provisions of any trust deed, it is impossible for him to know whether or not he is acting in accordance with them.
- The trustee must ensure that any procedures prescribed in the fund's rules or the Pension Funds Act regarding dispute resolution are adhered to, and that members or other interested persons have any queries or grievances suitably settled.

The trustee must ensure that the necessary laws regarding disclosure by the fund to its members are complied with.

The trustee must also have knowledge of the common law applicable and the various pertinent Acts of Parliament, the more important ones being:

- The Pension Funds Act; the whole of this Act, including the regulations, is very important. Of particular importance are the prescribed prudent investment guidelines as contained in regulation 28.
- The Income Tax Act; fortunately only the second and fourth schedules thereto and the sections dealing with retirement funds need to be known in detail. However, the trustee should acquaint himself generally with other sections of the Act and with the basic principles of taxation and tax administration.
- The Financial Institutions (Protection of Funds) Act; the whole Act.
- The Inspection of Financial Institutions Act; this Act enables the Registrar or his inspectors to inspect the business of a fund and to examine trustees under oath. Trustees should note that refusing to co-operate with the Registrar is a criminal offence,

The trustee must have a basic knowledge of the principles of the South African law of trusts, because, should the trustee undertake any action which does not fall within his powers in terms of the law or the



The biggest mistake people make in life is not making a living at doing what they most enjoy.

Anonymous

rules of the fund, such action would be ultra vires. The trustee may be held personally liable to the fund for losses it may suffer as a result of any such actions.

As funds often own policies of insurance, trustees must have a basic understanding of insurance principles, such as insurable interest and “utmost good faith”.

- Where the assets of the fund consist of policies of insurance, the trustee must be thoroughly familiar with the terms and conditions of such policies.
- The trustees must receive study and understand reports from the fund’s investment manager, actuary and auditor, and take appropriate steps as a result of such reports, should any be considered necessary.
- He must consider the necessity and desirability of any rule amendments and implement these if need be.
- The trustee must ensure that effective measures are implemented in order to manage support staff and agents to such a degree that the business affairs of the fund are properly undertaken with the minimum expense. The trustee must be satisfied that the procedures and systems necessary to maintain and update records, control finances, pay benefits, and so on, are adequate and efficient at all times.

He must also ensure that adequate and competent people are employed to carry out the administrative functions necessary. It is no excuse, when a trustee is accused of not displaying the attributes of a reasonable trustee, to divert blame to staff members under his control. It will often be proper, indeed necessary, for a trustee to delegate his various duties (except his duty to exercise his discretion), but he remains ultimately responsible for the actions of persons under his control.

A trustee, therefore, must always satisfy himself that the person to whom he is going to delegate a task is the appropriate person for the job. A trustee of a retirement fund usually needs to employ various experts, such as investment managers, actuaries, accountants and administrative staff. In all cases, the trustee must ensure that the experts he employs are properly qualified, both academically and in terms of adequate experience. He must be sure that the person he employs will be of the standard of a reasonable accountant or actuary, as the case may be, and that the person can in turn act as a

reasonable trustee in the circumstances.

One must keep in mind the fact that often members of staff or persons to whom tasks have been so delegated will, in terms of the common law or the Financial Institutions (Protection of Funds) Act, also fall within the definition of trustee, with the attendant duty to act with the necessary care and skill.

- If the fund makes use of the services of a professional pensions consultant or other intermediary, the trustee must ensure that such person is registered under and complies with the Financial Advisory and Intermediary Services Act or any other applicable legislation. The trustee has a duty to remain available and able to go about his duties properly. This generally means that the trustee must be accessible to his fellow trustees, the administrator, the employer and the members. He must not leave and remain outside the country for a lengthy period without making proper and adequate arrangements.
- If a trustee needs to be absent from the country for a length of time, he may find it impossible to continue his duties (remember he is still going to be liable for what takes place in his absence), and it may be prudent for him to resign in such a case or have an alternative appointed to take care of his duties during his absence.
- The trustee, and his administrative staff if he has them, must know and perform the administrative procedures required by the Registrar and SARS, conform to their directives and make the necessary statutory returns. The trustee and administrator, in particular, must comply with the provisions of PAYE and SITE insofar as these relate to benefits paid. This is because the fund is deemed to be an employer for the purpose of the Income Tax Act and “employees’ tax” must be deducted from any benefits paid to members.

4.1.2 Meetings

When a body of trustees is appointed, their powers are vested in them jointly and their decisions must be taken jointly. For this reason, in accordance with the provisions of the rules or trust deed, if any, the trustees must convene regular meetings, as regularly as the fund

rules require.

Meeting regularly will ensure that they adapt the fund's strategic direction, for instance where the fund's financial position changes or the law changes, and in so doing exercise appropriate supervision over the operations of the fund. A carefully worked out and disciplined agenda should be followed in order to ensure proper care and efficiency when dealing with fund business. A suitable agenda, one that would cover and ensure attention is given to important matters, would include for example:

- Approval of previous monthly/yearly accounts regarding, inter alia, the purchase and sale of investments.
- Possible amendments to the rules.
- The payment of benefits, bonuses, pension increases and gratuities.
- The examination and upgrading of benefits.
- Members and pensioner movements.
- Applications for early retirement and retirement due to ill-health.
- The status of beneficiaries.
- An analysis of paid and pending claims.
- An analysis of investment performance.
- Forthcoming retirements (fund liabilities).
- The financial position of the fund and examination of its accounts.
- An analysis of any actuarial or other reports.
- Administrative or other problems.
- Pending litigation or other legal developments.
- Communication with members.
- The adequacy of all insurance cover.

Meetings must be properly minuted and any decisions taken duly recorded in a "minute book", as prescribed by regulation 31 of the Pension Funds Act. Proper recording of all decisions taken as well as reason for these decisions are important, not only as a record of what actually transpired, but also as proof of the exercise of the trustees' discretion by way of active mental process.

Provisions regarding quorums and so on, which may be found in the rules, must be strictly adhered to. If the board consists of more than four members, the quorum should be structured in such a way that both member-elected trustees and employer-appointed trustees are included in such an arrangement. This need not be in a

50/50 ratio, but should take into account the majorities required for decision-making at board meetings. When a body of trustees is appointed, the chairperson may have a casting vote in terms of the fund's rules, so that when a deadlock arises, the chairperson's casting vote will break the deadlock.

Another solution to the problem of deadlocks is to appoint the chairperson on a revolving basis. This means that the chairperson is nominated from the ranks of the employer-appointed trustees for one term and for the next term the chairperson is appointed from the ranks of the member-elected trustees. The chairperson of the trustees does not have any additional or greater powers than the other trustees, unless these are provided for in the rules or deed of trust, if any. It will usually be the chairperson's duty to convene meetings. Proper and reasonable notice of meetings must be given to all trustees. PF 130 expands on the duties of the chairperson from a governance perspective.

The trustees must also arrange meetings between themselves and the auditor, actuary, investment manager, employer and other persons, as and when necessary, in order to discuss all matters concerning the administration of the fund. Efficient lines of communication must be established, so that any problems which may arise can be discussed and dealt with quickly.

4.2 Duty to keep account

It is the trustee's duty to keep a proper record of fund payments and receipts and to draw a proper set of accounts. This common law duty is further expanded, both directly and indirectly, by the requirements of the Pension Funds Act. While the trustee will most likely employ an accountant to draw up the necessary books of account, he must still ensure that the accountant is doing so in the proper manner. He must, as they say, "take an active interest" in the accounting of the fund's affairs.

The trustee must also prepare an annual report in the form as set out in Schedule E of the regulations to the Pension Funds Act covering, example, benefit changes, member movements, the accounts, the valuator's report and the financial affairs of the fund, the fund's

investment policy, and so on. A summarised version of the trustee's report could be distributed to members as part of the trustee's duty to keep them informed.

4.3 Duty to remain impartial and independent

As between the trustee and his private interests

A trustee must, so far as is possible, prevent a situation from arising whereby his duty as a trustee conflicts with his other business or private interests. A conflict of interest may arise where a trustee benefits himself as a member of the fund at the expense of other members and beneficiaries. The duty to avoid a conflict of interest also means that a trustee may not make any profit during his term as trustee except the receiving of remuneration provided for under the rules of the fund.

Where there is a conflict of interest, a trustee has an obligation to disclose it. The common law requires a trustee to account for, and to pay to the fund, any profit he may have derived. Section 3 of the Financial Institutions (Protection of Funds) Act provides that trustees who actively take part in the decision to buy and sell shares, have a duty to disclose any potentially conflicting interests that they may have. In addition PF circular 130 also provides guidelines for trustees regarding conflict of interest principles and disclosures.

As between the employer/members and the fund

Where a trustee is employer-appointed, he might well feel he has an obligation to protect the interests of the employer. Alternatively, a trustee may have been appointed by the members and may feel that this gives him an opportunity to exert pressure on the employer with regard to labour relations issues, or that he has a duty to protect the interests of the members only. None of these views are correct; a trustee must remain entirely independent, irrespective of whom he is appointed by. The trustee owes a duty to the fund, its members and the employer, and any trustee who favours one of these parties acts improperly.

As between beneficiaries

The trustee also has a common law duty to treat all beneficiaries impartially. This is in accordance with the Constitution's Bill of Rights which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The Promotion

of Equality and Prevention of Unfair Discrimination Act (the "Unfair Discrimination Act") gives effect to Section 9 of the Bill of Rights.

Section 6 of the Unfair Discrimination Act prohibits unfair discrimination against any person by the State or any person. Chapter 2 of the Unfair Discrimination Act places a duty on all persons (including retirement funds) to eliminate discrimination on the grounds of race, gender and disability, etc. Retirement funds, therefore, have to ensure that neither their rules, nor any practices, discriminate unfairly against members of their funds.

In terms of the rules of a fund, Trustees are often granted discretion when deciding issues such as the waiving of early retirement reductions or determining how to distribute death benefits. This discretion must be utilised with absolute integrity and impartiality. A trustee may not grant increased benefits to pensioners favoured by the employer, but not to those who are not so favoured (such as those who went on early retirement due to ill-health or those deferred pensioners no longer in the service of the employer). No beneficiary should be favoured above another unless the rules of the fund provide therefore and there are proper and sound reasons for doing so. Even when there are good reasons, this must be done only after the most thorough investigation and careful thought.

While a fund trustee will be bound by the fund rules as regards payment of benefits, he must similarly not unduly favour present beneficiaries over future beneficiaries and vice versa.

Trustees who are appointed by the members of the fund must refrain from the temptation of circumventing the accepted administrative processes to assist a workmate. The trustee's duty is to ensure the fund's administration works properly and, if it is unwieldy or inappropriate for some reason, the whole process should be reviewed. Trustees are not advocates for particular individuals and, while there is nothing wrong with empathising with a particular member in unfortunate circumstances, trustees must remember that they are protectors of the fund as a whole.

As between beneficiaries and the fund

Being impartial does not mean the trustee can sit back

and disregard his duty to give effect to the trust. With retirement funds, this means providing members with benefits on retirement and there is probably good argument for the contention that the members must be provided with REASONABLE benefits.

4.3.1 Benefit review

In properly carrying out this duty to provide reasonable benefits, the trustee will have to look at the type of benefits that the fund is providing and, if necessary, take appropriate action for the enhancement thereof. By doing this, the trustee may be acting in a way that is partial to the members, as the employer is likely to be liable for at least some of the added cost of enhancing benefits. However, this is both acceptable and necessary if the trustee is going to give proper attention to his fiduciary duty to act in accordance with the underlying intention of the trust (to provide members with retirement benefits).

At first glance, one would think that the trustee is faced with an impossible task, the duties of impartiality and giving effect to the intention of the trust being mutually exclusive. However, when there is such a conflict between duties, the more important duties (usually the general principles, such as giving effect to the trust instrument and acting in good faith) override the less important duties.

This does not mean that a trustee cannot search for, and implement, a suitable compromise if one can be found. In fact, the trustee has a duty to attempt to do so. Nor does it mean that a trustee can escape acting in good faith under the pretence of strictly adhering to some other duty. For example, where a trustee has the discretion to distribute benefits, he cannot fail, for improper reasons, to give a greater benefit to a beneficiary who is obviously in greater need thereof under the guise of treating all beneficiaries in an impartial manner.

In the normal course of events, the employer will set the level of benefits provided by the retirement fund in response to business pressures and according to what can be afforded. Often competitors will offer a better range of benefits to their staff and, in order to

retain existing staff and attract suitable new persons, the employer will decide to improve benefits. In other cases, the pressure will come from the members themselves who perceive that the benefits offered are inadequate in one way or another.

In a strict sense, the trustees are only required to exercise their duties and responsibilities in relation to the benefits currently provided. There is no general requirement to exert pressure on either the employer or the fund members to review benefits, yet trustees would be failing in their duties should they allow a fund to become outdated, thus providing virtually meaningless benefits, without bringing this to the attention of the employer. For example, many funds have restructured the way in which death benefit cash lump sums are provided in order to minimise or eliminate the tax payable on death, without any cost increase to the employer (although the members may have to assume responsibility for some of the cost). Trustees would be failing in their duty if such matters are not given attention. Accordingly, trustees must, when necessary, commission a review of the benefits being provided.

The employer must be closely involved in this exercise as it is more than likely that he will be footing the bill for any improvements granted.

It would generally be impractical for trustees themselves to research the whole range of benefits that are included in all funds in South Africa. The usual course of action would be to call upon the services of a professional pensions consultant to review the position and to make recommendations. It is important that this task be undertaken regularly to keep pace with the rapid developments that are continuously taking place.

The brief given to the consultant would vary according to whether a review of the fund in general was being undertaken or whether only a specific aspect was under consideration. It would be important to keep the following matters under attention:

- The level of retirement benefits.
- The fund retirement age.
- The eligibility conditions.
- The level of death benefits,
- The level of disability benefits.
- The level of, and practice towards, withdrawal

benefits.

- The tax effectiveness of the fund construction.
- Whether the fund should be constituted as a pension or provident fund.
- The suitability of the investment medium used.
- The level of employer and/or member contributions.

Once the consultant has presented his report, it would be up to the employer to make the final decision on any changes, particularly where these result in an increase in his contributions. Where no cost increase is involved, the trustees could probably restructure the fund to the benefit of the members without reference to the employer, failing which they might be in breach of their fiduciary duties.

4.4 Duty to take control of trust assets

It is the trustee's duty to take control of the assets of the trust and to deal with them in the appropriate way. If he loses control or possession, it is his duty to recover such control or possession, and such a trustee has locus standi (the right to sue) to initiate legal action to achieve this. Thus, a trustee of a retirement fund must ensure that contributions are paid timeously and that they are properly invested.

In terms of section 13A of the Pension Funds Act, payment of contributions to the fund by the employer must be made within seven days of the end of the month for which they are due. Section 13A also places a duty on the employer to provide the trustees with

certain information that must be contained in an Initial Contribution Statement and a Subsequent Contribution Statement.

Section 13A and Regulation 33 places various duties and functions on the employer, the trustees, the monitoring and the Principal Officer. If contributions are not paid within the time periods, various duties are placed upon each of these parties.

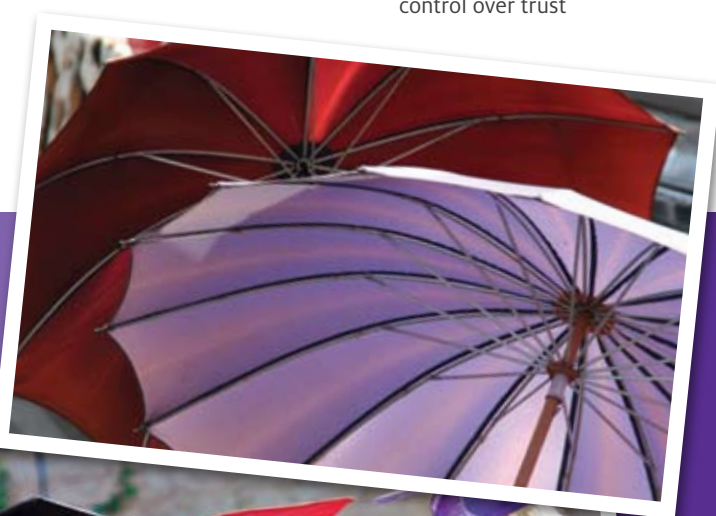
If a trustee is in a position where he has to collect and make payment of contributions to a fund's bank account or the administering insurer, as the case may be, he is under a duty to pay these contributions at the very first opportunity, usually the very next business day. Failure to do so could amount to a contravention of the Pension Funds Act, in addition to being a breach of his fiduciary duty.

It is a requirement for approval of the fund by SARS that the employer may not control the assets of the fund. There would therefore be a duty on the trustee to ensure that such a situation does not exist, and that it does not subsequently arise.

The trustee would be expected to keep proper records regarding the trust and trust property and, where necessary, to make an inventory of such property and institute systems in order to keep proper control over trust

*In the book of life,
the answers aren't in
the back.*

Charlie Brown



assets.

4.5 Duty to keep trust assets separate

It is the trustee's duty to keep trust assets separate from that of others. He must also, and especially, keep trust assets separate from his own. A trustee may not have any personal interest in trust assets and may therefore not form any particular partnership or other alliance in respect of trust assets. In particular, he may not use fund assets for his own personal gain or convenience.

The Financial Institutions (Protection of Funds) Act requires that trustees register fund assets in the name of the fund where this is possible and sets out alternate requirements where this is not possible. Trustees should examine section 4 of this Act very carefully in order not to fall foul of these requirements. Section 4 of the Act is reproduced in the Appendix.

In addition, trustees should examine PF 130 very carefully relating to good governance principles relating to fund assets, risk management and the like.

4.6 Duty to disclose interest

As mentioned, a trustee must not and cannot generally make a profit or benefit from his administration of the trust, unless this is provided for in the trust instrument.

The Financial Institutions (Protection of Funds) Act takes the matter further and states that a trustee shall not alienate, invest, pledge or otherwise encumber, or make use of any trust funds or trust property, or furnish any guarantee, in any way to gain improper advantage for himself or any other person, at the expense of the trust.

This Act makes it clear that a trustee must not allow himself to be placed in a position whereby he is able to gain any benefit or improper advantage at the expense of the fund or any beneficiary of the fund.

It is possible for the trustee of a retirement fund, in very limited cases, to have a personal interest in trust matters. Such personal interest, however, must not be "improper" and, for practical purposes, extends only to

benefits due to the trustee if he is also a member of the fund, and to proper fund investments with an institution in which the trustee has some incidental interest.

What is never permissible and what would constitute a gross breach of the trustee's general duty of good faith, is for the trustee to make any unauthorised profit or to receive any undisclosed benefit. Any incidental benefit or profit, whether received directly or indirectly, whether it be a monetary or any other benefit, must be fully disclosed.

Where an investment is made on behalf of the fund with an institution in which the trustee has some interest or control, full and detailed disclosure of this must be made.

The Financial Institutions (Protection of Funds) Act provides that a director, official, employee or agent of a financial institution (which includes the fund and an insurer) who takes part in any decision regarding an investment in which he has any interest, either directly or indirectly, must declare his interest to the trustees before the decision is made. This declaration must indicate both the nature and extent of the interest, and must be included in the minutes of the meeting of that board or governing body (the trustees) at which the declaration is made or considered.

PF Circular 130 also requires the disclosure and includes a sample disclosure document.

Even if such a disclosure is made, the director, official, employee or agent may have to account to the fund for any profit made. The Act itself, however, is silent on this point.

4.7 Duty to preserve trust property

The trustee must take steps to ensure the trust property retains its value. Accordingly, if the fund owns physical assets such as buildings, the trustee must ensure they are properly maintained. Obviously the trustee of a retirement fund would, other than in exceptional circumstances, also be under a duty to ensure sufficient growth of fund assets to ensure reasonable benefits for members.

4.8 Duty to invest trust funds

It is the trustee's duty to invest money which accrues to the fund at the earliest opportunity. It is improper for the trustee to borrow that money for his own private use, even if he pays the fund interest equivalent to that which could be earned if an investment was made elsewhere. It is also improper for the trustee to make personal use of trust assets because as we have seen, he must always keep trust assets separate from his own and cannot generally benefit from his trusteeship in this manner.

A more detailed discussion regarding the investment of fund assets is contained further in this brochure for your convenience.

4.9 Duty to transfer trust assets/pay benefits

A trustee must pay the income and deliver or transfer trust capital to the person entitled to it. For the purposes of retirement funds, this usually means the trustee must make payments of benefits in accordance with the rules of the fund and the Pension Funds Act.

The trustee must also ensure that the person to whom payment is made is in fact entitled to receive it. To this end, he should require proof of identity and should request to see identity documents, marriage and birth certificates. He must also take customary law, which may allow polygamy, into consideration. If a trustee negligently makes payment of an incorrect amount, or to a person not entitled to receive this benefit, he may be liable personally to make good the loss to the fund.

The Divorce Act provides for a member's pension interest to be included in the distribution of assets on divorce. This means that on the divorce of a member, the trustee may be instructed to calculate the relevant pension interest and make the necessary payment to the non-member spouse.

4.9.1 Death benefit payments

Where a member has died, the trustee must make every reasonable effort and take the necessary steps to find and make contact with all the member's dependants

and nominated beneficiaries, in order that an informed decision regarding payment of benefits can be made.

The trustee has the rather difficult job of determining who among the beneficiaries is the most deserving. Section 37C of the Pension Funds Act grants the trustee very wide discretionary powers in making payment of benefits, and extreme care and caution should be exercised when doing so. A thorough investigation of all claims is therefore extremely important. It is vital that the trustee keep a written record of his decisions regarding settlement of claims and his reasons, so that he is able to prove that he properly applied his mind to the problem.

Determining how to apportion death benefits between the various dependants and nominated beneficiaries who may survive a member is no simple task, yet it is a task which the trustee cannot evade or delegate to someone else.

The wide discretion given to trustees in this regard makes it very difficult for anyone to criticise the trustee's decisions, even if a different conclusion can be arrived at by someone else. The trustee will only be failing to fulfil his fiduciary duty in paying death benefits if he breaks the golden rule and does not act in good faith, if he does not apply his mind to the problem or fails to exercise his discretion after taking account of all the various facts at his disposal.

Arriving at a decision as to whom to pay and how much to pay them begs many questions, for instance:

- To what extent should a trustee go to identify unknown dependants?
- On what factors should a trustee base a decision regarding the apportionment of benefits to particular beneficiaries?
- When should a trustee consider an "on-account" payment to beneficiaries?

In identifying dependants, the trustee must ensure he is completely familiar with the definition of “dependant” as contained in the Pension Funds Act, so that he is in a position to recognise who the dependants are.

Some dependants may be relatively easy to identify and contact, for example, a spouse, minor children or an aged parent living with the deceased. There may however be a previous spouse, still dependent on the deceased member for maintenance, who is not readily identifiable.

The deceased member’s family and the employer should be questioned about the existence of other dependants. A beneficiary nomination is also very often a useful tool in identifying dependants. If the trustee has reason to suspect the existence of other dependants, he should take all reasonable steps to contact them.

To what extent such steps could be regarded as reasonable would depend very much on the particular circumstances. It would not, for example, be necessary for the trustee to go to great expense tracking down a suspected dependant who may or may not be living in a remote area of the country unless the benefit due to such dependant was very substantial.

Reasonable attempts at communication with such a person could include: sending registered letters to an address where it is believed the dependant, or people who know of the whereabouts of the dependant, may reside; making a few telephone calls; putting advertisements in local newspapers; enlisting the help of the local police, etc. If no dependant is found within 12 months of the death of the member, and all reasonable steps have been taken to notify such dependant of the benefit due, the trustees will not be criticised or liable to pay a benefit to a dependant who subsequently surfaces.

If the trustee decides to wait for the period of 12 months after the death of the member to pass before a final decision on the apportionment of benefits to dependants is to be made, considerable hardship could be faced by known dependants who are in need of support. In such a case, the trustee could consider paying a portion of the benefit due to such dependants. The decision to make such an “on-account” payment would rest largely on how desperately the money is

needed.

The precise amount to be paid would, in turn, depend on what ultimate benefit it is anticipated would be payable to such dependants, weighed up with the possibility that such ultimate benefit due could be reduced by the emergence of additional, as yet unknown, dependants. As a minimum payment, it is difficult to see how any trustee could be criticised for making an “on-account” payment at least sufficiently large to ensure that known dependants are properly fed, clothed and sheltered.

In fact, failing to ensure at least this could very likely be severely criticised, especially in the light of the fact that an unknown and distant dependant is less likely to be quite as dependent on the deceased member for his or her survival.

When determining how to apportion the available benefit between the various dependants and nominated beneficiaries, many factors must be taken into account. These include:

- The relative wealth of each dependant and nominated beneficiary and their accustomed standard of living.
- The number of dependants each may in turn be responsible for.
- The size of the benefit payable as a result of the death of the member.
- The period of time for which the particular dependant would have continued to be dependent on the deceased member.
- The dependant’s ability to become financially independent by going out to work.

The Pension Funds Adjudicator has laid down guidelines for trustees to enable them to distribute a death benefit on an equitable basis. The Adjudicator referred to the guidelines as a “basket of factors”, which includes the following:

- The age of the dependant;
- The relationship with the deceased;
- The extent of dependency;
- The financial affairs of the dependants including their future earning capacity or earning potential; and
- The wishes of the deceased as can be inferred from his/her nomination and/or his/her last will.

It would be quite in order, for example, especially where the benefit is not large, to decide that the full amount is to be paid to the deceased member's spouse and young minor children in his or her care, while making no payment to major children (either in regular employment or able to find employment) or nominated beneficiaries. Disappointed beneficiaries, even if nominated by the deceased, who do not receive a benefit, have no claim against a trustee, unless the trustee has not made his decision in good faith or has not applied his mind to the matter.

Where a trustee is concerned that a minor dependant's benefit will be squandered by his or her guardian, it is quite proper for such benefit to be paid into a Beneficiary Fund for the benefit of such minor. In fact, failing to do so may in certain instances constitute a breach of fiduciary duty.

Instead of the payment of a lump sum, the Act provides for payment of a death benefit in installments subject to the specific conditions contained in Section 37C.

4.10 Duty not to hamper his discretion

As the trustee has a duty to act in the best interests of the fund, and since his discretion is vested in him for this purpose, when the time comes to exercise this discretion, he must be able to do so with complete impartiality. It is therefore improper for the trustee to enter into any undertaking or agreement, or to do any act which has the effect of hindering or hampering his discretion, thereby interfering with his impartiality or his ability to act or make decisions on behalf of the fund.

4.11 The trustee's duty to invest fund assets

The trustee must always act in accordance with the power given to him by the trust instrument. The trustee should always be certain of the type of investment he is authorised to make and should consult the trust instrument to determine this. If the trust instrument (the fund rules or deed of trust or both) is silent, the common law will apply. Remember, in terms of the

common law a trustee must generally not take undue risks with trust monies. If the common law does apply and the trustee is uncertain about the reasonableness of a particular (perhaps risky) investment, he should seek professional opinion.

One must always, however, keep the provisions of the Pension Funds Act in mind, in particular the investment regulations (regulation 28) and section 19.

If a fund wishes to invest in or loan more than 5% of the fair value of its assets to the business of its participating employer, application must be made to the Registrar. The Registrar may approve an investment in the business of the participating employer of up to 10% of the fund's fair value, if the members of the fund have been consulted about the proposed investment and they agree to such an investment.

No assets of a fund may be invested in or lent to such a participating employer's business, unless it is in the best interests of the fund to do so.

Regulation 28 to the Pension Funds Act sets out the prudent investment guidelines applicable to pension funds. PF Circular 130 now requires trustees to develop an investment strategy specific to the fund and to monitor investments in accordance with such strategy.

4.11.1 Appropriate investments

The trustee is responsible for the financial soundness of the fund. It is his duty to ensure that the fund's assets are chosen and invested in a way which complements and is consistent with the ability of the fund to meet present and future liabilities. This is known as matching assets and liabilities.

The trustee will typically delegate the technical aspects of this duty if he employs a valuator, investment manager or accountant, but it remains the overall responsibility of the trustee to match fund assets and liabilities.

To do this, the trustee must acquaint himself fully with the expected future liabilities of the fund, the manner of estimating them and the investment mix which will

best enable the fund to meet these liabilities. If he has delegated this duty, he must monitor that the fund's experts are indeed matching assets and liabilities; it cannot be assumed that this will happen automatically. If the fund's investment mix is such that immediate benefit payments might not be met because sufficient cash is not immediately available, the trustee must rectify the situation at once.

The fund valuator, if any, should make regular reports regarding the financial soundness of the fund to the trustees, and the trustees must discuss any difficulties they may have with the valuator's report with the valuator himself. It is only the valuator who can give the trustee a true view of the financial soundness of the fund.

There is no fixed list of investments considered "proper" in trust law. It is the trustee's duty, along with his investment manager if he has one, to show the care of a prudent and competent businessperson in the circumstances. For retirement fund trustees, this would mean, amongst others, the investment of fund assets in accordance with investment regulations in force at the time, and in assets which will allow for the satisfaction of the fund's liabilities in an optimum way, i.e. which render a mix of returns and guarantees commensurate with the particular nature of the fund's liabilities.

The trustee must continuously monitor investment returns and exposure to risk, and attempt to achieve an optimum balance between the two. If a trustee finds that an investment has become unsound, too risky or simply does not provide an adequate return, it would be his duty to disinvest and seek better alternatives, ensuring that proper arrangements are made to allow the best possible returns in the interim, should this be necessary.


4.11.2 Using an investment expert

If the trustees decide to delegate the duty to invest the fund's assets, they may consider the desirability of "split funding". "Split funding" is the term used when a fund has more than one investment manager (multi manager), each employed for his particular strengths or investment philosophy.

Where a trustee employs the services of an investment manager to manage the investment of fund assets, it would be a breach of fiduciary duty for the trustee to appoint a person without satisfying himself that such person is properly qualified.

For instance, trustees should ensure that:

- The investment manager will serve the fund's interest and not those of anyone else.



If we could see the
miracle of a single
flower clearly, our
whole life would
change.

Buddha

- The person is competent and has the necessary academic and practical experience and is registered in terms of required legislative provisions.
- The investment manager, where this is a business entity such as a company or close corporation, is not owned or controlled by the participating employer.
- The person is in fact able to comply with any instructions, limitations or prohibitions placed on him or her by the fund.
- The person understands the investment objectives of the fund.
- The person can reasonably be expected to meet these objectives.

The trustees should also, when selecting or appointing an investment manager, consider the following factors:

Philosophy

is the investment manager's investment philosophy compatible with the views of the trustees?

People

does the investment manager have a stable team of well-qualified people to assist him?

Portfolio

does the investment manager offer suitably adaptable investment portfolios?

Strategies

are the trustees comfortable with the strategies adopted by the investment manager?

Infrastructure

does the investment manager possess the necessary infrastructure for research and analysis of the investment markets economic climate, and so on?

Risk

what is the profile of the investment manager as measured by past performance?

Past Performance

does the investment manager have the sort of track record that inspires confidence in his ability to perform during both good and bad times?

All these factors should be considered carefully

when choosing an investment manager, and similar considerations apply when the trustee appoints any other experts such as auditors and valuers.

While above-average past performance is not necessarily indicative of continuing good returns, there is little doubt that consistently good medium-term performance does give some indication of the investment manager's ability. However, returns should not be judged in isolation; all the various pertinent factors, circumstances, risk exposure, and so on, should be taken into account.

When assessing the appropriateness of fund investments and the investment manager's performance, the trustee should seek independent advice in order to be able to evaluate such matters objectively. Various services for the monitoring and analysis of investment performance are available and trustees should make use of these.

The trustee cannot simply sit back and leave the investment of the fund's assets to the investment manager alone. The trustee must actively acquaint himself with the investment manager's actions and monitor them to ensure that reasonable care and attention is being exercised. He must take an active interest in the investment of the fund's assets.

Some difficulties can be experienced where a fund's assets are invested in a pooled investment portfolio administered for instance, by a financial institution. While the trustee's fiduciary duties to take an active interest in fund investments remains, it is not required that the trustee concern himself in too great a detail with all the underlying assets held by the portfolio. Pooled portfolios typically hold investments for many funds, and it is not feasible for minor changes to the asset structure of the portfolio to be made each time a trustee of a particular fund becomes concerned about a particular investment holding.

Where investment in such a pooled portfolio is made, the trustees will fulfill their fiduciary duties if they are satisfied that the investment manager administering the portfolio is competent, that the core asset holdings of the portfolio are sound, and that the core asset holdings are appropriate with regard to the investment strategy of the fund.

Chapter 5

Fiduciary duties of specific persons

It is clear that certain persons, when they are attending to the affairs of a fund, are regarded as trustees of that fund. Due to this, they have a fiduciary duty in respect of their involvement or mandate.

The general principles of fiduciary duties, such as the duties to act in good faith for the benefit of the trust/fund, with the necessary care, skill and diligence, and to exercise an independent discretion while ensuring no conflict of interest occurs, applies to all trustees, including those deemed trustees discussed below.

The appointed trustees of a fund are required to take an active interest and to exercise their discretion in respect of every aspect of the fund and its business. For this reason, trustees need to have a detailed knowledge of the duties of all the other persons employed by the fund. Deemed trustees, however, need only take an active interest in, and concern themselves with, matters for which they are employed to have an interest, and matters which they could reasonably be expected to take an interest in, with regard to their position, qualifications, work duties, and so on.

While the specific duties of these trustees are not always as extensive as those of the appointed trustees, they must have some idea of the appointed trustees' duties in order to understand their own. Thus, while an actuary could have a fiduciary duty in respect of his particular function, he would not be expected to ensure that member records are correct. The actuary could not be faulted if the fund records were found not to be properly kept, since this would be a situation that he wouldn't reasonably be expected to know about. The

fund administrator and his clerks would owe a fiduciary duty in respect of this function. Should the actuary discover the fault, however, it would be his duty to bring this to the attention of the relevant persons.

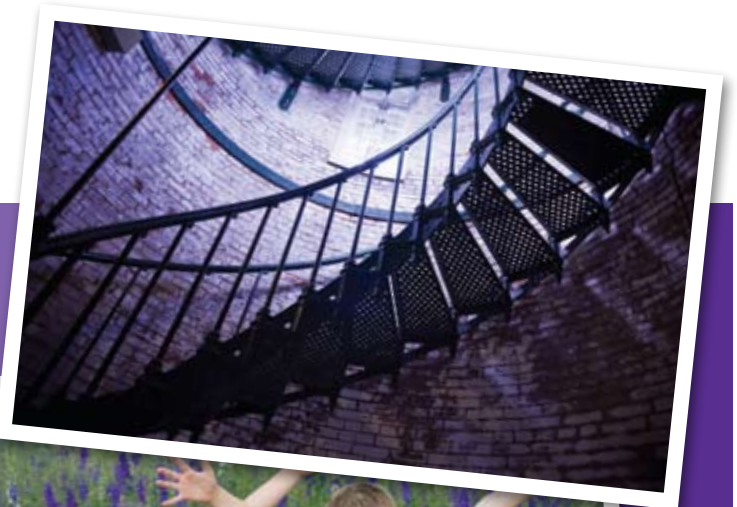
Auditors, valuers and other such persons must be satisfied that they are properly appointed and where necessary, that their appointment is approved by the relevant authority.

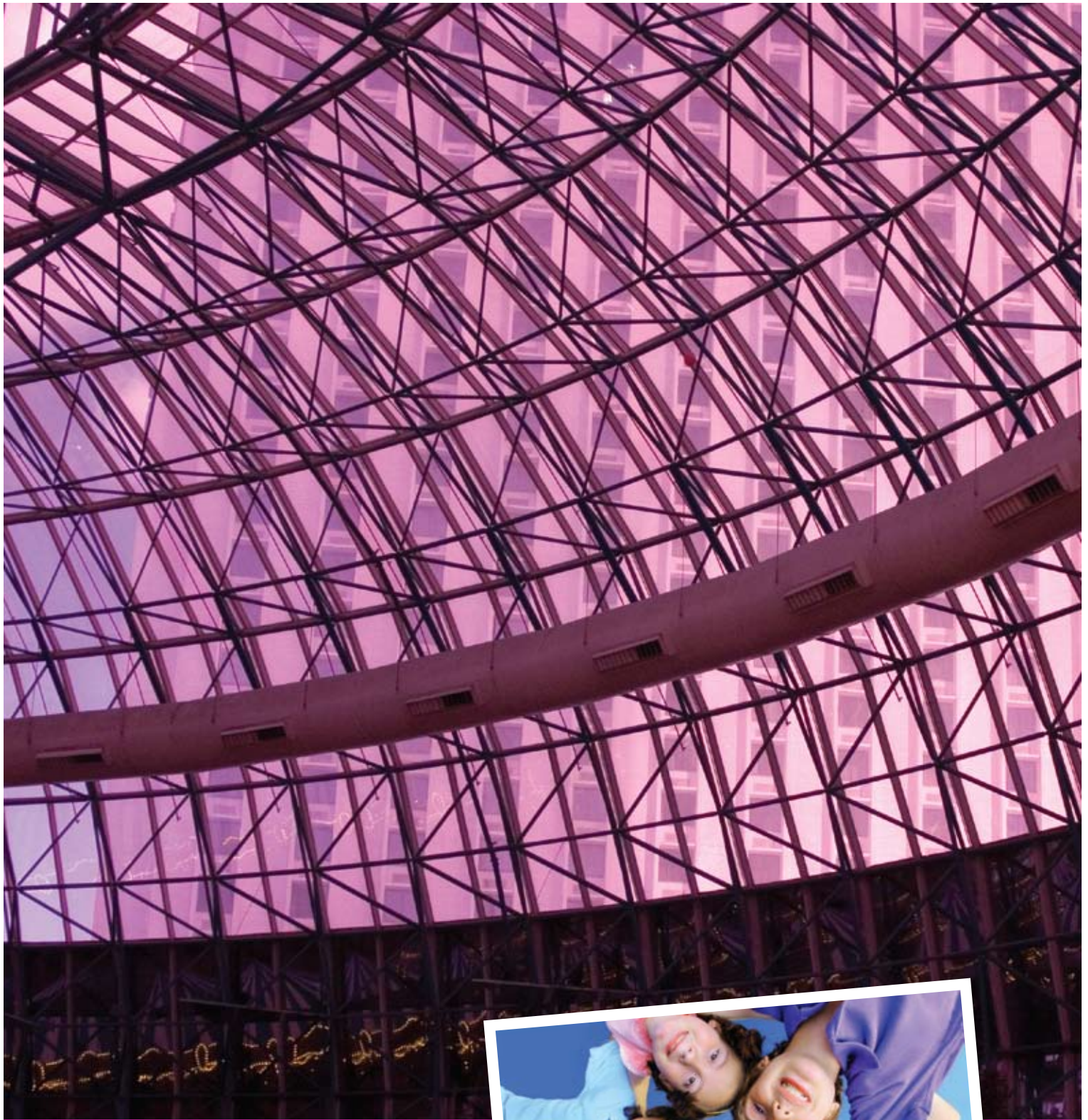
While no distinction between pension and provident funds or defined contribution and defined benefit funds is made in this book (because the fiduciary duties of trustees are not affected by the distinction), a trustee's choice of action and the decisions made may differ as a result of these distinctions. Trustees should always keep in mind that these distinctions may have different implications, especially for the fund's valuator and investment manager, and that these may have to be taken into account.

5.1 The investment manager

The most important duty of the investment manager is to ensure that the fund has money available to pay benefits as and when they fall due, and that the fund's assets are invested in such a way that will result in an optimum return subject to acceptable risk. This means that the investment manager must seek the investment portfolio which offers a high

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love, and you will
never have to work a
day in your life*
Confucius





Life is a great
big canvas, and you
should throw all the
paint you can on it.

Danny Kaye

return while keeping risk factors within acceptable limits, and which keeps the fund suitably liquid so that it has money readily available to pay benefits. As mentioned previously, this is known technically as matching assets and liabilities.

This very delicate balancing act must, notwithstanding, be accomplished while keeping investment within the confines of the investment regulations as laid down by the Registrar from time to time.

In determining the type of investments in which to invest the fund's assets, the investment manager must have regard to:

- The need for diversification of investments in order to minimise risks.
- The stability of the particular investment to the fund in terms of the size of the fund (small funds would probably steer clear of high risk investments if their asset base is small).
- The membership profile (a fund with a high proportion of pensioners must invest in a way that will keep the fund sufficiently liquid so that regular retirement benefit payments can be met).
- The size of the fund surplus, if any.
- The fund's objectives.

The investment manager has a responsibility to understand the fund's objectives and to provide asset management which he believes will satisfy those objectives in the form of an optimum return.

Having determined the investment objectives in consultation with, inter alia, the fund's valuator and the investment manager, the trustees will probably have to make a subjective judgement about the risks which they are prepared to accept in order to secure a return at least equal to (in a defined benefit fund) the expectation of return which has been adopted in determining the rate of funding of (contributions to) the fund. Frequently, but not always, this expectation of return will have been determined by the fund's valuator, if any.

Trustees then have a number of investment options, each with advantages and disadvantages and it is their duty, on the advice of the investment manager and/or valuator and/or other

experts, to apply their minds to the matter and make a decision.

In considering what investment to make, the trustees and investment manager must ignore personal interests and views, be they social or political. For example, the trustees or the investment manager may be opposed to investment in tobacco or alcoholic beverages, but if investing in these industries would be more beneficial to the fund than other investments, then their personal beliefs should be put aside and such an investment should be made. Obviously, should the fund rules prohibit investment in some or other type of industry, then regardless of the trustees' views or the potential returns available, no such investment can be made.

Before investment is made in a particular area, industry or asset, the investment manager must properly research the historical record of returns which the potential investment has offered, and do an analysis of the particular investment's strengths and weaknesses, opportunities and threats. He must also be familiar with the local and global economic climates and take cognisance of factors which may influence them.

The investment manager must assess the investment portfolio's performance, in terms of overall total return and individual asset/investment return, at regular intervals.

Total return considers the combination of income received as well as realised and unrealised capital gains, with suitable adjustments, for the timing of new money flows. A fund's investment portfolio's returns may match the actuarial expectations, but still be below the performances being achieved by other similar portfolios. This need not necessarily be a matter of concern in the short term since the investment manager may tactically restructure assets to match liabilities and/or changing economic and stock market expectations. However, if the fund's investment returns are constantly under-performing, it would be the duty of the investment manager and the trustees to take the necessary action to correct this.

Keeping track of the performance information will enable trustees to judge whether the investment manager's results are consistent with achieving the long-term objectives of the fund. It will also illustrate his relative achievement against that of his peers and may indicate either that his under-performance is acceptable under the circumstances or that corrective action should be considered.

As a result of the need to match assets and liabilities, assessing the investment manager's performance in specific investment sectors, such as equities or property, will probably be of more value than assessing his performance in terms of total returns. The ability of the investment manager to invest the fund's assets in the various investment sectors in the proper proportions – his strategy-- is just as important as his ability to select good investments within a particular sector.

Any decision to change investment managers should, however, be quite categoric and take all relevant factors into account, including expected fund liability and the need to keep the fund sufficiently liquid. The time period under consideration must be significant – at least five years – and there should be no convincing sign of an improving trend.

The reason for stressing this is that performance measurement over short time horizons and the results thereof are often of little value or relevance to the determination of the performance of, and the achievement of the aims of a long-term retirement fund. Short-term analysis of the investment manager's

performance may even be detrimental to the long-term interest of the fund if it prejudices the implementation of an appropriate long-term strategy.

In terms of Circular PF 130 the Registrar has expounded on the fiduciary duty of trustees to invest the assets of the fund in a prudent manner and the requirement for the trustees to have an investment policy in place and to regularly review such policy.

5.2 The fund valuator

The Pension Funds Act requires certain funds to appoint a valuator. The valuator must be approved by the Registrar and is an actuary who is experienced in the valuation of retirement funds. It is the valuator's primary duty to evaluate the financial soundness of the fund by valuing assets and liabilities, and to advise on:

- The contributions required to fund benefits.
- The financial soundness of benefits (a valuator might feel, for example, that particular benefits could cost the fund an escalating amount of money which the fund would not be able to afford in the future).
- The interests of particular members in the fund, where these could apply to one member or extend to all members, as in the case of a take-over or merger.
- The rate at which the fund commutes pension benefits for cash, if this is appropriate.
- The increases that can be granted to pensioners.
- The amount of past service that can be recognised in the fund in return for the benefits brought into the fund (usually from a previous fund) by new members.
- Membership profiles, for example, the ratio of members on pension to actively employed members, or the age pattern of withdrawals.

The determination of fund surplus/deficit

It is the valuator's duty to examine the expected income from, and capital growth on, the investments held by the fund as compared to the expected benefit outflow, and to advise the trustees whether he feels the choice of investment is appropriate to the fund's requirements. This matching of assets to liabilities is an instance when the valuator must work closely with the fund investment

manager.

The valuator must take account of whether the contribution inflow is adequate to meet the benefit outflow. Any shortfall would need to be made up by income from the assets of the fund. He would then advise the trustees as to whether the fund was likely to produce sufficient investment income or not.

Where significant outflows are expected, such as in a provident fund where the full interest of the member is paid out on retirement, the valuator should advise the investment manager so that the fund can ensure that it has sufficient liquid assets to meet the expected disinvestment.

The valuator's duty of providing the advice mentioned above is achieved through periodic valuation of the fund. This valuation follows a format laid down in the Pension Funds Act and regulations prescribed by the Registrar. All calculations, methods and assumptions used by the valuator must conform to the guidelines issued by the Actuarial Society of South Africa and the Registrar.

When making the periodic valuation, the valuator must estimate future withdrawals, deaths, disabilities, ill-health retirements, early retirements, normal retirements, mortality after retirement, the levels of salary, and pension increases and investment returns. At each three yearly review, the valuator will compare what has actually happened against these assumptions and will advise the trustees as to whether he feels he should change his assumptions.

Provided the experience of the fund remains stable, the funding rate will settle at a level which is, relatively speaking, independent of the initial assumptions made by the valuator. The absolute value of the result is less important than the trend from valuation to valuation and the trend in the sources of surplus revealed.

Absolute values become vital in situations of merger and take-over when, as part of the sale agreement, one or more parties may have to inject substantial amounts of money into the fund to make up a shortfall. Different valuers may well arrive at different results because of different assumptions used, but as long as the valuator's assumptions are reasonable, he will not be in breach of

his fiduciary duties. The valutors of each party should get together to agree on assumptions before they make their reports; this will avoid embarrassing differences.

In all his calculations, the valuator must take into account the interests of the employer, the trustees, the members and the regulatory authorities. It is the valuator's duty to act as a watchdog for the regulatory authorities and he must report infringements of the Registrar's directives. If the valuator has insufficient data or has doubts about the adequacy of the information at his disposal, he should qualify his report accordingly.

5.3 The fund auditor

It is the auditor's fiduciary duty to ensure that the necessary books of account, annual financial statements and auditor's report, many of which must be submitted to the Registrar each year, are drafted in accordance with appropriate, generally accepted accounting practice and comply with the Pension Funds Act and other requirements of the Registrar and SARS.

The annual financial statements should fairly represent the financial state of affairs of the fund and must conform with the provisions of the regulations to the Pension Funds Act, in particular regulation 12. These include:

- A balance sheet/statement of funds and net assets.
- An income statement/revenue account.
- Notes of the financial statements
- The auditor's report.
- The valuator's report.
- The trustee's report.
- Any other statements or reports as may have been presented to members.

The measurement of the financial position of retirement funds is extremely complex. This is because the obligations of the fund extend over many years and it is necessary to make various assumptions about the future.

If the financial soundness of a fund is to be adjudged from annual financial reports, then both assets and liabilities must be valued on a consistent basis. As the valuation of a fund's liabilities is dependent on

a number of assumptions concerning the future, it is necessary to apply similar considerations to the valuation of assets.

The auditor should meet with the trustees before the commencement of an audit to discuss and review the audit objective and procedures to ensure that all areas are properly dealt with.

As the actual valuations of assets and liabilities are not disclosed in financial statements, it is only with the valuator's knowledge and skills that the financial position of a fund may be properly measured. It is therefore considered essential that a report by a valuator should form part of any annual financial report. This report must contain an expression of opinion on the financial soundness of the fund. The content of this report must comply with the guidelines laid down from time to time by the Actuarial Society of South Africa.

The auditor must also ensure that the fund's investments are in accordance with the prudent investment guidelines as determined by regulation 28 to the Pension Funds Act.

The auditor is required to institute and conduct regular audits, ensure that the accounting system is both effective and working efficiently and introduce the appropriate audit checks and balances where necessary. He must also liaise closely with the fund's valuator and investment manager on matters such as asset valuation, investment performance and expected future capital and income growth.

Where an insurer is the fund administrator, the auditor be satisfied and certify that the insurer's accounting systems and controls are adequate for retirement fund administration, and that such administration is carried out in compliance with the provisions of the Pension Funds Act.

In particular, these systems and controls must be able to determine whether or not contributions to the fund have been made timeously in terms of section 13A. While this certification of an insurer's systems and controls is required by regulation 12(1) of the Pension Funds Act, it is part of the auditor's fiduciary duties to ensure that the administrators are capable of properly administering the affairs of the fund along the lines mentioned above. This applies even if the administrator is not an insurer.

PF Circular 130 requires trustees to ensure that the financial affairs of the fund are properly recorded and safeguarded.

5.4 The employer

Few people would regard the employer as being a trustee of the fund he has set up for his employees, yet the employer does owe the fund certain fiduciary duties.

These fiduciary duties arise because the employer has, by establishing a fund, entered into an agreement with his employees to help provide for their retirement, and because the money contributed to the fund, both by the employer and the employee, constitutes trust money.

For these reasons, the most important fiduciary duty owed by the employer to the fund is the duty to act with the utmost good faith, care and diligence when dealing with the affairs of the fund and to exercise his authority in a fair and reasonable manner. The employer must be valid in his desire to establish a fund. A fund established as a tax evasion scheme and designed to enrich the owner of the business/employer, besides being illegal, would be a very serious breach of fiduciary duty, with serious industrial relations consequences when uncovered.



The employer is thus expected to exercise this fiduciary duty, amongst others, when:

- Designing benefit structures and setting up the fund
- Appointing the trustees
- Making payment of contributions
- Determining increases to, and updating benefits
- Ensuring that all eligible employees join the fund
- Ensuring that members are not allowed to leave the fund or receive benefits from it unless they are genuinely leaving his service

It is the employer's duty to co-operate fully with the trustees and administrators of the fund. This especially applies with regards to furnishing details of salary increases, marriages and staff turnover. This kind of information must be supplied as soon as any changes occur.

There is also a duty on the employer to ensure that the fund is being properly managed. If it is not, then the employer must take the necessary corrective action, even replacing the trustees or changing the administrator if required. This does not mean the trustees can be removed simply because they have taken a decision which, though correct and within their powers is not to the liking of the employer. Such action on the part of the employer would certainly not be valid. Further, if any removal of a trustee is deemed necessary, this must always be done in accordance with the fund rules and trust document, if any.

Any unreasonable restraint of the trustees' discretion (unless provided for in the trust document or rules) or interference with the trustees in the performance of their duties by the employer, is unacceptable. The trustees have been placed in the position to do a particular, often onerous job, and they should be left to do it as they see fit. Clearly the employer must monitor the work done by the trustees and their performance, and intervene where such performance is not up to standard, but this is very different from unreasonable and unnecessary interference.

The employer must be particularly careful not to place, or be seen to place, pressure on fund trustees, especially those who are also his employees, concerning any decisions regarding the fund. It would be a gross abuse of power and fiduciary duty for an employer to use his powers (as employer) to coerce fund trustees in

any way.

The employer must realise that the particular employee in question occupies two very distinct and separate posts; that of employee on the one hand and fund trustee on the other. When acting as employee, the employer can give appropriate instructions. However, when his employee is acting as a trustee, the employer generally has no power or right to issue instructions.

The employer is often placed in a difficult position because there is always going to be a conflict between providing meaningful benefits and the cost of doing so. However, the employer must always keep in mind that he stands in a fiduciary relationship to the fund and that he has an obligation to provide his staff with meaningful benefits if he can afford them. Once the employer recognises that the fund is a separate entity, not simply another business asset, and that contributions by the employer to the fund are really part of an employee's remuneration, the conflict of interest that does exist will lessen considerably.

5.5 The fund administrator

Of all the so-called "deemed trustees", the person whose fiduciary duties most closely resemble those of the appointed trustees is the fund administrator. Fund Administrators are required to register with the Financial Services Board before they undertake administration of retirement funds.

The fund administrator is responsible for the efficient running and administration of the fund. It is the pivotal link between the member, the employer, the trustees and the insurer, investment manager, valuator, auditor and so on. The provision of this continuity between these various persons is more than merely a fiduciary duty. It is integral to the very performance of the administrator's function. Should any of the various persons responsible to the fund not be performing properly, it is the administrator's duty to either correct the situation or seek assistance in doing so.

The administrator is under a duty to ensure that the various fund employees, the trustees and the participating employer perform their particular duties promptly and to chase them up should they

fail to do so. Any failure or non-compliance with the reasonable requests of the administrator to rectify any problem must be reported to the trustees without delay. Of course, a problem arises if the trustees are failing to perform their duties properly, in which case the employer and/or relevant authorities should be informed and the trustees replaced if necessary.

All the fiduciary duties relating to administrative matters, investment of fund monies, running the affairs of the fund in an efficient and businesslike manner, and so on, as mentioned in Chapter 4, are equally applicable to the administrator and won't be repeated here. More specifically, however, the administrator must ensure:

- That all eligible employees are in fact members of the fund.
- That, in terms of section 13A of the Pension Funds Act, it monitors the payment of the contributions by the employer to the administrator. The payment must occur within seven days of the month for which they are due. If the employer does not pay the contributions within this period, the administrator must inform the fund's monitoring person or Principal Officer of the non-payment.
- That in terms of Regulation 33 to the Pension Funds Act, it monitors the receipt of minimum information that must be submitted by the employer to the administrator. The submission of the minimum information must occur within 15 days of the period for which they are due. If the employer does not submit the information within this period, the administrator must inform the fund's monitoring person or Principal Officer of the non-compliance.
- That the necessary documentation regarding the admission of new members is obtained from members/employers and advised to the insurer or investment manager where applicable.
- That the necessary documentation regarding the cessation of membership is obtained from members/employers and advised to the insurer or investment manager where applicable.
- That adequate records of member and employer participation in the fund are maintained to enable the accurate determination of any benefits accruing to a member.
- The timeous payment of benefits due to members or other interested parties on cessation of participation, and that it obtains the necessary

resources from the insurer or investment manager for this purpose.

- Compliance with the fund rules, the requirements of any trust deed, with any statutes and regulations affecting the operation of the fund, and with any contracts and policies which the fund is party to.
- Timeous referral of any matter requiring the attention of any other officer of the fund. In particular, the administrator should make regular and detailed reports to the trustees on all material matters, such as the membership profile, member movements, benefit payments made and contributions received.

5.6 The consultant

If the fund makes use of the services of a professional pensions consultant or other intermediary, the trustee must ensure that such person is registered under and complies with the Financial Advisory and Intermediary Services Act or any other applicable legislation.

The consultant is an important link between the various officers and employees of the fund, the insurer, if any, and the employer. As such, he often serves a vital role in advising the employer and where necessary, the trustees, on numerous aspects regarding retirement funds. Such aspects would include:

- Discussing matters such as the financial operations of the fund, and the impact which factors like HIV/AIDS could have on the fund in general.
- Discussing and advising on the structure of benefits, how current benefits compare with other alternatives, new products and market trends, and suggesting suitable amendments to the fund rules where applicable.
- Discussing the viability of increases for pensioner members.
- Advice on insurance policies and insurance matters. This is very important where underwritten funds are concerned. A consultant would be guilty of negligence if he failed to advise the employer on insurance policy conditions, limitations and exclusions.
- Advice on relevant changes in legislation and how these will affect the operation of the fund.
- Advice on possible industrial relations consequences

of rule amendments or discriminatory practices currently entrenched in the rules which could subsequently be challenged on constitutional grounds.

Obviously, where the consultant also administers a fund or where he is appointed as trustee, investment manager or to some other position, his duties would expand to encompass the duties of an administrator, trustee or investment manager, as the case may be.

Consultants who introduce retirement fund business also have a duty to ensure that the benefit and scheme design is precisely what the employer wants for his employees, that the scheme is affordable and that it will provide appropriate benefits. They must ensure that they are available to assist the employer in all aspects regarding the administration of the fund, as and when necessary.

The consultant also serves a vital role in advising the employer and the fund members on issues regarding retirements, withdrawals, taxation principles, the continued compliance with the rules of the fund by the trustees, administrator, and so on. Consultants would be failing in their duties to service the fund if they did not make themselves reasonably available for these purposes.

Generally, every consultant has a fiduciary duty to perform the mandate given to him by his client as expeditiously as possible and always to act in the client's best interests. A particular area of danger lies where the consultant is also responsible for arranging insurance cover for the fund. A failure to ensure that the proper and appropriate cover is effected timeously would constitute gross negligence, a consequent breach of fiduciary duty and, possibly, personal liability to make good any losses suffered by the fund. If the client is uninsurable or insurance will only be accepted conditionally, the consultant must notify his client of this as soon as is practically possible.

In some respects, the consultant also has to act like a watchdog, chasing up the various officers of the fund and ensuring that they are all doing their duties efficiently and timeously. To this end, the consultant, in conjunction with the trustees, should initiate and attend regular meetings of the various officers of the

fund. How often these meetings are held will depend on circumstances such as the make-up of the fund, its investment portfolio, member profiles, and so on, all of which can change. Meetings must, therefore, be held as frequently as is necessary.

5.7 The Principal Officer

In terms of section 8 of the Pension Funds Act every fund must have a Principal Officer. The Principal Officer, being an appointed officer of the fund in the same way as the trustees, and being a person in a position of trust, has very similar fiduciary duties. The Principal Officer must be a natural person who is resident in the Republic.

The trustees will choose a suitable candidate for appointment as Principal Officer and his appointment must be notified to the Registrar in writing within 30 days of registration of the fund. The Registrar must approve the appointment of the Principal Officer and refuse approval or request the fund to remove the principal if the Registrar is of the opinion that the Principal Officer is unsuitable. Section 8 of the Pension Funds Act provides that if a Principal Officer is absent from the Republic or unable to discharge his duties, the fund must, in the manner directed by its rules if any, appoint a replacement Principal Officer within 30 days. This replacement must also be notified to the Registrar in writing.

By virtue of the fact that the Principal Officer must sign certain fund documents in his capacity as Principal Officer (regulation 20 to the Pension Funds Act) he may not be appointed as chairperson of the board of trustees. However, the Principal Officer is not precluded from acting as an ordinary member-elected or employer-appointed trustee.

The Pension Funds Act sets out many duties which the Principal Officer is bound to comply with. These include:

- Notify the Registrar of Pension Funds of all amendments to the rules.
- Forward a copy of the consolidated rules to the Registrar.
- Within 6 months after the end of the fund's financial year, inform the members in summarised form of

all rule amendments registered during that financial year.

- Certify that the information given to the valuator for the purpose of valuing the fund's assets and liabilities is complete and correct.
- Sign any fund document other than the rules and the annual accounts and statements on the first page, in accordance with section 20 of the Pension Funds Act.
- Submit financial statements and statistics to the Registrar within 6 months after the end of the fund's financial year.
- Sign annual accounts and statements.
- Sign appeals to the Minister of Finance against the decision of the executive officer.
- Certify as correct copies of any document furnished to the Registrar.
- The name of the Principal Officer as well as the date of appointment must be disclosed in the new trustee report.
- Sign the section 14 documents required to transfer the business of the fund to another fund.

In addition, PF Circular 130 sets out certain governance principles regarding the role of the Principal Officer.

The Pension Funds Act contains many important administrative provisions necessary for the efficient


regulation of the fund by the Registrar. The person to whom the Registrar will look for any questions he may have regarding the fund, is the Principal Officer. For this reason, the Principal Officer must have a very thorough knowledge of the fund and its administration, as well as of the Pension Funds Act, its regulations and the numerous circulars put out by the Registrar.

The Principal Officer's duties and functions, other than those specifically provided in the Pension Funds Act, are determined by the fund rules to a large degree. He may or may not be appointed to the board of trustees. He may also have administrative or other duties. Most importantly, however, he is the Registrar's contact person; the person to whom the Registrar directs queries and so on. The Principal Officer can be likened to a company secretary in some respects, and is usually an authorised signatory. The Principal Officer would probably represent the fund in legal proceedings.

All general fiduciary duties applicable to trustees apply equally to the Principal Officer. Of the specific fiduciary duties, some, not all, will apply. The extent of his specific duties depends largely on his other functions as defined in the rules of the fund.

5.8 The liquidator

If a registered fund is to be terminated,



*Life is a field of
unlimited possibilities.*

Deepak Chopra

usually an independent liquidator must be appointed to oversee such termination. This independent liquidator's appointment must be approved by the Registrar. Termination of the fund will be deemed to have commenced on the approval of the liquidator by the Registrar.

Directive PF No. 4 issued by the Registrar makes provision for an administrator's responsible person to carry out the functions of a liquidator under certain circumstances. In such instances this person would have similar duties to a liquidator.

The person who is appointed as the liquidator must be completely independent of the fund. This means he must not have been involved in the registration of the fund, its administration, or any valuation of the fund.

The liquidator simply steps into the shoes of the trustees once his appointment is approved. As such, all the fiduciary duties applicable to the trustees are equally applicable to the liquidator.

On the appointment of the liquidator, the appointment of the board of trustees terminates automatically and all their powers become vested in the liquidator. The former trustees retain their general fiduciary duties, although many of the specific duties will fall away or be varied according to the specific circumstances. In particular, the former trustees have a duty to assist the liquidator by furnishing any information he may require, for example.

Absence from the country

Should the liquidator be absent from the Republic for more than 60 days, the Registrar's approval must be sought, failing which a new liquidator must be appointed and the Registrar's approval thereof received. The new liquidator will simply pick up from where the old liquidator left off and will complete the liquidation.

Preliminary accounts

In terms of section 28 of the Pension Funds Act, the liquidator must deposit the preliminary accounts, prescribed by regulation, with the Registrar as soon as possible. These must be signed by him and certified by him as correct. This preliminary account (which must be substantially in the form of schedule K in terms of the regulations) must show the assets and liabilities of the

fund at the commencement of the liquidation, and also the way in which it is proposed the assets should be realised and the liabilities discharged.

In discharging the fund's liabilities, full recognition must be accorded to:

- The rights and reasonable benefit expectations of the members.
- The provision of additional benefits, of which the payment by the fund has become an established practice.

The preliminary account must lie open at the registered office of the fund, the Registrar's office and in the appropriate Magistrate's Court for the district in which the registered office of the fund is situated, for inspection by interested persons, for a period of 30 days. The liquidator has a duty to advertise the fact that the preliminary account is lying open for inspection in the Government Gazette and an English and Afrikaans newspaper circulated in the relevant districts. Interested persons have 14 days, from the last day on which the documents lie open for inspection, to lodge objections in writing with the Registrar.

If any such objections are lodged with the Registrar, the Registrar may direct the liquidator to amend the preliminary accounts. Any such instructions given by the Registrar are binding upon the liquidator who must, within 14 days, post a copy of the Registrar's instructions to every member, shareholder and creditor of the fund. If the liquidator, or any other person, is unhappy about the Registrar's instruction, he may apply to court, within 28 days, for an order to set aside the Registrar's decision.

If the Registrar is satisfied that his instructions have been taken into account, or if he has no instructions, he will direct the liquidator to complete the liquidation.

Once he has finally completed the liquidation and paid all claims, the liquidator must send the Registrar a final liquidation and distribution account, signed and certified by him as correct, showing the assets and liabilities of the fund at the date of distribution and the manner in which the assets have been realised and liabilities discharged. If the liquidator is not certain about the validity of a particular claim made against

the fund, he may, and in fact should, require such claim to be made on affidavit or supported by any additional proof he deems necessary.

Once the Registrar is satisfied that the accounts are correct and that the liquidation has been completed, he will cancel the registration of the fund. The liquidator should ensure that such cancellation is in fact effected.

Requirements for ensuring compliance with statutory duties

The precise requirements the liquidator will need fulfilled before submitting a final liquidation and distribution account to the Registrar for approval are not laid down. This is where the liquidator's fiduciary duties become especially important, and he must act with extreme care and diligence and with complete impartiality.

In particular he must ensure that all members are treated fairly and be accorded their full benefits in terms of the rules. The liquidator may not favour certain members over others unless he has a legal justification for doing so. Should the liquidator fail to remain impartial and unjustly favour a particular member or members, he may well find himself personally liable to make good any losses suffered by aggrieved members.



Chapter 6

Individual investment choice

6.1 What is individual investment choice?

Individual investment choice is simply the administrative ability to give members the choice as to the type of assets they would like to invest in and thereby allocate returns on specific fund investments to that member's interests in the fund. It also acknowledges that individual members have different needs and that a single, one-size-fits-all investment strategy is not appropriate to all members. However, the assets remain the property of the fund and members have no rights to those assets.

6.2 The legal basis of individual investment choice

Trustees may only delegate their powers of investment to members if this is allowed in the rules of the fund. Whether the trustees' decision to grant individual investment choice to members can be considered proper and in compliance with their fiduciary duties, will depend on:

- the prudence of the delegation in the circumstances; and
- the controls the trustees have put in place to ensure that members exercise their investment choices appropriately.

However, in delegating such authority, the trustees should not abdicate their responsibilities, but they must first take reasonable steps to determine whether the members have the necessary financial skill to make individual choices as is required of a prudent and reasonable trustee. If the trustees fail to do this, they may be guilty of improperly delegating their powers for which the fund may be liable. This means that the fund may be obliged to compensate the members for such losses that they may suffer as a result of their poor investment choices.

It is argued that in the same way that the investments of the fund's assets as a whole must comply with the prudent investment guidelines set out in Regulation 28 to the Pension Funds Act, individual members' investment choices must also comply with Regulation 28.



6.3 Some practical steps trustees can take to ensure that members exercise their investment choices properly

- The trustees could limit the number of investment portfolios in terms of the rules of the fund, for example, to three or four portfolios that have been selected on the basis that they are secure investment vehicles.
- Alternatively, the trustees could consider establishing portfolios to reflect different levels of risk profiles (low, medium and high). For example, younger members may wish to have relatively more equity exposure than older members. These portfolios would have to comply with Regulation 28 to the Pension Funds Act.
- The trustees should always establish a so-called default portfolio for members who do not feel properly equipped to make individual choices.
- The trustees should ensure that members are properly educated on individual investment choice and that they receive adequate information on each investment portfolio in a clear and unambiguous manner. They can either educate the members themselves if they do possess the necessary skills, or they can give members access to investment experts where they (the trustees) lack sufficient expertise.
- Trustees will have the duty to guide members with regard to the advantages and disadvantages of each portfolio, relative to the individual member's circumstances at the time.
- The trustees should ensure that proper systems are in place to continuously monitor each member's investment choices.
- Since the physical exercise of an investment choice could be costly, the trustees could consider allowing members to make changes in portfolio choice only at certain intervals, for example annually, so as not to run up exorbitant administrative costs.

6.4 The potential liability of the trustees if the members suffer losses as a result of their poor investment choices

If the trustees themselves offer financial investment advice to the members, they will be judged according to the standard expected of a trustee who is equipped with that knowledge and skill, i.e. as a reasonable investment expert. However, should it subsequently transpire that the trustees never had the requisite knowledge and skill to give investment advice, or if the investment advice that they gave turns out to be incorrect, the trustees may be held liable for negligence. It would therefore be prudent for the trustees to employ the services of investment experts to educate members on individual investment choice.

If the trustees engaged the services of investment professionals to educate and advise members and the investment advice is poor, the investment professionals (and not the trustees) will be liable. This is particularly true if the trustees believed in good faith that the professionals were equipped to give such advice.

Chapter 7

The effect of the Constitution's Bill of Rights on retirement funds

7.1 The relevance of the Constitution for retirement fund trustees

The Constitution is the supreme law of South Africa and all legislation, such as the Pension Funds Act and even the rules of a fund, are subject to the Constitution. This means that if any provision in a statute or a rule of a fund is inconsistent with the Constitution's Bill of Rights, it may be declared unlawful and unconstitutional.

In terms of section 7D of the Pension Funds Act, it is the duty of trustees to ensure that the rules, practices and procedures of their retirement funds comply with all legislation, including the Bill of Rights. For this reason trustees must be careful to avoid discriminatory provisions in the rules of their funds, for example to provide different benefits for male and female members or to discriminate unfairly between members on the basis of their race or marital status.

Such practices may be regarded as unconstitutional and hence the trustees could be held liable for maladministration of the fund. However, this does not mean that the trustees may not treat different classes of members differently, for example active members versus pensioners, if the grounds for such differentiation are reasonable, fair and justifiable.

It is only when differential treatment amounts to unfair discrimination that it will be regarded as unconstitutional. An unhappy member merely has to prove the existence of a discriminatory practice. The

trustees must then prove that the discrimination is not unfair.

It is important to remember that if a complaint is lodged with the Pension Funds Adjudicator against the trustees, the Adjudicator has a legal duty to apply the Constitution in order to resolve the dispute and this includes the power to declare a rule or a decision by the trustees unconstitutional and therefore invalid.

7.2 Specific rights in the Constitution's Bill of Rights that are of relevance for retirement funds

The rights in the Bill of Rights that are important for members of retirement funds, and which trustees must take into consideration, are the following:

Section 9: The right not to be discriminated against. A retirement fund may not unfairly discriminate directly or indirectly against its members on any of the grounds listed in the Bill of Rights, e.g. race, gender, sex, marital status and sexual orientation.

Section 18: The right to freedom of association. Whilst this right may be enforced outside of a retirement fund, for example not to belong to a trade union, the requirement by SARS that membership of a retirement fund may be compulsory for eligible employees, cannot be frustrated or be subjected to an individual's right to freedom of association.

Section 23: The



Success is measured not so much by the position that one has reached in life as by the obstacles he has overcome.

Booker T Washington

right to fair labour practices. Since the rules of a retirement fund are considered by some to form part of the terms and conditions of an employee's contract of employment, they must be considered in the context of the employment relationship between the employer and the members of the fund. Therefore members could rely on section 23, read with the unfair labour practice provisions in the Labour Relations Act, to ensure that the rules of a retirement fund do not contain an unfair labour practice.

Section 25: The right not to be arbitrarily deprived of property. The Pension Funds Adjudicator has held that property in this context includes a member's right to an interest in a pension fund, e.g. a benefit payable by such fund. Thus it would be unconstitutional for trustees to withhold payment of a benefit to a member or his beneficiary on unreasonable or arbitrary grounds.

Section 32: The right to information. Members or beneficiaries will be able to rely on this clause when they require more information, for example in respect of the calculation of benefits or the allocation of death benefits in terms of section 37C of the Pension Funds Act and so on.

It is also important to note that trustees have a legal duty to ensure that adequate and appropriate information is communicated to the members of the fund in terms of section 7D of the Pension Funds Act.

Section 33: The right to just administrative action. Members of a retirement fund have the right to insist that decisions made by trustees are lawful, reasonable and procedurally fair. If a member's rights have been adversely affected by a decision of the trustees, he also has the right to be given written reasons for such decision.

A successful life is one
that is lived through
understanding and pursuing
one's own path, not chasing
after the dreams of
others.

Chin Ning Chu

Chapter 8

Conclusion

Some may argue that retirement funds are not trusts and that the use of the word “trustee” is inappropriate. Whether or not these arguments have any merit is really quite irrelevant because, no matter what names one uses, the duties of the relevant persons are comparable and, in most circumstances identical to those of trustees under the law of trusts. These “relevant persons” have a fiduciary relationship with the fund in the same way that a trustee has with a trust or a director with a company.

The weight of opinion, however, appears to be in favour of the contention that the words “trusts” and trustee” are not inappropriate, and the argument against them is merely mentioned here for the sake of completeness.

It is apparent that depending on their relationship and association with the fund at any one time, many persons can be described as falling within the broad definition of “trustee”. They could be agents of the fund, members of a Board of Management or trustees so appointed, the Principal Officer, an administrator, actuary, investment manager, accountant or a director, official, employee or agent of the employer or a financial institution, such as a retirement fund or an insurer, subject to the Financial Institutions (Protection of Funds) Act. These “trustees” all have a fiduciary relationship with the fund and consequent fiduciary duties.



Appendix A

Pertinent extracts from the Financial Institutions (Protection of Funds) Act No 28 of 2001

To provide for, and consolidate the laws relating to, the investment, safe custody and administration of funds and trust property by financial institutions; to enable the registrar to protect such funds and trust property; to repeal the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984); to improve the enforcement powers of the registrar; and to provide for matters incidental thereto.

1. Definitions – In this Act, unless the context indicates otherwise –

“company” includes a close corporation referred to in the Close Corporations Act, 1984 (Act No. 69 of 1984);

“financial institution” means –

(a) any person or institution referred to in the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);

or

(b) any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998 (Act No. 131 of 1998);

[In terms of section 1 of the Financial Services Board Act, 1990, a “financial institution” is defined as –

“(a) (i) any pension fund organization registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or any person referred to in section 13B of that Act administering the investments of such a pension fund or the disposition of benefits provided for in the rules of such a pension fund;

(ii) ...”]

“institution”, for the purposes of sections 5, 6, 9 and 10, means –

- (a) a financial institution;
- (b) any person, partnership, company or trust in which, or in the business of which, a financial institution or an unregistered person has or had a direct or indirect interest;
- (c) 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;
- (d) a participating employer in a pension fund organisation;
- (e) 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
- (f) any unregistered person;

“nominee company” means a company, controlled by a financial institution, which –

- (a) is incorporated under the provisions of the Companies Act, 1973 (Act No. 61 of 1973);
- (b) has as its principal object to act as nominee for, or representative of, any person in the holding of any property in trust for such person or persons;
- (c) is precluded by its memorandum of association from incurring any liabilities other than those to the persons on whose behalf it holds assets, to the extent of their respective rights to, and

interest in, such assets; and

(d) has entered into an irrevocable written agreement with a financial institution which controls the company, and in terms of which such financial institution has undertaken to pay all the expenses of, and incidental to, its formation, operations and liquidation;

“registrar” means -

(a) the registrar as defined in any of the Acts referred to in paragraph (a) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990;

(b) the executive officer defined in section 1 of the Financial Services Board Act, 1990; or

(c) except for the purposes of sections 6A to 6I, the registrar of medical schemes referred to in section 1 of the Medical Schemes Act, 1998;

“trust property” means any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership or company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal;

“unregistered person” means any person, partnership, company or trust not registered, approved or otherwise authorised by the registrar under a relevant law to carry on the business of a financial institution, but who or which carries on such business or a business corresponding to a business normally carried on by a financial institution.

Duties of persons dealing with funds of, and with trust property controlled by, financial institutions

2. A director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property -

- (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;
- (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and
- (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned.

Declaration of interest

3. (1) A director, member, partner, official, employee or agent of a financial institution or of a nominee company who takes part in a decision to invest any of the funds of the financial institution or any trust property in a company or other undertaking in which he or she has a direct or indirect financial interest, must declare that interest in writing to the board of management or other governing body of the financial institution or nominee company, indicating the nature and extent of such interest, before such decision is

made.

(2) For the purposes of subsection (1), 'invest' includes -
(a) the purchase of shares in a company, or of an interest in a close corporation or partnership;
(b) the granting of a secured or unsecured loan.

(3) A declaration of interest made in terms of subsection (1) must be recorded in the minutes of the meeting of the board or governing body at which the declaration is made or considered.

Investment of trust property

4. (1) A director, member, partner, official, employee or agent of a financial institution which administers trust property under any instrument or agreement may not cause such trust property to be invested otherwise than in a manner directed in, or required by, such instrument or agreement.

(2) In the absence of a direction or requirement referred to in subsection (1), a director, member, partner, official, employee or agent of a financial institution may not cause any trust property to be invested otherwise than in the name of -

(a) the principal concerned;
(b) the financial institution in its capacity as administrator, trustee, curator or agent; or
(c) a nominee company.

(3) (a) Despite subsections (1) and (2) -

(i) where the articles of association of a company prohibit the registration of its shares or debentures in the name of -
(aa) a trust;
(bb) a financial institution in its capacity as administrator, trustee or curator;

or

(cc) any nominee; and

(ii) where such shares or debentures form part of trust property administered by a financial institution, those shares or debentures must be registered in the name of a director, member, partner or manager of that financial institution.

(b) The director, member, partner or manager must hold those shares or debentures in a fiduciary capacity on behalf of the principal concerned.

(c) Prior to the registration of any shares or debentures in the name of a director, member, partner or manager as contemplated in paragraph (a), the financial institution concerned must furnish security to the satisfaction of the Master of the High Court, if such security has not already been furnished in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988).

(4) A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal.

(5) Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.

(6) This section also applies in a case where a financial institution invests, holds, keeps in safe custody, controls, administers or alienates trust property under any instrument or agreement jointly with another person.

Declaration of certain practices as irregular or undesirable

5. Declaration of certain practices as irregular or undesirable

(1) The registrar may, by notice in the Gazette, declare a specific practice or method of conducting business an 'irregular or undesirable practice' or an 'undesirable method of conducting business' for a specific category or categories of financial institutions, or for all such institutions.

(2) The registrar may not issue a declaration referred to in subsection (1) unless the registrar -

(a) has invited interested persons to make written representations concerning the intended declaration so as to reach him or her within 21 days before the proposed date of publication of that notice; and

(b) has consulted with any advisory committee or board established in respect of the supervision, regulation and control of the financial institutions concerned.

(3) A financial institution may not, on or after the date of the notice referred to in subsection (1), carry on the relevant business practice or method of conducting business.

(4) The registrar may, by notice in the Gazette direct a financial institution which carries on the relevant business practice or method of conducting business on or after the date of the notice referred to in subsection (1), to rectify or repair to the satisfaction of the registrar anything which was caused by, or arose out of, that business practice or method of conducting business: Provided that the Registrar may not make an order contemplated in section 6D(2)(b).

[Subs. (4) substituted by s. 44 of Act 22/2008]

(5) A financial institution which is directed to rectify or repair anything in terms of subsection (4), must do so within 60 days after the financial institution is so directed.

6. Offences

(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.

(3) A court may, in addition to any penalty imposed in terms of subsection (1) and an order made in terms of subsection (2), order that such person may not serve as a director, member, partner or manager of any financial institution for such period as the court may deem fit.

Appendix B

PF 130 can be obtained from www.fsb.co.za <<http://www.fsb.co.za>

Glossary of Terms

Alienation: Means the sale, pledge, cession, hypothecation, donation or transfer of an asset to another.

Common law: Law passed down over the centuries as expanded by precedent (court judgments) but excluding that contained in statute.

Consultant: Includes professional pensions consultants, financial consultants, insurance brokers and agents or insurers or other administrators.

Fiduciary duty: A duty held or founded in trust or confidence and/or a duty having to do with, or involving a confidence or trust which devolves upon a person who stands in a special relationship of trust, confidence or responsibility in his obligations to others.

Inter alia: Amongst others.

Retirement fund: Pension, provident and retirement annuity funds.

Statute: Laws as promulgated by the state and decreed by Act of Parliament.

Testator: Person leaving his assets to others by last will and testament.

Ultra vires: Outside the scope of the authority given or outside a trustee's power.

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GUIDE TO THE DECISION-MAKING PROCESS OF THE REASONABLE TRUSTEE

When faced with a difficult decision, the trustee should follow the organogram below, which should assist him in coming to a reasonable conclusion about the decision facing him.



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