Protecting the nest egg

Pension fund administration and the law

There are four parties involved in pension fund administration, namely the trustees, the principal officer, the administrators of the fund and lastly the registrar of pension funds. This article will deal with administration by the trustees, followed by the principal officer, the administrators and, finally, the registrar of pension funds.

Trustees of the fund

The board of trustees handle the day-to-day administration of the fund that, in terms of s 7D of the Pension Funds 24 of 1956 as amended (the Act), includes inter alia:

- the duty of ensuring that proper record of the operations of the fund are kept;
- the communication of information to the members; and
- ensuring that the rules and the operation and administration of the fund comply with the Act, the Financial Institutions (Protection of Funds) Act 28 of 2001, and all other applicable laws.

In terms of s 7C of the Act, the trustees have a further duty to act with due care, diligence and in good faith and they have to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times.

These duties create difficulty with employer operated pension funds, where employees are elected to serve as trustees of the pension fund. In such circumstances the employees also owes a duty of good faith to their employer. In the case of conflict between the interests of the members of the fund and the employer, which party’s interests will reign supreme?

The common law principle, bonis patrfamilias would naturally apply as the trustees are in a position of dealing with the members’ money and, according to Financial Services Board (FSB) Circular PF130, the board shall at all times act in utmost good faith towards the fund and in the best interest of the members.

The situation may arise where an employer may feel that the employee acting as trustee has overstepped his or her boundaries and then charge the trustee with misconduct. In such circumstances, it may well lead to intimidation from the employer that may subconsciously cause the employee not to comply with the duties as set out in the act, as he or she remains an employee.

A further question arises as to when a court may remove a trustee from office. Section 5 of the Financial Institutions Act states that the registrar of the FSB may apply to a division of the High Court, on
good cause shown, for the appointment of a curator to manage the whole or part of a business. In Ex parte Executive Officer of the Financial Services Board; In re Joint Municipal Pension Fund [2003] 4 All SA 603 (T), Bertelsmann J held that the wording ‘a good cause shown’ in s 5 of the Financial Institutions Act does not suggest a test that is more lenient than the common law test. Therefore the common law test that a trustee may be removed only if his or her actions are such that a very real risk exist that the funds entrusted to him or her will be dissipated, remains applicable if an application is brought to remove a trustee from office.

There is, however, nothing preventing the members of the fund to lodge a motion of no confidence for the removal of the board or a trustee and, if carried by a majority in terms of the rules of that pension fund, the board or trustee must vacate their offices.

Principal officer

The principal officer is central to the administration of a pension fund, as he or she is the link between the fund and the registrar, as well as between the trustees and the members of the fund.

The principal officer of the fund is appointed by the board of trustees and will, inter alia –

• arrange the meetings of the board of trustees as well as the annual general meeting with the members;
• minute the resolutions;
• ensure that a proper meeting is constituted; and
• ensure that the rules of the fund are updated after amendments and that these amendments are registered with the registrar of pension funds.

In terms of FSB Circular PF130 the functions of the principal officer also include ensuring that the decisions of the board of trustees are executed and ensuring that the fund complies with the formal requirements of the law, directives from South Africa Revenue Service, including all other regulatory bodies and to communicate with the service providers.

The trustees may also delegate certain administrative functions to the principal officer to avoid having to take a formal resolution for every administrative function. It is therefore clear that the principal officer plays a crucial part in the administration of a pension fund.

Despite this, the Act merely requires that a principal officer must be residing in South Africa. According to Ewing ‘Principles for Principals’ Today’s Trustee July/August 2005 (www.totrust.co.za/200508_principles.htm, accessed 9-12-2013), the principal officer -

• must ensure good corporate governance;
• put in place infrastructure to ensure compliance with the Act;
• must have a good understanding of the process in formulating investment strategy, setting benchmarks and asset managers mandates;
• monitor the investment strategy’s implementation; and
• oversee daily operations and instructions from trustees.

As it stands now, the board of trustees must take full responsibility in appointing a principal officer who will also be accountable to the trustees.

My submission is that the legislature should intervene to ensure that, due to the importance of the position, a fit and proper person be appointed by the board of trustees to protect the interest of the members of the fund.

Administrator

A pension fund may appoint an administrator to administer the fund’s investments, but before an administrator may be appointed such appointment must be approved in terms of s 13B(1) of the Act which states that:

‘No person shall administer on behalf of a pension fund the investments of such a pension fund, or the disposition of benefits provided for in the rules of the fund, unless the registrar has in a particular case or in general granted approval thereto and the person complies with such conditions as the registrar may from time to time determine in the particular case or in general.’

The administrator that is appointed must report to the trustees on matters such as the investment portfolio for a financial year, as well as the investment performance of the fund and enable the trustees to make informed decisions and to provide feedback to the members.

The administrator will usually be a firm of actuaries who are duly qualified and who appoints several fund managers to invest the pension fund’s money in order to spread the risk of the members.

The registrar of pension funds

The fourth party in pension fund administration is the registrar of pension funds who has various powers, such as the approval of the rules and the amendments to the rules that regulate the administration of a pension fund.

The registrar also has specific powers such as the right to inspect and investigate a fund and/or its administrator in terms of s 25(1) and (2). The person tasked with the inspection or investigation has a right of access at any reasonable time to all the documents as may reasonably be required to conduct such investigation. Regular inspections will, inter alia, ensure that trustees cannot be manipulated by their employers in employer pension funds, such as a municipal pension fund.

The registrar may further, in terms of s 26(1) of the Act, intervene in the management of a fund, after considering the interests of the members and may direct that the rules of the fund be amended if the investigation or inspection in terms of s 25 necessitates amendment of the rules.

Should a pension fund fail to comply with a direction or condition from the registrar to submit information, the registrar may, in terms of s 37(2), impose an administrative penalty not exceeding R 1 000 for every day such failure continues.

Before imposing such penalty, the registrar must in writing –

• inform the fund or administrator of its intention;
• specify the particulars and amount of the intended penalty;
• provide reasons; and
• invite interested persons to make representations.

The question, however, remains, who will be liable to pay the penalty? The members can surely not be prejudiced by the administrator’s or trustees’ failure to comply with a direction of the registrar.

I submit that the rules of a pension fund should incorporate a provision to prevent that the fund’s money may be used in such circumstances.

Conclusion

The rules of a pension fund are of utmost importance for the administration of the fund and it should ultimately ensure that the members’ interests are protected at all times.

The trustees have a fiduciary duty towards the members and should act with the utmost good faith at all times.

If there are any uncertainties or an ambiguity in the rules, the trustees and the principal officer of the fund must ensure that the rules are amended timely to eliminate such uncertainties or ambiguities in order to create a greater certainty in the administration of the fund.

A duly qualified and competent principal officer must be appointed by the board of trustees to ensure that the functions of the post is fulfilled and to safeguard themselves as they carry an inherent fiduciary duty towards the members and beneficiaries of the fund.

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