Trustee Tutor: Issue 1 – Duties of Trustees

Many times Trustees sit in meetings and have not been given the opportunity to learn about the importance of their position and the extent of their responsibility. Trustee Tutor is a series specifically written for Pensions World to help Trustees, and other stakeholders, understand the retirement funds industry. This series will allow you to build a library of information that you can refer back to when you need to.

The starting place for any Trustees' confidence to be able to make good decisions is to understand the law. Issue 1 will take you through the law on all your duties as a Trustee that you need to be aware of so that you understand how important your role is in a retirement fund.

In this article, retirement funds refers to both pension and provident funds. Trustees' roles and responsibilities are set out in the Pension Funds Act.

Build your confidence by understanding the law.

The Pension Funds Act, 24 of 1956

The Pension Funds Act, 24 of 1956, ("the Act") governs the management and operation of retirement funds in South Africa.

A fiduciary duty is a legal obligation of one party to act in the best interest of another.

Trustees' responsibilities

It is very important that Trustees always remember that they are responsible for managing a retirement fund that is built up with other peoples' money. Trustees cannot use the excuse that they didn't know the rules or the law.

Trustees' fiduciary duties and responsibilities are set out in Section 7 of the Pension Funds Act.

Section 7C(1) of the Act tasks Trustees to **"direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund."** It is very clear in the Act that the Trustees are ultimately responsible for the management and operation of a retirement fund. To be able to do this, you need to know all the pieces of legislation (law) that apply to all retirement funds and you need to understand the rules of your specific fund. (Amongst other things, your fund's rules set out the contribution rates that the members and employer pay, the benefits that your fund will give members when they leave and how your Board of Trustees will be set up and make decisions.)

Section 7C of the Act also requires that the Trustees:

- Ensure that all benefit payments are made in terms of the rules, and
- Ensure that the Fund's assets (money) are invested in line with the regulations to the Act.

Section 7C(2)(a) of the Act stresses to Trustees that while they are managing a retirement fund, they must **"take all reasonable steps to ensure that the interests of the members are protected"**. As a Trustee you are making decisions that affect other people – the members of your fund and sometimes their families. Members are relying on you to make the best decisions for them and to protect their interests in the fund.

Trustees should be especially careful in their decision making when dealing with:

- An amalgamation or transfer of members
- A splitting of the fund
- An employer terminates or reduces contributions to the fund
- An increase in the members' contributions
- A participating employer leaves the fund

Section 7C(2)(b) states that Trustees must **"act with due care, diligence and in good faith"**. The standard of care Trustees will be held to will be a higher standard than that of a "reasonable person". Trustees must act with a high degree of discipline and diligence, by applying their minds properly and carefully to the issues of the fund. And, of course, Trustees must always act honestly and reasonably.

Section 7C(2)(c) requires Trustees to **"avoid conflicts of interest"**. This means that Trustees must show independence in decision making and not be influenced by the wrong things. Whether you're an employer appointed, member elected, independent or sponsor appointed Trustee, your decision making must at all times be in the members' best interests. (More detail on conflicts of interest is discussed under PF 130 further on.)

In terms of Section 7C(2)(d), Trustees must **"act impartially in respect of all members and beneficiaries"**. The Trustees must treat all members of the fund equally and benefits must be paid out in terms of the rules of the fund.

A beneficiary is a person who may get benefits from a fund but is not a member of the fund, for example, a spouse or a child.

Section 7C(2)(e) expects Trustees to "**act independently**". Once again it is important to remember that you need to act in members' best interests – not your employer's or your own.

Section 7C(2)(f) requires the Trustees to fulfil their fiduciary duty towards members and all other beneficiaries to ensure that the fund is **"financially sound"** and responsibly managed and governed according to the rules and the Act.

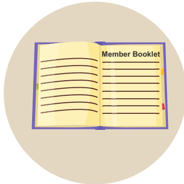
Section 7D of the Act sets out the administrative duties of Trustees. These are to:

(a) Make sure that **proper registers, books and records** of the operations of the Fund are kept, including proper minutes of all resolutions passed by the Board. Fund documents will include the Fund's minute book, Trustee register as well as details of the fund's membership, auditor, administrator, investment manager and valuator.

(b) Insist that **proper control systems** are employed by or on behalf of the Board. Trustees must make sure that control systems are in place to make sure that records are correct and that proper controls are in place to reduce the risks faced by the fund. In most cases, Trustees appoint an administrator to manage the member and financial records of the Fund. Even if you have an outside administrator on your fund, you as a Trustee remain responsible to make sure that they perform this function properly.

Administrative

Proper registers, books and records of the operations



Member Communication

Adequate and appropriate information is communicated to the members

Obtain expert advice on matters where Trustees lack sufficient expertise

Control Systems

Manage the member and financial records

Payment of Monthly Contributions

Employers must pay over contributions to the retirement fund by the 7th of the following month

Ensure rules, the operation and administration comply with:

The Pension Funds Act, the Financial Institutions (Investments of funds) Act and all other applicable laws

(c) Make sure 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. Trustees should make sure that the fund sends a new member a membership certificate when they join confirming basic details of the fund and contact details should the member have any questions. In addition, Trustees should make sure the Fund has:

- a member booklet summarising the rules and benefits of the fund
- a benefit statement, sent out at least once a year, showing the member the updated value of all his benefits in the fund
- information available on the Fund's investments – especially if your Fund has member investment choice
- an annual report from the Trustees updating members on changes in the fund (including changes to the rules), and reminding them of important contact details should they have questions or complaints.
- information available when the member leaves the fund – either resigns or retires – explaining the various options they can choose to follow with the money they receive from the fund

(d) **Payment of monthly contributions** is dealt with in Section 7 and Section 13A of the Act. In terms of the law, employers must pay over contributions to the retirement fund by the 7th of the following month, in other words, February's contributions are due by 7 March. If contributions are received late, interest is due and payable by the employer. By the 15th of the month, the employer must also provide a contribution statement or schedule showing the details of who the contributions are for.

(e) **Obtain expert advice on matters where Trustees lack sufficient expertise.** It's very important for Trustees to remember that there are experts around them who can support them in their decision making. If you don't have the necessary knowledge in the matter you need to make decisions on, you need to consult an expert. This expert could be your employee benefits consultant, the fund valuator, a pensions lawyer or an investment specialist.

If you are unsure of any matter which need to make a decision on, consult an expert to guide you.

(f) **Make sure that the rules and the operation and administration comply** with the Pension Funds Act, the Financial Institutions (Investments of funds) Act and all other applicable laws. This sweeping statement places a big responsibility on Trustees to make sure that they not only understand all the laws applicable to retirement funds, but also that they monitor that their funds comply with these laws.

Appointing a Principal Officer

Section 8 of the Act states that all retirement funds must appoint a Principal Officer in terms of the process set out in the fund's rules.

Briefly, the Principal Officer of your fund is responsible for the day to day running of the fund, liaising with the authorities and working closely with your fund's service providers. If you have any concerns or questions on your fund, the Principal Officer is the best person to help you.

The Financial Services Laws General Amendment Act 45 of 2013

This Act sets out a number of extra responsibilities of Trustees. These are:

- The duty to **acquire and maintain certain skills**. Trustees must get the necessary skills and training within 6 months of being appointed to the Board and are expected to keep updating their skills and knowledge for as long as they serve as a Trustee.
- The duty of **whistleblowing** whereby a Trustee must inform the registrar in writing of any information relating to the affairs of the fund, which in his opinion may seriously prejudice the financial soundness of the fund or its members.
- To **report the reasons for removing a Trustee** from your Board within 21 days. Trustees should also keep in mind that if they are removed from the Board, they must report to the authorities the reasons why they think they were removed.
- A reminder to **act independently and in the best interest of the fund**.
- To make sure that the fund is in a **sound financial position and that fund rules are complied with**. Your fund will be audited every year by an independent auditor. It is important that you understand this process and how to read a set of financial statements. The annual audit is an opportunity to look into the finances of the fund and the administration processes behind contribution reconciliations, member payments and contribution investment. You could also ask the fund valuator to give you an opinion on the financial soundness of the fund at the financial year end.
- **Informing members** of their rights and responsibilities. Member communication in a retirement fund is key to helping members make the right decisions while they're in the fund and when they leave it.
- To **follow procedures set out in the fund rules to delegate functions** to a person or committee. The delegation must note whether in an executive or advisory role and occur without the Board abdicating responsibility.
- **Allows the authorities to remove a Board member** if they feel that the Trustee is no longer fit and proper.

Up to this point, we've looked at a very high level summary of your duties as a Trustee that are set out in the law. There are other documents you need to be aware of that deal with the responsibilities of a Trustee.

Financial Sector Conduct Authority (FSCA) PF Circular 13

The FSCA issues PF (pension fund) circulars from time to time in order to clarify interpretations of the Act or to recommend best practice.

PF circular 130 was issued by the FSCA in 2007. While PF circulars are not law, it is advisable that you implement their best practice principles in your fund. And generally funds are expected to comply with PF 130.

PF 130 deals specifically with good governance in retirement funds and provides practical guidance on the duties set out in Section 7C and 7D of the Act.
PF 130 introduces Trustees to four recommended policies that all retirement funds should have in place, namely:

- Investment Policy Statement (IPS)
- Code of conduct
- Communication policy
- Risk management policy

As a Trustee of a retirement fund, you should keep an up to date copy of the rules of your fund together with the above four policy documents on hand. This will help you understand the context you are making decisions in.

Both the law and PF 130 maintain that the Trustees of the fund are responsible for everything that happens on the fund – not only strategic decisions, but also the day to day running of the fund as well. The Board can delegate some of these functions but they still remain responsible for them. Many times Trustees have committees to help them manage the large amount of detail and work on the fund. Committees are made up of a smaller group of some of the Trustees, generally those Trustees who have skill or knowledge in the particular area of the committee. For example, a Trustee who is the employer's financial director may also sit on the retirement fund's audit committee. Any delegation of duties to either a committee or to a service provider must be set out clearly in an agreement or mandate.

Where your fund does outsource functions (for example, to committees or to service providers), make sure that there is a clear agreement or mandate in place.

As mentioned previously, the Trustees have a duty of good faith to all board stakeholders and must work together as a Board to reach decisions that are in the members' best interests.

The Board of Trustees will elect one of the Trustees as the fund Chairperson in terms of the fund's rules. PF 130 regards the Chairperson role as a key role in making sure that the Board is effective in carrying out its duties.

In PF 130 the **role of the Chairperson** is to:

- Proactive lead the Board without bias.
- Meet regularly with the Principal Officer to monitor the business of the fund.
- Act as the fund's spokesperson.
- Evaluate the Board and the Principal Officer on a regular basis.
- Make sure that sufficient time is given to each item during trustee meetings.
- Proactively raise issues of concern on behalf of the Board with the employer or service providers.

PF 130 also gives more details around the **role of the Principal Officer**, who should:

- Make sure that the decisions of the Board are carried out.
- Monitor that the fund complies with the formal requirements of the law.
- Liaise on behalf of the Board with service providers to the fund.
- Contribute at Board meetings even though they do not have any vote in any decisions of the Board.

Importantly, PF 130 specifically states that the Principal Officer should not be the Chairperson of the fund.

PF 130 also mentions some important points about conflicts of interest:

- Trustees must demonstrate independence in decision making.
- Trustees must not be influenced by inappropriate considerations.
- Information should never be disclosed unless authorised by the Board.

Conflicts of interest

PF 130 has expanded on the Trustee's duty to avoid conflicts of interest. It is true that many Trustees may be conflicted because they work for the employer or the sponsor of the fund. This might make Trustees uncomfortable to make certain decisions for fear of consequences in their jobs.

There are two types of conflict:

Avoidable conflicts of interest, for example, where you accept an expensive gift from a service provider (who may have the understanding that he would be appointed on the fund in return).

Structural conflicts of interest that can't be avoided, for example, the situation mentioned earlier where you work for the employer.

In all instances, all conflicts of interest must be clearly disclosed and recorded in the minutes of the Trustee meeting where they are disclosed and managed to "promote the credibility of the governance of the fund …".

Your Board's Code of Conduct

Many of the duties raised in the various pieces of law and circulars are summarised in your fund's code of conduct. This code of conduct will generally set out in detail:

- The objectives on the fund, in other words, what the aim of the fund and the Trustees is when managing the fund.
- The Board's principles of honesty and integrity
- How Trustees are elected or appointed to the Board, a summary of the process outlined in the fund rules, as well as the skills and traits of those people who should be considered as Trustees, for example honesty and integrity.
- How the Board discloses and deals with conflicts of interest.
- Behaviour at Board meetings, including things like arriving prepared (having read the agenda), respecting your fellow Trustees, behaving with dignity and resolving disagreements.
- The duties of the Chairperson and the Principal Officer.
- What type of training you are expected to work through to make sure your skills and knowledge are kept up to date.
- Your duties of confidentiality – what fund information you are able to share.
- How to manage stakeholder relationships.
- Your Board's policy on the acceptance of gifts.
- The Board's disciplinary process should a Trustee breach their duties or the code of conduct.
- How the Trustees' performance will be measured and reviewed every year.

Your fund's code of conduct sets out the practical detail of how you need to behave as a Trustee. You need to familiarise yourself with these principles.

This first issue of Trustee Tutor focused on working through your duties as a Trustee. It is important that Trustees understand their responsibilities in order to become effective decision makers. In future issues we will deep dive into other technical aspects of benefits, investments, conflicts of interest and insurance.