Pension Fund Trustees and Personal Liability

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By Allan Greenblo, Editorial Director: Today's Trustee

Still want to be a trustee? Then go for it, provided you can take heat like the 'IF Four'

This should hardly be a question, but put at its simplest the answer has become hotly contested: when trustees of a pension fund have behaved reasonably in performance of their fiduciary responsibilities, can they still be held personally liable for the losses suffered by the fund despite the losses having been caused by a duly-appointed service provider?

Yes, held Pension Funds Adjudicator Lukhimane in a 2013 ruling against trustees of the IF umbrella pension and provident funds. Although the determination lacked analysis of the trustees' efforts at oversight of the service provider, to whom administration of the funds had been delegated prior to their appointment, the Adjudicator concluded that the trustees must be held personally liable "by reason of their failure to exercise their duties of proper care and diligence in the management of the funds".

No, not in this instance, say Gail le Grellier, Renier Botha, David Lepar and Carel Smith. They were IF trustees during various periods between November 2006 and February 2011, but critically in July 2010 when they decided that the funds' databases had to be rebuilt.

Heads of argument have now been filed on the trustees' behalf by Mohammed Chohan SC and Mark Costa in the Pretoria High Court. They're applying for the 2013 determination to be set aside and substituted with an order dismissing the complaint that had been lodged with the Adjudicator, alternatively for the trustees to be relieved of personal liability.

There are 34 respondents. They include the Adjudicator, over two dozen employers participating in the IF funds and Tony Kamionsky of Dynamique which administered the funds

from December 2005 to January 2008. Kamionsky was also the chairperson and a trustee of the funds during this period.

The matter has taken ages to reach the courts (see particularly TT Sept-Nov ’13 and Dec ’13-Feb ’14). In essence, the complaint upheld by the Adjudicator was that the decision by Le Grellier and her three colleagues (“the trustees”) to rebuild the records of the funds was an improper exercise of their powers as trustees. The rebuild, undertaken by Deloitte so that monies in the funds could be reconciled with credits to members, had cost R18,7m.

The trustees had resolved that this cost be paid by the IF and Dynamique funds through a levy against their respective assets. But the Adjudicator ruled that the four trustees, not fund members by a 2,5% deduction in their fund credits, personally pay the R18,7m rebuild cost (less the “negligible” R1m later paid by Kamionsky, without admitting to maladministration, in settlement of civil claims).

Counsel points out that, in the complaint, the trustees weren’t accused of maladministering the IF funds. Rather, as trustees, they were responsible for actions of Dynamique as administrator. To the extent that Dynamique had maladministered the funds, the Adjudicator had held, the trustees were responsible either vicariously or because they had failed to exercise proper oversight over Dynamique.

Further, according to the heads of argument:

- The applicants (the trustees) were only appointed well into the life of the IF funds. During their tenure they became aware that annual financial statements had not been audited. They accepted in good faith the representations of Dynamique that processes were underway to finalise them;
- At regular trustee meetings in 2006 and 2007, Le Grellier and Botha (who’d assumed office prior to being joined by Lepar and Smith) raised concerns about the lack of proper administration reports. “Dynamique and Kamionsky provided plausible explanations and ameliorated their concerns. It was only when Dynamique departed, and AON was appointed (to replace Dynamique as administrator), and after AON began reconciling membership data, that the applicants were told and thus became aware of the fact that the IF funds’ membership data lacked integrity and was unreliable;

- The complaint before the Adjudicator does not suggest what the trustees should have done and when they should have done it. If the end result is the same, irrespective of the time that the maladministration was discovered, the trustees cannot be accused of having caused prejudice because the rebuild was “necessary, prudent and inevitable”. (Even if the trustees had fired Dynamique immediately on their appointment, and engaged a new administrator, the records would still have needed a rebuild because of circumstances that began long before the four trustees had been appointed.)

The court will need to determine whether:

- The applicants, as trustees of the IF funds, ought to be held personally liable for the maladministration of Dynamique and Kamionsky;
- The applicants’ decision to treat the costs of the rebuild as a special ad hoc expense to the IF funds was a proper exercise of their powers as trustees.

An application under the relevant s30P of the Pension Funds Act is regarded as an appeal in the wide sense, the heads argue, requiring a complete rehearing and fresh determination on the merits of the matter with or without additional information: “The court is therefore not limited to a decision whether the Adjudicator’s determination was right or wrong. Neither is it confined to the evidence or the grounds on which the Adjudicator’s determination was based. The court can consider the matter afresh and make any order it deems fit, provided that it determines substantially the same ‘complaint’ as the one determined by the Adjudicator.”

Certain minutes had not been furnished to the Adjudicator because neither she nor any complainants had requested copies. However, in her response to the Adjudicator, Le Grellier had referred to what was discussed at relevant meetings.

Should the minutes nonetheless be considered new evidence, the trustees must apply for leave to place them before the court. They’ve done so in their replying affidavit to the answering affidavit of a complainant/respondent. There can be no prejudice because the complainant has not disputed what’s recorded in the minutes.

There’s abundant evidence in the founding papers, it’s submitted, that from the time of their appointments in 2006 Le Grellier and Botha had taken all reasonable measures that would ultimately have led to a rebuild from the IF funds’ inception. Their task was made the more invidious because they were co-trustees with Kamionsky.

He has not been held liable in his capacity as a trustee. Rather, his negligence “stems from his actions as the controlling mind and representative of the administrator responsible for the maladministration”.

Even if the question of the liability of co-trustees for breach of trust were relevant in the present matter – although it is trite that in exercising its powers the board acts as one – this does not necessarily mean that board members are jointly and severally liable for compensation for a loss caused to the fund or its members by a single board member.

In the present case, it’s argued, Le Grellier and Botha had clearly not adopted a supine approach. They’d acted with the requisite care and caution. They did not themselves have the necessary skills or expertise to administer the funds. So they relied, as the rules required, on Dynamique. “They ought not therefore to be held jointly and severally liable with Kamionsky for his negligence.”

Almost a side issue, because the court won’t have to decide on it, is the contention of Kamionsky that the cost of the rebuild would have been recovered from the funds’ professional indemnity insurance had the cover not lapsed because the trustees had not paid the premiums. But this contention, it’s countered, is flawed.

First, until the rebuild was done, there was no claim or loss suffered by the funds. Second, the insurance policies exclude liability relating to “any claim/loss arising in any way from the issues raised by the auditors” following their audit for the year to end-February 2006 i.e. prior to the appointment of the applicants as trustees.

In any event, writing to Kamionsky in 2011, the insurer’s attorneys stated: “At all material times prior to inception of the policy commencing 1 August 2009, you bore knowledge of material facts relating to errors or omissions, or alleged errors or omissions, with regard to administration of the funds by Dynamique. Such information was material to assessment of the risk and should have been disclosed prior to inception of the policies.”

Even had payments of the premiums continued, the insurers would have moved to void the policy due to Kamionsky’s alleged misrepresentation and non-disclosure.

http://www.insurancegateway.co.za/RetirementConsumers/PressRoom/ViewPress/Irn=14259&URL=Pension+Fund+Trustees+and+Personal+Liability+2#.WBnebcsVhQs