



Duties and responsibilities of the trustee

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Any person assigned the duty to manage interests on behalf of others has a responsibility to fulfil this duty to the best of his ability, and in accordance with appropriate legal standards and requirements. Trustees of retirement funds have an obligation to understand the important role that they fulfil in ensuring that funds under their control are managed according to applicable laws and regulations, and in the best interests of the members.

The relationship between the trustee of a retirement fund and the members of that particular fund, is one of trust. As such, the duties that go with the relationship of trust are fiduciary duties, which are governed by the statutory and common law.

3.1 Duties and responsibilities imposed by specific statutory law

The Pension Funds Act is a comprehensive legislative decree governing retirement funds. It provides for the registration, incorporation, regulation and dissolution of funds. The main purpose of the Pension Funds Act is to protect the rights of members of funds. This Act therefore aims to ensure that retirement funds follow prudent financial management and administrative procedures. It further serves as a guideline for trustees in their management role.

Section 7C of the Pension Funds Act sets out the general duties of trustees and effectively states that trustees should:

- take all reasonable steps to protect the interests of members
- act with due care, diligence and good faith
- avoid conflicts of interest
- act with impartiality in respect of all members and beneficiaries.

Section 7D of the Pension Funds Act states that the board of trustees should perform the following duties:

- maintain proper registers, books and records of the operations of the fund, including proper minutes of all resolutions passed by the board
- maintain proper control systems
- communicate adequate and appropriate information to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund
- take all reasonable steps to ensure that contributions are paid timeously to the fund as prescribed by the Act
- obtain expert advice on matters where board members may lack sufficient expertise
- ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, (Act 28 of 2001) (the Protection of Funds Act), and all other applicable laws.

To assist trustees in compliance with the Pension Funds Act, a checklist, marked Appendix A, addressing the legislative responsibilities of trustees, has been included in this Toolkit. The checklist should not be regarded as the sole or ultimate reference for compliance. Trustees are advised to regularly update their understanding of the responsibilities that the Act imposes on them.

3.2 Duties and responsibilities imposed by other statutory law

Pension Fund Circular 130 states that the board of trustees and the principal officer should ensure that the governance of the fund complies with the requirement of applicable legislation. Proper identification and prioritisation of legislative and regulatory duties and requirements will assist the trustees in managing and mitigating regulatory risks.

In addition to the Pension Funds Act, the statutory laws that govern the duties and responsibilities of retirement fund trustees, to a greater or lesser extent, are contained in the Acts listed below. This list is by no means complete and it is recommended that trustees seek specialist advice in order to determine which Acts are applicable to the particular fund that they are managing.

- The Basic Conditions of Employment Act, 1997 (Act No 75 of 1997)
- The Broad Based Black Economic Empowerment Act, 2003 (Act No 53 of 2003)
- The Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993)
- The Consumer Protection Act, 2008 (Act No 68 of 2008) ⁴
- The Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996)
- The Divorce Act, 1979 (Act No 70 of 1979)
- The Electronic Communications and Transactions Act, 2002 (Act No 25 of 2002)
- The Employment Equity Act, 1998 (Act No 55 of 1998)
- The Estate Duty Act, 1955 (Act No 45 of 1955)
- The Financial Institutions (Protection of Funds) Act, 2001 (Act No 28 of 2001)
- The Financial Intelligence Centre Act, 2001 (Act No 38 of 2001)
- The Financial Advisory and Intermediary Services Act, 2002 (Act No 32 of 2002) ⁵
- The Income Tax Act, 1962 (Act No 58 of 1962)
- The Labour Relations Act, 1995 (Act No 66 of 1995)
- The Maintenance Act, 1998 (Act No 99 of 1998)
- The National Credit Act, 2005 (Act No 34 of 2005)
- The Occupational Health and Safety Act, 1993 (Act No 88 of 1993)
- The Prevention and Combating of Corrupt Activities Act, 2004 (Act No 12 of 2004)
- The Prevention of Organised Crime Act, 1998 (Act 121 of 1998)
- The Promotion of Access to Information Act, 2000 (Act No 2 of 2000)
- The Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000)
- The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No 4 of 2000)
- The Protected Disclosures Act, 2000 (Act No 26 of 2000)
- The Protection of Personal Information Bill
- The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No 70 of 2002)
- The Skills Development Act, 1998, (Act No 97 of 1998)
- The Skills Development Levies Act, 1999 (Act No 9 of 1999)
- The Tax on Retirement Funds Act, 1996 (Act No 38 of 1996)
- The Transfer Duty Act, 1949 (Act No 40 of 1949)

⁴ The Consumer Protection Act will be applicable to retirement funds not rendering "advice" as contemplated in the Financial Advisory and Intermediary Services Act, and who have not registered as service providers in terms of the Financial Advisory and Intermediary Services Act.

⁵ The Financial Advisory and Intermediary Services Act is only applicable to retirement funds who render "advice" as contemplated in this Act.

- The Tobacco Products Control Act, 1993 (Act No 83 of 1993)
- The Unemployment Insurance Act, 2001 (Act No 63 of 2001)
- The Unemployment Insurance Contributions Act, 2002 (Act 4 of 2002)
- The Value Added Tax Act, 1991 (Act No 89 of 1991)
- Annual updates to the Revenue Laws Amendment Act.

3.3 Duties and responsibilities imposed by common law

Common law principles have, over the years, been determined by the courts of law. Many of the principles are based on laws that have developed over time or in other legal systems.

The main aspect of common law, relevant to the behaviour of trustees of retirement funds, is the law of trust. In terms of section 2(a) and (b) of the Protection of Funds Act, *“any person dealing with funds must observe the utmost good faith, and exercise the proper care and diligence...required of a trustee in the exercise or discharge of his powers and duties...”* The Protection of Funds Act is applicable to the trustees of a retirement fund and, as such, confirms that the common law fiduciary duties are also applicable to retirement fund trustees.

Most of the duties, which appear below, are also evident in section 7C and section 7D of the Pension Funds Act. In interpreting the meaning of these duties it is necessary to look at the common law principles, usually imbedded in case law. In terms of common law principles, each trustee should at least maintain the standards set out below:

3.3.1 Act with care, skill and diligence

When dealing with fund assets, the standard of care expected from a trustee is higher than the standard of care expected when that trustee is dealing with his own assets. Trustees will be judged by the standard of care that is expected from a person familiar with retirement fund issues, and the standard of care expected from someone that has been entrusted with the assets of others. In order to reach and maintain the required standard of care, trustees should:

- be familiar with the rules of the fund, the provisions of the Pension Funds Act and all other applicable legislation
- through appropriate training, obtain reasonable knowledge and skill regarding fund matters
- obtain independent expert advice on matters not within the areas of their expertise and competency
- make decisions as transparently as possible
- not allow themselves to be persuaded by “experts” to take decisions that they are uncomfortable with.

3.3.2 Act in good faith (fiduciary duties)

Trustees are required to exercise their powers and carry out their duties in the best interests of the members of the fund or the members’ beneficiaries. As such, trustees are placed in a fiduciary relationship, or a relationship of trust, relative to the members of a retirement fund. Should a trustee act in his own interest, he will commit a breach of trust, rendering him potentially liable for damages to the retirement fund or its members.

In order to adhere to the duty of good faith, trustees should, in practice, always maintain the standards set out below:

3.3.2.1 Avoid conflicts of interest

Trustees are at all times required to put the interests of the fund and the members of the fund first. They should, as far as possible, avoid situations that could give rise to a conflict of interest; for example, serving only the employer's interests where they were appointed by the employer. In the event of a conflict of interest arising, the trustee should declare such interest at a board meeting of trustees; the board should then make a decision as to the significance of the effect that such conflict could have on the fund, and decide on the future course of action. Circular PF130 goes a step further and requires the board of trustees to properly resolve any conflict of interest, i.e. to attempt to remove the conflict, or if this is not possible, to have the conflict resolved transparently and defensibly. This would require not only that the conflict of interest situation is fully recorded in the board minutes, but also that the minutes include details as to how the board of trustees has addressed or resolved the matter.

When selecting and appointing service providers, trustees should also be alert to possible conflicts of interest in acceptance of advice where, for instance, a principal officer or a consultant is also an employee of an investment or benefit administrator.

3.3.2.2 Maintain proper administration

Trustees should ensure that the administrative issues relevant to the fund are properly managed and up to date. Proper administration will usually be defined in the rules of the particular fund.

3.3.2.3 Monitor delegated duties

Trustees are allowed to delegate their duties to suitably qualified people, but they retain ultimate responsibility for decisions and actions taken. It is therefore important that trustees, who have delegated their duties, regularly monitor the extent to which the delegated duties are being complied with.

3.3.2.4 Avoid exceeding authority

Trustees must exercise their discretionary powers in line with the rules of the fund and legislative requirements that are applicable to the fund. Failure to adhere to the limits of the discretionary powers given to the trustees in terms of the common law, legislation, or the rules of the fund, will render the trustees potentially liable to the retirement fund or its members for damages.

3.3.2.5 Act with impartiality

Trustees are required to act impartially. This requires that equal weight be given to the interests of all members when considering a particular issue. One member may not be favoured or, conversely, prejudiced above another. Circular PF130 states that "... independence is essential also for the credibility of governance requirements, and is demonstrated by any discretion of the board being exercised in a manner which is impartial, fully informed and not influenced by inappropriate considerations."

3.3.2.6 Respect confidentiality

By virtue of their position, boards of trustees will be exposed to certain information pertaining to the particular fund they are managing. Trustees should respect the confidentiality of their functioning as a board, as well as the information pertaining to the fund. Trustees should not disclose any information relating to the operations of the fund, its members or investments to outside parties.

3.3.2.7 Adhere to the rules of the fund

The rules of the fund are the constituting documents of the fund; therefore trustees are to administer the fund according to these rules at all times, provided that the rules are not in conflict with applicable legislation.

3.4 Duties and responsibilities imposed by other documents

The fund's own rules, as well as other contractual arrangements, will also influence the general management requirements of the fund. It is therefore vital that trustees familiarise themselves with the following, as may be applicable:

- the trust deed of the fund
- the rules of the fund
- contractual arrangements with third parties
- Circulars, Board Notices and Gazettes issued by the Financial Services Board.

3.4.1 The trust deed of the fund

As a trust deed is not specifically required, very few retirement funds in South Africa have a trust deed in place. Most funds are either established in terms of a set of rules or in terms of their own establishing Acts.

However, in the event of a retirement fund being established in terms of a trust deed, the trust deed will be the founding document of the fund, with a set of rules ancillary to the trust deed regulating the operational matters of the fund.

In these instances, it is necessary for the trustees to familiarise themselves with the trust deed and the rules, as many of the powers of trustees are set out therein.

The trust deed normally includes the:

- name of the fund
- procedure for the appointment and removal of trustees
- voting requirements, e.g. what constitutes a majority
- requirements for a quorum
- remuneration of trustees
- general powers of the trustees, e.g. delegation of duties and consulting of experts.

The trust deed may also address certain powers of trustees. These may include the powers to accept contributions and other monies into the fund, decisions regarding investment strategies and asset allocations, the admission of members on special terms, the increase of members' benefits and dealing with funding surpluses, as well as any winding up arrangements for the retirement fund.

3.4.2 The rules of the fund

In most instances, the rules will regulate the operation and administration of the fund. Each fund will have its own set of rules, designed for its particular identity and objectives.

If the fund is subject to the Pension Funds Act, the rules will have to be approved by the Registrar of Pension Funds.

Specific requirements in terms of the Pension Funds Act include the:

- name of the fund, including name changes that may have occurred
- objectives of the fund
- requirements of membership of the fund, and circumstances under which membership would cease
- conditions under which members or other persons may become entitled to benefits
- nature and extent of these benefits
- appointment, removal and powers of the fund officers and trustees
- investment framework of the fund
- manner in which the fund's rules may be changed
- appointment of the auditor
- dispute resolution method
- custody arrangements of title deeds and other securities owned by the fund
- manner in which the fund may be terminated or dissolved
- appointment of a liquidator.

Circular PF130 suggests that the rules of the fund also address possible delegation of board responsibilities to board sub-committees or management.

A list of matters that need to be addressed in the rules of the fund are included in Appendix A to this Toolkit.

It is the trustees' responsibility to ensure that the rules of a fund, regulated by the Pension Funds Act, are kept up to date with any amendments made to this Act, and are registered with the Registrar. Only registered rules are valid and enforceable.

Rules for a fund not regulated in terms of the Pension Funds Act will have to be drafted in accordance with the establishing Act. (Refer also to paragraph 2.2.2 for further explanation in this regard.)

3.4.3 Contractual arrangements with third parties

Trustees of retirement funds are required to understand the impact and effect of the contracts concluded by them on behalf of the fund. The primary responsibility of the board in relation to the business of the fund is to ensure that the board exercises a rigorous oversight function. Once signed, these contracts are binding, and the trustees should ensure proper contract management procedures are put in place whereby contractual risks and obligations are identified. The board of trustees should ensure that there is regular assessment of the performance of the service providers involved in the operation of the fund. A regular review of the service providers' fees and costs associated with the operational involvement should be conducted ⁶, to ensure that these are still appropriate.

⁶ Refer to Principle 5: paragraph 38.1 and 38.2 of PF130.

3.4.3.1 Contracts with investment managers

These are contracts between the fund and the investment managers, in terms of which the investment managers offer investment management service. The contracts will set out the terms and conditions of the service that the investment management companies must deliver, as well as the parameters within which the investment managers must invest.

3.4.3.2 Contracts with administrators

Trustees of retirement funds may wish to sub-contract the administration of the fund to an administrator. The administrator then takes care of proper record keeping, including:

- membership records
- financial records
- actuarial records
- investment records
- statutory records (including the minutes of meetings)
- records of contracts.

The administrator could also be requested to administer key fund operations, these being:

- collection of contributions
- processing of benefit payments
- member administration
- financial reporting.

Funds (and therefore trustees) that use an administrator, require assurance that the processing environment is well controlled and that the administrator is complying with the control requirements of their service level agreement. As part of good corporate governance, trustees need this assurance in order to discharge their onerous fiduciary duties.

3.4.3.3 Re-insurance arrangements

These arrangements constitute contracts concluded between the fund and insurance companies, whereby insurance companies are obliged to pay certain insured sums to the fund on the death or disability of members of the fund.

Most funds take out insurance to cover the death and disability of their members, but the extent of the insurance varies from fund to fund. Some funds pass the entire risk of death or disability to an insurance company; others accept part of the risk within the fund. For example, they may ensure half the cover and pay only half the premium.

3.4.3.4 Fidelity insurance arrangements

Regulation 30(2)(u) of the Pension Funds Act requires the fund to have a policy of insurance in place to indemnify the fund against losses owing to the dishonesty, fraud or negligence of any of its officials, which include the trustees, the employers, the investment managers, the benefit administrators, or others on behalf of the fund.

3.4.4 Circulars issued by the Financial Services Board

The Financial Services Board regularly issues circulars (generally referred to as “Pension Fund Circulars”) that communicate the best practice to be adopted regarding retirement fund matters. Trustees should ensure that they are aware of all circulars issued, and that the principles included in these circulars are implemented, where applicable.

A list of circulars applicable to funds is attached as Appendix C.