

Legal update

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Changes to the Pension Funds Act: Trustees

Summary

The Financial Services Laws General Amendment Act No. 45 of 2013 was published in Government Gazette No.37237 on 16 January 2014. It amends certain provisions of the Pension Funds Act (the Act) relating to the composition of the board and the duties and obligations imposed on the individual board members (trustees). The effective date of the Act has not yet been promulgated.

1. Requirements for a properly constituted board

Current position

Every fund must have a board consisting of at least 4 trustees. The members of the fund have the right to elect at least 50% of the trustees. Umbrella funds, preservation funds and retirement annuity funds can apply for exemption from this last requirement. They must then have at least one independent board member, and 3 other members. The election procedures, terms of office, procedures at board meetings, voting rights of trustees, the quorum for a board meeting, deadlock breaking mechanisms and the powers of the board must all be set out in the rules of the fund.

Position once the Amendment Act comes into effect

In addition to the above requirements, the Act now requires that the composition of the board must at all times comply with the requirements contained in the rules of the fund and that any vacancy on the board must be filled within such period as prescribed.

This means the rules of the fund must at all times reflect the correct number of employer appointed and member elected trustees that comprise the board.

A vacancy on the board must be filled within the period prescribed by the registrar.

If there are any changes to the board composition, for instance if the board decides to increase or decrease the number of trustees, the rules must be amended to reflect the new board composition.

If the board composition does not comply with the requirements in the rules, or if a vacancy on the board is not filled within the prescribed period, the board will not be properly constituted and any resolutions or decisions made by that board will be void.

Impact on FundsAtWork

The Rules of the FundsAtWork Umbrella and Preservation Funds (the Funds) already reflect the exact number of trustees that make up the board.

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The Rules will be amended to align with the prescribed period for the filling of a vacancy on the board once the prescribed period is known. If there are any changes in the board composition, the Rules will be amended accordingly.

2. New obligations on trustees

The Amendment Act imposes a number of new duties on trustees:

- a. The registrar may prescribe the level of skills and training that a trustee must attain. These requirements will be published in the Government Gazette and trustees will have 6 months from the date of their appointment or election to attain the necessary skills and training. In addition to this, trustees must ensure that they retain those skills throughout their time on the board.
- b. A trustee who is removed from office must submit a written report to the registrar. The report must be submitted within 21 days of the trustee's removal and must explain why the trustee thinks that their appointment was terminated. This requirement is not applicable where the trustee resigns voluntarily or where their term of office expires.
- c. There will be a 'whistle-blowing' obligation on trustees. A trustee must inform the registrar, in writing, of any information relating to the affairs of the fund, which in their opinion may seriously prejudice the financial soundness of the fund or its members. This obligation arises as soon as the trustee becomes aware of any such information.
- d. Trustees are required by law to act independently. They must exercise their powers in a manner that is impartial and not influenced by inappropriate considerations. A failure to act independently will result in a contravention of the Pension Funds Act.
- e. In addition to the duties of due care, diligence and good faith, the Act imposes a fiduciary duty on trustees. Trustees have a legal obligation to act in the best interests of the members and beneficiaries for accrued benefits or any amount accrued to provide a benefit. This duty extends not only to active members, but to deferred pensioners, pensioners and any other person deriving a benefit from the fund.
- f. The trustees also have a legal duty to the fund to ensure that the fund is financially sound, responsibly managed and governed in accordance with its rules and the Act.
- g. In addition to ensuring that adequate and appropriate information is communicated to the members of the fund informing them of their rights and benefits, this duty now extends to beneficiaries of the fund as well. The trustees must ensure that beneficiaries of a fund are informed of their rights, duties and benefits.
- h. The board is permitted to delegate its functions under the Act to a person or committee, subject to any conditions as the board may decide. The delegation must be in writing and must be in line with the system of delegation laid out in the rules of the fund. The rules should specify whether or not the board is required to ratify any decisions or actions taken by a delegate or subcommittee.
- i. The board is not relieved of its functions once delegated and remains responsible for any decisions taken by the delegate or committee. The board may withdraw the delegation any time.

Impact on FundsAtWork

The trustees of the Funds are already well versed in pension fund and other related matters. Once the required level of skills and training that a trustee must attain has been published, FundsAtWork will do a gap analysis to see whether the trustees of the Funds need any additional training and arrange for the required training. FundsAtWork will also put a training program in place to ensure that the trustees maintain the required level of skills.

FundsAtWork will include communicating to beneficiaries in the Funds' Communication Strategy and Plan as well as the Communication Policy Statement and will make sure that they are informed of their rights, duties and benefits.

FundsAtWork already has a system of delegation in place in terms of which functions and duties of the board are delegated.

3. Liability of a trustee

Prior to the amendment, the Pension Funds Act did not contain any provisions specifically relating to the liability of a trustee. A new section 7F is inserted which will change the position as follows once the amendment comes into effect:

- a. In proceedings brought against a trustee the court may relieve the trustee of any liability, either wholly or partly, if the court is of the view that the trustee acted independently, honestly and reasonably, or if after considering all the circumstances of the case, the court is of the view that it would be fair to excuse the trustee.
- b. In relieving the trustee of liability the court may impose any terms or conditions that it considers to be fair in the circumstances.
- c. The provisions of this section only apply in cases where the court is of the view that there was no wilful misconduct or wilful breach of trust on the part of the trustee.

4. New requirements for appointments made by the board

A. Principal officers

Current position where a principal officer is unable to perform their duties

Where a principal officer is outside the country or otherwise unable to perform their legal duties, the fund has 30 days to appoint a new principal officer. However, the Act is silent on when this period starts.

The fund may appoint only one principal officer and is not permitted to appoint a deputy principal officer.

Position once the Amendment Act comes into effect

The 30 days that the board has to replace a principal officer is removed. The registrar will prescribe the period within which a new principal officer may be appointed. The board must appoint a new principal officer within the prescribed period after the commencement of a continuing absence or inability to discharge any duty by the principal officer.

The fund will be permitted to appoint a deputy principal officer. Further, the principal officer of the fund may delegate any of their duties to the deputy principal officer. Such delegation must be done in writing and must be done according to the rules of the fund. The principal officer is not relieved of any of their functions and may withdraw the delegation at any time. The deputy principal officer does not replace the principal officer but acts as the principal officer until the fund appoints a new one.

Impact on FundsAtWork

FundsAtWork will amend the Rules of our Umbrella and Preservation Funds (the Funds) to provide for the appointment of a deputy principal officer and to set out the system of delegation in terms of which the principal officer delegates duties to the deputy principal officer. The principal officer of the Funds will also be asked to set out the delegation of their documents in writing to comply with the new requirement.

B. Valuator

The Pension Funds Act is amended to provide that the valuator must be a natural person who is resident in South Africa. If the valuator resigns or is unable to discharge their duties, the fund must appoint a new valuator within the period prescribed by the registrar.

Impact on FundsAtWork

FundsAtWork will ensure that all documents relating to the appointment of the valuator reflects the name of the individual that is appointed as the valuator and not the partnership or company to which the valuator belongs.

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