



Case law update – Fund governance

This update discusses several recent determinations / judgements relating to fund governance issues that have an impact on retirement funds as well as the approach adopted by the MMI Sponsor Funds.

A. Executive Summary

1. **Gumede and Others v PEP Limited Provident Fund and Others (Case number: A7/2016)**

- The Appeal Board of the Financial Services Board found that only members of a fund can exercise the right to appoint the member appointed trustees to the board of trustees of a fund.
- The MMI Sponsor Funds have been granted an exemption in terms of section 7B of the Act from the requirement that the members of the Funds have the right to elect 50% of the members of the board of trustees. To qualify for such exemption, a board must have at least one independent trustee. The Funds have more than one independent trustee.

2. **Kemklean (Pty) Ltd v Genesis Umbrella Fund – Participating Employer: Kemklean (Pty) Ltd and Genesis EB Solutions (Pty) Ltd and Verso Financial Services (Pty) Ltd (Case number: PFA/WC/00019836/2015/PGM)**

- The Pension Fund Adjudicator determined that the board of a pension fund, and all service providers performing delegated functions, must act with due care, diligence and good faith.
- The trustees of the MMI Sponsor Funds ensure that where their duties are delegated to another person, like a pension fund consultant, such person is mandated to always act in a manner that is in line with the duties of the trustees and in the best interests of the members.

B. Case law

1. **Gumede and Others v PEP Limited Provident Fund and Others (Case number: A7/2016) – Appeal Board of the Financial Services Board: Right of trade unions to nominate and appoint trustees.**

The Appeal Board of the Financial Services Board had to decide whether trade unions have the right to nominate and appoint trustees to the board of trustees of the PEP Limited Provident Fund. The old rules of the fund provided that the board of trustees consisted of 12 trustees. The employer was entitled to appoint six trustees and the remaining six would be appointed by the members. For the member appointed trustees, each trade union that was recognised by the employer as representing employees in collective bargaining was entitled to appoint a trustee, and the remaining trustees were to be elected by members of the fund.

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The Pension Funds Act (the Act) was amended in 1996 to insert section 7A into the Act. In terms of this section, every fund is required to have a board with at least four members, and the members of the fund have the right to appoint at least 50% of the members of the board. In 2012, the fund submitted revised rules for approval and registration to the Registrar of Pension Funds. The revised rules contained the same provisions as in the old rules relating to the appointment of the board of trustees. The Registrar refused to register the revised rules on the basis that they did not comply with section 7A. A section 26 board was appointed and new rules which complied with section 7A were submitted and approved by the Registrar. The trade unions unsuccessfully applied to the Financial Services Board (FSB) to challenge the approval and registration of the new rules.

On appeal, the Appeal Board found that the purpose of section 7A is to give the members of the fund an equal say in the affairs of a fund. The members, and not others on their behalf, have the right to elect their number of trustees. If a trade union appointed the trustees, such trustees are not elected by the members and the right of the members to appoint trustees is then useless or futile. Allowing a trade union to appoint a trustee would be undemocratic as not all the members of a fund may belong to a trade union, and allowing a trade union to appoint a trustee would weaken the rights of non-members. It would also weaken the rights of members of a larger trade union who would have the same number of trade union appointed trustees as a smaller trade union.

The Appeal Board also found that the members could only waive the right to appoint trustees if they had the right under the rules of the fund. The members did not have that right in terms of the old rules. In addition, the Appeal Board held that not every right could be waived. A person cannot waive a right if this goes against a law or if such right is also in the interests of the public. A right cannot be waived if its effect would be to avoid the terms of a law which are mandatory or compulsory. The Appeal Board concluded that the members could not waive their rights in terms of section 7A.

The Appeal Board dismissed the appeal.

Approach adopted by the MMI Sponsor Funds

The MMI Sponsor Funds have been granted an exemption in terms of section 7B of the Act from the requirement that the members of the fund have the right to elect 50% of the members of the board of trustees. The rules of the Funds provide that the sponsor of the Fund, MMI Group Limited, will appoint the trustees. At least one of the trustees must be independent. The Sponsor Funds have more than one independent trustee. The General Rules of the FundsAtWork Umbrella Funds also require that each participating employer has to have an advisory body, consisting of at least 50% member appointed representatives. This second tier of management acts as the liaison between the trustees and the employer.

2. Kemklean (Pty) Ltd v Genesis Umbrella Fund – Participating Employer: Kemklean (Pty) Ltd and Genesis EB Solutions (Pty) Ltd and Verso Financial Services (Pty) Ltd (Case number: PFA/WC/00019836/2015/PGM) - Pension Fund Adjudicator - Duty of good faith borne by pension fund consultants.

Kemklean was a participating employer in the Corporate Selection Umbrella Retirement Fund, which was administered by Liberty Group Limited until 1 December 2013. Kemklean transferred its participation to the Genesis Umbrella Provident Fund which was administered by Verso Financial Solutions.

Kemklean lodged a complaint with the Pension Fund Adjudicator as it was of the view that the board of the fund and the pension fund consultant, Genesis EB Solutions (Pty) Ltd, had failed in their duties to look after the best interests of Kemklean's employees who were members of the fund, by not ensuring that the fund contributions had been correctly invested since the participation date, 1 December 2013. The fund contributions were held in a bank account and only earned bank allocated interest. The fund contributions had not been invested as there did not appear to be a signed investment mandate which Kemklean

needed to sign before the fund contributions could be invested. Kemklean wanted to receive the investment returns that would have been earned from 1 December 2013 to 10 June 2015.

The PFA found that the boards of pension funds have a legal duty towards their members to act with due care, diligence and good faith. This duty is delegated to administrators and pension fund consultants who need to act in a manner which is in line with the objects of the board. Genesis EB did not submit a signed investment mandate to Verso on the participation date. Genesis EB only notified Kemklean about the unsigned investment mandate in August 2014. The investment mandate was only finalised on 9 June 2015 and the fund contributions were invested on 10 June 2015. The failure of Genesis EB to notify Kemklean of the unsigned investment mandate resulted in the members losing investment returns between 1 December 2013 and 9 June 2015.

The PFA ordered that an independent actuary should be appointed to calculate the investment loss suffered by the members on the net fund contributions for the period between 1 December 2013 and 9 June 2015. Genesis EB was ordered to pay the investment return loss calculated by the independent actuary. The investment return loss would be credited to the member's fund credits.

Approach adopted by the MMI Sponsor Funds

The trustees of the MMI Sponsor Funds act with the care, diligence and good faith that is required of them. Where such duties are delegated to another person, like a pension fund consultant, such person is mandated to always act in a manner that is in line with the duties of the trustees and in the best interests of the members.

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