

JULY 2021: EDITION 6 of 2021

In case you missed it...

5. [June 2021: Financial Services Tribunal](#)
4. [May 2021: Section 37C: When does dependency commence? And Is a death benefit decision subject to PAJA?](#)
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2. [February 2021: Smoothed Bonus Policies](#)
1. [January 2021: Conduct Of Financial Institutions Bill 2nd Draft](#)

Are Retirement Funds subject to Administrative Law or governed by the Fiduciary Obligations of the Trustees? Does it matter?

1. At present, there is no legal certainty regarding whether retirement funds are subject to administrative law.

- 1.1 At the 2021 conference of the Pension Lawyers Association, Mr Jonathan Mort presented a paper which suggested that the fiduciary obligation of the trustees was more important in the governance of a retirement fund than the requirements of administrative law. However, other pension lawyers have argued that administrative law does in fact apply, particularly in the case of a death benefit decision by the trustees (Refer the [Seshego Insights: May 2021: Edition 4 of 2021](#)). Case law is not helpful in this regard as the decisions on the matter have been conflicting, with some courts holding that administrative law does apply to retirement funds and others that it does not.
- 1.2 Legal clarity will only be obtained once a higher court has given a final decision on the matter. This is unfortunate, since legal opinion has it that administrative law and the fiduciary duty of the trustees cannot apply simultaneously.

2. Why does this question matter? Are there practical implications for retirement funds?

The implementation of Section 37D (1) (b) (ii) of the Pension Funds Act (“the Act”) and the onus of making a fair and equitable decision with regards to the distribution of death benefits in terms of Section 37C of the Act, are probably the most difficult aspects of the legislation for the trustees.

2.1 Section 37D (1) (b) (ii) of the Act.

- 2.1.1 Trustees are frequently asked by the employer to withhold payment of benefits subject to a potential deduction in terms of Section 37D (1) (b) (ii) of the Act.
- 2.1.2 Recently, there has been a spate of determinations by the Pension Funds Adjudicator (“the PFA”) in favour of the complainant and against the fund withholding the benefit on the grounds that the trustees did not provide the member accused of wrong-doing by the employer the chance to state his or her case – that is, the trustees did not apply the *audi alterem partem* rule, which is a requirement of administrative law. For a full discussion of the meaning of the *audi alterem partem* rule, please refer to item 3.2 below.
- 2.1.3 These determinations have mainly been supported by the Financial Services Tribunal and the fund has been forced to pay out the benefit to the member together with punitive interest in most cases. This issue was discussed in [Seshego Insights: August 2020: Edition 8 Of 2020](#).
- 2.1.4 The requirement to apply the *audi alterem partem* rule arose from the decision of the High Court in the case of SA Metal Group versus Deon Jefftha and Others (“the Jefftha case”), where an improper decision by the trustees to withhold his retirement benefit caused clear prejudice to the affected member.
- 2.1.5 Prior to the Jefftha case, the PFA and the courts asked only if the trustees had exercised an independent discretion in making their decision to withhold payment of the benefit – i.e. that they were not improperly influenced by the employer and had applied their minds and properly exercised their fiduciary duty. The nature of the fiduciary duty of the trustees is discussed in item 4 below.
- 2.1.6 Should guidance come from a decision by a higher court that the fiduciary duty of the trustees and not the requirements of administrative law apply to the governance of retirement funds, it is possible that the determinations by the PFA which insist on the application of the *audi alterem partem* rule may be found to be incorrect in law.
- 2.1.7 This would make it much easier for the trustees to withhold payment of benefits in order to implement the provisions of Section 37D (1) (b) (ii) of the Act and effect a deduction if the criminal or civil case initiated by the employer is successful.

2.2 Section 37C of the Act.

2.2.1 For a full discussion of the effect of the provisions of the Promotion of Administrative Justice Act, Act No.3 of 2000 (“PAJA”) on death benefit decisions by the trustees, please refer to the [Seshego Insights: May 2021: Edition 4 of 2021](#). However, the question of whether or not the trustees are *functus officio* has implications for decision making in terms of Section 37C of the Act.

2.2.2 For a discussion of the meaning of *functus officio*, please refer to item 3.3 below. If the trustees are in fact *functus officio* after taking the initial decision on the distribution of the death benefits in a particular case they would not be able to consider further potential beneficiaries who might come forward with a claim, even if the actual distribution had not yet been carried out.

3. What are the requirements for administrative law to apply?

The key requirement of administrative law is that any decision made by an administrative body – or if it applies to retirement funds, a decision of the trustees, must be procedurally fair. The following requirements also apply when deciding whether an organisation is subject to administrative law.

3.1 The organisation subject to administrative law must exercise a public power. For example, the FSCA exercises a public power, as the FSCA has a constitutional imperative to regulate capital markets and oversee institutional savings. This power is coercive in nature as the FSCA has the power to close down the operation of an administrator of retirement funds if they are of the opinion that the administrator is not complying with the provisions of Section 13B of the Act.

3.2 The *audi alterem partem* rule (which means to hear the other person’s point of view) must apply. A party affected by a decision of an administrative organ has the right to make representations if they believe they have been treated unfairly. They may also require the organisation to provide reasons for its decisions. PAJA governs decisions made under administrative law and sets out specific time periods within which the administrative organ must respond to a person querying a decision made in terms of administrative law.

3.3 An administrative organ is *functus officio* after having made a decision. This means that when a person representing an administrative organ has discharged his duty, his authority is at an end and the person making the decision cannot change it, even if the decision has not been carried out.

3.4 Since the person making a decision in terms of administrative law becomes *functus officio*, the decision may be voidable if it is incorrect. If the decision is set aside it may also be referred back to the decision maker. For example, if the Financial Services Tribunal disagrees with a determination made by the PFA the Tribunal will refer the matter back to her office for reconsideration. The office of the PFA exercises a public power and is therefore subject to administrative law.

4. What is the nature of the fiduciary duty of the trustees?

In the exercise of their fiduciary duty, the trustees are required to apply a higher degree of care towards the affairs of the members of the fund than they would normally apply to the management of their own affairs. Accordingly:

- 4.1 The trustees must apply the rules of the Fund.
- 4.2 They must act with care, diligence and skill and in the best interests of the person to whom they owe a duty of care.
- 4.3 The trustees of a retirement fund must exercise an independent discretion which is not improperly influenced by any external factors and must avoid any situation or relationship that conflicts with or is perceived to conflict with their duty towards the retirement fund and its members. For example they cannot simply act on the direction of the employer without having properly considered the matter and applied their mind to the issue.
- 4.4 It is also important to note that the trustees are not *functus officio* after making a decision, if the decision has not yet been carried out.
- 4.5 If a trustee is in breach of his fiduciary duty, he or she may be held personally liable. The person affected could have a claim for damages in delict since the duty of care applies automatically.
- 4.6 The trustees derive their powers from the rules of the fund which are not coercive in nature. The rules affect only a section of the public and not the public in general.

5. Are members better served by administrative law or by the fiduciary duty of the trustees?

It may be more beneficial for members if it is recognised that the governance of retirement funds is subject to the fiduciary duty of the trustees rather than the requirements of administrative law.

- 5.1 Retirement funds are fundamentally private in nature in that they belong to the member – they essentially represent the deferred remuneration of an employee.
- 5.2 In this context, the protection given to the member by the exercise of the trustees’ fiduciary duty, in particular the duty of care, may be more effective in protecting the financial interest of the members than the application of administrative law.
- 5.3 The purpose of administrative law is to balance the power of the state by giving rights to individuals. This may not be appropriate in the context of an entity such as a retirement fund which does not carry out a public purpose or have a constitutional mandate as the basis for its existence.

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