

23 September 2015

TO: The Board of Trustees of all registered pension fund organizations

CC: Principal Officers of all registered pension fund organizations

The Chairperson of RFIN

DIRECTIVE: PI/PF/DIR/06/2015

EFFECTIVE DATE: 23 September 2015

SUBJECT: FIDUCIARY DUTIES OF TRUSTEES TOWARDS REGISTERED FUNDS AND MEMBERS OF REGISTERED FUNDS WITH REGARD TO CONTRIBUTIONS PAYABLE TO SUCH FUNDS

1 Introduction

- 1.1 This Directive is issued by virtue of NAMFISA's functions and powers and those of its CEO in his capacity as the Registrar of Pension Funds in terms of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) ("the NAMFISA Act") and is applicable to all pension fund organizations registered under the Pension Funds Act, 1956 (Act No. 24 of 1956) ("the PF Act").
- 1.2 This Directive is with reference to Directive no. **PI/PF/DIR/02/2014** pertaining to the late payment and non-payment of contributions in contravention of section 13A of the PF Act dated 12 December 2014.
- 1.3 The purpose of this Directive is to remind Board of Trustees of their fiduciary duties towards registered funds and members of registered funds in respect of contributions payable to funds and to draw the attention of trustees to the possible consequences that may flow from the dereliction of fiduciary duties.



2 The current practice

The Registrar has been inundated with notifications of late payment and non-payment of contributions by employers since the issuance of Directive no. **PI/PF/DIR/02/2014**. In the circumstance, the Registrar is concerned that some trustees of registered funds are derelict in their fiduciary duties towards registered funds and members of registered funds. This is evident from the lax manner in which the late payment and non-payment of contributions by employers are dealt with by some trustees of registered funds. The Registrar is not convinced that trustees of registered funds take reasonable steps to ensure the timely payment of contributions or the recovery of outstanding contributions from employers.

3 The law

3.1 The PF Act does not explicitly provide for the fiduciary duties and responsibilities of trustees of registered funds.

3.2 The general fiduciary duties of trustees are primarily contained in the common law. The main common law fiduciary duties of trustees are the duty to act with due care and diligence and the duty to act in good faith and in the best interest of the fund and its members.

4 Conclusion

4.1 The duty to act in the best interest of the fund requires the Board of Trustees to ensure that contributions that are due to the fund are paid to the fund timeously and any outstanding contributions are recovered in full on behalf of the fund for the benefit of its members.

4.2 The duty of good faith¹ necessitates the Board of Trustees to inform members of registered funds when their employers have failed to pay contributions as required in terms of section 13A of the PF Act to the fund on their behalf.

¹In the matter between Tatiya and Others v Liquor and Catering Trade (Cape) Pension Scheme and Others [1999] 11 BPLR 315 (PFA), the Pension Funds Adjudicator stated the following with regard to the duty of good faith: *"It would seem to be just and equitable, therefore, that the boards of management of pension funds in terms of their duty to act in good faith should be expected to disclose such information as is reasonably required for the exercise or protection of any right."*

4.3 A delegation of any duty or responsibility of the Board of Trustees to any person does not divest the Board of Trustees of their fiduciary duties and responsibilities towards the fund and its members.

4.4 Trustees may thus be held personally liable for damages suffered by the fund or its members if evidence shows that the trustees acted in breach of their fiduciary duties and such breach is the cause of the damages suffered by the fund or its members.

5 The Directive

5.1 The Board of Trustees of all registered funds are hereby directed to take all reasonable steps to ensure that contributions that are due to the fund in respect of its members are paid to the fund timeously and any outstanding contributions are fully recovered on behalf of the fund and its members.

5.2 The Board of Trustees of all registered funds are further directed to ensure that all relevant members of registered funds are informed of any late payment or non-payment of their contributions within one month from the last date on which the contribution was required to be paid in accordance with section 13A of the PF Act.

The Registrar therefore requires full cooperation and support in this process by all industry players and stakeholders at large.

Should you require more clarity on this Directive, kindly contact the Manager of the Pension Funds Department at telephone number 061-290 5000.



Kenneth S. Matomola
Registrar of Pension Funds