

### **Lack of command and control?**

While the FSB clamps down on the Command Provident Fund, a trustee trainer says there is a bigger problem.

While a security guard provident fund has been provisionally placed under curatorship by the Pretoria High Court after the former and current employers failed to pay the fund contributions deducted from workers, a trustee trainer says this highlights a greater underlying problem.

The application for curatorship by the Registrar of pension funds at the FSB follows protracted attempts by the FSB to get the former and current employers of a security company to pay over monies deducted from employees, to the fund.

In terms of the court order the curator must also take over control of the board of management of the fund.

It appears that the affairs of the fund had received periodical attention over the past two years and as no satisfactory solution could be found, the FSB conducted an investigation into the fund.

### **Some of the findings include:**

- The fund has not been able to achieve final registration due to outstanding queries.
  
- For the period between March 2005 and August 2006 the fund operated without a board of trustees.
  
- The Fund's financial statements for the years ended 28 February 2005 and 28 February 2006 are overdue.
  
- Two consecutive participating owners in the fund have deducted contributions from member's salaries, but have failed to pay such contributions to the Fund.
  
- Marius Potgieter, chairman of the fund and employer-appointed trustee, finds himself in a position of conflict in representing the employer while simultaneously being a trustee of the Fund. Trustee decisions were influenced by Potgieter.
  
- The trustees of the Fund have not taken steps against the employer for repayment of the misappropriated member contributions, notwithstanding the fact the employer had breached the agreement entered into with the Fund, where the employer undertook the repayment of the misappropriated contributions.
  
- The failure of the employer to repay what it owes the Fund has been a nagging problem since September 2005. Notwithstanding intermittent payments made by the employer the amount of misappropriated contributions owed to the Fund at 30 November 2006 was R2 266 317, 08.
  
- The member elected trustees were patently not conversant with the provisions of the Pensions Act and did not understand what was required of them in terms of carrying out their fiduciary duties.

"I believe this case highlights one of the many problems within the pension fund industry - and this will not be the last of these examples - where unscrupulous employers misuse the members contributions," says John Williams of the Retirement Planning Bureau.

"The problem will be finally compounded when the employer eventually places itself into liquidation and there is no practical recourse to redeeming all the outstanding monies."

In this instance of the Security Guards Provident Fund, it seems fairly clear that nobody really had any understanding of the requirements of the Pension Funds Act (employer or members). It seems the trustee meetings were treated as a continuation of the workplace situation.

Williams maintains that even a small amount of trustee training could have clarified the task of a retirement fund trustee which is:-

To direct control and oversee the operation of the fund in accordance with:

- (a) Applicable law and
- (b) The rules of the fund.

In other words, a trustee (board of management member), has an overriding duty to the proper running of the fund and has to prioritise this over and above their primary accountabilities to the employer or the members.

In the case in question one suspects that "loss of job" might have been one of the fear factors employed as a coercive measure against the member elected trustees.

Interestingly Williams confirmed that in his opinion trustees should be aware that they do not have to be "employees" in order to continue as a trustee, as long as the members have elected them and still support their selection.

I think this and other recent situations (such as Fidentia) suggests that the FSB is not up to the job of effectively policing retirement funds, claims Williams.

**Editor's thoughts:**

- Thorough investigation is an essential ingredient before action is taken, but two years of periodic investigation is pushing the limit a little.
- While the FSB must be praised for acting, the anxiety faced by members because they may not get paid out has to be the main focus.
- A recent report by PwC on trustees and retirement funds highlighted the problem, and yet no-one seems to want to do anything about it.