



## GUIDANCE NOTICES 5 AND 6 FROM THE FINANCIAL SECTOR CONDUCT AUTHORITY (“FSCA”) AND THE AMPLATS ADJUDICATOR DETERMINATION

### WHAT IS A GUIDANCE NOTICE?

A Guidance Notice may be issued by the FSCA under the Financial Sector Regulation Act. A Guidance Notice is not binding and is issued for information only. In addition, the subject matter of a Guidance Notice is always a financial sector law (for example the Pension Funds Act, the Long-term Insurance Act, etc). In the case of these Guidance Notices, the law in question is the Pension Funds Act (“the Act”).

### GUIDANCE NOTICE 5

- Persons will have *60 days* to reply to the FSCA’s queries where the Fund has made an application to *register* a fund.
- Funds will have *180 days* to reply to the FSCA’s queries about *rule amendment* applications.

If registration and rule queries are currently outstanding and over these periods – they will lapse on 30 November 2018.

This 60 or 180 day period requirement will be applied immediately.

Funds must indicate where re-application is being made and must not use the original application number.

### GUIDANCE NOTICE 6

Funds that appoint attorneys to collect or litigate with respect

to outstanding fund contributions must enter into agreements with the attorneys. Where the recoveries made by attorneys are paid into the attorney’s trust account, agreements must include the requirement for attorneys to pay the recovered amounts to the Fund within seven days of receipt. Defaulting employers must provide the contribution statement required under the Act.

### AMPLATS GROUP PROVIDENT FUND CASE

A recent determination from the Office of the Pension Funds Adjudicator, dated 24 July 2018, ordered a hefty fund loss of R40 501 000 plus interest to be paid by the previous valuator of the fund.

### THE PARTIES

The Amplats Group Provident Fund (“the Fund”), the current board of management of the Fund and the current Principal Officer of the Fund (all being referred to as “the Complainants”) laid a complaint with the Adjudicator against:

- the “Implicated Board Members of the Complainants”, being the previous board of management of the Fund (“Previous Trustees”),
- Mr Vivian Cohen, the previous Valuator/actuary (“the Valuator”) of the Fund; and
- Sanlam Life insurance Limited, the Fund’s administrator (“the Administrator”).

### THE ERROR

The Valuator was required to calculate unit prices. The Valuator appointed a third party to do the calculations. This third party made an error in the excel spreadsheets when calculating investment return (used to calculate a weighted average return and unit prices). This led to unit prices being overstated and benefits being paid out to members (based on the overstated unit price) that were larger than they should have been.

The Administrator pointed out to the Fund's new valuator that it thought the benefits looked too large. The new valuator then had to request the Valuator's working papers to determine if an error had been made. Once this was determined, the new valuator then informed the Fund. The Fund's subsequent valuation then disclosed the loss.

### WHAT DID THE COMPLAINANTS WANT?

The Complainants sought to hold the Previous Trustees, the Valuator and the Administrator personally jointly and severally liable (that is, any or all of them may be personally liable) for the loss to the Fund in the amount of R40 501 000, plus interest.

### THE COMPLAINANT'S ARGUMENTS

The Complainants submitted (among other things) that:

- the Previous Trustees were liable to the Fund for the loss in that the Act requires a board to ensure the Rules, operations and administration of the fund comply with the law. While it's impossible for a board to personally make every decision and perform every action to manage the fund, it must monitor and supervise the conduct of the party to which it has delegated duties and functions to ensure the board maintains the ultimate control. If the board does not do so, it has abdicated its duties. The Complainants alleged that the Previous Trustees failed to maintain proper controls over the management of the Fund and service providers;
- the Valuator, in performing his duties negligently was accountable for the loss suffered by the Fund as had he acted reasonably in accordance with his sophisticated training and skill and in accordance with the level of skill expected of him in his capacity as actuary to the Fund, the error would not have occurred;
- the Administrator was liable as it was the administrator of the Fund at all times and should have detected the Valuator's error and it had an obligation to reconcile the Fund's assets and liabilities daily and notify the Fund of errors; and
- the Previous Trustees failed to ensure that the Fund was insured for financial loss due to its officials' errors and omissions. Thus, the Fund was uninsured and did not enjoy cover for the loss suffered as a result of the Previous Trustees' conduct.

### THE ADJUDICATOR'S REASONING AND DETERMINATION

As regards the Previous Trustees, the Adjudicator pointed out, among other things:

- the Adjudicator went through how a mismatch may arise in a fund in relation to the investment and disinvestment of monies and stated that in this instance the error was not due to a mismatch but a unit pricing error by the Valuator and that “[t]he Processing Error Reserve Account was not meant to cover occurrences like the current...”. Therefore, the fund had suffered a loss;
- the Adjudicator stated that a fund was required to take out fidelity cover and that members of the board should have indemnity insurance. Plus, the board should ensure that all service providers have professional indemnity and fidelity guarantee cover;
- it cannot be expected of a board to replace an expert's opinion with their own and specifically not an actuary whose appointment was a statutory requirement; and
- Based on the submission of the Previous Trustees, they cannot be held liable personally jointly and severably for the Valuator's conduct.

As regards the Administrator, the Adjudicator found that, among other things:

- It could not be held liable as it was the other persons' responsibility to consider the mismatch report, verify values in reports, etc; and
- Neither the Previous Trustees nor the Administrator would have been able to detect the error as it could only be detected by an expert advisor.

As regards the Valuator, the Adjudicator made the following statements (among others):

- The test for negligence with respect to the actuary is the test of the so-called reasonable expert. This is the same test as that of the reasonable man except for the fact that a reasonable measure of the relevant expertise is added. This test does not have regard to the highest degree of expertise, but to the general or average level of such expertise. It follows that each advisor will be judged according to the standards of the profession to which he belongs; and
- found that the Fund had suffered a loss (as the Processing Error Reserve was not meant to be used in situations such as these).

An independent actuary, appointed by the Adjudicator, stated that the conduct of the Valuator as an expert advisor did not appear to have been reasonable. The Adjudicator then found that the Valuator was negligent and should be held liable for the Fund's loss in the amount for R40 501 000 plus interest.

## COSTS

The Previous Trustees claimed costs from the Complainants, including the cost of two counsel. They claimed that the Complainants conduct against them was frivolous, vexatious, not based on fact, had no legal basis and was manifestly inappropriate. The Adjudicator ordered the Complainants to pay the Previous Trustees' costs.

So what can we learn from this matter? Going back to basics...

- Make sure that the agreement between the Administrator and the Fund sets out the Administrator's duties in sufficient detail and that it includes all the functions the Administrator is expected to perform.
- Service providers to the Fund should be required, under their agreement, to, at least, notify the fund if they sub-contract work.
- The service providers to the Fund should hold sufficient Errors and Omission insurance and the board should request evidence of this.
- Fund service providers need to be carefully controlled and managed. Funds should keep good records (including minutes of meetings) about how they go about doing this. Delegation documents are important and should be of sufficient detail to spell out what is being delegated as well as powers and duties.
- Ensure you amend your Rules to deal with what actually happens in practice as you will be held to the Rules.
- Do you know what your Processing Error Reserve Accounts are being used for? Do these uses accord with the FSCA's Interpretation Note and the Rules of the Fund?
- Be careful of imposing a higher test on yourself in a contract or document (for example a death benefit distribution resolution) than what the law would impose on you. For example, have you said that you have done or will do "everything possible" or that you have done or will do "everything in your power"?
- If you are a respondent to a complaint, consider obtaining legal advice where the legal issues are complex or the amount involved is large.