

The Need to Adopt Preventative Measures to Combat the Misappropriation of Retirement Fund Assets

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Online ISSN
1727-3781

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Date Submission

31 October 2020

Date Revised

3 May 2021

Date Accepted

3 May 2021

Date published

12 May 2021

Editor Dr TV Warikandwa

How to cite this article

Marumoagae MC "The Need to Adopt Preventative Measures to Combat the Misappropriation of Retirement Fund Assets" *PER / PELJ* 2021(24) - DOI
<http://dx.doi.org/10.17159/1727-3781/2021/v24i0a10732>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2021/v24i0a10732>

Abstract

This paper discusses the challenge of the misappropriation of retirement fund assets by trustees, fund asset managers and retirement funds' administrators. It demonstrates that retirement fund members lose substantial retirement benefits due to the illegal and unlawful conduct of those who manage and administer retirement funds. It evaluates whether the South African legislative framework offers retirement funds and their members adequate protection from activities that may compromise the delivery of the pension promise such as: mismanagement; fraudulent activities; gross negligence; and the outright looting of retirement fund assets. In particular, this paper illustrates that the law in South Africa does not deter would-be wrongdoers from acting in a manner that may compromise the benefits expected by retirement fund members when they exit their funds. It advocates the adoption of adequate preventative legislative measures that would make it difficult for anyone to act in a manner that would compromise retirement fund members' benefits in South Africa.

Keywords

Misappropriation; retirement funds assets; trustees; corporate governance; preventative measures.

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1 Introduction

The sound administration and management of retirement funds is important for retirement fund members' realisation of the pension promise made by their funds. This also contributes to economic growth that enables governments to attend to their social programmes.¹ For these reasons, individuals who manage and administer retirement funds must possess the highest level of integrity and honesty.² They should avoid conflict of interest that may lead to the misappropriation of retirement assets for personal gain. It is unfortunate that in South Africa there is evidence of the misappropriation of retirement fund assets by members of the boards of management of retirement funds (hereafter "trustees"), fund asset managers and retirement funds' administrators.³ This conduct often results in members of the retirement funds losing substantial retirement benefits due to the illegal and unlawful conduct of those who manage and administer retirement funds.⁴ This raises the important question of whether the South African legislative framework offers retirement funds and their members adequate protection from activities that may compromise the delivery of the pension promise, such as mismanagement, fraudulent activities, gross negligence and the outright looting of retirement fund assets.

The purpose of this paper is to engage this question by highlighting some of the measures that have been put in place to prevent illegal and unlawful

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¹ See Coggburn and Reddick 2007 *Int J Publ Admin*, where it is correctly stated that "[s]uccess or failure in pension management has direct bearing on well-being of governments, taxpayers, and public employees and retirees. Pension systems are responsible for the investment of trillions of dollars in plan assets and for the disbursement of hundreds of billions of dollars in pension benefits annually". Damant and Jithoo 2003 *ILJ* 1-22, on what constitutes a pension promise in relation to occupational retirement funds.

² See Marumoagae 2012 *PELJ* 560.

³ See generally *Campbell v Johannesburg Municipal Pension Fund* 2001 6 BPLR 2055 (PFA) and *Electrical Contractors' Association (SA) v Fedsure Group Staff Pension Fund Scheme* 2013 JOL 30023 (PFA). Also see Marumoagae 2016 *THRHR* 615.

⁴ Also see Rusconi *South Africa's Mandatory Defined Contribution Retirement Savings System*, where it is stated that: "Some may suggest that regulation is weak in this country, citing evidence of serious mismanagement of pension fund money, for example by Fidentia, responsible for managing the assets of the Living Hands widows and orphans trust."

loss of retirement funds' assets, with a view to determining their effectiveness. This will be done in order to evaluate whether these measures are adequately placed to deter would be wrongdoers from acting in a manner that may compromise the benefits expected by retirement fund members when they exit their funds. This paper advocates the adoption of adequate preventative legislative measures that would make it difficult for anyone to act in a manner that would compromise retirement fund members' benefits in South Africa.

While reference to media reports is often frowned upon in academic writing, nonetheless, given the dearth of academic literature on this topic, to contextualise the challenge raised in this paper, I will start by referring to uncontested media reports that have adequately captured the misappropriation of retirement fund assets in South Africa. The research conducted towards composing this paper has not revealed any reported judgment where this issue was adequately ventilated. However, this does not mean that this social challenge is not material and does not merit academic attention. Secondly, I will discuss the legislative framework and some of the initiatives that have been introduced to tighten the regulatory environment and prevent the misappropriation of retirement fund assets in South Africa. Herein, I will demonstrate that there has been more emphasis on the education and training of members of the boards of management aimed at capacitating them to competently perform their duties. I will then deal with the duties of the boards and the need for these boards always to observe the principles of good corporate governance. Thirdly, I will reflect on the duty (if any) to report acts of wrongdoing related to retirement funds in South Africa. Throughout the paper, I will make recommendations for law reform that may strengthen the regulatory framework and adequately protect the assets of retirement funds from being misappropriated.

2 Mismanagement of retirement fund assets

In his foreword to the Pension Funds Adjudicator's (hereafter Adjudicator) report in 2016, Malusi Gigaba, as the Minister of Finance at the time, noted with concern that "there are cases of [retirement] funds being badly run or mismanaged".⁵ The mismanagement of retirement funds has devastating effects on members and their beneficiaries due to the loss of benefits that often results from theft, fraudulent activities, incompetence, the poor delegation of functions, a lack of adequate oversight over the work done by

⁵ Office of the Pension Funds Adjudicator 2017 <https://www.pfa.org.za/Publications/AnnualReports/Annual%20Report%202016%20-%202017.pdf> 2.

service providers, and general conflicts of interest. Even though trustees can engage in activities that could affect the benefits that members expect to receive, it is mostly asset managers and administrators contracted by retirement funds who are most likely to engage in such activities. These service providers are closer to retirement funds assets than trustees, whose interaction with the assets of their funds may be limited to meetings they attend and decisions they take in such meetings.

It is trite that, while it is advisable for trustees to be knowledgeable in the business and management of retirement funds, nonetheless they are not "expected to be experts on all aspects of retirement fund management and may take expert advice"⁶ from asset managers and administrators. Boards delegate some of their functions to asset managers and administrators, who play an important role in assisting boards to make investment decisions and appoint other service providers such as auditors and valuers of such funds. It is worrying, however, as Hunter correctly observes, that "there are many ways in which asset managers have been able to make improper use of retirement funds and other clients' assets for their own benefit or the benefit of third parties".⁷ While several examples of the misappropriation of retirement fund assets have occurred in South Africa, some of which have received media coverage, nonetheless in this paper⁸ I will highlight only four major incidents.

First, the Fidentia group of companies purchased Fidentia Asset Management, which was appointed in 2004 by the Mineworkers Provident Fund as its asset manager.⁹ Fidentia Asset Management persuaded the board to invest about R1,2 Billion in the Living Hands Umbrella Trust, which was mandated to administer death benefits on behalf of the beneficiaries of mine workers who were members of the Mineworkers Provident Fund.¹⁰ Another company that fell within the Fidentia group, Mantadia Asset Trust Company (Pty) Ltd (MATCO), was the sole trustee of the Living Hands Umbrella Trust at the time when the Mineworkers Provident Fund's investment was made.¹¹ The directors and shareholders of the Fidentia

⁶ Hunter "Legal Framework" 2.

⁷ Hunter "Legal Framework" 15.

⁸ See among others, Cameron 2013 <https://www.iol.co.za/personal-finance/financial-planning/the-greedy-feed-well-off-your-billions-1580841>; Cameron 2011 <https://www.iol.co.za/personal-finance/retirement/shoddy-admin-may-cost-fund-members-1040269>; and Nombembe 2011 <https://www.sowetanlive.co.za/news/2011-11-29-stolen-pensions-used-to-buy-property-car>.

⁹ Swanepoel 2003 SACJ 202.

¹⁰ Swanepoel 2003 SACJ 202.

¹¹ *Living Hands (Pty) Ltd v Ditz* 2013 2 SA 368 (GSJ) para 4.

group of companies looted the Living Hands Umbrella Trust, leaving around 50 000 widows and orphans of deceased mineworkers without death benefits.¹² The Financial Services Board (as it then was) inspected the affairs of the Fidentia group of companies and applied for these companies to be placed under curatorship in order for its affairs to be investigated. An order placing these companies under curatorship was granted in 2007.¹³ In *Gihwala v Brown* it was held that "[t]he business of the Fidentia [group of] companies was effectively run as one integrated business under the effective control of Mr Brown, who to all intents and purposes was the guiding mind and controller of Fidentia".¹⁴ Mr Brown was subsequently convicted of fraud relating among others things to money that had been invested in Living Hands Umbrella Trust.¹⁵ In sentencing Mr Brown, the court failed to take into account the devastating effects of the conduct of Mr Brown and his associates on many beneficiaries whose death benefits were looted. In imposing the lenient sentence of a fine of R75 000 or 18 months imprisonment, Veldhuizen J made the following unfortunate remarks:

Considering the publicity which your case has received in the media, I think it appropriate to make it clear what you have not been convicted of. You have not been convicted of having stolen money from investors or pensioners or that you defrauded them. You have not been convicted of having stolen money from Fidentia or its subsidiaries. Your conduct underlying your convictions can in no way be described as a pyramid scheme. I cannot overemphasize that the two counts of fraud that you have been convicted of are an extremely diluted version of the fraud that the indictment alleges. The second count of fraud relates only to fraud against the shareholders of MATCO, not against widows and orphans. These two counts of fraud pale when compared to the charges in the indictment. But it has been accepted by the prosecution that you never had the intention to cause actual prejudice or damage.¹⁶

This statement clearly illustrates that the court failed to consider the fact that Mr Brown, acting as both a director and shareholder of Fidentia Asset Management, among others, advised and encouraged the board of the Mineworkers' Provident Fund to invest member's money in a trust that he managed for personal gain. In relation to the Mineworkers Provident Fund, the court failed to take into account the fact that as an asset manager, Mr Brown continuously misrepresented to the board that the investments that has been made on behalf of the members' beneficiaries were secured. But most importantly, the court ignored the fact that Mr Brown, through his

¹² Hogg 2014 <https://www.biznews.com/undictated/2014/12/02/justice-for-j-arthur-brown-revisiting-feb-2007-story-breaking-news-of-fidentia-scandal>.

¹³ *Brown v Financial Service Board* 2013 ZAWCHC 142 (20 September 2013) para 1.

¹⁴ *Gihwala v Brown* 2007 JOL 20078 (C) para 1.

¹⁵ *S v Brown* 2013 ZAWCHC 211 (15 May 2013) para 1.

¹⁶ *S v Brown* 2013 ZAWCHC 211 (15 May 2013) para 4.

companies, squandered large amounts of money in investments which left thousands of beneficiaries of deceased mineworkers destitute.¹⁷

The state appealed against the sentence to the Supreme Court of Appeal. It was alleged that through the companies that Mr Brown had established and controlled he took money from his clients "by fraudulently representing that he would safeguard those amounts and obtain favourable returns".¹⁸ This "money was thereafter invested recklessly or misappropriated for the benefit of Brown, his associates and/or corporate entities in which he held an interest".¹⁹ It was alleged further that when purchasing the MATCO's shares, Mr Brown "used R60 million of the funds MATCO was administering, *inter alia*, on behalf of pension fund beneficiaries" to conclude the deal.²⁰ It was also apparent that the Fidentia Asset Management's monthly wage bill of R12 million was paid from investments that this company managed, including that made by the Mineworkers Provident Fund.²¹

After evaluating the evidence, Navsa JA held that Mr Brown and his colleagues "ignored the most basic regulatory rules directed at ensuring that the funds were safeguarded and treated as trust funds".²² Further, that Mr Brown had committed fraud in this case and that "the sentence imposed by the court below tends toward bringing the administration of justice into disrepute".²³ The court sentenced Mr Brown to an effective 15 years imprisonment.²⁴ Even though Mr Brown was sentenced, most of the beneficiaries of the deceased mineworkers did not receive their death benefits because these benefits had been looted and could not all be recovered. In other words, the criminal sanction imposed on Mr Brown did not bring justice to those who lost their retirement benefits.

Secondly, in 2017 City Press published an article that alleged that a pension fund administrator, Bophelo Beneficiary Fund, had lost R255 million worth of Amplats Group Provident Fund members' pension money, which was administered for the benefit of mineworkers.²⁵ The Financial Sector Conduct Authority (hereafter "FSCA") applied for an order to place Bophelo

¹⁷ Masondo *City Press* 1.

¹⁸ *S v Brown* 2015 1 SACR 211 (SCA) para 4.

¹⁹ *S v Brown* 2015 1 SACR 211 (SCA) para 4.

²⁰ *S v Brown* 2015 1 SACR 211 (SCA) para 3, "[t]hus, so it was alleged, funds previously under MATCO's control for the benefit of beneficiaries of the investment portfolio were not employed to that end but were used to benefit Brown".

²¹ *S v Brown* 2015 1 SACR 211 (SCA) para 10.

²² *S v Brown* 2015 1 SACR 211 (SCA) para 105

²³ *S v Brown* 2015 1 SACR 211 (SCA) para 121.

²⁴ *S v Brown* 2015 1 SACR 211 (SCA) para 147.

²⁵ Masondo *City Press* 1.

Beneficiary Fund under curatorship in order to investigate its financial affairs.²⁶ Makhubele J in *Transport Sector Retirement Fund v Bophelo Beneficiary Fund* illustrated the role of the media in these matters when he stated that:

The information that was considered to appoint a curator included the media reports about large sums of money that were unaccounted for, and in particular the R255m which City Press newspaper had earlier reported on. On the basis of this information the registrar held a view that 'the institutions may have in material respects failed to comply with certain aspects of the law; there are concerns about their financial soundness and that there may have been maladministration of the affairs of the institutions'.²⁷

As a result of the mismanagement of the retirement fund monies, it was discovered that about 2 000 beneficiaries of deceased mine workers who turned 18 years were not paid their death benefits by Bophelo Beneficiary Fund even though they were entitled to be paid a lump sum of their remaining money.²⁸ The investigations in this matter are ongoing, but it does not appear as if the money that has been lost will be recovered.

Thirdly, in 2018 the Gauteng Division, Johannesburg granted an order appointing curators who were mandated to take control of the Municipal Councillors Pension Fund to manage and investigate its business and operations.²⁹ This appointment followed allegations of mismanagement, corruption, fraud and theft of retirement assets against the fund's trustees in relation to property investment that the board authorised on behalf of the fund in various parts of South Africa.³⁰ One of the main transactions that led the curators to report the matter to the Directorate of Priority Crime Investigation was the purchasing of eleven empty stands. These stands were reported to be worth R46 million for R120 million and the fund is alleged to have paid R17 million in value added tax for the properties,

²⁶ See Registrar of Pension Funds 2018 <https://www.fsca.co.za/Annual%20Reports/Registrar%20of%20Pension%20Funds%20Annual%20Report%202017.PDF> 10, where it is stated that "[a]fter receiving reports and investigating allegations that approximately R255 million of the fund's assets were improperly accounted in the financial statements, the Registrar decided to appoint a statutory manager to the Fund and its administrator with the consent of the managements of the two institutions".

²⁷ *Transport Sector Retirement Fund v Bophelo Beneficiary Fund* 2020 ZAGPPHC 529 (31 August 2020) para 17.

²⁸ Staff Reporter 2017 <https://mg.co.za/article/2017-04-30-at-least-r255m-in-mine-workers-cash-lost-in-amplats-pension-scam/>.

²⁹ Salga 2018 <https://www.salga.org.za/Documents/Media%20Room/Circulars/Circular%2023-2018%20-%20Update%20on%20MCPF.PDF>.

³⁰ Sidimba and Sifile 2018 <https://www.pressreader.com/south-africa/pretoria-news/20180716/281573766469329>.

despite these properties being registered in the fund's name.³¹ To date the curators have issued eighteen reports to the FSCA which detail what they have done since their appointment. In the latest report the curators say that the Directorate of Priority Crime Investigation has not yet concluded its investigations in this matter.³² These allegations, which are currently under investigation, raise a fundamental concern about the role of the trustees in the alleged escalation of the prices paid, using money that the members had invested in this retirement fund, and about how this would impact on the benefits that members would receive when they exited the fund.

Finally, in 2018, at the request of the Minister of Finance, the board of the Public Investment Corporation, a state-owned asset management company that manages the Government Employees Pension Fund (hereafter "GEPF") among others, initiated a process of an independent forensic investigation into allegations of misconduct against its former Chief Executive Officer and Chief Financial Officer.³³ This investigation was initiated pursuant to anonymous emails that had been distributed to the board and employees of the PIC making serious allegations of misconduct and mismanagement against the PIC and in particular its former Chief Executive Officer.³⁴ While there was no finding of any wrongdoing in relation to the assets that are managed by the PIC, this investigation revealed that political pressure had been exerted on the former Chief Executive Officer by a former Minister, conduct which had not been disclosed to the board.³⁵

The reference to potential political pressure and the allegations of mismanagement attracted great media interest, which led to the establishment of a commission of inquiry mandated to investigate allegations of impropriety regarding the PIC.³⁶ At the hearings the former CEO testified that he "experienced a great deal of pressure from senior politicians of most parties, very influential people in various fields and business people who, for no other reason than entitlement, felt their business venture or those of their associates deserved to be financed by

³¹ Davis 2018 <https://briefly.co.za/14300-millions-rands-reportedly-stolen-municipal-councillors-pension-fund.html>.

³² MCPF 2020 <https://www.fsca.co.za/Enforcement-Matters/Curatorships/Municipal%20Councillors%20Pension%20Fund%2018th%20Curator's%20Report%20Dated%2030%20September%202020.pdf> para 4.

³³ PIC 2019 <https://www.pic.gov.za/DocAnnualReports1/PIC%20Integrated%20Annual%20Report%202019.pdf> 13.

³⁴ Budlender 2018 <https://www.justice.gov.za/commissions/pic/st/PIC-20190326-BudlenderReport.pdf> 3.

³⁵ Budlender 2018 <https://www.justice.gov.za/commissions/pic/st/PIC-20190326-BudlenderReport.pdf> 67.

³⁶ Proc 30 in GG 41979 of 17 October 2018.

the PIC".³⁷ It was clear from his testimony that these requests were not in line with PIC policies and were not investments that were meant to maximise the benefits that GEPF fund members were to receive when they exited the fund. These requests were for the sole benefit of those who wanted to extract as much money from the PIC as possible, to the detriment of GEPF members. The commission of inquiry had to investigate how these requests had impacted on the operations of the PIC.

To illustrate the importance of media reports in the misappropriation of retirement fund assets, the terms of reference of this commission of inquiry specifically mandated it to investigate media reports of alleged acts of misconduct at the PIC. One of the terms of reference specifically stated that:

[t]he commission must enquire into, make findings, report and make recommendation on ... [w]hether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time.³⁸

It cannot be doubted that any impropriety regarding investments would have a direct impact on the assets that the PIC managed on behalf of its clients, particularly the GEPF, which is the biggest retirement fund in Africa. The GEPF has "more than 1.2 million active members, in excess of 450 000 pensioners and beneficiaries, and assets worth more than R1.61 trillion",³⁹ which are managed by the PIC. Any mismanagement of the PIC would have detrimental effects on members of the GEPF. In its report the commission found that there were certain financial transactions and investments that had been undertaken in contravention of PIC Policy. In these transactions, "processes were not followed [and] necessary disclosures were not made to the Board and on certain occasions the Board was misled".⁴⁰ The Commission "found that a number of individuals unduly benefited from the improprieties [it] identified".⁴¹ The commission proceeded to make several recommendations relating to the operations of the PIC and its former CEO. In relation to the latter the commission recommended that an appropriate

³⁷ Cotterill 2019 <https://www.ft.com/content/9cc336fe-a313-11e9-a282-2df48f366f7d>.

³⁸ Mpati 2020 <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf> 8.

³⁹ GEPF 2021 <https://www.gepf.gov.za/who-is-gepf/>.

⁴⁰ Mpati 2020 <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf> para 16.

⁴¹ Mpati 2020 <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf> para 17.

investigation must be instituted against him to ascertain whether he acted with honesty and integrity and whether he was a fit and proper person.⁴²

The commission further recommended that the government as a shareholder must evaluate whether the former CEO should be held personally liable for any loss to the PIC that arose out of his conduct, including his approval of certain risky investments made into insolvent and technically insolvent companies.⁴³ Most importantly, the commission recommended that "[w]here money has been lost or investments made where the funds provided have not been used for the intended purpose, this must be identified, quantified and recovered".⁴⁴ The money that was lost through ill-conceived investments made by the PIC that were politically motivated to benefit certain individuals with political connections impacted on the benefits that GEPF members accumulated. Due to this conduct, members' benefits over time would not grow as they would have had such politically motivated investments not been made.

It is thus important to assess whether there is an adequate legislative framework that can prevent retirement funds' key decision makers from acting in a manner that would negatively affect members' benefits. It is also worth determining whether systems could be put in place which could lead to administrators' and asset managers' corrupt activities being identified before the retirement assets are misappropriated. A stringent legislative framework that would make it difficult for members' benefits to be mismanaged for corrupt ends should be enacted.

3 Regulatory framework and retirement fund governance

The major challenge facing the management and administration of retirement funds is the lack of an adequate and clear legislative provision that would ensure effective oversight over the operation of retirement funds. The legislative requirements regarding the registration of retirement funds with the FSCA,⁴⁵ the requirement of the appointment of the auditor,⁴⁶ and the appointment of skilled persons as trustees⁴⁷ have not prevented the

⁴² Mpati 2020 <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf> para 36.

⁴³ Mpati 2020 <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf> paras 38 and 40.

⁴⁴ Mpati 2020 <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf> para 39.

⁴⁵ Section 4 of the *Pension Funds Act* 24 of 1956 (hereafter PFA).

⁴⁶ Section 9 of the PFA

⁴⁷ Section 7A(3)(a) of the PFA.

misappropriation of retirement fund assets in South Africa. This directly brings into question the effectiveness of retirement funds' boards when carrying out their duties.

In terms of section 7C of the PFA, the board is mandated to "direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund". Implicit in this mandate is the duty to ensure that retirement fund assets are not only invested prudently but also that the proceeds of such investments are utilised towards the realisation of the obligations of such funds, such as providing retirement benefits to members when such become due. This is fortified by section 7C(2)(a) of the PFA, which explicitly provides that "[i]n pursuing its object the board shall— take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times ...". The primary interests that members have in relation to the retirement funds to which they are contributing is for their promised benefits to be secured and not to be threatened by acts of misappropriation. It is submitted that it is not enough, as demonstrated by the four examples of misappropriation discussed above, for section 7C(2) of the PFA to merely require trustees to act with due care, diligence and good faith,⁴⁸ to avoid conflict of interest,⁴⁹ to act with impartiality to all members and beneficiaries,⁵⁰ and to act independently.⁵¹ This is because trustees may honestly observe these duties but service providers that they have appointed may conduct themselves in a fraudulent manner. Thus, a holistic approach that is focussed not only on the trustees but also on the service providers would go a long way toward reducing the chances of the misappropriation of retirement fund assets.

Under the watch of the FSCA corrupt individuals continue to steal retirement fund moneys to the detriment of retirement fund members. This is despite the clear legislative oversight and monitoring role that the FSCA has. The FSCA relies largely on the information provided to it by retirement funds or whistle-blowers. Thus, where no information suggesting any wrongdoing is provided to the FSCA, it will not be able to detect any wrongdoing from any retirement fund early enough to prevent losses that members may suffer due to corrupt activities. The FSCA has the legislative mandate to "regulate and supervise, in accordance with the financial sector laws, the conduct of

⁴⁸ Section 7C(2)(b) of the PFA.

⁴⁹ Section 7C(2)(c) of the PFA.

⁵⁰ Section 7C(2)(d) of the PFA.

⁵¹ Section 7C(2)(e) of the PFA.

financial institutions".⁵² It is also mandated to "regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks identified to the achievement of its objective or the effective performance of its functions". Based on this mandate, perhaps the FSCA should consider methods that can enable it to intervene in the management of retirement funds early enough to detect any wrongdoing that may jeopardise members' retirement benefits. As the regulator the FSCA can also use section 26 of the PFA to intervene in the operations of retirement funds. It is the industry "authority". This provision enables the "authority" to direct that the rules of a fund be amended if the fund is not in a sound financial condition or does not comply with the provisions of the Act or when the fund is not managed in accordance with the Act or its rules.⁵³ Surely any corrupt activity by unscrupulous trustees, fund administrators or asset managers would amount to the fund's not being managed in accordance with the PFA and the rules of the fund, thereby justifying the intervention of the FSCA.

It is submitted that the legislature must consider amending all available retirement fund legislation to empower the FSCA and the National Treasury to play a more pro-active and interventionist approach that would make it difficult for retirement assets to be misappropriated.⁵⁴ Both the FSCA and National Treasury must play a role in ensuring that persons who are appointed as trustees are not only fit and proper but also have the appropriate level of skill, understanding, knowledge and competence required in the performance of their functions. To offer more protection to retirement fund members, the legislature should also empower the FSCA to play a prominent role in the appointment of retirement fund administrators and fund asset managers. While the PFA expressly provides for the appointment of retirement fund auditors⁵⁵ and valuers,⁵⁶ it is silent on the appointment of retirement fund asset managers and fund administrators. These latter service providers are currently appointed in terms of section 7D of the PFA, which empowers boards to "obtain expert advice on matters where the board member may lack sufficient expertise".⁵⁷ Section 7D(2)(a) of the PFA also empowers boards to delegate any of their functions to service providers such as fund administrators and asset managers without providing any guidance as to how such delegation should be effected.

⁵² Section 58(1)(a) of the *Financial Sector Regulation Act 9 of 2017* (FSRA).

⁵³ Section 26(1)(a) and (c) of the PFA.

⁵⁴ IOPS *Supervisory Oversight* 13.

⁵⁵ Section 9 of the PFA.

⁵⁶ Section 9A of the PFA.

⁵⁷ Section 7D(1)(e) of the PFA.

There is no legislative provision that provides guidance on how trustees should satisfy themselves of the alleged expertise of the service providers that they consider appointing. This is a role that the FSCA could play in vetting all fund administrators and asset managers who profess to possess expertise in pension fund management before they can be appointed by retirement funds. The FSCA would be better placed to adequately assess each appointment and detect any conflict of interest in relation to that appointment. There should be a legislative requirement for these service providers to be approved by the FSCA before they can be appointed to render services to retirement funds. The FSCA would be able to assess these service providers' track records, business models and general reputations in the industry. The appointment of these service providers should not be left purely in the hands of trustees, some of whom may be conflicted in their appointment. This might go a long way towards substantially reducing the prevalence of acts of corruption in the retirement fund industry. It is accepted that trustees may not have the capacity to perform certain functions, and would need to seek external expert assistance. There is a need also to strengthen the capacity of the boards so that they can perform a more active oversight role in relation to all service providers contracted by their funds. This can be achieved only if the education of trustees is prioritised and governance structures of retirement funds are improved. It is nonetheless, encouraging, as will be shown below, that efforts are being made to strengthen the reporting and monitoring systems in the retirement fund industry.

It appears that the current legislative framework has not succeeded in combatting the misappropriation of retirement funds assets. The first major challenge is the regulation of the retirement fund industry, which is fragmentary. Many different pieces of legislation regulate different aspects of the industry.⁵⁸ While there are retirement funds that are regulated by their own legislation, such as the GEPF, many retirement funds operate in the private sector and are regulated by the PFA. These statutes do not contain provisions that can directly be interpreted as providing a platform for the prevention of the misappropriation of retirement fund assets. The PFA, for instance, does not provide strict accountability measures for service providers that boards appoint. It merely emphasises that the board retains the fiduciary duties to the members and beneficiaries even in respect of

⁵⁸ See among others the PFA; *Government Employees Pension Law Proc 21 of 1996*; *Transnet Pension Fund Act 62 of 1990*; *Post and Telecommunication-related Matters Act 44 of 1958*; *Military Pensions Act 84 of 1976*; *Income Tax Act 58 of 1962*; *Financial Advisory and Intermediary Services Act 37 of 2002*; and the FSRA. Also see Marumoagae 2017 *PELJ* 4.

delegated functions. It specifically states that the board must "ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act".⁵⁹ Section 6(6) of the *Government Employees Pension Law* also allows the board to delegate its functions to service providers without providing guidance on how the board should satisfy itself of the service provider's expertise and efficiency. There is no provision in this Act does allows the National Treasury as the "authority" to play an oversight role in the appointment of fund administrators and asset managers. It is pleasing, however, to note that the PFA in particular has provisions dealing with the required level of skill for trustees, the governance of retirement funds and the reporting of wrongdoing. Trustees are required to perform the fiduciary duties provided in section 7C(2) of the PFA.

3.1 Board members' expected levels of skills and training

In terms of section 7A(3) of the PFA, every trustee of a retirement fund must attain the level of skill and training that is required to perform his or her functions in a period of six months from the date of appointment.⁶⁰ Trustees are legislatively required to retain the acquired skill and training throughout their term of office.⁶¹ The FSCA has issued a Conduct Standard⁶² which prescribes the requirements relating to the minimum skills and training that trustees must possess, the discussion of which is beyond the scope of this paper. For the purposes of this paper, it suffices to mention that the statement that the FSCA issued in support of this Conduct Standard makes it clear that trustees should understand their duties and responsibilities as well as what is required of them if they are to be regarded as fit and proper individuals to manage their retirement funds.⁶³ The FSCA's emphasis on trustees' attainment of skills and training was motivated by the observation that there were instances where trustees failed to implement and monitor control measures that were needed to adequately manage retirement funds and safeguard members' benefits.⁶⁴ Most importantly, the FSCA recognised that some board members have failed "to objectively assess financial statements and proposals made by service providers". Apart from the training that is now a legislative requirement, it is submitted that to reduce

⁵⁹ Section 7C(2)(f) of the PFA.

⁶⁰ Section 7A(3)(a) of the PFA.

⁶¹ Section 7A(3)(a) of the PFA.

⁶² GN 760 in GG 43514 of 10 July 2020 (Conduct Standard 4 of 2020: Minimum Skills and Training Requirements for Board Members of Pension Funds).

⁶³ FSCA 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx> para 2.2.

⁶⁴ FSCA 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx> para 2.2.

corrupt activities relating to retirement assets, the FSCA should be legislatively required to review and approve the appointment of fund administrators and asset managers. In practice, corrupt activities are not perpetuated by trustees *per se* but by fund administrators and asset managers who manage retirement fund assets, as was the case in the Fidentia saga discussed above.

The fact that the FSCA is not directly involved in the appointment of fund administrators and asset managers enables unscrupulous trustees and corrupt fund administrators and asset managers to misappropriate retirement fund assets to the detriment of members. To mitigate this the FSCA has created a Trustee Training Toolkit online assessment which covers, among other matters, internal controls and governance mechanisms and risk management as well as the protection of members' and beneficiaries' rights. All trustees are required to complete this training programme.⁶⁵ It is worrying, however, that "to date the FSCA has not prescribed any minimum levels of skills and training ... that board members must comply with in order to ensure that they have appropriate knowledge and expertise to perform their functions as board members".⁶⁶ It is important that this prescription should not take the form of a Conduct Standard only. The relevant legislation must be amended to incorporate the minimum levels of skills and training that trustees should possess before they can be appointed as board members. This initiative should pay particular attention to the need to prevent the misappropriation of retirement funds assets.

One important skill that is not often emphasised is the trustees' ability to efficiently monitor, evaluate and interrogate the accuracy of the information that service providers provide to them through presentations during meetings, some of which might be distorted. It is for this reason that the FSCA must be capacitated to play a more active oversight role. This could be achieved by the establishment of a dedicated unit in the FSCA that would regularly monitor the financial health of all retirement funds. This unit should be staffed by competent auditors and evaluators who could evaluate and examine the information provided by retirement funds to the FSCA regarding their investments and financial health. This might place the FSCA in a better position to timeously detect the misappropriation of retirement funds assets. For this to be effective, retirement funds should legislatively be required to fully report and account to the FSCA every four months on

⁶⁵ FSCA Date Unknown <https://www.trusteetoolkit.co.za/pages/learner/default2.aspx?firstLogon=1>.

⁶⁶ FSCA 2020 <https://www.fsc.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx> para 2.4.

their operations, investments, management and administration. This exercise might be costly and might possibly dissipate assets that could have been invested for the benefit of members. However, these are necessary costs arising from the need to prevent members retirement benefits from being stolen to the extent that they do not receive anything at all from their invested contributions. To ensure that it is fully capacitated with the relevant personnel and expertise, this unit could be funded by the retirement funds themselves through an annual fee that could be negotiated by the retirement funds, National Treasury and the FSCA. This would also force boards to take their fiduciary duties seriously and regularly monitor the performance of all their service providers to satisfy themselves that the assets of their funds are secured before they report to the FSCA.

3.2 Delegation of authority

It is concerning that retirement funds assets have been misappropriated in South Africa despite the boards' fiduciary duty "to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act".⁶⁷ This fiduciary duty can be breached when the board has contracted services providers and there are no adequate control measures in place to regularly assess the performance and conduct of such services providers in relation to the assets of the retirement fund. Principle 5 of the principles of good governance of retirement funds provides that "the primary function of the board in relation to the business of the fund is to ensure that it exercises a rigorous oversight function".⁶⁸ This is an important duty which, if performed efficiently, should go a long way toward assisting boards to safeguard the assets of their funds. This principle further provides that "[f]or the board to exercise its oversight role properly, those to whom functions are delegated should be required to report back regularly on such delegated functions and with sufficient and relevant information to enable board[s] to make informed performance assessments". While this is a noble principle, however, it is submitted that it does not go far enough. Most administrators and asset managers can report back to their contracted retirement funds and provide as much information as possible. The issue is not ultimately about reporting back and the information given. The issue is the accuracy of the information given and the ability or capacity of the board and trustees to engage with such information and satisfy themselves of its accuracy. It is for this reason that the board may need to use different

⁶⁷ Section 7C(2)(f) of the PFA.

⁶⁸ FSB 2007 <https://www.fscs.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> para 35

service providers such as auditors, as will be explained below, with adequate skills to verify the accuracy of the information it has received.

In terms of section 7D(2)(a) of the PFA, boards have the power to delegate some of their functions to service providers who are better equipped in terms of knowledge, specialisation, technical ability, and skill to perform specified functions of the board. It is important to note that once functions have been delegated to service providers, boards are not relieved of such functions and have a duty to ensure that they are carried out properly in the interest of the members and the fund.⁶⁹ Once functions of the boards are delegated to service providers, boards have a duty to ensure that there are proper control systems in place that would enable service providers to adequately perform such functions in a manner that enhances the objects of the funds.⁷⁰ The management and administration of retirement funds depends largely on expert advice that boards generally seek (and receive) from service providers.⁷¹ This advice includes such matters as suitable destinations for retirement fund investments. If no adequate oversight mechanisms are put in place, this is where the misappropriation of retirement fund assets can materialise. Unfortunately, none of the retirement fund legislation adequately provides trustees with guidance on how to exercise their oversight duties when entrusting a funds' assets to asset managers and administrators. This is a clear legislative gap that has enabled those who operated the likes of Fidentia Asset Management to loot the assets, thereby prejudicing the members of the fund.

South Africa needs a legislative framework that would make it difficult for any person to influence the board to acquire the services of a certain service provider in order for that person or those close to them to benefit financially at members' expense. It is submitted that it must be a legislative requirement that once the appointment of asset managers and administrators has been approved, boards should regularly subject their functions to regular internal evaluation and auditing by independent valuers and auditors. These independent valuers and auditors must evaluate and assess whether the books and investment information presented to the boards correctly reflect the retirement fund's financial position before this information can be passed on to the FSCA, as recommended above.

⁶⁹ Section 7D(2)(b) of the PFA.

⁷⁰ Section 7D(1)(b) of the PFA.

⁷¹ Section 7D(1)(e) of the PFA.

Currently it is not easy to determine whether the accounting and investment information presented to boards in their meetings truly reflects the financial position of their funds. Asset managers have enormous power and control over retirement assets and are usually the only party that understands the true financial state of the funds that they manage. The boards' capacity to monitor and evaluate the delegated work done by service providers must be strengthened to place boards in a position to detect any wrongdoing as early as possible.

3.3 Corporate governance

One of the most effective tools that can mitigate against the mismanagement of retirement funds and acts of corruption and fraud that are likely to threaten members' benefits is for retirement funds to observe the principles of good corporate governance. In the context of this paper, governance entails the managerial control and administration of retirement funds. This includes the accountability of the boards, decisions made by the boards, the supervision of service providers on behalf of retirement funds and the supervision of retirement funds by the FSCA.⁷² Governance can also be understood as the framework which enables boards to establish adequate checks and balances regarding the functions and roles of trustees on the one hand and of service providers on the other hand, to develop a mechanism that will enable boards to protect the assets of their retirement funds.⁷³

"Good governance goes beyond this basic goal and aims at delivering high pension fund performance while keeping costs low for all stakeholders."⁷⁴ The Organisation for Economic Co-operation and Development (hereafter "OECD"), which has partnered with South Africa and regularly reviews the country's economic policies, has provided dedicated guidelines which are aimed at promoting the good governance of retirement funds.⁷⁵ These guidelines highlight the identification of responsibilities as one of the key aspects of the good governance of retirement funds. They emphasise that "good governance calls for a clear identification and separation of operational and oversight responsibilities of a pension fund".⁷⁶ The board is to perform its oversight responsibilities by "monitoring the administration of

⁷² Yermo and Steward *Pension Fund Governance* 5.

⁷³ Rusconi *South Africa's Mandatory Defined Contribution Retirement Savings System* 23.

⁷⁴ Yermo and Steward *Pension Fund Governance* 5.

⁷⁵ OECD 2009 <https://www.oecd.org/daf/fin/private-pensions/34799965.pdf> 5.

⁷⁶ OECD 2009 <https://www.oecd.org/daf/fin/private-pensions/34799965.pdf> 5.

pension funds in order to ensure that the objectives set out in the fund ... [rules and governing legislation] are attained".⁷⁷ Effective monitoring is a must for retirement funds, and this can adequately take place only when boards have put in place governance structures that enable them to regularly review the performance of the service providers whose expertise they rely on.

In the South African context, guidance regarding the good governance of retirement funds is contained in the relevant government publication.⁷⁸ These guidelines identify the duty of the boards to always act with the utmost good faith as a fundamental principle of governance.⁷⁹ This duty is owed to the funds and to the members, who are identified as important stakeholders in the governance of retirement funds. Thus, boards are held accountable to members and their beneficiaries for the governance of their funds.⁸⁰ While several principles aimed at guiding boards in their governance of retirement funds are provided in these guidelines, there is no particular focus on how to combat the misappropriation of retirement fund assets as part of the governance strategy of retirement funds. These guidelines do not provide adequate guidance on how boards can efficiently monitor the performance of service providers to ascertain as early as possible when any wrongdoing is being perpetrated by service providers.

The failure to establish and implement good governance systems that encourage effective monitoring has provided unscrupulous trustees and corrupt administrators and assets managers an opportunity to misappropriate retirement funds' assets. It cannot be denied that "[p]oor organisational [retirement fund] systems combined with a palpable lack of expertise make many pension funds soft targets for financial service providers".⁸¹ Over and above the internal (by the fund) and external (by FSCA) monitoring suggested above, one of the means that could be adopted to prevent the misappropriation of retirement fund assets would be to regularly and fully inform the members of the boards' decisions. This would empower members to directly monitor the performance of their funds and their contracted service providers.

⁷⁷ OECD 2009 <https://www.oecd.org/daf/fin/private-pensions/34799965.pdf> 7.

⁷⁸ FSB 2007 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf>.

⁷⁹ FSB 2007 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> para 2.

⁸⁰ FSB 2007 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> paras 3, 6 and 13.

⁸¹ Clark 2004 *JPEF* 251.

According to Clark and Urwin, the difficulty of getting members to directly monitor the actions of their trustees and service providers is one of the major governance challenges for retirement funds.⁸² It is true that section 7A of the PFA mandates that at least 50% of the persons appointed to the board must be elected by the members of the fund, but members who are not elected as trustees of their funds also have an interest in the management of such funds. Regular communication with these members could indirectly allow them to monitor the way their funds are managed. Even though members of the fund can elect their representatives to the board, in practice that does not provide members who are not appointed to the boards ready access to the operations of their funds. There is no statutory obligation for appointed board members to regularly report to those who elected them on the operations and decisions taken by the board. At best, retirement fund members would only be called to annual general meetings where some of the decisions taken by their retirement fund boards will be highlighted.⁸³

Direct transparent communication with ordinary retirement fund members is one of the key elements of the good governance of retirement funds. Boards are enjoined by section 7D(1)(c) of the PFA to provide retirement funds members with adequate and appropriate information. But the content of the information that needs to be communicated is not entirely clear. In terms of this provision, boards are mandated to communicate information relating to members and beneficiaries' rights, benefits, and duties.⁸⁴ At times the FSCA provides guidance as to the content of the information that must be communicated to members. For instance, on 08 June 2020 the FSCA published a draft notice regarding the communication of benefit projections to pension fund members, which requires retirement funds to provide the members with benefit projection statements.⁸⁵ In terms of this draft notice, retirement funds are expected to provide such statements when members join their funds, on an annual basis, and upon pre-retirement withdrawal.⁸⁶ These statements must contain the value of their projected benefits and information regarding underlying risks and assumptions.⁸⁷ However, the draft notice does not contain any information regarding any action that

⁸² Clark and Urwin 2008 *J Asset Manag* 6.

⁸³ FSB 2007 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> para 64.

⁸⁴ Section 7D(1)(c) of the PFA.

⁸⁵ FSCA 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx> para 3.

⁸⁶ FSCA 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx> para 3.

⁸⁷ FSCA 2020 <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Retirement-Funds.aspx> para 4.

members can take when their funds have failed to provide them with such information and it does not inform members about any steps to take to verify the information contained in their benefit statements. The value that would be derived by retirement funds from effectively communicating with their members is that some of their members may have the knowledge of investments generally or even about the reputation of the relevant service providers which might not be available to the board. Such members may be able to provide the board with important information that may place the board in a better position to detect any wrongdoing as early as possible.

The regulations issued in terms of section 36 of the PFA (hereafter "Regulations to the PFA") are intended to enhance the governance of retirement funds in South Africa. Unfortunately, even these regulations do not adequately empower members to monitor the performance of the retirement funds to which they are contributing. Regulation 37 of the Regulations to the PFA requires the boards of defined contribution funds to include default investment portfolios wherein members contributions and retirement savings will be invested. This regulation imposes a duty on retirement funds to adequately communicate the composition of assets and the performance of such default investment portfolios to their members.⁸⁸ No guidance is provided in this regulation as to how members can directly hold their boards accountable for the information which they provide. It appears that members are expected to merely accept such information as being correct.

Similarly, regulation 28 generally deals with the investment of retirement assets.⁸⁹ However, this regulation does not make provision for boards to directly communicate with members of their funds once an investment decision has been taken, or to communicate the reasons which informed such investment decision. Communicating such information would enable interested members monitor the performance and operations of their

⁸⁸ Regulation 37(2)(a) of the Regulations to the PFA (GN R98 in GG 162 of 26 January 1962, as amended).

⁸⁹ See *Simon v NMG Umbrella Smartfund (Provident Section)* 2019 1 BPLR 283 (PFA) para 5.5, where the adjudicator determined that "[t]he purpose of regulation 28 of the Act is to ensure that the savings members contribute towards their retirement are invested in a prudent manner that not only protects the member, but is channelled in ways that achieve economic development and growth. Therefore, regulation 28 aims to protect the investor. Regulation 28 of the Act prescribes the maximum exposure that funds may invest in various asset classes. The main purpose is to protect the members' retirement provision from the effects of poorly diversified investment portfolios. This is done by limiting the maximum exposure to more risky asset classes, making sure that no unnecessary risks are taken with retirement money".

retirement funds to some extent and to assess some of the decisions that are taken which may empower them to actively play a role in safeguarding their benefits. Regarding the disclosure of investment decisions South Africa can draw lessons from the United Kingdom, where the legislature promulgated the Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations 2019. These regulations require trustees to disclose information relating to how they incentivise asset managers to align their investment strategies with those of their retirement funds and how turnover in investment portfolios and the associated costs are defined and monitored, as well as the latest statement of investment principles that govern decisions about investments.⁹⁰ These regulations enjoin trustees to disclose this and other information such as the management of the trustees' actual and potential conflict of interest on the website so that it is easily accessible to members of the retirement fund.⁹¹ Should South Africa follow the UK's sound disclosure approach, this would enhance the quality of the corporate governance of retirement funds.

The scandals pertaining to the governance of retirement funds that have been identified in this paper raise questions regarding the trustees' understanding of and commitment to good governance. The Institute of Directors in Southern Africa (IoDSA) and the King Committee have published the fourth King report on corporate governance in South Africa (hereafter "King IV"), which also covers the management and administration of retirement funds. It is trite that the King Code is not law but a voluntary guide towards good corporate governance. The boards of retirement funds could also seek guidance from the King Code regarding their governance practices.⁹²

The King Code defines corporate governance "as the exercise of ethical and effective leadership by the governing body towards the achievement of ... [e]thical culture; [g]ood performance; [e]ffective control [and] legitimacy". For the purposes of retirement funds, a lack of ethical leadership can enable corrupt individuals to misappropriate retirement fund assets for personal gain, to the prejudice of the members of the retirement fund. A lack of effective leadership leads to weaknesses in the processes and systems that are put in place by retirement funds, thereby allowing those who wish to unlawfully profit from retirement assets to do so. An ethical culture would

⁹⁰ Section 3 of the *Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations*, 2019.

⁹¹ Section 5 of the *Occupational Pension Schemes (Investment and Disclosure) (Amendment) Regulations*, 2019.

⁹² See Kilian 2020 Koers 3.

result in adequate checks and balances and the development of sound policies that would empower boards to notice earlier rather than later when some board members or service providers misappropriate assets of the retirement fund. The boards would then have effective control over operations and the execution of retirement funds' functions.

In the definition section, the King Committee provides definitions of the terms applicable to retirement funds, such as beneficiary, member, board, and principal officer, which illustrates that the committee recognised the importance of the good corporate governance of retirement funds and thus extended to retirement funds the reach of the principles included in this report. In particular, the committee noted that retirement funds "need to be well-governed and apply the principles of responsible investing in the quest for long-term, sustainable returns". King IV provides seventeen important principles of good governance that specifically relate to retirement funds, the thorough discussion of which is beyond the scope of this paper.

It suffices to state, however, that the first two principles underscore the need for the boards of retirement funds to adopt ethical and effective leadership standards/principles, which will ensure that every board member has integrity, is competent, acts responsibly, is accountable, and acts fairly and transparently.⁹³ Principle 5 of the King IV report appeals to the boards of retirement funds to issue reports that can place stakeholders in a position where they can adequately assess the performance of the funds and evaluate the funds short-, medium- and long-term prospects.⁹⁴ This principle identifies such reports as powerful instruments of meaningful communication with members and the regulator in particular.⁹⁵ This is a welcome development and is in line with the argument advanced in this article that greater member involvement in the operations of their retirement funds must be encouraged. As stated above, should members regularly receive information relating to their retirement funds, they are likely to regularly contact their funds to seek clarification or provide information that can highlight some of the worrying aspects of some of the service providers used by their funds. The explanatory note to this principle correctly points out that boards that adopt such disclosure practices will demonstrate that they are accountable to their funds' members regarding investment decisions and that they take their reporting responsibilities seriously.⁹⁶ This principle appears to be in line with principle 8 of the Principles of Good

⁹³ IoDSA *King IV* 96.

⁹⁴ IoDSA *King IV* 97.

⁹⁵ IoDSA *King IV* 97.

⁹⁶ IoDSA *King IV* 97.

Governance of Retirement Funds, which advises retirement funds to communicate their investment policy statements to their stakeholders. Further, in such statements boards should provide stakeholders with information such as the names of the fund's advisors, performance benchmarks in respect of asset managers, the classes of assets held by the funds, and the level of risk attributed to each asset class and asset manager.⁹⁷

Should retirement funds adopt this recommendation, this will make it easier for retirement funds also to comply with principle 9, which deals with the evaluation of the performance of the board, its committees, chair and individual members.⁹⁸ Principle 9 does not recommend that the boards and their members must be evaluated by retirement funds' members. However, I am of view that should boards be transparent and regularly communicate their decisions to their members, this will provide members with an opportunity to interrogate some of the decisions taken by the boards. This is underscored by principle 16, which requires boards of retirement funds to "adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the fund over time".⁹⁹

The King Code also emphasises the need for a board to "comprise the appropriate balance of knowledge, skill, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively".¹⁰⁰ The Code correctly identifies expertise and knowledge as key elements of the good governance of retirement funds. The management of retirement funds involves complex issues such as investments, accounting, law and compliance, actuarial valuations, human resources, and the ability to identify adequate and efficient service providers. Retirement fund assets can be misappropriated when the trustees' knowledge base regarding these and other areas is not balanced. Board members should have diverse expertise to be able to interrogate the advice provided by different service providers. The King Code also emphasises the importance of the trustees' independence. When trustees are not independent, they will be more susceptible to corrupt activities that are meant to personally benefit them and those who influence their decisions to the detriment of members. The Code correctly points out that

⁹⁷ FSB 2007 <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> para 51.

⁹⁸ *IoDSA King IV* 97.

⁹⁹ *IoDSA King IV* 103.

¹⁰⁰ *IoDSA King IV* principle 7.

"[i]ndependent board members could add objective judgment in dealing with conflict of interest ...".

One of the major governance recommendations that the King Committee made in King IV in relation to companies - but not explicitly extended to retirement funds - is the need for companies' audit committees to meet with internal and external auditors annually in the absence of management to address audit-related concerns.¹⁰¹ The importance and value of independent auditors in relation to retirement funds cannot be overstated. Section 9(1) of the PFA makes provision for the appointment of auditors for retirement funds. Auditors should assist retirement funds to furnish annual audited statements dealing with the funds' revenue and expenditure, and the general financial position of the funds.¹⁰² Apart from this requirement, there is not much legislative guidance on how auditors should perform their functions in relation to retirement funds. This might be because auditors are regulated by their own legislation. Be that as it may, there should be adequate legislative guidance on how auditors ought to perform their functions when rendering services to retirement funds. To combat acts of mismanagement, fraud and theft of retirement fund assets, auditors must regularly inspect the funds' transactions and provide their findings not only to the board but also to the members of the fund. This can be done by publishing regular reports on the financial health of the funds on the funds' websites. Administrators and asset managers should constantly have a sense that there is a person who is constantly evaluating and monitoring their performance.

Auditors play an essential role which empowers them to detect wrongdoing sooner than any other functionary in the fund. However, in practice the independence of auditors is compromised by the fact that they are appointed on the recommendation of administrators and fund assets managers, who can advise retirement funds to change them at any time. Evidence from practice reveals that "[t]here is a risk that an administrator or consultant, may tend to promote a firm that they perceive to be more lenient towards them and their administration, over a firm that often highlights shortcomings in the administrator's processes".¹⁰³ Boards should prioritise

¹⁰¹ IoDSA *King IV* 56

¹⁰² Section 15(1) of the PFA.

¹⁰³ Rutherford 2007 <https://www.fanews.co.za/article/retirement/1357/general/1358/who-is-choosing-your-pension-fund-auditors/993>. Reflecting on his experience as an auditor, Rutherford further states that "[t]here have been many cases where a firm is notified by the administrator that their services have been terminated by a fund, without the board of trustees communicating with the existing firm. These

the appointment of auditors that are completely independent from other service providers, particularly fund administrators and asset managers. Auditors must have the full support of boards to independently assess, evaluate and adequately examine all the financial transactions and investments (working with the fund evaluators) and properly audit such transactions. It is important for auditors to audit and monitor all the retirement fund's transactions to ascertain whether they are being carried out in the best interests of the fund and in a manner that is not prejudicial to members.

4 The duty to report wrongdoing

Currently, the method used to deal with the misappropriation of retirement funds' assets is for those who become aware of any wrongdoing to report such conduct. This is not really an effective preventative measure because at times unlawful conduct relating to retirement funds may be reported after the retirement assets have been misappropriated. In any event, section 34(1) of the *Prevention and Combating of Corruption Act*,¹⁰⁴ requires a person who holds a position of authority who either knows or suspects that an act of corruption is being committed involving an amount of R100 000.00 or more to report such conduct to the Directorate for Priority Crime Investigation. Mismanagement, theft, fraud and corruption relating to retirement funds often amount to millions of Rands, which entails that trustees and principal officers generally have the obligation to report any of the other members or service providers who are engaged in these activities in relation to their retirement funds.

In the context of retirement funds, section 7A(4)(b) of the PFA provides that "a [b]oard member must - on becoming aware of any material matter relating to the affairs of the pension fund which, in the opinion of the board member, may seriously prejudice the financial viability of the fund or its members, inform the registrar thereof in writing".¹⁰⁵ On paper this appears to be a useful provision that encourages honest trustees to report wrongdoing that may prejudice the financial viability of their fund. The challenge, however, is that often those who misappropriate retirement fund assets are very careful when they start looting retirement funds and it may be difficult for ordinary trustees, whose contact with their funds is restricted only to meetings of the

decisions in some cases are based on the recommendation of the administrator or consultant".

¹⁰⁴ *Prevention and Combating of Corruption Act* 12 of 2004.

¹⁰⁵ Sections 8(6)(b), 9(4)(c) and 13B(1) of the PFA impose a similar duty on principal officers, auditors and administrators.

funds, to pick up any act of wrongdoing. In practice, various service providers at board meetings merely present power-point slides which, without adequate knowledge of finance and investments, would be difficult for lay trustees to critically engage with and interrogate. In most instances, as was the case in the Fidentia Asset Management matter discussed above, service providers in these meetings will present a positive outlook of the fund and present a case which may be difficult to question. This might buy them enough time to misappropriate as many assets of the funds as they wish before their conduct can be discovered, which puts into question the efficiency of whistleblowing as a mechanism designed to protect retirement assets from corrupt individuals.

Nonetheless, section 9B(1) of the PFA obliges the regulator to create an environment that protects those who wish to report wrongdoing linked to retirement funds so that they may do so without fear of victimisation, by treating their submissions as protected disclosures. In terms of section 9(3)(a) of the PFA, those who make protected disclosures are protected from occupational or other detriments. In terms of section 1(e) of the *Protected Disclosures Act 26 of 2000*,¹⁰⁶ a protected disclosure is a disclosure of wrongdoing made in good faith to a person or body such as the FSCA. This was confirmed in *RFS Administrators v National Fund for Municipal Workers (NFMW)*,¹⁰⁷ where the court held that "[a] disclosure is protected if it is communicated to the Registrar by members of a broad category of designated persons who fall within a range of persons likely to encounter impropriety and who ... may have duties of a fiduciary or statutory nature".¹⁰⁸

It is submitted that, while the necessity and importance of whistleblowing provisions cannot be questioned, nonetheless, from the retirement fund members' perspective, these provisions are not necessarily useful. By design, these provisions are inherently incapable of preventing the misappropriation of the assets of retirement funds unless the person who wishes to report the action was lucky enough to realise the potential wrongdoing before it materialised. These provisions are useful for punishment for wrongdoing and not for preventing retirement fund assets from leaving the funds' coffers. South Africa has an adequate criminal

¹⁰⁶ *Protected Disclosures Act 26 of 2000*.

¹⁰⁷ *RFS Administrators v National Fund for Municipal Workers (NFMW)* 2017 ZAPGPHC 255 (1 June 2017). It is important to note that since the promulgation of the FSRA, we refer to the Regulator as opposed to the Registrar.

¹⁰⁸ *RFS Administrators v National Fund for Municipal Workers (NFMW)* 2017 ZAPGPHC 255 (1 June 2017) para 27.

justice system that can punish those who commit crimes, but criminal processes often do not lead to the return of looted assets to the retirement funds, leaving thousands of members and their beneficiaries without their hard-earned savings. The focus should be on preventative measures as opposed to punitive measures, which can be instituted only after the event.

Finally, for retirement funds to be sustainable, their boards must adopt efficient risk management framework mechanisms that would ensure that they are operated in a prudent, profitable, and effective manner. Boards should adopt processes that would create sound organisational structures to make it difficult for corrupt service providers and unscrupulous trustees to have easy access to the assets of retirement funds for personal gain. Trustees can carefully select service providers with relevant expertise that can adequately check and monitor's one another's performance and duly report any worrying activities to their boards. This would ensure regular monitoring and reporting. In this regard, guidance can be sought from principle 2.4 of the OECD recommendation on the core principles of occupational pension regulation, which provides that "[p]ension entities should have adequate risk control mechanisms in place to address investment, operational and governance risks, as well as internal reporting and auditing mechanisms".

5 Conclusion

South African government has long recognised that "a sound, well-regulated financial system is essential not only for financial stability, but also for supporting economic growth, development and the creation of jobs".¹⁰⁹ The misappropriation of retirement funds has a devastating impact not only on the economy but also on the social security of ordinary retirement fund members and their beneficiaries, who are often left destitute when retirement fund's assets are stolen. It cannot be denied that a "collapse due to mismanagement and fraud can profoundly damage the future of pension fund members, and also undermine the certainty and incentives of the savings regime".¹¹⁰ This paper has argued that South Africa should focus more on preventative measures than on punitive measures. This would increase the chances of wrongdoing being detected before it happens. The paper has argued further that effective preventative measures such as strengthened regular monitoring and auditing would go a long way towards

¹⁰⁹ National Treasury *Safer Financial Sector* 23.

¹¹⁰ National Treasury *Safer Financial Sector* 50.

providing some measure of protection of retirement fund assets before they are misappropriated.

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List of Abbreviations

CEO	Chief Executive Officer
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
FSRA	Financial Sector Regulation Act 9 of 2017
GEPF	Government Employees Pension Fund
J Asset Manag	Journal of Asset Management
JPEF	Journal of Pension Economics and Finance
ILJ	Industrial Law Journal
Int J Publ Admin	International Journal of Public Administration
IoDSA	Institute of Directors in South Africa
IOPS	International Organisation of Pension Supervisors
MCPF	Municipal Councillors Pension Fund
OECD	Organisation for Economic Co-operation and Development
PELJ	Potchefstroom Electronic Law Journal
PFA	Pension Funds Act 24 of 1956
PIC	Public Investment Corporation
SACJ	South African Journal of Criminal Justice
SALGA	South African Local Government Association
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
UK	United Kingdom