
Constitutional Issues Impacting on Pension Law: a talk delivered
at the Pension Lawyers Association Conference on
17 March 2008

13/3/08

LIST OF ABBREVIATIONS

FMR	Former Member Representative
FSB	Financial Services Board
FSB Act	Financial Services Board Act, 97 of 1990
LAWSA	The Law of South Africa, 2 nd ed, vol 1
PAJA	Promotion of Administrative Justice Act, 3 of 2000
PFA	Pension Funds Act, 24 of 1956
Pharmaceutical Manufacturers	Pharmaceutical Manufacturers of SA, in re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC)
Randburg Town Council	Randburg Town Council v Kerksay Investments (Pty) Ltd, 1998(1) SA 98 (SCA)
Registrar	Registrar of Pension Funds
Robertson	Robertson ao v City of Cape Town ao 2004 (5) SA 412 (C)
Sanlam	Chairman Sanlam Pensioenfonds v Registrar of Pension Funds 2007 (3) SA 41 (T)
Shell	The first interim determination of the s15K tribunal in the Shell Southern Africa Pension Fund matter

Summit	Summit Industrial Corporation v Claimants against the fund comprising the proceeds of the sale of MV Jade Transporter, 1987(2) SA 583 (A)
2001 Act	Pension Funds Second Amendment Act, 39 of 2001
2007 Act	Pension Funds Amendment Act, 11 of 2007
The Commentary	"A Commentary on the Act and selected board notices, directives and circulars" by Esterhuizen, Hunter, Jithoo and Khumalo
The Constitution	The Constitution of the Republic of South Africa, 108 of 1996
The scheme	A scheme for the proposed apportionment of any actuarial surplus

Preliminary remarks

1. I begin this talk as a bridegroom would in giving thanks. Instead of thanking the mother-in-law, the bridesmaids, the lady who did the flowers and so on, I want to thank those whom I tapped for ideas in preparing this talk: Graham Damant, Rosemary Hunter, Mickey Lowther and Jonathan Mort. I was also privileged to be given insight into a book in draft form which should be published in the near future: "A Commentary on the Act and selected board notices, directives and circulars" by Johan Esterhuizen, Rosemary Hunter, Tashia Jithoo and Sandile Khumalo ("The Commentary").

2. Actuaries and members of the Financial Services Board ("FSB") are probably sensitive to the criticisms lawyers have made in the last few years of the draftsmanship of the surplus apportionment legislation contained in the Pension Funds Act, 24 of 1956 ("PFA"). In mitigation I quote the following exchange in Court between a lawyer and a witness:

"Lawyer: Doctor, before you performed the autopsy, did you check for a pulse ?

Witness: No.

Lawyer: Did you check for blood pressure ?

Witness: No.

Lawyer: Did you check for breathing ?

Witness: No.

Lawyer: So, then it is possible that the patient was alive when you began the autopsy ?

Witness: No.

Lawyer: How can you be so sure, Doctor ?

Witness: Because his brain was sitting on my desk in a jar.

Lawyer: But could the patient have still been alive, nevertheless ?

Witness: Yes, it is possible that he could have been alive and practising law.”

3. This talk will be available on the website www.pensionlawyers.co.za, so you can relax, sit back, and enjoy. The next time your spouse says that he or she has a headache, you can read this talk: you will find it equally uplifting.

Retrospectivity

4. The Republic of South Africa is one, sovereign, democratic state founded on a number of values, one of which is the supremacy of the Constitution and the rule of law.¹ “The rule of law is ...[a] principle of the greatest importance. It acts as a constraint upon the exercise of all power. The

¹ s1(c) of the Constitution of the Republic of South Africa, 108 of 1996 (“the Constitution”).

scope of the rule of law is broad. It has managed to justify... a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that it is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it should be applied equally without unjustifiable differentiation.”² (Emphasis added.)

5. More than 300 years ago, Voet said in his Commentary on the Pandects:

“It is certain further that laws give shape to affairs of the future, and are not applied retrospectively to acts of the past. They are rules of action, precepts regulating the lives of men, and they have to be promulgated before they have obligatory force... Thus those things which were done prior to a new law under precept of ancient right stand fast.”

Voet gave two exceptions to the rule: the one was “when the legislator has nevertheless expressed himself otherwise in clear words, treating both of past time and of present events”; another was that of cases of “clear injustice or disgrace”:

² De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed, at 14-15, quoted with approval by Chaskalson P in Pharmaceutical Manufacturers of SA, in re ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para [39] (“Pharmaceutical Manufacturers”).

“The same applies to past events to which some obvious and ingrained injustice or disgrace attaches.”³

6. According to Baxter, *Administrative Law*, (1984):

“Events that have occurred in the past cannot, of course, be changed but the *legal relations* arising out of these events can be changed by means of retrospective legislation or decisions. Such action obviously undermines the principle of legality. On the other hand, situations can arise in which a departure from this principle might be desirable in order to rectify a previously unjust situation.

There is a strong presumption in South African law that legislation is not intended to operate with retrospective effect or in such a manner as to interfere with the existing rights and liberties. ...Express or clearly implied authority will be necessary if a public authority wishes to take action which alters legal relations.”⁴

The presumption against retrospectivity may be said to rest on the presumption that the legislature must be taken not to have intended anything unjust.⁵

7. In Robertson ao v City of Cape Town ao (“Robertson”),⁶ Bozalek J said:

“[130] ...the rule of law requirement [is] that law be accessible and clear and that the government, in all its actions, be bound by rules fixed and announced

³ Voet 3.1.17.

⁴ p355.

⁵ R v Sillas 1959 (4) SA 305 (AD) at 309H.

⁶ 2004 (5) SA 412 (C) paras [130] to [135].

beforehand. The presumption against retrospectivity and the requirement that it can be rebutted only by express terms or clear implication is based on 'elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. In *National Director of Public Prosecutions v Carolus and Others*, the following was stated:

'An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the statute to have that effect...'

[131] Retrospective legislation undoubtedly poses difficulties for the rule of law, one of the foundational values of our Constitution, difficulties which are, for obvious reasons, far more pronounced in the area of criminal law. This fact is recognized by the provisions of ss35(3)(l) and (n) of the Constitution, which proscribe retrospectivity of legislation creating increased sentences. Apart from the above provisions, the Constitution contains no prohibition of retrospective legislation. Counsel was unable to refer me to any reported South African decisions in which retrospective legislation has been challenged on the rule of law grounds other than a general observation in *Pharmaceutical Manufacturers* that statutes should not be retrospective in their operation.

[135] It appears that retrospective legislation may contravene the rule of law where it unreasonably and unfairly impairs the ability of those bound by the law to regulate their conduct in accordance therewith...'

8. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already passed.⁷
9. Even where a statute has clear retrospective effect the Court must be careful to see that the retrospectivity is limited to the exact extent which the section or statute provides.⁸ A Court will not give greater retrospective operation to a statute than its language renders necessary.⁹
10. The relevant principles may be summarized as follows:
 - (1) South Africa is founded on the supremacy of the Constitution and the rule of law.
 - (2) The rule of law requires that law should be certain, that it is ascertainable in advance so as to be predictable and not retrospective in its operation.
 - (3) There is a presumption that legislation is not intended to operate with retrospective effect.
 - (4) Express or clearly implied authority is necessary if a public authority wishes to take action which alters legal relations.
 - (5) Retrospective legislation may be justified to rectify a previously unjust situation (Baxter) or past events to which some obvious and ingrained justice or disgrace attaches (Voet).

⁷ National Iranian Tanker Co v MV Pericles GC 1995 (1) SA 475 (A) at 438 I.

⁸ Attwood v Minister of Justice 1960 (4) SA (T) at 914F-G.

⁹ R v Ah Koon 1927 TP 966 at 969.

The 2001 Act

11. The Pension Funds Second Amendment Act, 39 of 2001 (“the 2001 Act”) amended the PFA with effect from 7 December 2001. In terms of the 2001 Act, the board of a fund shall submit to the Registrar of Pension Funds (“the Registrar”) a scheme for the proposed apportionment of any actuarial surplus (“the scheme”) as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date.¹⁰ The board must include in the apportionment existing members and former members who left the fund in the period from 1 February 1980 to the surplus apportionment date.¹¹ The board must apportion the actuarial surplus between the various classes of stakeholders whom the board has determined must participate in the apportionment, provided that the actuarial surplus to be apportioned must be increased by the amount of actuarial surplus utilized improperly by the employer prior to the surplus apportionment date as determined in terms of s15B(6).¹²
12. After deducting the cost of the increases to former members and pensioners the balance of the actuarial surplus must be equitably split between existing members, former members and the employer in such proportions as the board must determine after taking account of the financial history of the fund.¹³ If the amount apportioned to the

¹⁰ s15B(1)(a).

¹¹ s15B(4).

¹² s15B(5)(a).

¹³ s15B(5)(c).

employer in terms of s15B(5)(c) is less than the actuarial surplus utilized improperly by the employer as determined in s15B(6) the difference between the two amounts shall represent a debt owed by the employer to the fund which the employer must redeem within a period to be agreed with the board.¹⁴

13. The use of the word “improper” in the 2001 Act (and the 2007 Act) was unfortunate. The word “improper” is defined as including something which is “not in accordance with truth, fact, reason or rule; abnormal; incorrect; wrong”.¹⁵ At the time the improper uses would have occurred, the uses were not abnormal, incorrect, wrong, or not in accordance with truth, fact, reason or rule, nor were the uses prohibited by the PFA or by the rules of pension funds. The intention of the legislature was that if an improper use of surplus occurred in terms of s15B(6) – even though the use was not improper in the ordinary sense of the word – and s15B(5)(d) came into play, the employer incurred a debt and became obliged to pay to the pension fund the amount referred to in s15B(5)(d).¹⁶

14. In terms of s15B(6):

“Surplus utilised improperly by the employer prior to the surplus apportionment date shall consist of –

¹⁴ s15B(5)(d).

¹⁵ New Shorter Oxford English Dictionary.

¹⁶ First interim determination of the tribunal appointed in terms of s15K in the Shell Southern Africa Pension Fund matter (“Shell”) paras 59-62.

- (a) the cost of benefit improvements for executives in excess of the cost that would have applied had the executives enjoyed the benefits provided to other members;
- (b) the cost of any additional pensions or deferred pensions granted to selected members in lieu of the employer's obligation to subsidise the medical costs after retirement of those members;
- (c) the cost to recognise prior pensionable service for selected members or for members transferred into the fund in excess of any amount paid into the fund in respect of such prior service; and
- (d) the value of any contribution holiday enjoyed by the employer after the commencement date:..."

15. In regard to paragraphs (a) (benefit improvements for executives), (b) (the fund assuming the employer's obligation to subsidise medical costs) and (c) (recognition of prior pensionable service) of s15B(6), it is the pension fund, and not the employer, which would have utilised the surplus. It is only in the case of (d) (the taking of a contribution holiday) that it can be said that it was the employer who utilised the surplus. The employer would have benefited directly only in the case of paragraph (b) (the fund assuming the employer's obligation to subsidise medical costs) and paragraph (d) (the contribution holiday). The employer might only have benefited indirectly in the case of paragraphs (a) (benefit improvements for executives) and (c) (recognition of prior pensionable service).¹⁷

¹⁷ Shell para 64.

16. It must have come as a surprise, and something of a shock, when the court found in Sanlam¹⁸ that the provisions of subsections 15B(5)(a) and (c) of the 2001 Act did not have retrospective effect to a date before 7 December 2001 and that those subsections did not apply to actuarial surplus utilised before 7 December 2001. The Court relied on the rule that a statute should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used [para 45]. Prior to the Sanlam judgment, it was generally accepted that on a proper interpretation of the 2001 Act the surplus apportionment legislation had retrospective effect.

17. Assuming that Sanlam was incorrectly decided, and that subsections 15B(5)(d) and (6) did have retrospective effect, the opposing contentions would have been the following:-

17.1 On behalf of employers it would have been argued that the 2001 Act was retrospective in its effect because it created “a new obligation or imposed a new duty or attached a new liability in regard to events already passed” in that employers could attract a debt in terms of s15B(5)(d) which had not existed at the time the employer used the surplus ‘improperly’. Employers were in effect being penalised for “improper” conduct which was entirely lawful at the time. Moreover, in some cases it would have been the pension fund which was guilty of the improper conduct, and not the

¹⁸ Chairman Sanlam Pensioenfonds v Registrar of Pension Funds 2007 (3) SA 41 (T).

employer, and in some cases the employer would have benefited only indirectly. The contention would have been that subsections 15B(5)(d) and (6) contravened the rule of law in that they “unreasonably and unfairly impair[ed] the ability of those bound by the law to regulate their conduct in accordance therewith”.

17.2 The members of the pension fund would have argued that in the past there were cases of “clear injustice or disgrace” and that legislation was required “to rectify a previously unjust situation”. Attempts to justify the 2001 Act have been the following:-

- (1) In his affidavit in the Sanlam matter, the Deputy Registrar of Pension Funds justified the 2001 Act as follows:

“2.13 Reference has been made to the fact that the employer has not (and has never had) exclusive entitlement to the surplus assets of the fund. Some employers erroneously believed that they did, others devised spurious schemes to “access” the surplus. In order to rectify the past misappropriation of assets of the fund at the hands of an employer, the Legislature has seen fit to add to the basis on which the actuarial surplus of a fund is calculated before its apportionment between the classes of stakeholders, the amount of actuarial surplus “utilized improperly” by the employer prior to the date of apportionment.

2.14 The amended Act then proceeds to list the types of surplus which must be regarded as “utilized improperly” by the

employer. This gives a clear indication of the kind of mischief which was known to have been practiced by employers in the dominant position which they occupied in the affairs and operations of a pension fund.”¹⁹

- (2) In the Memorandum on Objects of the Pension Funds Second Amendment Bill, 2001, published in the Government Gazette of 24 January 2001, it was stated that the Guiding Principles included the following:

“...the history of South African retirement funds...has left a substantial amount of surplus (estimated by the Chief Actuary to the Financial Services Board at R80 billion as at the end of 1999) in residual defined benefit funds.

Labour, in particular, felt that some of the existing surplus had been generated at the expense of members and represented assets which should be used for the benefit of members. Labour felt that professional advisors, including actuaries, had, at times, acted in concert with the employer to achieve an outcome which favoured the employer at the expense of members. This could be achieved because, even if there were member elected trustees, such trustees were at a disadvantage because of historic educational disparities, a relative lack of financial sophistication and a lack of experience.”

¹⁹ At p54 G-H.

The 2007 Act

18. The PFA was amended by Act 11 of 2007 (“the 2007 Act”). That Act dealt expressly with retrospectivity, providing that s15B was deemed to have come into operation on 7 December 2001 for funds whose surplus apportionment schemes had not been approved or whose nil returns had not been received by the Registrar²⁰. Section 15B(5)(d) was amended to provide that if the amount apportioned to the employer in terms of s15B(5)(c) was less than the actuarial surplus utilised improperly by the employer as determined in s15B(6) the difference between the two amounts would represent a debt owed by the employer to the fund and the employer was required to submit a scheme conforming with the prescribed requirements and repay that debt within a maximum period approved by the Registrar. Subsections 15B(6)(a) – (d) of the 2001 Act were incorporated in s15B(6)(b)(i)-(iv) of the 2007 Act after the following preamble:

“The board shall investigate any improper utilisation of surplus by the employer prior to the surplus apportionment date which shall consist of any of the following amounts incurred from 1 January 1980 or since the date of the fund’s commencement or such earlier date agreed to by the employer to the surplus apportionment date:”.

19. The word “employer” was defined in s15B(6)(a) as meaning “the employer or employers participating in the fund at the time of the improper

²⁰ s40B

utilisation of surplus, determined in accordance with this section, and whom benefited from the improper use: Provided that where a subsequent employer or employers by contract or law became liable for the employee-related liabilities of the previous employer or employers, the subsequent employer is also liable for the apportionment of surplus used improperly.” (Emphasis added.)

20. The 2007 Act cured the defect found in Sanlam in that the PFA now expressly provides that the investigation of improper uses should operate from 1 January 1980 or since the date of the fund's commencement or such earlier date agreed by the employer to the surplus apportionment date.
21. But the 2007 Act did not address the potential constitutional challenge that the improper use provisions infringed the Constitution. The contention would be that those provisions infringed the rule of law in that s15B unreasonably and unfairly impaired the ability of employers to regulate their conduct in accordance with the law: at the time the improper uses occurred s15B had not been enacted; the laws or rules of action had not been promulgated; and the employers could not conform their conduct accordingly.
22. The counter to that contention would be, presumably, that retrospective legislation was necessary in order to rectify a previous unjust situation. The two explanations given for the legislation, namely the affidavit of

the deputy registrar in Sanlam and the Memorandum on Objects of the 2001 Act are unconvincing. Clearly, if there was evidence of an improper access to the surplus by an employer or a misappropriation of assets that conduct would call for remedial action. The improper uses listed in s15B(6)(b)(i)-(iv), however, do not amount to an “improper” access to the surplus nor to a misappropriation of assets. In regard to the Guiding Principles in the Memorandum on Objects, there are these criticisms:

- Firstly, eight years after the chief actuary of the FSB estimated the surpluses at R80 billion, one can safely say that that was an overestimate. At an ASSA (Actuarial Society of South Africa) conference in 2007 the Chief Actuary said that the amount of surplus being distributed in terms of surplus apportionment schemes which had been approved by the Registrar had amounted to approximately R13 billion by that date. Surplus apportionment schemes are still in the process of being prepared, but it seems unlikely that the total amount will ever reach anything like R80 billion. If the surpluses were eventually to reach R20 billion, then the surpluses were one-quarter of the estimate (of R80 billion) on which the justification for the surplus apportionment legislation was partly based. Put differently, the estimate was exaggerated by 4 times.
- Secondly, the government was persuaded by the trade unions, referred to as “Labour” in the memorandum, that surpluses had been generated at the expense of members and that actuaries

had acted in concert with employers to achieve an outcome which favoured the employer at the expenses of members. I do not know on what factual basis these allegations were made. It is easy to make vague allegations in the air; it is not so easy to substantiate those accusations. Let us just take the clearest example of what has been described as an improper use, and that is the contribution holiday. Contributions holidays were common in over-funded pension funds. While it is true that the over-funding ceased during the contribution holiday, contribution holidays were agreed to by the trustees, usually motivated for by the actuaries advising the fund, were not contrary to the rules of the fund, and were not illegal.

23. Unlike in 2001, when the 2001 Act was enacted, today we have a seven year history of investigations into surpluses in pension funds. It would be interesting to know to what extent boards or ad hoc tribunals have found evidence of the allegations made by the deputy registrar in Sanlam and in the Memorandum on Objects.
24. Nevertheless, the surplus apportionment legislation has proved to be beneficial to former members, active members and pensioners, without one assumes, putting the financial viability of the funds with surpluses at risk.

25. So far I have debated the case that can be made out in regard to employers who “benefited from the improper use” (to use the words in s15B(6)(a) of the 2007 Act). It seems to me that no case can be made out at all for burdening a subsequent employer with the cost of an improper use which had taken place by a previous employer.²¹ When the new employer assumed the liability for employee related liabilities of the previous employer, the new employer had no reason to investigate improper use because the statutory concept of improper use had not seen the light of day. A due diligence investigation of the affairs of the old employer would not have revealed the liability for the simple reason that at that time the liability did not exist. The new employer could not have taken any steps to guard itself from this potential liability. And, of course, the new employer did not “benefit” from the “improper use”. How can it possibly be said that the new employer had acted “unjustly” or “disgracefully” (in the words of Voet)?
26. While it may be convincingly contended that the surplus apportionment legislation is contrary to the rule of law, especially as regards the new employer, as the Court pointed out in Robertson, retrospective legislation has not yet been challenged on the rule of law grounds. All there is is the general observation in Pharmaceutical Manufacturers that statutes should not be retrospective in their operation.

²¹ See the definition of ‘employer’ in s15B(6)(a) of the 2007 Act: “where a subsequent employer or employers by contract or law became liable for the employee-related liabilities of the previous employer or employers, the subsequent employer is also liable for the apportionment of surplus used improperly.”

Powers of the Registrar

Introduction

26. The executive officer and a deputy executive officer of the FSB shall also be the Registrar and Deputy Registrar of Pension Funds, respectively.¹⁹
27. The PFA, as amended by the 2007 Act, confers a number of wide ranging powers on the Registrar, including the power:
- to order a compliance audit,²⁰ and to intervene in the administration of a pension fund;²¹
 - to intervene in the management of a pension fund;²²
 - to issue directives,²³ and
 - to impose an administrative penalty.²⁴

Registrar may intervene in the administration of a pension fund

28. The Registrar may instruct any person to conduct a compliance visit of the business and affairs of the fund or of an administrator, in order to determine whether the PFA, the rules of the fund or the conditions of the administrator's approval are being complied with.²⁵

¹⁹ s3 of the PFA read with sections 1 and 13 of the Financial Services Board Act 97 of 1990 ("FSB Act").

²⁰ s25.

²¹ s13B(6)-(9).

²² s26.

²³ s33A.

²⁴ s37(2).

²⁵ s25(2).

29. A person conducting a compliance visit:
- (a) has a right of access at any reasonable time to all such documents or records as may reasonably be required for the purposes of the compliance visit; and
 - (b) may require an administrator or any person holding, or who is accountable for, any such document or record or involved in the management of the business or affairs of the fund, to provide such information and explanation as may be necessary for the purposes of the compliance visit.²⁶
30. If the Registrar, after an inspection or investigation under s25, considers that the interests of the members of the fund or of the public so require, the Registrar may-
- (a) direct the administrator to take any steps, or to refrain from performing or continuing to perform any act, in order to terminate or remedy any irregularity or undesirable practice or state of affairs disclosed by the inspection or investigation;
 - (b) direct the administrator to withdraw from the administration of the fund;
 - (c) suspend or withdraw the approval granted to the administrator on such conditions and for such period as the Registrar deems fit.²⁷

²⁶ s25(3).

²⁷ s13B(6).

31. The Registrar may, despite taking any steps he or she may take under the PFA, impose an administrative penalty prescribed by regulation on an administrator for any failure to comply with any conditions determined under s13B(1) or any directive issued under s13B(6).²⁸ Before taking any action under subsections (6) or (7), the Registrar must inform the administrator and the board of the fund of the proposed action and grounds therefor, and afford them a reasonable opportunity to be heard.²⁹
32. If it is in the public interest, the Registrar may through appropriate media make known:
- (a) the suspension or withdrawal of an approval referred to in subsections (6);
 - (b) any non-compliance and administrative penalty referred to in subsection (7).³⁰

Registrar may intervene in management of fund

33. Prior to its amendment in 2007, s26 of the PFA provided that if in the opinion of the Registrar a registered fund was not in a sound financial position, and if the fund had failed to act in accordance with the provisions of s18, or if such action was necessary as a result of an investigation under s25, the Registrar was entitled to apply to court for an order directing that the rules of the fund relating to the appointment,

²⁸ s13B(7).

²⁹ s13B(8).

³⁰ s13B(9).

powers, remuneration (if any) and removal of office of the board, or relating to such other matter as the Registrar might regard as appropriate, be altered in a manner to be specified by the Registrar in such application. The court was required to consider the equitable interests of the members of the fund (or of the several classes or members if there was more than one such class) and of any other person who had rendered or who intended to render financial assistance to the fund, and, subject to such considerations, could make an order as it deemed most advantageous to members of the fund.³¹

34. The 2007 Act deleted s26 and substituted a new s26. In terms of the new s26 the Registrar may, after considering the interests of the members of a fund (or of the several categories of members if there is more than one such category), direct that the rules of the fund, including rules relating to the appointment, powers, remuneration (if any) and removal of the board, be amended if the results of an inspection or investigation under s25 necessitates amendment of the rules of the fund or if the Registrar is of the opinion that the fund-

- (b) is not in a sound financial condition or does not comply with the provisions of the PFA or the regulations affecting the financial soundness of the fund;
- (c) has failed to act in accordance with the provisions of s18; or

³¹ s26(1) and (2).

(d) is not managed in accordance with the PFA or the rules of the fund.³²

35. Where a fund has no properly constituted board contemplated in s7A and has failed to constitute a board after 90 days written notice by the Registrar, the Registrar may, notwithstanding the rules of the fund, at the cost of the fund-

- (a) appoint so many persons as may be necessary to the board of the fund or appoint so many persons as may be necessary to make up the full complement or quorum of the board; and
- (b) assign to such board such specific duties as the registrar deems expedient.³³

36. A board constituted in terms of s26(2) holds office until the Registrar is satisfied that the fund has constituted a valid board in terms of s7A and the Registrar has relieved the former board in writing of its duties.³⁴

37. If the Registrar has reason to believe that a board member is not fit and proper to hold office, the registrar may, after giving the board member a reasonable opportunity to be heard, direct the board member to vacate office.³⁵

³² s26(1) Section 18 deals with the powers of the Registrar to deal with a fund which he believes is not in a strong financial position.

³³ s26(2). Section 7A(1) provides that the board of a fund should consist of at least 4 members, half of whom the members of the fund have the right to elect. In terms of s7A(2) various matters, such as the constitution of the board, the election procedure of the members, and so on, must be set out in the rules of the fund.

³⁴ s26(3).

³⁵ s26(4).

38. In the circumstances described in subsection (4), the fund shall cause the vacancy to be filled in accordance with the provisions of s7A and the rules of the fund, failing which the Registrar may adopt the course set out in subsection (2).³⁶
39. The most significant amendment to s26 was the removal of the court in the process and the substitution of the Registrar.
40. Prior to its amendment by the 2007 Act, s26 provided for a three step process with a separation of powers between the Registrar and the court. The first step was for the Registrar to form an opinion (whether the fund was not in a sound financial position or it failed to act in accordance with the provisions of s18 or if the action was necessary as a result of an investigation under s25). The second step was for the Registrar to apply to court for an order. The third step was for the court:
- (a) to consider the equitable interests of the members or any other person who had rendered or who intended to render financial assistance to the fund, and
 - (b) to make an order as it deemed most advantageous to members of the fund.

³⁶ s26(5). See the discussion on s26 in The Commentary.

41. In terms of the old s26 an independent third party, acting impartially, namely a Court:
- (a) would consider the equitable interests of members of the fund and others who intended or who had rendered financial assistance to the fund, and
 - (b) would make an order which it deemed most advantageous to members of the fund.
42. In terms of the new s26 the Registrar is to be judge and jury. The Registrar is entitled to direct that the rules of the fund be amended; to appoint members to the board; and to remove a member of the board, without the intervention and sanction of an independent and impartial third party, a Court.
43. There does not appear, however, to be anything unconstitutional in the removal of the court and the substitution of the Registrar. But the exercise of the powers conferred on the Registrar and the process followed by him will nevertheless be scrutinized by a court if he is challenged by any person aggrieved by his decision.
44. In terms of s33(1) of the Constitution everyone has the right to administration action that is lawful, reasonable and procedurally fair.
45. The decisions of the Registrar are subject to judicial review:

“The basic justification for judicial review of administrative action originates in the Constitution. In the constitutional State there are, by definition, legal limits to power, and the courts are bestowed with judicial authority, which incorporates the competence to determine the legality of various activities, including those of public authorities.”³⁷

46. In the first place, the Registrar must act lawfully. In order to act lawfully he must act in accordance with the provisions of s26.

46.1 In regard to his power to amend the rules of a fund (in terms of s26(1)) the court would consider whether:

- (1) the Registrar considered the interests of the members of the fund; and
- (2) the results of an inspection or investigation under s25 necessitated an amendment of the rules of the fund; or
- (3) the Registrar had formed the opinion that the fund –
 - (a) was not in a sound financial position or did not comply with the provisions of the PFA or the regulations affecting the financial soundness of the fund; or
 - (b) had failed to act in accordance with the provisions of s18; or
 - (c) was not managed in accordance with the PFA or the rules of the fund.

³⁷ Boule, Harris and Hoexter, Constitutional and Administrative Law: Basic Principles at 98, quoted with approval in Pharmaceutical Manufacturers.

46.2 In regard to his power to appoint members of a pension fund, the Court would consider whether the fund

- (1) had no properly constituted board contemplated in s7A and
- (2) had failed to constitute a board after 90 days written notice by the Registrar.

46.3 In regard to the Registrar's power to remove a member of the board, the Court would consider whether the Registrar had "reason to believe" that a board member was not "fit and proper to hold office". The phrase "reason to believe" was recently considered by Murphy J:

"There is ample precedent on the approach a court or tribunal should follow when deciding whether 'there is reason to believe' that an objective state of affairs exists. The phrase places a much lighter burden of proof on a party than, for instance 'a court is satisfied'... The reason to believe must be constituted by facts giving rise to such belief, and a blind belief or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice... There must be facts before the court or tribunal on which it can conclude that the applicant for asylum committed a non-political crime punishable by imprisonment in South Africa. ... Put in another way, for there to be a reason to believe a crime was committed there must be a belief based upon reason and an objective factual basis for

the reason. It will not be enough that the second respondent thought he had reason to believe... The phrase thus imposes a jurisdictional precondition that there must exist a reasonable basis for the factual conclusion that the applicant committed a crime before the discretion to exclude can be exercised. Absent a reasonable basis, the exercise of power must be set aside.”³⁸

The phrase “fit and proper” probably means whether the trustee “..is generally a person of integrity and reliability.”³⁹

47. The constitutional requirement of procedural fairness is not defined in s33(1) of the Constitution. According to LAWSA,⁴⁰ in order to determine the content of a constitutionally protected right the following legal sources must be considered: the judicial interpretation of the right (under both the Interim and 1996 Constitutions); the Promotion of Administrative Justice Act; (“PAJA”)⁴¹ and the common law to give “fresh meaning” to the constitutional right and the statutory provisions laid down in the Act. (I will refer only to the provisions of PAJA).
48. In terms of PAJA a fair administrative procedure depends on the circumstances of each case.⁴² In order to give effect to the right to procedurally fair administrative action, an administrator, subject to

³⁸ Tantoush v Refugee Appeal Board 2008 (1) SA 232(T) para [111].

³⁹ S v Mkhise; S v Mosia; S v Jones; S v Le Roux 1988 (2) SA 868 (A) at 875D; In re Chikweche 1995 (4) SA 284 (ZSC) at 291 I.

⁴⁰ The Law of South Africa, 2nd ed, vol 1, (“LAWSA”) para 109.

⁴¹ Act 3 of 2000

⁴² s3(2)(a).

s3(4), must give a person whose rights or legitimate expectations have been materially and adversely affected:

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;
- (iii) a clear statement of the administrative action;
- (iv) (not applicable);
- (v) adequate notice of the right to request reason in terms of s5.⁴³

49. In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give such a person an opportunity to:

- (a) obtain assistance and, in serious or complex cases, legal representation;
- (b) present and dispute information and arguments; and
- (c) appear in person.⁴⁴

50. If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in s3(2).⁴⁵ Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.⁴⁶

⁴³ s3(2)(b).

⁴⁴ s3(3).

⁴⁵ s3(4)(a).

⁴⁶ s3(5).

Registrar's power to issue directives

51. In terms of s33A the Registrar may, in order to ensure compliance with or to prevent a contravention of the PFA, issue a directive to a pension fund, an administrator or any other person in which practices or actions that are required or prohibited are set out.⁴⁷ A directive takes effect on the date determined by the Registrar in the directive.⁴⁸ The Registrar may cancel, amend or revoke any previously issued directives.⁴⁹ The Registrar may, where a directive is issued to ensure the protection of the members and the public in general, publish the directive in the Gazette and any other media that the Registrar deems appropriate.⁵⁰
52. Section 33A was introduced by the 2007 Act. Prior to that Act, the PFA did not empower the Registrar to issue directives.
53. As The Commentary correctly points out, it is not the function of the Registrar to make the law, and the action of issuing directives constitutes administrative action which is subject to the provisions of PAJA.
54. The Registrar, in issuing directives, must act in accordance with the provisions of the PFA. In order to do so, he must correctly interpret the

⁴⁷ s33A(1). See the section on s33A in The Commentary.

⁴⁸ s33A(3).

⁴⁹ s33A(5).

⁵⁰ s33A(6).

PFA, a Herculean task which has taxed some of the best legal brains in South Africa since 2001.

55. In interpreting the PFA, the Registrar must apply the rules of interpretation of a statute. He cannot interpret the PFA subjectively, ascribing a meaning which he believes the Act should have, and which a Court would not give to the Act. The rules of interpretation he must apply are the following:-

[1] The general rule is that one must endeavour to ascertain the intention of the Legislature from the words used in the statute. Those words must be attributed their ordinary, literal, grammatical meaning.⁵¹

[2] The general rule may be departed from by cutting down or adding to or varying the actual language of the statute or even by expanding the actual language of the statute only where not to do so would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account.⁵²

[3] In that event the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give

⁵¹ Summit Industrial Corporation v Claimants against the fund comprising the proceeds of the sale of MV Jade Transporter, 1987(2) SA 583 (A) at 596G-597B ("Summit"); Randburg Town Council v Kerksay Investments (Pty) Ltd, 1998(1) SA 98 (SCA) at 107B-G ("Randburg Town Council").

⁵² Venter v R, 1907 TS 910 at 915; Summit; Randburg Town Council.

effect to the true intention of the Legislature.⁵³ It is dangerous to speculate on the intention of the Legislature and the Court should be cautious about departing from the literal meaning of the words of a statute. It should only do so where the contrary legislative intent is clear and indubitable. It is not the function of the Court to supplement a statutory provision in order to provide for a *casus omissus*.⁵⁴

- [4] The words of a statute should not be added to or subtracted from without almost a necessity.⁵⁵
- [5] What seems an absurdity to one person may not seem absurd to another. So too what seems a clear meaning to one person may not seem clear to another. This consideration must also be borne in mind when one refers to the literal, ordinary, natural or primary meaning of words or expressions. The "literal" meaning is not something revealed to judges by a sort of authentic dictionary; it is only what individual judges think is the literal meaning, if they employ that term.⁵⁶
- [6] The Court does not impose its notion of what is absurd on a Legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the Legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.⁵⁷

⁵³ Summit.

⁵⁴ Summit.

⁵⁵ Randburg Town Council.

⁵⁶ Savage v Commissioner for Inland Revenue, 1951(4) SA 400 (A) at 410 per Schreiner JA.

⁵⁷ Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, 2001(3) SA 582 (SCA) at para[11].

- [7] In terms of s39(2) of the Constitution, when interpreting any legislation, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights. This means that all statutes must be interpreted through the prism of the Bill of Rights.⁵⁸ The courts are under a general obligation, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights.⁵⁹
- [8] In terms of ss35(2) and 232(3) of the Constitution the Court must read down a provision which is reasonably capable of a more restricted and constitutional interpretation. If the provision is reasonably capable of being read down in such a way which would be consistent with the Constitution, the Constitution requires that it shall be read in such a way. If the provision is not reasonably capable of such an interpretation, then s98(5) requires the Court to hold the provision invalid.⁶⁰
- [9] The Court must construe a legislative provision so as to avoid its unconstitutionality if it is reasonably capable of being interpreted in that way or to put it differently, the construction is not unduly strained.⁶¹

⁵⁸ Investigating Directorate: Serious Economic Offences ao v Hyundai Motor Distributors (Pty) Ltd ao, 2001(1) SA 545 (CC) at 558E.

⁵⁹ First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service ao, 2002(4) SA 768 (CC) para[31].

⁶⁰ S v Bhulwana, 1996(1) SA 388 (CC) para[28]; National Coalition for Gay and Lesbian Equality ao v Minister of Home Affairs ao, 2000(2) SA 1 (CC) para[24].

⁶¹ Bissett v Buffalo City Municipality, 2005(1) SA 530 (CC) para[27].

56. An example is the draft Information Circular on Specialist Tribunals circulated by the FSB on 27 February 2008. The draft circular contains the following paragraphs:

“6. All reports which are required in terms of section 15B of the Act from third parties, e.g. from the former member representative, must still be obtained. The Tribunal is also required to communicate the scheme to stakeholders and allow for objections from stakeholders.

25. In terms of section 15K(15) of the Act the Registrar must accept the determination by the tribunal, unless he is of the opinion that the tribunal failed to exercise its discretion properly and in good faith. Once a tribunal has made its determination it must prepare a scheme. In terms of section 15B(8) the Registrar has to approve that scheme.

26. No surplus apportionment scheme can be implemented without the express approval of the Registrar, even though such approval may be no more than a formality by virtue of the issue of an certificate to the principal officer of the Fund to the effect that all the requirements of subsection 15B(9)(d) have been fulfilled. Until such time as the certificate has been issued, the scheme cannot be implemented and will be of no force or effect.”

57. The relevant sections are the following:-

57.1 s15B(8)

“Notwithstanding anything to the contrary in the rules, no person other than the relevant board or, in the event of referral to the special *ad hoc* tribunal referred to in section 15K, the special *ad hoc* tribunal, and the registrar may approve the scheme.”

57.2 s15B(9)

“An apportionment in terms of this section shall be of no force or effect unless-

(a) the scheme, the statutory actuarial valuation as at the surplus apportionment date of the fund, as well as a copy of any other actuarial or other statement taken into account for purposes of the scheme and the report by the person appointed in terms of subsection (3), has been submitted to the registrar and the registrar is satisfied that the statutory actuarial valuation has been prepared on actuarially sound and acceptable principles prescribed.

(b) the registrar has been furnished with a certificate signed by the valuator stating-

(i) whether the valuator finds that the process of apportionment complied with this Act; and

(ii) where it was necessary for the board to apply its discretion, whether the exercise of such discretion was not unreasonable taking into account the demands of equity within the bounds of practicality and the circumstances of the particular fund, together with such additional particulars or such special report by the valuator as the registrar may deem necessary for purposes of this subsection.

(c) the registrar has been furnished with such additional report as he or she may require from an independent actuary appointed by him or her on such matters associated with the apportionment of the

actuarial surplus as the registrar shall determine and including such information as may be prescribed: Provided that-

- (i) the registrar shall require such report where there are complaints in respect of the apportionment of surplus which have not been resolved to the satisfaction of the complainants concerned; and
 - (ii) the costs resulting from the appointment of such independent actuary shall be borne by the fund;
- (d) the fund demonstrates that reasonable measure have been taken to inform employers, members and former members, together with any fund to which former members transferred, of the scheme in a manner which is clear and understandable to the members and former members and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the amounts of any actuarial surplus which it is intended to credit to the member surplus account and to the employer surplus account, respectively, and the costs of any benefit improvements for members and former members: Provided that-

- (i) the manner of communication and the type of information to be included in this communication may be prescribed and such prescription may include a requirement that the person appointed in terms of subsection (3), the independent actuary, if any, and the valuator shall certify that they are satisfied that the communication material is objective and contains sufficient information to enable any stakeholder to judge the reasonableness of the scheme; and

- (ii) the communication shall be explicit about how and where any complaint should be lodged;
- (e) the employer, members, former members, and any fund to which former members have transferred have had 12 weeks after dispatch of the communication in which to complain, in writing, to the board;
- (f) the board has considered any objection contemplated in paragraph (e) before submitting the scheme to the registrar;
- (g) the principal officer of the fund has furnished the registrar with details of all objections lodged with the board and the actions taken to address such objections;
- (h) the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date; and
- (i) the registrar has forwarded a certificate to the principal officer of the fund to the effect that all the requirements of this subsection have been fulfilled.”

58. s15K

- “(3) The tribunal shall make the apportionment within such period as may be determined by the registrar.
- (7) The tribunal may follow any procedure which it considers appropriate in conducting an investigation, including procedures in an inquisitional manner, and affording any stakeholder the right to a hearing.
- (9)(a) For purposes of an investigation, the tribunal may-

(i) under the hand of the chairperson, summon any person who in the opinion of the tribunal may be able to give material information concerning the subject matter of the investigation or who is believed by the tribunal to have in his or her possession or custody or under his or her control any book, document, record or thing which has any bearing on the subject matter of the investigation, to appear before it at a time and place specified in the summons, to be questioned or to produce that book, document, record or thing, and may retain for inspection any book, document, record or thing so produced; and

(ii) through the chairperson administer an oath to, or accept an affirmation from, any person summoned under sub-paragraph (i) and question that person and require the person to produce any book, document, record or thing in his or her possession or custody or under his or her control.

(11) After the tribunal has completed an investigation, it shall send a statement containing its determination and the reasons therefore, signed by the members of the tribunal, to all parties concerned as well as to the registrar.

(14) The determination of the tribunal shall be binding on the stake-holders.

(15) The registrar must accept such determination as satisfying the requirements of section 15B(9) unless the registrar is of the opinion that the tribunal failed to exercise its discretion properly and in good faith.”

59. The Registrar asserts in the draft circular that in terms of s15B(8) he must approve the scheme. Yet s15(8) does not clearly provide that the Registrar must approve every scheme. In its own terms, read in

isolation, it is limiting the classes of persons who have the power to approve a scheme to the board, a s15K tribunal, and the Registrar. But the use of the word “and” is a strong indication that the legislature intended that a board and the Registrar or a s15K tribunal and the Registrar must approve a scheme. s15B(8), however, must be read with subsections 15K(11), (14), and (15). In terms of those subsections, the tribunal sends its determination to all parties and to the Registrar; the determination of the tribunal is binding on the stakeholders; and the Registrar must accept such determination as satisfying the requirements of s15B(9) unless he is of the opinion that the tribunal failed to exercise its discretion properly and in good faith. Had the legislature intended the Registrar to approve the scheme of an *ad hoc* tribunal one would have expected it to make provision for such approval in s15K, and to make the determination of the tribunal conditional on the Registrar's approval. It would be anomalous for the determination of the tribunal to be binding on all stakeholders, and yet face the risk that the Registrar might not approve the scheme in terms of s15B(8). In terms of s15K(15) the only basis on which the Registrar can reject the tribunal's determination (and scheme) is if he is of the opinion that the tribunal failed to exercise its discretion properly and in good faith.

60. It is implicit in the draft circular that the Registrar is of the view that an *ad hoc* tribunal is obliged to comply with the provisions of s15B(9). He is not correct. s15K(15) provides for the exact opposite: the Registrar

must accept the *ad hoc* tribunal's determination "as satisfying the requirements of s15B(9)" unless he is of the opinion that the tribunal failed to exercise its discretion properly and good faith. A determination by the tribunal is substituted for the requirements of s15B(9), including giving stakeholders the opportunity to make objections. In Shell, counsel who appeared for the Former Member Representative ("FMR") and counsel who appeared for the Employers agreed that an *ad hoc* tribunal was not obliged to follow the provisions of s15B(9). As counsel for the FMR submitted:

"We submit that it follows from the express provisions of s15K(15)...that the tribunal's investigation and determination take the place of the requirements set out in s15B(9). Presumably the legislature was content to trust the specialist tribunal to follow procedures which were fair and to make an apportionment which was reasonable and equitable."⁶²

The submissions of counsel representing the Employers were that s15K(15) constitutes a form of deeming provision. As soon as the tribunal has made its determination, the determination becomes binding on all stakeholders, whether or not the Registrar believes that it is reasonable and equitable.⁶³

⁶² Counsel for the FMR were Owen Rogers SC and Andrew Breitenbach.

⁶³ Counsel for the Employers were Chris Loxton SC and Mohamed Chohan.

Registrar's power to impose administrative penalties (in terms of s37 as amended by the 2007 Act)

61. The Minister of Finance may prescribe by regulation administrative penalties for non-compliance with the PFA.⁶⁴ If the Registrar on reasonable grounds believes that an administrator, fund or third party has failed to comply with the PFA, the Registrar may, after consideration of all material facts, impose an administrative penalty not exceeding R5 million for every day during which non-compliance with the PFA continues.⁶⁵
62. Before imposing a penalty the Registrar must in writing—
- (a) inform the administrator, fund or third party of his or her intention to impose a penalty;
 - (b) specify the particulars of the alleged non-compliance;
 - (c) provide reasons for the penalty intended to be imposed;
 - (d) specify the amount of the penalty intended to be imposed;
 - (e) invite interested parties to make representations within a period specified by the Registrar; and
 - (f) inform the administrator, fund or third party that it may be assisted by a legal representative or other advisor.⁶⁶
63. If the Registrar after consideration of the representations decides to impose an administrative penalty, he or she must by written notice

⁶⁴ s37(1). See the section on s37(2) in The Commentary.

⁶⁵ s37(2).

⁶⁶ s37(3).

inform the administrator, fund or third party that it may, within 30 days after the date of the notice, pay the penalty or lodge an appeal in accordance with s26 of the FSB Act, to the FSB board of appeal.⁶⁷

64. If an administrator, pension fund or third party fails to pay an administrative penalty the Registrar may by way of civil action in a competent court recover such administrative penalty.⁶⁸
65. The 2007 Act substituted a new s37 for the old s37. The old s37(1) created various statutory offences for which nominal fines could be imposed on conviction by a Court. The old subsections (2), (3) and (4) made provision for the payment of penalties for the failure to make a return or to transmit or deposit a scheme, report, account, statement or other document within the time prescribed. The penalties were to be prescribed by regulation.
66. It follows that in doing away with criminal penalties, the 2007 Act bypassed the Courts, and vested the Registrar with the sole power to penalise an administrator, fund or third party who has failed to comply with the PFA.
67. I agree with the following comment in The Commentary:

⁶⁷ s37(4).

⁶⁸ s37(5).

“The imposition of the administrative penalty by the Registrar is an administrative act which must comply with administrative and constitutional law principles.”

In enacting the procedure to be followed by the Registrar in s37(3) the legislature has sought to comply with the requirement of procedural fairness (as to which see the earlier discussion).

68. In exercising the powers conferred upon him by s37, the Registrar must act in accordance with the following principles:

“(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will

very often require that he is informed of the gist of the case which he has to answer.”⁶⁹

69. In summary:

- the mere fact that the Registrar has been substituted for a court, or that he has been given very wide powers, does not necessarily mean that those provisions of the PFA are unconstitutional;
- the decisions of the Registrar are subject to judicial review;
- he must act in a procedurally fair manner;
- he must act lawfully in accordance with the provisions of the PFA, properly interpreted;
- he cannot interpret the PFA subjectively; he cannot ascribe a meaning to the Act which he believes it should have; he must interpret the PFA objectively by applying the rules of interpretation of a statute.

70. The Registrar has been given the power to intrude in a large, complex and important industry in the South African economy. He is hampered in carrying out his responsibilities by legislation which was introduced in 1956, 52 years ago, which has been amended a number of times over

⁶⁹ Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL) at 106d-h quoted with approval by Corbett CJ in Du Preez ao v Truth and Reconciliation Commission 1997 (3) SA 204 (AD) at 231H-232C; SA Heritage Resources Agencies v Arniston Hotel Property 2007 (2) SA 461 (C) at 473A-H.

the years. The PFA resembles a patchwork quilt knitted over time by a granny with fading eyesight : the patches are not aligned and it is fraying at the edges. The time has come, and past, for a new statute to be drafted which is coherent, internally consistent, and unambiguous.



John Myburgh

13/3/08