REGISTRAR'S DISCRETION IN TERMS OF ADMINISTRATIVE LAW INCLUDING REDOING OF DECISION

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INTRODUCTION

1. "Pension law" essentially involves a combination of contract law, the law relating to fiduciaries (such as trustees and liquidators), administrative law and what, for want of a more elegant phrase, might be called statutory law.

2. The topic I have been asked to address today relates to the last two categories: administrative and statutory law. Issues such as the ambit of an organ of state's discretionary powers and its power to revisit decisions clearly fall within the scope of administrative law (as the title chosen for my address by the conference organisers indicates). But the statutory dimension, too, must not be overlooked. For an administrative functionary's powers derive from legislation or regulations, or some other empowering provision, and it those enabling laws or rules which in the first instance define and circumscribe the powers in question.

3. I shall consequently commence my analysis of the two issues identified in the title chosen for this paper by referring to provisions in the Pension Funds Act, 24 of 1956 ("*the PF Act*") – the most relevant statute for present purposes. Thereafter, I shall consider the nature and extent of the statutory powers conferred on the Registrar in the light of applicable administrative law principles.

THE REGISTRAR'S DISCRETION

Statutory overview

4. The PF Act confers a myriad of powers and duties on the Registrar, which extend to every area of operation of a pension fund. As the Cape High Court stated in Financial Services Board and Another v De Wet NO and Others 2002 (3) SA 525 (C) at par [169] (588F-G) (in words that were endorsed by the Supreme Court of Appeal in Pepkor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA) at 48C): "*Virtually every section of the PF Act contains some or other provision reflecting the Registrar's supervision over the affairs of pension funds*".

5. The responsibilities entrusted to the Registrar under the PF Act include having to take decisions about whether to:

   5.1 register a pension fund (both provisionally and finally) [s 4];

   5.2 authorise a fund to have a board consisting of less than 4 members or exempt a fund from the requirement that the members of the fund elect members of the board [s 7B];

   5.3 approve any appointment of an auditor or withdraw any prior approval of such an appointment [s 9(3) and (4)];

   5.4 approve and register an amendment of pension fund rules [s 12];

   5.5 approve an amalgamation of pension funds or the transfer of business from one fund to another [s 14];

   5.6 endorse an apportionment scheme submitted by a pension fund [s 15B(9)(h)];

5.7 approve the transfer of a portion of a participating employer's surplus account from the fund to the employer surplus account in another fund [s 15E(2)];

5.8 approve the transfer of all or some of the credit balance in an existing employer reserve account to an employer surplus account [s 15F];

5.9 permit a fund to pay any credit balance in an employer surplus account to an employer to avoid retrenchments [s 15J];

5.10 require the board of a fund to refer a scheme for the apportionment of an actuarial surplus to the specialist tribunal created by the PF Act and, if the board fails to make a selection within the prescribed three-month period, who the three members of that ad hoc tribunal should be [s 15K];

5.11 approve a scheme designed to return a fund to a sound financial condition [s 18(2)];

5.12 temporarily exempt a fund from compliance with the provisions of subsection 19(5) or (5B)(a), which deal with loans by a pension fund to its members [s 19(6)(a)];

5.13 cancel or suspend the registration of a fund where appropriate [s 27(1)];

5.14 direct the liquidator of a fund to amend the preliminary accounts, or give any other directions regarding the liquidation [s 28(9)];

5.15 cancel the registration of a fund (where the fund has been wholly terminated), or confirm the completion of the partial liquidation of a

fund (in the case of its partial dissolution), after receipt of the liquidator's final accounts [s 28(15)];

5.16 declare a specific practice or method of conducting business to be irregular or undesirable (by notice in the Gazette), and direct a particular fund to cease carrying on the practice or method of conducting business so identified [s 32A(1) and (3)]; and

5.17 extend a period within which a particular act may be performed in terms of the PF Act [s 33].

Degrees of discretion

6. The text of the provisions to which I have referred, as well as the many other enabling provisions in the PF Act, reveal that Parliament has conferred differing degrees of discretion on the Registrar in respect of his various functions.

7. In a memorable image, Professor Ronald Dworkin likened discretion to the hole in a doughnut: it is its outer limits which provide its definition. Using that analogy in the present case, one might say that the PF Act has given the Registrar an assortment of ring doughnuts. On a few occasions the Registrar's discretion is extremely small, but more often it is of a significant size, and at times is barely circumscribed at all. Employing more technical terminology than a baking metaphor, one could thus also categorise the Registrar's discretion – adapting the terminology used in a well-known treatise on administrative law (Peter Cane's Administrative Law, 4ed, at pages 186-187) – as involving, at various places in the PF Act, a *confined discretion*, a *structured discretion*, and an *unstructured discretion*.

Confined discretion

8. In a few instances, the Registrar has effectively been given no choice as to whether to take certain action.

9. A good example is provided by s 15K(15), which provides that the Registrar must accept that the determination of the specialist *ad hoc* tribunal (set up to determine a scheme for the apportionment of an actuarial surplus) satisfies the requirements of s 15B(9) "*unless the registrar is of the opinion that the tribunal failed to exercise its discretion properly and in good faith*". There is thus very limited room for the Registrar to reject the tribunal's determination.

10. The Registrar's discretion to disapprove of rule amendments is also fairly narrow, although not nearly as constricted as his s 15K(15) obligation. As is apparent from s 12(4), the Registrar is required to register an alteration, rescission or addition if he "*finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound*". Provided that there is no breach of the PF Act – and thus, for example, the amendment does not purport to effect any right of a creditor of the fund or other member or shareholder thereof (s 12(1)(a)), and has been submitted to the Registrar within the prescribed 60-day period (s 12(2) – and the rule amendment could not jeopardise the financial stability of the fund, the Registrar may consequently not refuse to approve a rule amendment. As the appeal board of the Financial Services Board ("*FSB*") stated in the appeal between BKB Group Retirement Fund v Registrar of Pension Funds (in a decision handed down on 14 December 2004), in a matter in which financial soundness of an amendment was not at issue: "*if the proposed amendment is not inconsistent with the Act, the Registrar was obliged to register it and the Board would likewise be so bound*".

(That is of course not to say that the question of compliance with the PF Act is always a simple matter to determine, as is apparent from the BKB Group Retirement Fund matter, where a retrospective rule amendment was at issue. But whether or not the Registrar could potentially misinterpret the PF Act, and consequently be guilty of a (reviewable) error of law, the fact remains that the Registrar cannot refuse a rule amendment on another basis, as he tried to do in the BKB Group Retirement Fund matter - where he refused an amendment *inter alia* because there was allegedly no common error, and because the attempted "*rectification*" had not been brought within a reasonable time (see par 24 of the FSB appeal board's decision).)

Structured discretion

11. On other occasions, the Registrar is required or permitted to do something if certain criteria are met or he is satisfied about the existence of certain facts or circumstances.

12. For example, s 14(1)(c) and (d) provides that the Registrar may approve an amalgamation of pension funds or the transfer from one fund to another, where:

> "(c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition-
>
> (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer;
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> (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and
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> (iii) to the payment of minimum benefits referred to in section 14A,
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> and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the

requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;

(d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme".

The Registrar is thus given a choice as to whether to approve an amalgamation of funds or a transfer of assets, but is required to exercise his discretion within certain specified parameters, some of which are more open-ended than others.

13. Other examples of provisions which provide the Registrar with a structured discretion, albeit sometimes by means of flexible and abstract standards, are sections such as:

13.1 s 15F – the Registrar "*may approve* [a transfer of all or some of the credit balance in an existing employer reserve account to the employer surplus account] *if he or she is satisfied that the allocation of actuarial surplus to such account was negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C*";

13.2 s 15B(9)(h) – which provides that the Registrar may approve a surplus apportionment scheme, where he "*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

13.3 s 28(15) – which stipulates that the Registrar "*if satisfied that the liquidator's accounts in respect of the fund are correct and that the liquidation has been completed*" cancel the registration of the fund or confirm the partial liquidation thereof.

Unstructured discretion

14. At other times, the Registrar's discretion is very wide and unguided, and barely constrained by any specified and objectively ascertainable criteria.

15. A particular stark example of such a power is to be found in s 9(3), part of a section dealing with a fund's appointment of an auditor. That provision states simply that: "*The registrar may, without assigning any reason therefor, refuse to approve any appointment of an auditor or withdraw his prior approval and thereupon the auditor concerned shall vacate his office as auditor of the fund*". The PF Act provides no parameters as to when the Registrar may reject an auditor. The Registrar is effectively given free reign to do as he sees fit.

16. Another example is to be found in s 37D(1)(c)(iii), which permits a registered fund to deduct from a benefit any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or beneficiary in respect of "*any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund*". See, too, s 33 (which provides for the extension of specified time periods by the Registrar, both before and after the expiry dates, without providing any indication as to what factors should be taken into account by the Registrar in the exercise of his discretion) and s 28(9) (which provides, in the context of a voluntary dissolution of a fund, that, if objections are lodged with the Registrar, he may, after considering those objections, "*direct the liquidator to amend the preliminary accounts or give such other directions as he thinks fit, provided such directions are not inconsistent*

with the rules of the fund or this section, and any such directions shall be binding upon the liquidator").

17. There are also a number of instances of the PF Act stipulating that the Registrar should be "*satisfied*", or form an "*opinion*", about something, without expressly indicating what the Registrar should take into account in reaching the requisite degree of satisfaction or in forming the opinion. For just one example, see s 15B(4)(a)(iii)(bb) (less extensive advertisement to potential claimants is permissible where "*representations by the fund satisfy the registrar that limited advertisement will be adequate*").

18. In addition, there are provisions in the PF Act which permit the Registrar to take a decision after considering information which the Registrar may require to be submitted to him, but which do not stipulate either what information can be demanded by the Registrar, or in all instances what factors can or should be taken into account by the Registrar before he reaches a conclusion in the light of such information. (See for example s 2(2)(b), s 7B(1), s 14(1)(c) and (d), and s 32(1)-(3).)

The Registrar's subjective discretion

19. What is notable from a survey of the PF Act is that by and large the Registrar has been entrusted with extremely wide and unguided powers of supervision and regulation – of the kind frowned upon by the Constitutional Court in Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) and Janse van Rensburg NO v Minister of Trade and Industry 2001 (1) SA 29 (CC). Much has also been left up to the subjective discretion of the Registrar, as is shown by the frequent use of the terms "*is satisfied*" and "*in his opinion*" in the Act. By my count, no few than 35 sections make the exercise of the Registrar's powers or the performance of his functions dependent on his being "*satisfied*" as to the existence of a

state of affairs,[1] while a further 13 sections permit him to act when he has formed a particular "*opinion*".[2] Subjectively-phrased clauses in fact make up the bulk of all three kinds of discretionary powers mentioned above: i.e., confined, structured and unstructured discretion.

20. In sections which contain wording of that kind, Parliament has not made the Registrar's ability to take a decision or make a ruling dependent on whether a type of fact or state of affairs actually exists (or even can reasonably be thought to exist). Instead, the Registrar is permitted to exercise his powers if he himself has decided that the prerequisites for a valid decision are present. In other words, Parliament has, to use administrative law parlance, decided that the jurisdiction of the Registrar is dependent on a *subjective jurisdictional fact*, as opposed to an objective one.

21. The distinction which has traditionally been drawn between subjective and objective jurisdictional facts has been neatly explained by Professor Cora Hoexter in Volume 2 of The New Constitutional and Administrative Law (at page 142), with reference to a much-quoted passage from a judgment of the former Chief Justice Corbett, when he was still a Judge in the Cape High Court, in SA Defence and Aid Fund v Minister of Justice 1967 (1) SA 31 (C) at 34H-35D.

> "The first category (objective jurisdictional facts) contains the type of fact or state of affairs that must exist in an objective sense before the power can validly be exercised. Here the reviewing court is entitled to inquire as to the objective existence of the fact or state of affairs: in the case of the

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[1] Section 2(2)(a)(i)&(iii), s 4(3)&(4), s 10, s 11(3)(a), s 12(4)&(5), s 14(1)(c)&(e), s 15B(4)(a), s 15B(6), s 15B(9)(a), s 15B(10), s 15E(2)(d), s 15F(2), s 15J(3), s 15K(1)&(12), s 17(1), s 18(2), (3)&(4)(a), s 22(2), s 27(1), s 28(7A), s 28(11)&(15), s 28A(2), s 29(5)&(8), s 30A(3), s 32(2), and s 37D(1)(a)(ii).

[2] Section 2(3)(a), s 15(3), s 15K(15), s 16(5)&(9), s 18(1)&(4), s 21(1)&(2), s 26, s 27(2)(b), s 29(1), s 32A(3), and the definition of "valuator" in s 1(1).

> example above, were there in fact reasonable grounds for believing that an offence had been committed? But in the second category, that of subjective jurisdictional facts, the court is entitled only to consider whether the police officer held the opinion that the offence was committed. This is because 'the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact … existed'."

Subjective discretion pre-1994

22. Legislative provisions which make a subjective jurisdictional fact a prerequisite for the exercise of a power have over the years proved to be highly effective in immunising administrative decisions from review, or at least in watering down the degree of scrutiny to which those decisions are subjected by the Courts. To quote Professor Hoexter again (at page 143):

> "In fact, subjectively-phrased clauses operate as a kind of covert ouster clause - and, in the pre-democratic era, were often a more effective technique than [a] conventional ouster clause for restricting a court's jurisdiction. While they tended to react contrarily to a crude attempt to oust their jurisdiction altogether, the courts felt constrained to acknowledge instances in which Parliament had clearly vested a discretion exclusively in the administrator. The following dictum of Innes ACJ in *Shidiack v Union Government* [1912 AD 642 at 651] nicely expresses the reluctance of the courts to interfere:
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> > [W]here a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result. ... [I]f he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own."

23. The limited scope of review contemplated by cases such as Shidiack and SA Defence and Aid Fund, as well as other apartheid-era judgments such as Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa 1987 (1) SA 695 (A) and Minister of Law and Order v Dempsey 1988 (3) SA 19 (A), gives extremely wide latitude to decision-makers. Because the Court essentially confines its enquiry to whether the decision-maker has in fact formed the requisite opinion or satisfied himself as to the existence of a particular state of affairs, and does not enquire too deeply (or at all) into

the reasoning process or the basis on which the decision was reached, the administrative functionary virtually has *carte blanche* to act as he sees fit.

23.1 Thus in Dempsey, an arresting officer's decision to arrest a nun who had obstructed the police in an attempt to prevent them from assaulting mourners at a funeral was upheld on the basis that the officer had indeed formed the "*opinion*" that an arrest or detention was "*necessary for the maintenance of public order, the safety of the public or the termination of the State of Emergency*". The subjective jurisdictional fact was accordingly present, notwithstanding the patent unreasonableness of the opinion which had purportedly been formed.

23.2 And in a notorious Second World War decision in England, the House of Lords in Liversidge v Anderson [1942] AC 206 upheld a decision by the Home Secretary, Sir John Anderson, to detain Mr Liversidge on the basis that the Home Secretary genuinely believed that the detainee was "*of hostile origins or associations*", and that this subjective satisfaction was enough for a valid decision. (The regulations – wartime public safety regulations – permitted the Home Secretary to detain a person if he had "*reasonable cause to believe*" that the detainee's origins or associations were hostile.) The House of Lords did not even require the Home Secretary to make public the basis for his belief as to the supposed danger posed by Liversidge. Many years later, when Sir John Anderson's reasons were finally released, it transpired that two of the grounds for Liversidge's indefinite wartime detention were that he was suspected of having been engaged in commercial frauds and that he was the son of a Jewish rabbi. (See J Gauntlett "The Satisfaction of Ministers: Judicial Review of 'Subjective' Discretions

in South Africa" in Ellison Kahn (ed) The Quest for Justice: Essays in Honour of Michael McGregor Corbett (1995) 208 at 228.)

24. The deference accorded to organs of state in those cases was regarded as excessive in some quarters even prior to 1994. By way of example, Mr Justice Marais (when still in the Cape High Court) stated the following in the court *a quo* in Dempsey v Minister of Law and Order 1986 (4) SA 530 (C) at 532E-G:

> "I agree, with respect, with the view of the Full Bench of the Eastern Cape Division in *Nkwinti v Commissioner of Police and Others* 1986 (3) SA 421 (E) at 430I that the holding by a member of a Force of the opinion described in reg 3(1) is akin to a jurisdictional fact which must exist before an arrest and detention thereunder may lawfully take place, and that the Court is entitled to enquire as to whether or not such an opinion was indeed held. I accept, too, that if such an opinion was held, the mere fact that the Court would not have been of the same opinion does not entitle the Court to substitute its own opinion. However, I think it is reasonably plain that, if an opinion is not only wrong, but so unreasonable (and this obviously entails a value judgment) that it can be inferred, or if there is other evidence that shows, that it was not *bona fide*, or that it was prompted by an ulterior motive, or was the result of a failure to apply the mind to the matter, the Court may interfere notwithstanding the strongly subjective element adhering in the holding of an opinion."

Subjective discretion under the Constitution

25. In my opinion, the standard of review proposed by Mr Justice Marais in Dempsey is strongly to be preferred to the hands-off approach adopted by the Appellate Division on appeal in that case. But in any event, under the post-1994 constitutional order – and more particularly, s 33(1) of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") and the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*") – Courts would in any event no longer be permitted to absolve a decision from scrutiny on the basis that the legislature has made the only precondition thereto the exercise of a subjective discretion.

25.1 As I shall discuss further in a moment, any administrative action

can, under s 33(1) of the Constitution, read with s 6 of PAJA, be set aside by virtue of, for example, being taken for a reason not authorised by the empowering provision, or for an ulterior purpose or motive, or because irrelevant considerations were taken into account or relevant considerations were not considered, or because the decision was taken arbitrarily or capriciously.

25.2 We also know, in the light of the Financial Services Board / Pepkor Retirement Fund judgments that a material mistake of fact on the part of the decision-maker can in certain circumstances be sufficient for a Court to set aside a decision.

25.3 Moreover, any person whose rights have been materially and adversely affected by administrative action is entitled to be given reasons for that action (s 33(2) of the Constitution and s 5 of PAJA) – something which should itself inhibit unreasonable conduct.

25.4 And, perhaps most significantly, all administrative action is now required to be "*reasonable*" – a standard explained by Justice O'Regan in the Constitutional Court decision in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at 511H-513D (par [43]-[45]) as follows:

> "It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review. Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision.
>
> [44] There was some debate in the supplementary heads filed by the parties as to the precise meaning of s 6(2)(h) of PAJA, which provides that, if a decision 'is so unreasonable that no reasonable person could have so exercised the power', it will be reviewable. This test draws directly on the language of the well-known decision of the English Court of Appeal in *Associated Provincial*

Picture Houses Ltd v Wednesbury Corporation. The repetitiousness of the test there established has been found to be unfortunate and confusing. As Lord Cooke commented in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*:

> 'It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the Courts of the United Kingdom and beyond. *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR ([1947] 2 All ER 680 at 683 and 685, [1948] 1 KB 223 at 230 and 234) twice uses the tautologous formula "so unreasonable that no reasonable authority could ever have come to it". Yet Judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1976] 3 All ER 665, [1977] AC 1014 the precise meaning of "unreasonably" in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock ([1976] 3 All ER 665 at 697, [1977] AC 1014 at 1064) as "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt". These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. . . . Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.'

In determining the proper meaning of s 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution 27 and in particular s 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.

[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision,

> the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

26. But while the Constitution has unquestionably added elements of transparency and accountability into all administrative decisions, and also introduced a reasonableness standard against which to evaluate administrative action, there remains some uncertainty about the extent to which Courts will be prepared to intervene when faced with subjectively-phrased clauses.

27. There have been a number of judicial decisions in South Africa post-1994 which have recognised that deference is still due to the administrative functionary when Parliament has seen fit to include subjectively-phrased clauses in the empowering legislation.

    27.1 In Strauss v The Master NO 2001 (1) SA 649 (T), Mynhardt J, after reviewing the case-law, concluded that the only grounds for reviewing the "*opinion*" of the Master were the traditional ones laid down in Shidiack v Union Government *(supra)* (i.e., *mala fides*, material non-compliance with a statutory provision etc).

    27.2 The decision in Strauss was followed in Smartphone SP (Pty) Ltd v Absa Bank Ltd and Another 2004 (3) SA 64 (W) at 70 (par [10], read with footnote 4 thereto). That case, which was handed down after PAJA came into operation, dealt with the nature of the discretion afforded to the Commissioner of SARS in s 47 of the Value-Added Tax Act 89 of 1991, which is to the effect that "*the Commissioner may, if he thinks it necessary, declare any person to*

be the agent of any other person ...". The Court, in the person of Ponnan J (as he then was) held – with reference to decisions such as that of Nugent J (as he then was) in Leech and Others v Farber NO and Others 2000 (2) SA 444 (W) at 448 – that "*[i]t is trite that a Court has narrow powers to review conduct which has as its foundation the subjective opinion of the administrative decision-maker*".

28. Some consequences should also seemingly be attached to Parliament's decision to use phrases such as "*is satisfied*" or "*in his opinion*", as opposed to objectively-worded clauses, or even a phrase like "*has reason to believe*". As Professor Hoexter has noted (*op cit*, at page 148) the change from parliamentary sovereignty to a constitutional order does not mean that the courts are now entitled to ignore the wishes of Parliament. In a number of cases, subjective language may therefore be regarded as at least signalling the legislature's desire for deference.

29. This would particularly be so where the administrative functionary or tribunal operates in a special field in which it has particular expertise, or where the functionary or tribunal is required to deal with policy-laden or polycentric issues, or matters dependent on subjective assessments. (See Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en andere 1976 (2) SA 1 (A) *per* Jansen JA; A Chaskalson "Legal Control of the Administrative Process" (1985) 102 SALJ 419 at 427.) In such cases, the Court may not be as well placed as the functionary or tribunal to evaluate the evidence or make an assessment of what is reasonable or appropriate. Judicial deference in such circumstances may thus well be desirable and flow from an acknowledgment of different areas of competence and specialization, as well as an appreciation of the separation of powers doctrine. As the Supreme Court of Appeal noted in Minister of Environmental Affairs and

Tourism and Others v Phambili Fisheries (Pty) Ltd 2003 (6) SA 406 (SCA) at par [47], judicial deference in that context should not be confused with judicial timidity or an unreadiness to perform the judicial function. (See, too, the Constitutional Court judgment in Bato Star (*supra*) at par [46]-[50]; Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA) at par [21]; and Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at par [39], as well as the judgment of the Canadian Supreme Court in Monsanto Canada Inc. v Superintendant of Financial Services 2004 SCC 54 (CanLII) at par 9-12 and 15.)

Constraints on the Registrar's subjective discretion: a summary

30. What then can one conclude about the extent of the discretion afforded to the Registrar in the PF Act in sections which make his exercise of a power or performance of a function dependent on his "*opinion*" or his "*satisfaction*" about the existence of a particular state of affairs (or, in other words, dependent on the exercising of a subjective discretion)?

31. In my view, one can, at the risk of over-simplification, validly distil the following principles.

31.1 First, no matter what the wording of the statutory provision, no discretion is ever unfettered or untrammelled. As illustrated by Dworkin's "hole in the doughnut" analogy, discretion is never simply a vacuum; it always has some shape or outer limit. These constraints are created in the first instance by the empowering provision, and any jurisdictional facts imposed therein. This was in fact emphasized prior to 1994 by Van Dijkhorst J in Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs 1992 (3) SA 838 (T), a case concerning a decision made under a statutory provision which empowered the Minister "*to regulate in such manner as he may deem fit, or prohibit, any business practice*

… which, in the opinion of the Minister, is calculated to influence … the purchase or selling price of petroleum fuel at any outlet". Resorting himself to metaphorical language, Van Dijkhorst J stated (at 848I-849A):

> "I have stated that the Minister's opinion is subjective. Yet it is not unfettered. Like a dog on a leash its free and wilful movement is constrained by the legislator by means of the enabling enactment. It can sniff only at trees which the length of the leash permits. The origin of the power lies in, and the limitations thereon are to be determined from, the words used in the empowering legislation."

31.2 Secondly, decisions of the Registrar in terms of the PF Act constitute administrative action for the purposes of the Constitution and PAJA (something which was apparently common cause in the Financial Services Board / Pepkor Retirement Fund case). Consequently, s 33 of the Constitution and the whole of PAJA are applicable to decisions of the Registrar.

31.2.1 That means *inter alia* that decisions which materially and adversely affect the rights or legitimate expectations of any person must be *procedurally fair* (s 3 and s 6(2)(c)); that *reasons* must be provided to persons materially and adversely affected by decisions (s 5); and that decisions can be reviewed on the grounds specified in s 6(2).

31.2.2 As a consequence, too, any decision of the Registrar under the PF Act can be set aside under s 6(2) of PAJA not only if (as was mentioned in Lucky Horseshoe) a mandatory and material procedure or condition prescribed by the empowering provision was not complied with (s 6(2)(b)), but also if, for example–

31.2.2.1 the decision was taken in bad faith

(s 6(2)(e)(v)) or was tainted by bias (s 6(2)(a)(iii)), or

31.2.2.2 the process whereby the decision was reached was not procedurally fair (s 6(2)(c)); or

31.2.2.3 the decision was taken for an ulterior purpose or motive (s 6(2)(e)(ii)), or

31.2.2.4 the Registrar had failed to apply his mind properly to the matter and only consider all relevant considerations (s 6(2)(e)(iii)), or

31.2.2.5 the decision was taken arbitrarily or capriciously (s 6(2)(e)(vi)), or

31.2.2.6 the Registrar had fettered his discretion (for example, by considering himself bound to follow his circulars or board notices) (s 6(2)(e)(iv)), or

31.2.2.7 the decision was taken by someone other than the Registrar or Deputy Registrar of Pension Funds, including someone who had purportedly been delegated a power by either of those officials – as delegation would not appear to be authorised by the PF Act (see Financial Services Board v Pepkor Pension Fund 1999 (1) SA 167 (C) at 172F), more especially when the Registrar has to form an opinion, or be satisfied of the existence of certain facts (s 6(2)(a)(i)&(ii)).

31.2.3 Phrased differently, the Registrar's discretion is not only curtailed by conditions expressly prescribed by the empowering provision. It is also constrained by traditional administrative law requirements and principles of natural justice such as *bona fides*, proper purpose, rationality, *audi alteram partem* and so forth, which must be read as implied conditions of any exercise of power or performance of a function.

31.3 Thirdly, a Court will be likely to entertain some debate on the reasonableness of a decision reached by the Registrar in terms of a subjectively-phrased clause. But, at the same time, a Court is likely to be wary of second-guessing any opinion honestly formed, or any view honestly reached, by the Registrar – unless there is an error such as a mistake of law, in respect of which Courts have generally not hesitated to overrule administrative officials or tribunals. This judicial deference may be couched as appropriate respect for the views of a specialised official, who has built up a degree of expertise in his field. It may also in certain circumstances be motivated by a view that the legislature has deliberately conferred a wide discretion on the Registrar to give him latitude as to what course of action to adopt. As Van Dikjhorst J stated in Lucky Horseshoe at 848D, H-I: the Minister must as an objective fact form the requisite opinion; however the "*content of the opinion is subjective. It is the Minister's opinion, not that of a notional reasonable man or of the Court*".

31.4 Fourthly, a distinction should be drawn between provisions which simply confer a subjective discretion, and those which, in addition to requiring the Registrar to form an opinion or "*be satisfied*", also impose certain procedural requirements (e.g., require certain

information to be provided, or persons to be consulted), and thus require *procedural jurisdictional facts* to be present in order for there to be a valid decision.

31.4.1 See, for example, s 15J(3), dealing with the approval of an application by a fund for permission to pay any credit balance in an employer surplus account to an employer:

> "The registrar may only grant an application, and issue a certificate to the applicant to the effect that the requested payment may take place, if the registrar is satisfied that-
>
> (a) members have had full disclosure of the current financial position of the fund and the proposed distribution to the employer, and the need of the employer for additional capital in order to maintain employment, together with the report of the independent auditor, if any, and any information that members may require to exercise their rights under the Labour Relations Act, 1995 (Act 66 of 1995);
>
> (b) members have had a reasonable opportunity to consider the proposal;
>
> (c) at least 75 per cent of the members currently in employment have approved the proposal, in writing; and
>
> (d) negotiations in terms of section 189 of the Labour Relations Act, 1995 (Act 66 of 1995), have confirmed the need to retrench more than 10 per cent of the membership of the fund at the previous financial year end if the payment is not made."

See, too, the sections which require a fund to comply with regulations (e.g., s 15B(2)), as well as a provision such as s 32A(1) (which requires the consent of the Minister and publication in the Gazette prior to the registrar declaring a method or practice of conducting business to be an irregular or undesirable business practice).

31.4.2 There can be no doubt in those circumstances that the procedural jurisdictional requirements must be satisfied in

order for a valid decision to be made by the Registrar. The position was well stated by Lord Wilberforce in the House of Lords' decision in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 (CA & HL) (in a passage also quoted by the Supreme Court of Appeal in Pepkor Retirement Fund v Financial Services Board at 55G-I (par [36])):

> "The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however *bona fide* it may be, becomes capable of challenge. . . .'

31.5 Finally, the Registrar should, in addition to any substantive or procedural preconditions (or jurisdictional facts) stipulated in the specific empowering provision, as well as the traditional requirements for a valid decision in administrative law, bear in mind his responsibilities as the guardian of the interests of members of pension funds in general, and the interests of members of any pension fund(s) directly affected by his decision in particular. (See paragraphs [175] to [178] of the judgment of Rogers AJ in Financial Services Board v De Wet NO (*supra*), and par [14] of the judgment of Cloete JA in Pepkor Retirement Fund v Financial Services Board (*supra*).) In other words, the Registrar should bear in mind the scheme and purpose of the PF Act and the rationale behind the creation of his office, when exercising his discretionary powers.

The Registrar's power to make subordinate legislation

32. The PF Act does not only give the Registrar the power to approve or disapprove applications, or to extend time periods. or to otherwise act in a "*quasi-judicial*" manner. It also notably gives the Registrar the power to make regulations or rules: see, for example, s 14B(2)(a)(i)(bb), s 15B(2)(a), s 15B(5)(c), s 28(7A), s 28(12A) and s 32A(3).

33. The making of subordinate legislation (such as rules and regulations) has traditionally been regarded as falling within the province of administrative law, albeit that the standard of review has been more benevolent for subordinate legislation than for other administrative decisions (see C O'Regan "Rules for Rule-making: Administrative Law and Subordinate Legislation" in 1993 Acta Juridica 157 at 165-168). However, as the judgment of the Constitutional Court in its much-anticipated recent decision in Minister of Health and Another v New Clicks SA (Pty) Ltd and Others 2006 (1) BCLR 1 (CC) reveals, it is not yet settled whether the making of subordinate legislation constitutes administrative action for the purposes of PAJA, and thus is reviewable under the grounds set out in s 6(2) thereof (a number of which I have referred to at paragraph 31.2.2 above).

34. If the making of rules and regulations by an organ of state does not constitute administrative action under the new constitutional order, then it is only reviewable on the grounds of legality – or effectively on the basis of being irrational or *ultra vires*. But even if the Registrar's rule-making were to be regarded as administrative action, he would still be accorded a fair degree of latitude because of the policy-laden nature of rule-making. The Registrar's discretion in relation to the regulation and supervision of pension funds by means of rules and regulations is therefore wide indeed.

35. A word of caution should nevertheless be expressed in relation to the Registrar's powers, under s 32A, to declare a specific practice or method of conducting business to be an irregular or undesirable practice for all or some pension funds by notice in the Gazette, and to direct any fund in writing to rectify something arising out of that business or practice. Any such notice or direction could clearly impact materially and adversely on the rights or legitimate expectations of any person. The requirements of procedural fairness must therefore be complied with prior to any notice or direction being issued – as indeed is recognised by s 32A(1) of the PF Act, as well as s 7(2) of the Financial Institutions (Protection of Funds) Act, 28 of 2001 ("*the FI Act*").

The appeal to the FSB

36. The controls on the Registrar's discretion which have been discussed thus far involve both *prospective* checks (i.e., restraints contained in the PF Act and the Constitution) and *ex post facto* or *retrospective* checks (in the form of judicial review by a Court). But there is of course also a further retrospective check on the Registrar's discretion: the right of a person aggrieved by a decision of the Registrar to appeal to the FSB's appeal board in terms of s 26(1) of the Financial Services Board Act, 97 of 1990 ("*the FSB Act*"). As the FSB has indicated (for example, in Lintas v The Registrar of Pension Funds and the BKB Group Retirement Fund appeal), an appeal is a "wide" one, and thus involves a rehearing on the merits, and potentially, too, on additional evidence. The FSB's appeal board can accordingly overrule the Registrar simply on the basis that a decision of the Registrar was wrong. The appeal mechanism is accordingly a considerable check on any inappropriate or over-zealous exercise of discretion by the Registrar.

THE "REDOING OF DECISIONS"

The *functus officio* principle

37. It is a fundamental principle of administrative law that once a public official has given a decision by exercising a discretionary power he may not reverse or alter his decision (see Financial Services Board v De Wet NO (*supra*) at 581E-G (par [147]) and the authorities there cited, including Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Services 2001 (3) SA 210 (W) at 222G-225F). In other words, the public official is *functus officio* (a maxim which, translated literally, means having discharged his office).

38. Absent any contrary indications in the PF Act or any other statute (something addressed below), a decision reached by the Registrar when exercising a discretionary power – or for that matter, any decision reached by the FSB's board of appeal in terms of s 26 of the FSB Act – is accordingly final, and may not be reversed or altered by the Registrar without the intervention of the Court.

39. The *functus officio* rule is thus squarely applicable to the Registrar. Apart from the particular statutory provisions referred to below, the Registrar may thus not overturn his own decision. He is also not permitted to appeal that decision (as he would not be a "*person aggrieved*" by that decision, and thus not come under s 26(2) of the FSB Act). The Registrar may furthermore not choose to ignore, or treat as *pro non scripto*, a decision which he considers to have been wrongly made (see Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)). He must give effect to the decision when requested to do so, or apply to Court to set it aside.

40. The acceptance of the *functus officio* principle indeed underlay the Financial Services Board / Pepkor Retirement Fund litigation, as the Registrar and the FSB felt compelled to approach the Court to set aside the Registrar's approval of transfers of funds in terms of s 14 of the PF Act. The Cape High Court in that matter also expressly held that permitting the Registrar to come to Court to obtain an order overturning his decision was not contrary to the *functus officio* rule (Financial Services Board v De Wet NO (*supra*) at 581E-G (par [148]-[154]).

41. The same principle was reaffirmed by the Queens Bench Division (Administrative Court) in England in a recent pension case, R (on the application of the Secretary of State for Defence) v President of the Pensions Appeal Tribunal (England and Wales) [2004] 2 All ER 159 (QB) at 168e-g, in respect of a decision of the Pensions Appeals Tribunal (PAT):

> "Except in the circumstances provided for by s 6(2A) of the 1943 Act and rr 20 and 21 of the 1980 rules, once the PAT has announced its decision it has no power to reconsider it or reopen the case subject to its decision being quashed by the High Court. See Wade and Forsyth *Administrative Law* (8th edn, 2000) p 916 and *Akewushola's* case, where Sedley LJ said:
>
> > '… I do not think that, slips apart, a statutory tribunal – in contrast to a superior court – ordinarily possesses any inherent power to rescind or review its own decisions. Except where the High Court's jurisdiction is unequivocally excluded by privative legislation, it is there that the power of correction resides'."

42. There are indications in earlier South African cases that an obviously unlawful decision can simply be ignored as it is void. Moreover, as the Supreme Court of recently held in Northern Free State District Municipality v Matshai (SCA Case No. 90/2004; delivered on 30 March 2005) at par [15]-[16], action taken on the assumption that a prior administrative act is invalid will itself be valid if the assumption turns out to be correct. But as Professor Baxter pointed out (in Administrative Law at p 378), "*invalid decisions are only relatively void, and … are presumed valid until*

impugned and authoritatively determined by a court". If the Registrar were not to seek to set aside a decision which was to his knowledge unlawful, it could accordingly become immune from challenge in a review as a result of unreasonable delay, and accordingly validated in that manner. Consequently, all decisions by the Registrar should as mentioned above be regarded as being incapable of being reversed or altered, except with the intervention of the Court.

Statutory authority to reverse, undo or alter decisions

43. The PF Act does not contain any general provision which gives the Registrar the power to "redo" or revisit any decision. There is thus no equivalent in the PF Act of Uniform Rule 42, which permits a Court *mero motu* or on the application of any affected party, to rescind or vary an order or judgement (i) erroneously sought or erroneously granted in the absence of any party affected thereby, or (ii) in which there is an ambiguity or patent error or omission, or (iii) which was granted as a result of a mistake common to the parties. There is also no comparable provision to s 3(2) of the Customs and Excise Act, 91 of 1964, which allows any decision made and any notice of communication signed or issued by any delegate of the Commissioner to be withdrawn or amended by the Commissioner or by the officer or person concerned.

44. There are, however, various provisions in the PF Act which permit the Registrar to revisit his decisions. For example –

    44.1 s 2(2)(b) allows the Registrar at any time to change his mind about the non-applicability of the PF Act to a pension fund, if in the light of information and returns requested from any person carrying on the business of a pension fund in the Republic, he is "*no longer satisfied as regards any of the matters specified in paragraph (a)*";

44.2 s 7B(2) enables the Registrar to withdraw an exemption granted under s 7B(1) (i.e., an exemption from the requirement that a board of a fund have four members, 50% of which can be elected by the members of the fund, or an exemption from the requirement that the members of the fund elect members of the board);

44.3 s 9(3) permits the Registrar to withdraw any prior approval of the appointment of an auditor to a fund;

44.4 s 18(4)(b) permits the Registrar to withdraw his approval of a scheme arrangement designed to bring a financially unstable fund into a sound financial condition, if in his opinion the scheme is unlikely to accomplish the objects of s 18; and

44.5 in terms of s 27, the Registrar may:

44.5.1 cancel the registration of a fund on proof to his satisfaction that the fund has ceased to exist, or if the Registrar and the fund are agreed that the fund was registered by mistake in circumstances not amounting to fraud (s 27(1));

44.5.2 apply to Court for the cancellation or suspension of the registration of a fund if the fund has wilfully and after notice from the Registrar violated any provision of the PF Act, or the Registrar is of the opinion, as a result of an investigation, that the registration should be cancelled or suspended (s 27(2)).

(Section 27(3) provides that the Court may cancel the registration of the fund or suspend such registration for such period as it thinks fit, and may attach to such cancellation or suspension such

> conditions as it thinks desirable, or may make any other order which in the circumstances it thinks desirable.)

45. Although not directly concerned with the "redoing" of an earlier decision, it is also significant that s 26 of the PF Act permits the Registrar to apply to Court for an order directing the rules of a fund relating to the appointment, powers, remuneration and removal from office of the board be altered in a manner specified by the registrar in such application.

46. All the aforementioned powers of the Registrar are couched in notably wide and open-ended terms. To use the terminology employed earlier in this paper, they are all examples of "*unstructured discretion*". The clauses are also mostly subjectively-phrased. The Registrar should, however, only exercise those powers if satisfied that the requirements for the original exercise of the approval power are no longer met and a revocation or alteration of his earlier decision would be consistent with his general duties and responsibilities as the guardian and custodian of pension funds.

47. Also relevant to some extent is s 10 of the Interpretation Act, 33 of 1957, subsections (1) to (3) of which provide that:

> "(1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.
>
> (2) Where a law confers a power, jurisdiction or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office or by the person lawfully acting in the capacity of such holder.
>
> (3) Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws."

48. The Registrar can thus clearly reverse or alter a decision to make particular rules or regulations; and accordingly revoke them, and put new

rules in their place. Section 10 of the Interpretation Act does not, however, override the *functus officio* principle in any other respect. All it does is make it clear that once the Registrar has exercised a power (of approval or reversal), it is not thereby exhausted.

The Registrar's power to approach the Court

49. The only issue remaining under this heading concerns when it is generally appropriate for the Registrar to raise the invalidity or irregularity of any of his acts in a court of law. (The circumstances in which the Registrar can apply to Court to cancel or suspend the registration of a fund are expressly dealt with in s 27(2) of the PF Act, as indicated in paragraph 44.5.2 above.)

50. In the light of the judgments in the Financial Services Board / Pepkor Retirement Fund matter, it would appear that the Registrar could apply to Court to reverse or alter one of his decisions when this is thought to be in the public interest, and where the interests of any members of any fund(s) directly affected by the unlawful decision, require such action to be taken. This would appear to be the effect of paragraphs [13], [14] and [15] of the Supreme Court of Appeal judgment in that case, where Cloete JA stated:

> "[13] … Section 14 [of the PF Act] deals with an important aspect of the regulation of pension fund organisations. … The section provides that no such amalgamation or transfer 'shall be of any force or effect' unless the prescribed requirements are met. … One of these requirements is that the Registrar must be satisfied both generally that the scheme for the proposed transaction is reasonable and equitable, and also in regard to the other matters specified in ss(1)(c). It is unthinkable that, if the Registrar were to realise *ex post facto* that there had not been compliance with the section, he could not apply to Court to have it set aside. … It would indeed be the Registrar's duty to make such an application, if prejudiced.
>
> [14] It was submitted on behalf of the appellants that the Registrar was not prejudiced and that it should be left to those prejudicially affected by his decisions to take them on review. That submission is equally without merit. The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be

> regulated to achieve these objects. That is the whole purpose which underlies the Act. Of course only a particular fund and the members of that fund may be directly affected by a particular decision of the Registrar under s 14(1)(c). But that does not derogate from the fact that the function the Registrar performs is performed in the public interest generally. In addition, the interests of the very persons affected by the decision require the Registrar to perform his functions properly and to seek judicial review of his own decisions should he not have done so. The prejudice to the Registrar in allowing a certificate improperly given in terms of s 14(1)(e), and transfers pursuant thereto, to stand consists in his not having had an opportunity to evaluate the true facts in arriving at decisions which he is required to make in the protection of the public interest generally, and the particular interests of those directly affected. His function is compromised.
>
> [15] I therefore conclude that the Registrar had *locus standi* to bring review proceedings to have the validity of the certificates granted under s 14(1) and the subsequent transfers made pursuant thereto, set aside."

51. It should also be borne in mind that s 6(1)(a) of the FI Act provides that the Registrar may institute proceedings in the High Court having jurisdiction in order to *inter alia* "*discharge any duty or responsibility imposed on the registrar in terms of any law*". As the Registrar is required to control and oversee all facets of pension funds (including the registration of funds and their rules, the amalgamations and transfers of the business of pension funds, the use and apportionment of surpluses in defined benefit funds, and so forth), it would clearly be a proper exercise of the Registrar's discretion were he to apply to Court to reverse any decision which he is not by statute allowed to correct in circumstances when any conduct permitted by that decision would not be in accordance with the PF Act.
