

## ADMINISTRATIVE LAW WEAPONS THAT COULD BE USED

### BY OR AGAINST THE FSB

#### **INTRODUCTION**

1. The title of the topic upon which I am to address you (Jonathan Mort's choice of words, not mine) is both unusual and revealing. It is unusual in that it suggests that "*Administrative Law Weapons*" are available not only to those affected by administrative decisions but also to those making such decisions. That that suggestion has some substance is apparent from the decision of the Supreme Court of Appeal in **Pepkor Retirement Fund & Another v Financial Services Board & Another** 2003 (6) SA 38 (SCA), a case to which I shall return later. The title is revealing in that a reference to "*Administrative Law Weapons*" suggests that a state of conflict (but perhaps not yet open warfare) exists between the FSB and those affected by its decisions.

#### **ADMINISTRATIVE LAW BEFORE THE INTERIM CONSTITUTION**

2. Mention the words "*Administrative Law*" to a pre-constitutional lawyer and he or she is likely to think

immediately of a common law doctrine developed by the Courts, the material elements of which have been borrowed from English law.

3. Pre-constitution those elements were:

3.1 Firstly, the doctrines of legislative supremacy and parliamentary sovereignty. The sovereignty of the South African parliament had been undisputed in this country since the enactment of the Statute of Westminster by the English parliament in 1931. The Courts could not question the validity of duly enacted Acts of Parliament and judicial review of administrative action had to take place within the limits imposed by the Court's obligation to observe and enforce the will of parliament.

3.2 Secondly, the principle of parliamentary government implied ministerial responsibility for administrative action.

3.3 Thirdly, a belief in the Diceyan Doctrine of the *Rule of Law* that the administration of justice ought to fall under the jurisdiction of the "*ordinary Courts*" and that all inferior tribunals and public bodies ought to be subject

to the supervisory review jurisdiction of the Supreme Court (as it then was).

3.4 Finally, an acceptance of the doctrine of the separation of powers.

4. Writing in 1984, some 10 years before South Africa's first democratic election, Baxter was able to write in his seminal work "*Administrative Law*" (at 32) that:

*"... the character of parliamentary sovereignty in South Africa is modified by three features: the limited franchise, the long-established dominance of the governing party, and the strength of the State President under the new Constitution."*

(The reference to "new" here being to the 1983 Constitution).

5. Having pointed out that in South Africa (prior to 1994) the imbalance of party representation and the lack of universal franchise had led to the situation where the executive, instead of having to account to parliament, had at its disposal a sovereign, powerful and willing ally, Baxter went on to say, in the same work, (at 33-4):

*"The difficulties run even deeper, for the inadequacies of parliamentary control cannot simply be remedied by extending judicial control. Dicey was able to eulogize the ideal of general supervision of administrative action by the ordinary Courts precisely because the convention*

*and ministerial responsibility was meant to take care of the merits of administrative action – something with which the Courts could not and cannot be expected to cope. This is the track in which South African administrative law has found itself. Even if there were no special political difficulties facing South African lawyers there would still be the need to revise the outdated framework of administrative law. Yet there has been little attempt to do so. In England, as in many other countries, extensive reforms have been effected during the past 50 years. To the extent that South African administrative law does resemble English administrative law, it is a pale reflection of the English law of a bygone age.”*

6. On the positive side Baxter pointed out that our Courts had not lagged far behind their foreign counterparts in developing the principles of review where they had been allowed to do so and that the body of principles so developed did not compare badly with those in most other countries. He was also able to point in recent years to an inclination towards judicial activism. That judicial activism continued to grow in the decade after 1984, culminating in the creation of the interim Constitution.

### **ADMINISTRATIVE LAW POST THE INTERIM CONSTITUTION**

7. One of the very first questions which emerged after the advent of the interim Constitution in 1993 was whether and to what extent the common law doctrine of administrative law survived. The question was exacerbated by the

jurisdictional tension between the Constitutional Court on the one hand and the Appellate Division on the other. The question which Court would have final authority to pronounce upon the relationship between pre-constitutional administrative law rules and constitutional law arose because the interim Constitution had denied the Appellate Division jurisdiction to hear and pronounce upon "*constitutional matters*".

8. When the final Constitution granted constitutional jurisdiction to the renamed Supreme Court of Appeal a territorial battle developed between it and the Constitutional Court on this issue.
9. The first occasion upon which this issue rose to prominence was in **Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others** 1998 (12) BCLR 1455 (CC). The question posed by the SCA, which had declined jurisdiction to hear the matter, was whether the interim Constitution had preserved for it "*any residual or concurrent jurisdiction to adjudicate ... on administrative action ... on the grounds that [it] fell to be set aside, reviewed or corrected at common law.*" Upon hearing the matter the Constitutional Court avoided the issue by

concluding that whether the direct application of section 24 of the interim Constitution meant that the common law must mould itself to fit the section or whether the section "*grounds a cause of action independent of the common law*" need not be decided. It did however find that the exclusion of the SCA from constitutional jurisdiction during the interim regime had been unsatisfactory and that it was accordingly in the interests of justice that the SCA should exercise its constitutional-review jurisdiction in future on all matters which came before it and not only on those which had arisen after the coming into force of the final Constitution in early 1997.

10. In **Commissioner for Customs & Excise v Container Logistics (Pty) Limited; Commissioner for Customs & Excise v Rennies Group Ltd t/a Renfreight** 1999 (8) BCLR 833 (SCA) the SCA chose to regard the Constitutional Court's suggested approach to constitutional matters before the SCA in the future as not binding, but rather as a general statement of policy. Having taken that view the SCA nevertheless accepted jurisdiction as being "*in the interests of justice*" and found that the entrenchment of a right to administrative justice could not have been intended to do away with the common law approach review. The Court held

further that administrative review in its common law guise continued to exist alongside the constitutional regime, almost as a parallel system of review. In consequence the SCA was able to set aside the administrative action concerned by reference to common law principles of review without having regard to section 24 of the interim Constitution.

11. That approach did not find favour with the Constitutional Court. In **Pharmaceutical Manufacturers Association of SA & Others; In re: Ex parte application of President of RSA & Others** 2000 (3) BCLR 241 (CC) the Constitutional Court unanimously held, with barely concealed irritation, that the SCA had erred in taking such a view. The true position, so the Constitutional Court held, was that common law and the Constitution were not separate bodies of law: *"there is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law derives its force from the Constitution and is subject to constitutional control."*
12. Having expressed grave doubts about the notion that the common law doctrine of review had and was entitled to continue to enjoy a separate existence from the Constitution

in the **Fedsure** case, it restated its views in the **Pharmaceutical Manufacturers** case in the following unambiguous terms (at para 33):

*"The control of public power by the courts through judicial review is and has always been a constitutional matter. Prior to the interim Constitution, this control was exercised by the Courts through the application of common law principles. Since then, such control has been regulated by the Constitution. The common law principles ... had been subsumed under the Constitution, and insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."*

13. It is accordingly to the Constitution and to the promotion of Administrative of Justice Act 3 of 2000 that one must turn in order to establish what administrative law weapons are available to be used either by or against the FSB.

## **THE 1996 CONSTITUTION**

14. Section 33 of the Constitution is headed "*Just Administrative Action*" it provides:

- "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given reasons.*

- (3) *National legislation must be enacted to give effect to these rights, and must –*
- (a) *provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;*
  - (b) *impose a duty on the State to give effect to the rights in subsections (1) and (2); and*
  - (c) *promote an efficient administration.”*

15. The national legislation contemplated in section 33(3) of the Constitution was ultimately passed in the form of the Promotion of Administrative Justice Act 2 of 2000 (“PAJA”).

16. As far as the control of public power is concerned, there are now 4 different sources of judicial review jurisdiction and administrative law, namely:

- (a) section 33 of the Constitution;
- (b) PAJA;
- (c) the constitutional principle of legality; and
- (d) special statutory reviews.

17 As indicated by its long title, the purpose of PAJA is:

*"To give effect to the right to administrative action which is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto."*

- 18 Section 6 of PAJA provides that a Court or tribunal has the power to review "*administrative action*" and contains a comprehensive list of grounds for review. Although PAJA does not replace section 33 or amend it in any way, it has a codifying effect. As more and more cases are brought under the mantle of PAJA, it will come to constitute the embodiment of section 33 of the Constitution.
- 19 Direct constitutional review in terms of section 33 itself will, one expects, be available only infrequently. Thus, for example, it may be found in certain cases that instances of the exercise of administrative power exist which fall outside of the definition of "*administrative action*" under PAJA, but fall within the ambit of that term as used in sections 33(1) and (2) of the Constitution.
- 20 The term "*administrative action*" is defined in section 1 of PAJA as meaning:

*"... any decision taken, or any failure to take a decision, by –*

- (a) an organ of state, when –*
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or*
  - (ii) exercising a public power or performing a public function in terms of any legislation, or*
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*

*which adversely affects the rights of any person and which has a direct, external legal effect ...".*

21 A number of instances of the exercise of executive, legislative or judicial functions have been excluded in the proviso to the definition of "*administrative action*". None of those exclusions has any relevance to the Registrar or the FSB generally.

22 The term "*organ of state*" is defined in section 1 of PAJA as bearing the meaning assigned to it in section 239 of the Constitution. Section 239 of the Constitution in turn defines "*organ of state*" as meaning:

- (a) any department of State or administration in the national, provincial or local sphere of government; or*
- (b) any other functionary or institution –*

- (i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
- (ii) *exercising a public power or performing a public function in terms of any legislation,*

*but does not include a Court or a judicial officer;”*

23 It follows that the Registrar and other functionaries of the FSB qualify as organs of state for the purposes of section 239 of the Constitution and their decisions will, with a few exceptions, constitute administrative action for the purposes of PAJA. Some decisions will be excluded from the definition of “*administrative action*” either because they do not adversely affect the right of any person or because they have no direct, external legal effect. An example of such a decision would be a decision on the part of the Registrar or some other functionary of the FSB to exercise a right conferred under the Act, for example a right to institute action against a pension fund or intermediary or to request information concerning the financial affairs of a pension fund.

24 As we shall see in a moment, the Financial Services Board Act 97 of 1990 (“*the FSB Act*”) has created an internal system of appeal in respect of decisions made by the Registrar in terms of

that Act "*or any other law*". The latter phrase includes of course the Pension Funds Act 24 of 1956 ("*the Act*"). In this regard it is important to bear in mind that in terms of section 7(2)(a) of PAJA, no Court or tribunal may review an administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted. In terms of section 7(2)(b) of PAJA, a Court or tribunal must, if it is not satisfied that any internal remedy has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in the Court or tribunal for judicial review.

25 A Court or tribunal does however have the discretion, in exceptional circumstances and on application by the person concerned, to exempt him or her from the obligation to exhaust the internal remedies if the Court or tribunal deems it in the interest of justice.

26 It is accordingly necessary, before considering further the question of judicial review under PAJA, to consider the Acts' internal appeal mechanism.

**INTERNAL APPEALS**

27 The Financial Services Board of Appeal was established in terms of section 26(1) of the FSB Act. Subsection (2) of that section provides:

*"Any person aggrieved by a decision by the executive officer under a power conferred or duty imposed upon him by or under this Act or any other law made within the period and in the manner and upon payment of the fees prescribed by the Minister by regulation, appeal against such decision to the Board of Appeal."*

28 In terms of subsection (10) the Board of Appeal may, after hearing the appeal:

- (a) confirm, set aside or vary the relevant decision against which the appeal was brought;
- (b) order that the decision of the Board of Appeal be given effect to; or
- (c) refer any matter back for consideration or reconsideration by the executive officer in accordance with such directions as the Board of Appeal may lay down."

29 It was held by the Board of Appeal in the matter of **Lintas v The Registrar of Pension Funds** (and confirmed in a number of its decisions thereafter) that an appeal to the Board is an appeal in the broadest sense of the word and involves a rehearing of the merits of the decision made by the Registrar. It follows that the complainant may lead evidence (whether viva voce or by way of affidavit) of facts and circumstances relevant to the decision. It may even lead evidence of circumstances of which the Registrar was unaware when the decision was made. In short, the effect of section 26(2) of the FSB Act is that the decision of the Registrar may be set aside or corrected even where it cannot be said that the Registrar erred on the facts known to him at the relevant time. Equally, it may turn out that the Registrar was right for the wrong reasons. Some of the decisions of the Registrar (or of the person to whom the Registrar has delegated authority) which may be taken on appeal to the Financial Services Appeal Board are:

- (a) a decision by the Registrar in terms of section 4 of the Act to register or not to register a pension fund;
- (b) a decision of the Registrar in terms of section 7B to authorise a fund to have a board consisting of less than 4

members or to exempt a fund from the requirement that the members of the fund elect members of the board;

- (c) a decision of the Registrar in terms of section 9(3) to refuse to approve any appointment of an auditor or to withdraw his prior approval of such an appointment;
- (d) a decision of the Registrar to approve or disapprove the amendment of rules in terms of section 12 of the Act;
- (e) a decision of the Registrar to approve or decline to approve an amalgamation of pension funds or the transfer of business from one fund to another in terms of section 14;
- (f) a decision of the Registrar in terms of section 15B(9)(h) that an apportionment scheme submitted to him by a pension fund 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;
- (g) an approval or refusal by the Registrar to approve the transfer of a portion of the employer surplus account from the fund to the employer surplus account in another fund in terms of section 15B(2) of the Act;

- (h) a decision of the Registrar to approve or decline to approve in terms of section 15F the transfer of all or some of the credit balance in an existing employer reserve account to an employer surplus account;
- (i) the granting or refusal of permission in terms of section 15J for a fund to pay any credit balance in an employer surplus account to an employer to avoid retrenchments;
- (j) the selection by the Registrar of members of the tribunal where the board fails to make a selection within 3 months of the Registrar having requested it to do so in terms of section 15K of the Act;
- (k) an approval or refusal by the Registrar to approve a scheme for the return of a fund to a sound financial condition in terms of section 18 of the Act;
- (l) the granting or the refusal by the Registrar to grant a temporary exemption to a fund from compliance with any provision of subsection (5) or (5B) or (a) of section 19 of the Act dealing with loans by a pension fund to its members or to the participating employer.
- (m) a decision by the Registrar in terms of section 27 of the Act to cancel the registration of a fund where he is

satisfied that it has ceased to exist or was registered by a mistake;

- (n) a decision by the Registrar under section 28(9) of the Act to direct the liquidator to amend the preliminary accounts or to give other directions regarding the liquidation as he sees fit;
- (o) a decision by the Registrar in terms of section 28(15) of the Act to cancel the registration of the fund or to confirm the completion of the partial liquidation of the fund where the Registrar has received the liquidator's final accounts;
- (p) a decision by the Registrar under section 32A to declare a specific practice or method of conducting business to be irregular or undesirable and a decision to direct a particular fund to cease carrying on the practice or method of conducting business so identified;
- (q) a decision by the Registrar under section 33 to extend or to refuse to extend the period within which a particular act may be performed in terms of the Act.

30 As will be seen from the above list, the powers of the Registrar under the Act are comprehensive and extend to every area of operation of a pension fund.

31 Because of the requirement in section 7(2) of PAJA that internal remedies should first be exhausted before approaching the Court to review administrative action, it would be prudent whenever seeking to set aside a decision of the Registrar referred to above first to approach the Appeal Board. An adverse decision by the Appeal Board also constitutes administrative action for the purposes of PAJA and may therefore be taken on review to the High Court.

### **THE REVIEW OF ADMINISTRATIVE ACTION**

32 The bases upon which a Court or tribunal may review administrative action are set out in section 6(2) of PAJA. That subsection provides:

*"(2) A Court or tribunal has the power to judicially review an administrative action if –*

*(a) the administrator who took it –*

*(i) was not authorised to do so by the empowering provision;*

*(ii) acted under a delegation of power which was not authorised by the empowering provision; or*

*(iii) was biased or reasonably suspected of bias;*

*(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*

*(c) the action was procedurally unfair;*

- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken –*
  - (i) *for a reason not authorised by the empowering provision;*
  - (ii) *for an ulterior purpose or motive;*
  - (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
  - (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
  - (v) *in bad faith; or*
  - (vi) *arbitrarily or capriciously;*
- (f) *the action itself –*
  - (i) *contravenes a law or is not authorised by the empowering provision; or*
  - (ii) *is not rationally connected to –*
    - (aa) *the purpose for which it was taken;*
    - (bb) *the purpose of the empowering provision;*
    - (cc) *the information before the administrator; or*
    - (dd) *the reasons given for it by the administrator;*
- (g) *the action concerned consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so*

*exercised the power or performed the function; or*

- (i) *the action is otherwise unconstitutional or unlawful.”*

33. Although the Constitution has significantly broadened the scope of review, there remains a significant difference between a review and an appeal. That difference is explained in Hoexter et al: **The New Constitutional & Administrative Law** (vol. 2) at 64 as follows:

*“A right of appeal may be thought of as a second chance: an opportunity to have one’s case heard a second time by a new decision-maker, with the possibility of a different decision being reached. Appeal is concerned with the merits of the case, meaning that the second decision-maker is entitled to declare the first decision right or wrong. A simple example is a criminal case in which a lower Court finds the accused guilty and the appeal Court comes to the opposite conclusion.*

*Review, by contrast, is not concerned with the question whether the decision was right or wrong, but whether the way the decision was reached is acceptable. A Court of review is not entitled to concern itself with the merits of the decision. An example of review is where a Court quashes (invalidates) the decision of a lower Court on the ground that the latter took irrelevant evidence into consideration in coming to its decision. That decision would be set aside even if the reviewing Court felt that the same decision would have been reached on relevant evidence, which indicates that the focus of review is not so much on the decision itself rather but on the process of arriving at it.”*

34. At common law unreasonableness does not per se constitute a sufficient ground for review. Thus in *Union Government v Union Steel Corporation* 1928 AD 220, at 236-7 Stratford JA said:

*"[N]owhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of mala fides or ulterior motive' ... or that it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter ...".*

35. Section 33(1) of the Constitution provides however that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". Section 6(2) of PAJA furthermore also establishes "unreasonableness" as a ground of review.

36. Both the Courts and academic writers have recognised that the introduction of "reasonableness" as a ground of review has threatened the common law distinction between review and appeal, since it entails a scrutiny of the merits of administrative decisions. The delicate balance which is to be preserved between examining the merits on the one hand and not collapsing the distinction between review and appeal was considered by Froneman DJP in **Carephone (Pty) Ltd v**

**Marcus NO** 1998 (11) BLRR 1093 (LAC) in the following terms (at para 36):

*"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."*

37. Froneman DJP's formulation of the test has been adopted in a number of decisions of the High Court. Similar tests have been formulated in later cases, where rationality has emerged as the touchstone. Thus in **Derby-Lewis & Another v Chairman of the Committee on Amnesty of the Truth & Reconciliation Commissioner & Others** 2001 (3) SA 1033 (C) the Court said:

*"A review Court is not called upon to pronounce on the correctness or otherwise of the decision arrived at by an administrative decision-maker. The test, for purposes of the review proceedings is that, objectively speaking, there must be a rational connection between the outcome of the decision and the facts on which such decision is based."*

38. In **Nieuwoudt v Chairman, Amnesty Subcommittee, Truth & Reconciliation Commission**; 2002 (3) SA 143 (C) at 155F-G, Davis J expressed the test in the following terms:

*"The essence of the test to be employed in reviewing the substance of a decision of a body such as the Committee concerns an inquiry as to the presence of a rational connection between the decision taken, the facts on which such decision is based and the reasoning provided for the decision. Viewed within this context, this form of rationality test is appropriate to a review which deals with the substance of a decision. It reconciles the seemingly competing principles of the autonomy of the specialised body created by the Legislature for a particular purpose – in this case the consideration of applications for amnesty – and the principle of the rule of law in which accountability for a rational decision-making is mandated."*

39. In *Pepkor Retirement Fund v Financial Services Board & Another* 2003 (6) SA 38 (SCA) the Supreme Court of Appeal materially extended the ambit of judicial review. In that case the Court decided not only that a functionary was entitled to approach a Court to set aside his own decision on the basis that it was erroneously made, but also that a material mistake of fact constituted a sufficient ground of review. In this regard Cloete JA (with whom the remainder of the Court concurred) said (at para [47]):

*"[47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have*

*been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been made for the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suite of, inter alios, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in **Fedsure**, **SARFU** and **Pharmaceutical Manufacturers** requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires.*

*[48] Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between 2 distinct forms of relief: appeal and review. For example where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide. Of course, these limitations upon a reviewing Court's power do not extend to what have come to be known as jurisdictional facts and, in my view, it will continue to be both necessary and desirable to maintain that particular category of facts. I am therefore, with respect, unable to share the opinion of Professors Wade and Forsyth (quoted in para [39] above) but one can safely 'consign much of the old law about jurisdictional fact, etc, to well-deserved oblivion' if by that statement is meant that the distinction between appeal and review will be eliminated."*

40. The Pepkor decision has material consequences for the notion of certainty, which underlies the doctrine of *functus officio*. That doctrine (prior to the Pepkor decision) operated so as to ensure that the beneficiary of a favourable decision by a functionary exercising administrative powers could safely act upon that decision and plan his or her affairs accordingly. Barring a challenge from a disappointed competitor, the functionary could not (in the absence of fraud and want of power) unilaterally reverse his decision on the basis that he had erred.
  
41. In the Court *a quo* in the Pepkor case Rogers AJ was at pains to point out that granting a functionary *locus standi* to approach a Court to review his own decision did not undermine the notion of *functus officio*, since the functionary was not himself setting aside his decision, but approaching the Court to do so. That response however loses sight of the fact that it matters little to the beneficiary of the decision whether it is set aside by the functionary himself or by the Court at his instance. The consequence for the beneficiary is the same.
  
42. The Registrar and the FSB hailed the Pepkor decision as a great victory, recognising as it did the supervisory role of the

Registrar. Both may however come to regret the consequences of the decision.

43. In the Court *a quo* in the Pepkor case Rogers AJ said (at para [176]):

*"I think it would be correct to say that one of the reasons why the Legislature has seen fit to grant extensive powers of supervision and control to the Registrar is that the members of pension funds often do not have the knowledge, skill or resources to take adequate steps to protect themselves. Their right to do so is, of course, not taken away by the PF Act, but this does not detract from the conclusion which, in my view, can fairly be drawn from the provisions of the PF Act and the FI Act, namely that the Registrar fulfils an important function as the guardian of the interests of members of pension funds."*

44. That concept of the Registrar's duties and functions was echoed, albeit in different terms, by Cloete JA in the Supreme Court of Appeal (at para [14]):

*"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 seek judicial review of his own decisions should he not have done so."*

45. In the result the Pepkor decision appears to have had at least two consequences which the Registrar and the FSB did not intend when launching their action. The first is that a person aggrieved by a decision of the Registrar may now seek to set it aside simply on the basis that the Registrar reached his decision on facts which were materially incorrect. The second is that as "*guardian of the interests of members of pension funds*" the Registrar has a duty to such members to exercise reasonable care and diligence when performing his functions and exercising the powers conferred upon him by the Act. A breach of that duty may well lead to a claim by the members concerned for damages, where the breach arises from a want of due care (in other words negligence) on the part of the Registrar.
46. In **Knop v Johannesburg City Council** 1995 (2) SA 1 (A) the Court held that the City Council was not liable in damages for the negligent exercise of a statutory duty. In **Faircape Property Developers (Pty) Ltd v Premier (Western Cape)** 2000 (2) SA 54 (C) Davis J distinguished the **Knop** decision on the basis that the plaintiff there (who had been refused a subdivision of land) had been afforded a remedy by the statute in that he had a right to appeal against the

refusal, whereas in the **Faircape** matter no rights of appeal against the decision of the Minister to grant the application for the refusal of restrictive conditions of title lay.

47. Of course losses may be suffered because of a negligent decision of the Registrar even where a right of appeal lies. Equally, members of a pension fund may suffer losses where a decision is made in favour of the fund (as in Pepkor's case) but later set aside.

48. In **Olitzki Property Holdings v State Tender Board & Another** 2001 (3) SA 1247 (SCA) Cameron JA, dealing with a right arising from the breach of a statutory duty said (at para [33]) said:

*"The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, and the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than a broad assessment by the Court whether it is 'just and reasonable' that a civil claim for damages should be accorded. 'The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal rights. The determination of reasonableness here in turn*

*depends on whether affording the plaintiff a remedy is congruent with the Court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the constitution and the impact upon them that the grant or refusal of the remedy that the plaintiff seeks will entail."*

49. In **Knop's** case (a decision reached on the law as it was prior to the coming into effect of the interim Constitution) Botha JA said (at 33F):

*"As to the broader considerations of policy, on the one hand an aggrieved applicant does not need an action for damages to protect his interests; he has already at hand the appeal procedure provided within the legislative framework. On the other hand, considerations of convenience militate strongly against allowing an action for damages; the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the Local Authority in the first instance. That is not to say that the Local Authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the Local Authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community ... in my judgment, therefore, the refusal of an application, through an error due to negligence, is not a wrongful act giving to arise to a delictual claim for damages."*

50. In **Premier, Western Cape v Faircape Property Developers (Pty) Ltd** 2003 (6) SA 13 Lewis JA remarked, in connection with the passage quoted above, that the dictum uttered there by Botha JA had to be qualified in the light of the duties imposed on all organs of government by the Constitution.
51. It seems to me to be arguable that in the case of the Registrar, his position as guardian of the interests of members of pension funds may well place a greater burden upon him (and concomitantly confer greater rights upon members of pension funds) than would ordinarily be the case. If he truly fulfils the role of guardian of the interests of members of pension funds, he may well be held liable to his words if he fails in his duties.
52. In conclusion it seems to me that post the Pepkor decision the administrative law position of the Registrar (and to a lesser extent the FSB) in relation to decisions made by the Registrar is the following:
- (a) Generally where a person affected by a decision of the Registrar is aggrieved by it, he or she must

take that decision on appeal to the Financial Services Appeal Board.

- (b) If the appellant is dissatisfied with the decision of the Appeal Board he or she may take that decision on review to the High Court.
- (c) Notwithstanding the continued distinction between appeals and reviews, the aggrieved party will succeed if he or she can show that the decision of the Registrar was irrational, unreasonable or was reached upon materially incorrect facts.
- (d) The right to set aside a decision of the Registrar is not limited to those affected by it. The Registrar himself may, when he appreciates that a reviewable decision has been made, take his own decision on review to the High Court. (In this regard it should be pointed out that the Registrar has no right of appeal against his own decision because he can hardly be said to be "*a person aggrieved by a decision by the executive officer*").
- (e) Depending on the circumstances, the Registrar (and perhaps the FSB) may be liable to those who

suffer losses as a result of a negligent decision by him. The Registrar may also be liable (having regard to his power and duty to take his own decisions on review) where he has negligently failed to set aside his own decision upon realising that it was reached as a result of a material error of fact. The question whether or not the Registrar will be liable to those who suffer losses as a result of his negligent decisions is however a matter of some uncertainty at present. The Supreme Court of Appeal in **Premier, Western Cape v Faircape Property Developers** left that door open, holding that whether or not such a liability arose would depend on the facts of each particular case.

### **PF CIRCULARS AND BOARD NOTICES**

53. It is necessary, in order to complete my address on the topic of administrative law weapons, to refer briefly to PF Circulars and Board Notices.
  
55. The Registrar has for some years now been in the habit of issuing PF Circulars to make known his views on various pension fund issues or in order to give directives to the various role-players in the industry.

56. Neither the Act nor the regulations published in terms of the Act confer upon the Registrar the power to issue such circulars. In consequence they do not have any legal status. They constitute instead notice to the public (and more particularly the pension fund industry) of the Registrar's policies or views upon sundry issues.
57. Whilst it is perfectly permissible for a functionary to make his or her policies on any particular matter known to the public in order to promote consistency and effective implementation, the Courts will insist that any discretion conferred upon such a functionary be exercised strictly in accordance with the relevant provisions of the empowering statute. In particular, the Courts will not accept that a discretion has been properly exercised where a functionary has followed some inflexible rule of his or her own making.
58. Equally, where a functionary makes compliance with one of his or her rules a necessary pre-condition to the exercise of a discretion in favour of the person affected, the Courts will not hesitate to direct the functionary to exercise his or her discretion properly and in accordance with the empowering statute. Thus in the case of the Registrar, an interested party may approach the Courts to require the Registrar to exercise

a discretionary power conferred upon him in terms of the Act notwithstanding that the provisions of one or other PF Circular have not been met.

59. In terms of section 36 of the Act, the Minister of Finance may make regulations in regard to a number of matters. The Registrar is also given certain limited powers to prescribe by notice in the Gazette certain procedures or methods to be adopted in connection with pension funds. Examples of such powers are to be found in sections 14B(2)(a)(i) and 15B(5)(c) of the Act. The Registrar may also in terms of section 32A, with the consent of the Minister, by notice in the Gazette declare certain practices or methods of conducting business to be irregular or undesirable.

60. Both the regulations made by the Minister and the notices issued by the Registrar in terms of the above-mentioned sections constitute forms of subordinate legislation. As such they are valid only to the extent to which they are authorised by the particular empowering Act and are not inconsistent with any provision of any Act of Parliament. Indeed, section 36(1) of the Act explicitly restricts the Minister's powers to make regulations as are not inconsistent with the provisions of the Act.

61. Both the regulations made by the Minister of Finance in terms of section 36 of the Act and notices issued by the Registrar in terms of the Act are subject to review in terms of section 33 of the Constitution and section 6 of PAJA but are not subject to appeal in terms of section 26(2) of the FSB Act.

**C.D.A. LOXTON SC.**

2<sup>nd</sup> February 2004.