PENSION LAWYERS ASSOCIATION

REVIEW OF DECISIONS OF THE REGISTRAR

THE LAW AND PROCEDURE

- Overview of the presentation
  - Powers of the registrar;
  - Review of the registrar's decisions and the *functus officio* doctrine;
  - Review under PAJA – grounds of review, the procedure to be followed and remedies;
  - Review by the appeal board – grounds of review and remedies; and
  - Practical example of the review of a decision of a registrar to approve an apportionment scheme where the decision is flawed because it was based on a mistake of fact in actuarial calculations.

- Powers of the registrar in terms of the Pension Funds Act include:
  - Registration and supervision of the affairs of pension funds (sections 4-13);
  - Approval of transactions relating to the amalgamation and transfer of businesses (section 14);
  - Reporting of audited accounts, documents and reports (sections 15, 20);
  - Powers to call for certain documents and of inspection (sections 16, 21-22, 24-25); and
  - Wide powers of intervention, management and winding-up of funds (sections 26-29).

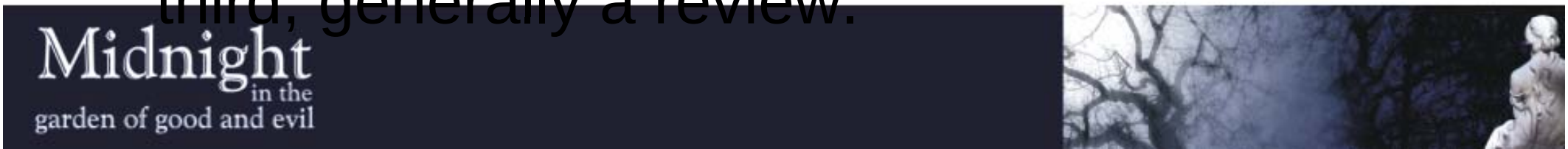
(See *FSB v de Wet NO* 2002 (3) SA 525 (C) at [169]-[172].)

- Where a decision of the registrar is a final decision which adversely affects the rights of any person, and involves the exercise of public power, then it will generally be ‘administrative action’.

  (See *Pepcor Retirement Fund v FSB* 2003 (6) SA 38 (SCA) and the definition of ‘administrative action’ in section 1 of PAJA.)

- The registrar may, however, make a mistake in carrying out his powers. Such a mistake can relate to:
  - A wrong decision, based on the facts before it;
  - An incorrect procedure adopted; or
  - A decision which is wrong because it was based on incorrect facts or law placed before the registrar.
- Can the registrar correct such a mistake?

- It is useful, at this point, to distinguish between an appeal and review. Very roughly:
  - An appeal is where the merits are revisited, and the matter is re-decided on the facts; and
  - A review is where a decision is set aside because of a procedural irregularity, or some other “ground of review”.
- Looking back at the previous slide, the first would be an appeal; and the second and third, generally a review.



- *Functus Officio d*octrine
  - Once an administrative official has 'discharged his official function' he cannot change his decision: he is *functus officio.*
  - The doctrine is not absolute, and there may be circumstances in which the decision-maker can vary his decision.
- Is the registrar *functus officio*?
  - Generally, where the decision is a final one, he will be *functus*. (See *Lucas South Africa Pension Fund v Soundprops 178 (Pty) Ltd*, unreported judgment, case no. 06/21258, Witwatersrand Local Division, 26 June 2008.)

- If the registrar is *functus*, his decision will have to be set aside by a higher institution.
- One statutory exception to the doctrine, can be found in section 14(6) of the Pension Funds Act:

> *"The registrar may withdraw or amend a certificate issued in terms of subsection (1)(e), in circumstances where the registrar is satisfied that—*
>
> *(a) the scheme or information provided in terms of subsection 1 was so inaccurate that he would not have granted such certificate had he been aware of the actual facts; or*
>
> *(b) The certificate contains a* bona fide *error."*

- See *Pering Mine (Pty) Ltd v Director-General: Mineral and Energy Affairs* [2005] 4 All SA 641 (T) at 645, where the court said the following:

> *"It is trite that where an administrative official has made a decision that affects a private individual's interests, he is* functus officio *and unless the enabling statute expressly or by necessary implication gives him the authority to do so, he may not reopen the decision which he has taken. […] The* functus officio *principle applies in cases like the present where the official contents that he has taken his decision based on an error of fact or law."*

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- Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- This constitutional right is given effect to in the Promotion of Administrative Justice Act (PAJA).
- Application for review must be instituted without unreasonable delay, and no later than 180 days, after becoming aware of the reasons necessitating a review (section 7(1)).

- Section 6 of PAJA sets the grounds of review – these include:
  - Where the administrator was not properly authorised to take the decision;
  - Material procedures or conditions were not complied with, or there were other procedural irregularities, or the procedure was unfair; and
  - Where the decision was based on a material mistake of law.
- Where the decision is based on a material mistake of law, this is now recognised as a ground of review under section 6(2)(e)(iii), although it is not expressly spelt out (*Pepcor* at [46]).

- Rule 53 of the Uniform Rules of Court sets out the procedure to follow when instituting reviews.
  - All applications for review must be on notice of motion supported by an affidavit setting out the grounds for review;
  - A record of the proceedings must be placed before the Court; and
  - The procedure generally follows the motion procedure (Rule 6).
- PAJA adds some additional requirements (such as the 180-day rule and the obligation to exhaust internal remedies).

- Section 7(3) of PAJA recognises the inadequacy of these rules and provides that new rules of procedure must be adopted.
- Draft rules have now been submitted to Parliament for approval, and are expected to be adopted shortly. The significant features of these draft rules are:
  - They will replace Rule 53 in High Court proceedings;
  - They provide rules for requesting reasons (section 5 PAJA);
  - They establish rules for requesting document needed for an intended review of a decision;

- They allow for an application to
  - amend time periods in PAJA (including the 180-day rule);
  - compel an administrator to give reasons; and
  - Compel the furnishing of documents necessary for an application for judicial review where a request for these documents is refused;
- An application for judicial review must still be brought on notice of motion supported by an affidavit, in which specific information must be included;
- The Judicial officer may require the parties to attend a conference in chambers; and
- They provide specific rules on pagination!

- Remedies of the High Court (section 8 of PAJA):
  - High Court has wide discretion to grant any order that is ‘just and equitable’. This could include:
    - Setting aside administrative action and referring it back to the administrator;
    - Substituting or varying the decision;
    - Declaring the rights of the parties; or
    - Granting a temporary interdict.

- Can the registrar approach a High Court to have his own decision reviewed?
  - Yes – the registrar has *locus standi* to have his own decisions reviewed, even where he is *functus officio*.
  - In *FSB v De Wet NO* 2002 (3) SA 525 (C) at [154], the Court held:

    "Whether [the registrar] has the right to approach the Court involves an interpretation of the legislation which governs his powers and duties, and the aspects of the legislation which are relevant to the issue of standing may well be quite unrelated to the question of whether the official himself has the right to alter of reverse his decisions."

- In addition to review by the High Courts, section 26 of the FSB Act gives the appeal board certain review powers (note that the 2008 amendments are now in force, and the wording of section 26 has changed).
- The appeal board has both review and appeal jurisdiction (*Nichol* paragraph 22).

- Section 26B(15) provides that:

  "The appeal board may—

  (a) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or

  (b) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine."

- These are slightly narrower than the powers of a High Court.
- The decision of the appeal board has the same legal status as a decision of a High Court (section 26B(17)).

- Practical Example:
- Section 15B of the Pension Funds Act sets out the procedure whereby an apportionment scheme for the distribution surplus funds to various stakeholders is created and approved by the registrar.
- Section 15B(9)(b)(a) states that in order for an apportionment scheme to be valid

  "… the registrar [must be] satisfied that the statutory actuarial valuation has been prepared on actuarially sound and acceptable principles prescribed".

- The registrar then considers whether this is the case, and makes a decision as to whether to approve the scheme or not.

- What happens when the decision is made on the basis of a factual mistake in the actuarial calculations?
- Can the registrar go back and change his or her decision?
  - No – he is *functus officio.*

- Assuming that the registrar is indeed *functus* in this case, this means that he cannot change his own decision.
- In order to correct the mistake the decision will need to be set aside by either
  - A High Court (exercising review power in terms of PAJA); or
  - The appeal board (exercising review power in terms of section 26B(15) of the FSB Act).

- Can the registrar's decision be changed by the appeal board?
- Section 26(1) of the amended FSB Act states:

  "A person who is aggrieved by a decision-maker may, subject to the provisions of another law, appeal against that decision to the appeal board in accordance with the provisions of this Act or such other law."

- Note that only an ‘aggrieved party’ can bring a review or appeal to the appeal board.
  - The issue is whether a Fund (or the employer, members, or former members) can be said to be an aggrieved party for the purpose of bringing a review or appeal to the appeal board.
- There are two divergent views on this question:
  - Fund is not an aggrieved party because the mistake lies with the fund itself and not the registrar; or
  - Fund is an aggrieved party as it is materially affected by a decision which is flawed.

- My view is that the preferable interpretation is that the Fund is an ‘aggrieved person’ for the purpose of section 26(1) of the FSB Act, and that it can apply to the appeal board to have the decision of the registrar set aside.
  - Case law in a trust law context, for instance, indicates that there is case law which indicates that an ‘aggrieved party’ includes a trustee which fails to meet its duties.
  - In *Pepcor*, which dealt with a review in the High Court of the registrar’s decision, the registrar was found to be ‘prejudiced’ and therefore to have standing, where he had made a decision which was not compliant with section 14 of the Pension Funds Act, and his function was consequently compromised.

- Ultimately this question will have to be decided by a court.
- Consequences of proceeding on review to the High Court rather than the appeal board:
  - Under PAJA, there is an obligation to exhaust internal remedies, before proceeding to a High Court.

– Section 7(2) of PAJA provides:

"(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that any person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

- *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (SCA) – sets out the meaning of 'exceptional circumstances':
  - Must have existed at time of instituting proceedings; and
  - Not merits of case or grounds of review.
  - *Platinum Asset Management (Pty) Ltd v FSB; Anglo Rand Capital House (Pty) Ltd v FSB* 2006 (4) SA 73 (W) at [40]ff:
  - Found 'exceptional circumstances' justifying an exemption.