

LEGAL STATUS OF DIRECTIVES ISSUED BY THE REGISTRAR

Introduction

1 Section 33A of the Pension Funds Act 24 of 1956 provides as follows:

“33A Directives

- (1) The registrar may, in order to ensure compliance with or to prevent a contravention of this Act, issue a directive to a pension fund, an administrator or any other person in which practices or actions that are required or prohibited are set out.
- (2) A directive issued in terms of in subsection (1) may-
 - (a) apply to pension funds generally; or
 - (b) be limited in its application to a particular pension fund or kind of pension fund, which may among other things be defined either in relation to a type or budgetary size of a pension fund.
- (3) A directive issued in terms of subsection (1) takes effect on the date determined by the registrar in the directive.
- (4) In the event of a departure from section 3 (1) or 4 (1), (2) or (3) of the Promotion of Administrative Justice Act, (Act 3 of 2000), the directive must include a statement to that effect and the reasons for such departure.
- (5) The registrar may cancel, amend or revoke any previously issued directives.
- (6) The registrar may, where a directive is issued to ensure the protection of the members and the public in general, publish the directive in the Gazette and any other media that the registrar deems appropriate.”

2 Prior to the latest amendment to the PFA,¹ the Registrar had been issuing PF circulars to the pensions industry and requiring that pension funds and administrators comply with them.²

3 The PF circulars often³ only represented the Registrar’s interpretation of the PFA, nothing more. Indeed, the Registrar has recently conceded that the PF circulars were generally

¹ Act 11 of 2007.

² Hunter et al, forthcoming.

³ Except in those instances where the PF circulars gave effect to the Registrar’s express and specific discretion stipulated in terms of the PFA. See, for example, sections 15B(2)(a), 15B(5)(c) and 15B(9)(d)(i) of the PFA.

only guidelines and had no binding legal force.⁴

4 It appears that section 33A has ostensibly been introduced in order to change the position;⁵ namely, to provide a statutory basis and legislative stamp of approval to what were otherwise non-binding “PF circulars” issued by the Registrar so as to facilitate the implementation of the PFA.

5 In effect, the section appears to enable the Registrar, in his discretion, to issue a directive to a pension fund, administrator, or any other person. Such a directive would set out practices or actions that are required or prohibited, in order to ensure compliance with or to prevent a contravention of the PFA.

6 However, section 33A gives rise to numerous issues of interpretation, some of which will be touched upon during the course of this paper.

Overview

7 This paper is divided into four parts. The first part locates the Registrar’s power in section 33A in its broader context.

⁴ **Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds** 2007 (3) SA 41 (T) at para 9.

⁵ Pursuant to Act 11 of 2007, section 33A came into force on 13 April 2007.

- 8 The second part of the paper identifies the nature of the Registrar's power in section 33A.
- 9 The third part of the paper explores the wide scope of section 33A.
- 10 The fourth part of this paper considers the issue of whether the provisions of section 33A are unconstitutional on grounds of vagueness.
- 11 Each of these parts is explored in turn.

Part one: The Registrar's power – the broader context

- 12 One of the main objects of the PFA is to regulate pension funds. The Registrar is a key person who has been appointed by the legislature to effect this crucial object.
- 13 Accordingly, a number of statutes, including the PFA, the Financial Institutions (Protection of Funds) Act,⁶ the Financial Services Board Act,⁷ and the Inspection of Financial Institutions Act⁸ clothe the Registrar with significant and extensive powers of supervision and control over pension funds.
- 14 This is the broader context in which section 33A needs to be evaluated.

⁶ 28 of 2001.

⁷ 97 of 1990

⁸ 38 of 1984.

Part two: The nature of the Registrar's power in terms of section 33A

15 In the present instance it is clear that the Registrar's powers to issue directives in terms of section 33A are not judicial in nature.

16 Nor are the Registrar's powers legislative in nature. There are several reasons for this. The Registrar is not an elected official. His directives are not the product of a deliberative process akin to that of a legislature. The directives need not necessarily be of general application. Finally, the wording of section 33A enables the Registrar to issue directives simply in order to implement the PFA. Our case law makes it abundantly clear that this is not a legislative task. This is quintessentially an administrative task.

17 Therefore, the Registrar's power appears to be administrative in nature. Significantly, even though the issuing of directives by the Registrar would constitute administrative power, our case law reveals that the exercise of such administrative power often also involves the formulation of policy, in a narrow sense.

Part three: The scope of the Registrar's power in terms of section 33A

18 Bearing in mind the above two factors, namely:

18.1 first, the context of the pivotal role of the Registrar in the implementation of the PFA and the extensive legislative powers afforded to the Registrar, and

18.2 secondly, the administrative nature of the Registrar's rule-making powers in terms of section 33A of the PFA which can often be accompanied by the potential to formulate policy,

on a proper construction, what is the exact scope of the Registrar's power in terms of section 33A?

19 Is the Registrar confined, on the one polar end, to issuing directives that simply reproduce the formulaic wording of the PFA in the implementation of uncontroversial aspects of the PFA? Or, on the other polar end, in implementing the PFA is the Registrar tasked with interpreting the law and making significant policy decisions which can easily be ascribed to broad open-ended legal principles enshrined in the PFA? Where, between these two polar ends, can the scope of the registrar's power in terms of section 33A be located?

20 It would be too narrow and artificial a construction of the provisions of the PFA to contend that only where the PFA expressly prohibits or requires X or Y, can the registrar issue a directive in such terminology. Indeed, with a deft pen the multitude of provisions in the PFA can easily be cast and re-cast as "requirements" or "prohibitions".

Therefore, the registrar simply cannot be confined to issuing directives that reproduce formulaic wording in the implementation of ‘uncontroversial’ aspects of the PFA. (I have yet to come across an uncontroversial aspect of the PFA).

- 21 There are a handful of instances where the PFA makes reference to an exercise of the Registrar’s power using the expression “the registrar may *direct*”⁹ or “the registrar shall *direct*”.¹⁰ But the use of the word “direct” in this handful of instances is not a term of art. Its use seems to be merely incidental to the fact that the registrar is being afforded express powers. Moreover, where these expressions – “the registrar may *direct*” or “the registrar shall *direct*” – are used to clothe the registrar with powers in the PFA, such powers are indistinguishable in principle from the innumerable other powers afforded to the registrar in terms of the PFA but in respect of which different terminology is employed.¹¹
- 22 Accordingly, it appears that the scope of the subject-matter in respect of which the registrar can issue directives extends at least to all instances in which the registrar is expressly granted specific powers in terms of the provisions of the PFA, outside that of section 33A.

⁹ Section 6(3); sections 15B(11)(e)(ii) and 15B(11)(h); section 18(5)(a); sections 26(1) and 26(4); sections 28(5), 28(7), 28(9); and section 32A(3).

¹⁰ Section 18(1), and sections 28(8) and 28(11)

¹¹ See, for example, section 2(2)(b) – “approved by the registrar”; section 2(3) – “as may be requested by the registrar”; section 2(4)(a) – “the registrar is satisfied”; section 4(3) – “the registrar shall ... register”; section 4(6) – “in the discretion of the registrar”; section 5(4) – “the registrar may permit”; section 6(2) – “the registrar shall prepare”; section 6(3) – “the registrar may ... require”; section 6(4) – “the registrar shall transmit” etc.

23 But does section 33A go further still and allow the registrar to issue directives to ensure compliance with or prevent a contravention of any provision of the PFA, irrespective of whether such provision expressly enshrines a power of the registrar?

23.1 Arguably Yes. The wording of section 33A(1) certainly supports such an interpretation. There is nothing to gainsay this.

23.2 This interpretation also accords with the pivotal role of the registrar in the implementation of the PFA and the extensive legislative powers afforded to the Registrar.

23.3 Finally, such a construction of the scope of section 33A is also consonant with the administrative nature of the registrar's rule-making powers wherein the registrar, as the key regulator and protector of the public interest can formulate policy within some of the open-ended, broad legal provisions enshrined in the PFA in order to implement the Act in the public interest.

Part four: Is section 33A unconstitutional on grounds of vagueness?

The over broad unfettered scope of the registrar's discretion

24 In evaluating this question, the first issue that arises is the sheer unfettered scope of the discretion afforded to the registrar in terms of section 33A. There are several glaring manifestations of this, including the following:

24.1 First, in terms of section 33A(3), “a directive ... takes effect on the date determined by the registrar in the directive”. Accordingly, the registrar can issue directives which are retrospective in effect. The potential for prejudice and unfairness occasioned to a party affected by a directive as a result of its retrospective application is self-evident. Yet there are no clear fetters on the registrar’s untrammelled powers in this respect. Nor is any guidance whatsoever afforded to the registrar in relation to the exercise of this power.

24.2 Secondly, in terms of section 33A(5), the registrar “may cancel, amend or revoke any previously issued directives”. This power of revocation, cancellation or amendment is, once again, unfettered; there is no legislative protection whatsoever for previously vested rights or legitimate expectations that accrued in terms of prior directives. Nor is there any guidance provided to the registrar in relation to such matters.

24.3 Thirdly, section 33A(4) either itself appears to enable the registrar to avoid the fundamental procedural safeguards in sections 3(1) or 4(1), (2) or (3) of the

Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)¹², or at least foreshadows the real possibility that this could occur when the registrar issues his directives.

24.4 The only alternative procedural safeguards that section 33A provides in relation to the manner in which the registrar exercises his power to issue directives are:

24.4.1 In terms of section 33A(4), where the registrar departs from the requirements of PAJA, he must include a statement to that effect and provide reasons for doing so; and

24.4.2 In terms of section 33A(6) where the directive “is issued to ensure the protection of the members and the public in general”, the

¹² Section 3(1) of PAJA provides for procedural fairness:

“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”

Sections 3(2) and 3(3) of PAJA spell out the mandatory and discretionary components of procedural fairness. Section 3(4) indicates that the obligation to abide by procedural fairness can only be departed from in circumstances which are reasonable and justifiable. Section 4(5) states that where a different procedure is provided for, the administrator concerned may follow such procedure provided that it is fair. Section 4(1) of PAJA provides for procedural safeguards in relation to administrative action that affects members of the public:

“(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-

- (a) to hold a public inquiry in terms of subsection (2);
- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
- (e) to follow another appropriate procedure which gives effect to section 3.”

Sections 4(2) and 4(3) of PAJA detail the procedural requirements of a public inquiry and a notice and comment procedure respectively which are mentioned in section 4(1).

registrar “may” (he is not bound to do so) publish the directive in the Gazette and any other media that he deems appropriate.

24.5 With respect, both these alternative procedural safeguards are minimalist in their guidance and constitute the weakest form of procedural protection (if they can be classified as protective measures at all) that could have been envisaged. They certainly do not give effect to the constitutional right to fair administrative action as enshrined in PAJA.

24.6 Fourthly, the net effect of this is potentially that: the registrar’s directives can cast a wide net and affect “any person”; the registrar’s directives can, as will be illustrated below, have a disastrous effect on the persons they affect; and, the registrar’s directives can apply retrospectively and affect members of the public arguably without the need to abide by the requirements of procedural fairness other than for explaining the reasons for his departure from the requirements of crucial provisions of PAJA.

The potentially severe effect of the registrar’s directives on affected persons

25 The second matter that arises in relation to the constitutionality of section 33A concerns the likely effect of the registrar’s directives on affected persons.

- 25.1 If we have regard to the registrar's circulars and understanding of his statutory powers, they appear to provide convenient yardsticks as to what we can expect from the registrar in the form of directives. There are two examples of this.
- 25.2 The first example concerns the draft Information Circular on Specialist Tribunals. As Advocate John Myburgh SC has pointed out, this draft circular is incorrect in its interpretation of the PFA. If Adv Myburgh SC is correct, and the registrar seeks to refashion this as a directive, he would be perpetuating a fundamental error with far-reaching consequences.
- 25.3 The second example concerns valuation reports. Up until recently the registrar was under the mistaken but determined view that the provisions of the PFA empowered him to reject a valuation report if, in his opinion, the valuator has adopted valuation assumptions which, while falling within the range of assumptions that a valuator might reasonably adopt, are simply not the assumptions which the registrar would have adopted.
- 25.4 Without overstating the case, the consequences for a fund where the registrar exercises his power in such a fashion, relying on his own view as to what are acceptable actuarial methodologies and standards, are potentially severe.
- 25.5 As it turns out, the recent FSB Appeal board decision in **Standard Bank**

Group Retirement Fund v Registrar of Pension Funds¹³ held that¹⁴ the Registrar's interpretation of the PFA and his understanding of his powers in relation to valuation reports were fundamentally wrong.

25.6 Both these examples establish that, if this is a taste of what is to come in the form of the registrar's directives, the directives have the overwhelming potential to "wreak injustice and cause undue hardship" to the prejudice of members of funds and the public at large.

The registrar has ample alternative mechanisms by which to implement the PFA

26 A third matter to consider when evaluating the constitutionality of section 33A is the fact that if this section were struck down as unconstitutional on grounds of vagueness with immediate effect, this would not by any means be severely prejudicial to the implementation of the PFA.

26.1 This is because, the registrar has a veritable abundance of legislative powers at his disposal in order to implement the PFA (which entails ensuring compliance with and preventing a contravention of the Act).

¹³ The judgment may be found at www.fsb.co.za under 'board of appeal' and then 'retirement funds'.

¹⁴ At paragraph 11 of the judgment of the board of appeal (per Friedman, McLeod and Pema) dated 1 June 2007.

26.2 In addition, there is a great deal of scope and flexibility for formulating rules and policy within the legislative framework of the PFA through the medium of ministerial regulations.¹⁵ Such regulations can be promulgated with appropriate and proper guidance in relation to the exercise of other broad discretionary powers conferred on the registrar.

There is no imperative justifying the lack of statutory guidance

27 A fourth factor to consider is that there is no basis for contending that there is a justifiable basis for conferring the broad discretionary powers on the registrar through the mechanism of section 33A without any guidance as to how such powers are to be exercised.

The administrative nature of the registrar's functions

28 Fifthly, an equally important but obvious point that must be borne in mind is that the registrar is not to be equated with a judicial official. He does not possess nor can he be expected to possess an intricate knowledge of the finer points of constitutional law and statutory interpretation. On the contrary, he is a busy official burdened with the

¹⁵ Section 36 of the PFA provides in relevant part that:

- “(1) The Minister may make regulations, not inconsistent with the provisions of this Act-
...
(c) generally, as to all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.
(2) Different regulations may in terms of subsection (1) be made in respect of different funds.”

monumental task of discharging his innumerable statutory obligations, regulating all registered pension funds, and generally acting in the public interest. For this reason it is all the more important that he be given the requisite proper guidance in relation to the exercise of his broad discretionary powers.

- 29 In sum, these factors all point toward the *prima facie* conclusion that section 33A is arguably unconstitutional on grounds of vagueness.

Application of the legal principles to section 33A: factors in favour of constitutionality

- 30 However, these factors must be balanced against the countervailing argument which marshals the factors that weigh in favour of constitutionality. They are as follows:

30.1 When called upon to interpret the PFA, the Registrar must abide by the established raft of rules governing statutory interpretation.

30.2 The Registrar must be fully alive to the complexity inherent in the PFA, including the role of other actors and the need to exercise his powers in consonance therewith.

30.3 The registrar must be alive to the fact that the directives constitute administrative law and attract the scrutiny of PAJA insofar as it has not been

excluded.

Conclusion

- 31 In my view, on balance, these counterveiling factors arguably do not suffice in order to save section 33A from being declared unconstitutional.
- 32 The broad statutory discretion afforded to the registrar in terms of section 33A and the resulting potential unfairness cannot be cured by the haphazard piecemeal application of the right to administrative justice enshrined in PAJA, as is apparently currently envisaged.
- 33 The constraints that would supposedly provide guidance to the registrar in the exercise of his broad discretion are also unrealistic when one considers the burdensome administrative (as opposed to judicial) role of the registrar
- 34 If section 33A is allowed to stand on this basis, it arguably leaves too many issues begging which can only precipitate a glut of litigation to the detriment of all concerned and in violation of the spirit and tenor of the objects of the PFA to ensure the smooth and efficient regulation of pension funds.

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