THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 198/2002
REPORTABLE

In the matter between :

PEPCOR RETIREMENT FUND — FIRST APPELLANT
PEPKOR LIMITED — SECOND APPELLANT

and

THE FINANCIAL SERVICES BOARD — FIRST RESPONDENT
THE REGISTRAR OF PENSION FUNDS — SECOND RESPONDENT

CORAM : VIVIER ADP; MARAIS, NAVSA , CLOETE and LEWIS JJA

HEARD : 9 MAY 2003

DELIVERED : 30 MAY 2003

Summary: *Locus standi* of a functionary, empowered by legislation to make a decision in the public interest, to have that decision reviewed in a court of law and set aside; whether of a material mistake of fact should be a ground of review of such a decision.

JUDGMENT

CLOETE JA/

CLOETE JA:

INTRODUCTION

[1] This appeal concerns primarily the *locus standi* of a functionary, empowered by legislation to make a decision in the public interest, to have that decision reviewed in a court of law and set aside; and the question whether a material mistake of fact should be a ground of review of such a decision.

FACTS

[2] At issue are certificates granted by the second respondent, the Registrar of Pension Funds ('the Registrar'), issued in terms of s 14(1) of the Pension Funds Act 24 of 1956 ('the Act') in respect of the Pepkor Pension Fund ('the Fund'); and also the transfer of R9 223 118 ('the R9,2m') made from the Fund to the Pepkor Retirement Fund, the first appellant, which was not authorised in terms of that section. Commendably the complex chain of events was comprehensively and compendiously analysed by the court below (Rogers AJ) in a judgment which has been reported *sub nom Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C). Neither side challenged this analysis and accordingly the following relatively brief summary will suffice for the purposes of this appeal.

[3] The Fund was a defined benefit fund registered in 1973 for the purpose of providing retirement and ancilliary benefits to eligible

employees in what was to become the Pepkor Group. At all times material to this matter that Group consisted of the holding company, Pepkor Limited and three other operating companies: Ackermans, Pep Stores and Shoprite. The fund is in liquidation; the liquidator, the first defendant in the court below, did not oppose the action and was not represented in the appeal. The second appellant was the controlling employer ('beherende werkgewer') for the purposes of administration of the Fund.

[4] During the mid 1990's the Fund was 'unbundled' – initially into three 'daughter' funds, the Shoprite Pension Fund (the second defendant), the Ackermans Pension Fund (the third defendant) and the Pep Stores Pension Fund (the fourth defendant), which were also defined benefit funds; and ultimately, also into four defined contribution pension funds, the Shoprite Checkers Retirement Fund (the fifth defendant), the Ackermans Retirement Fund (the sixth defendant), the Pepkor Retirement Fund (the seventh defendant and the first appellant) and the Pep Retirement Fund (the eighth defendant). The Fund continued to exist. The 'unbundling' was effected by a series of applications for transfers of business in terms of s 14(1) of the Act, all of which, bar one, were approved by the Registrar. The exception was the amount of R9,2m which was paid to the first appellant.

[5] Before the approvals were furnished the Registrar was at his request furnished with information by one Meyer who was the actuary to the Fund (or, to use the terminology in the Act, its 'valuator'). The information related to the funding level of the fund. The funding level is the ratio of the actuarial value of assets to the actuarial value of liabilities. Meyer said that the funding level of the Fund before and after the transfers from the Fund to the 'daughter' funds was 137% 'met uitsluiting

van spesiale reserwes' in the former case and excluding certain 'spesiale surplusse soos deur die makelaar versoek' in the latter. It is common cause that in fact the funding level of the Fund before the transfers was 151% and thereafter, 606%. The Court *a quo* criticised Meyer's method of calculating the funding levels, which essentially involved the unwarranted exclusion of amounts in the Fund, as 'arbitrary and indefensible' (para [244]).

[6] No attempt was made on appeal to justify Meyer's calculations. The applications for the transfers were approved in ignorance of Meyer's misstatements and the transferring members transferred from the Fund to the 'daughter' funds without knowledge of the substantial surplus which stood to the credit of the Fund. In contrast to the funding level of the Fund after the transfers which, as I have said, was 606%, the funding levels of the three daughter funds, the second to fourth defendants, was respectively 123%, 121% and 116%. The 'unbundling' left the Fund with a very large surplus (which by now must be over R100m), no active members and only fourteen pensioners.

[7] The trustees of the Fund in the fullness of time applied to the Registrar for the liquidation of the Fund, and this was approved. The trustees thereafter submitted a draft amendment to the rules of the Fund which would permit the payment of the surplus to the second appellant. It was consideration of this draft amendment which led the chief actuary of

the Financial Services Board ('FSB') to discover the initial misstatements by Meyer and the unauthorised transfer of the R9,2m to the first appellant.

[8] The FSB, a statutory body established by the Financial Services Board Act 97 of 1990, as the first plaintiff and the Registrar, as the second plaintiff, brought the proceedings in the court below, the purpose of which was to review and set aside the approvals and the transfers made pursuant thereto, and to direct the first appellant to repay the R9,2m together with interest to the liquidator of the Fund. Rogers AJ granted that relief but suspended the declarations of invalidity for a period of six months, with the proviso that any party to the action might, on notice to the other parties, apply on good cause shown for the period of suspension to be lifted, reduced or extended. The appellants appeal to this court with the leave of the court below.

[9] In this court, as in the court below, the appellants challenged the *locus standi* of the FSB and the Registrar to bring the proceedings. It would be convenient to deal with these questions first, after quoting the provisions of s 14(1) of the Act as it read at the relevant time:

> '14(1) No transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless -
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> (a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the

scheme, has been submitted to the Registrar;

(b) the Registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;

(c) the Registrar is satisfied that the scheme referred to in para (a) is reasonable and equitable and accords full recognition -

(i) to the rights and reasonable benefit expectations of the persons concerned in terms of the rules of a fund concerned; and

(ii) to any additional benefits the payment of which has become established practice,

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, insofar 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;

(e) the Registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.'

LOCUS STANDI OF THE REGISTRAR

[10] This court has already held that if an administrative act has been performed irregularly – be it as a result of an administrative error, fraud or other circumstance – then, depending upon the legislation involved and the nature and functions of the public body, it may not only be

entitled but also bound to raise the matter in a court of law, if prejudiced: *Transair (Pty) Ltd v National Transport Commission and Another* 1977 (3) SA 784 (A) at 792H-793G.

[11] The Act was passed, as appears from the preamble thereto, to provide *inter alia* for the regulation of pension funds. It is the Registrar who performs this function. As the learned judge in the court below pointed out (paras [169] to [175]) virtually every section of the Act contains some or other provision reflecting the Registrar's supervision over the affairs of pension funds. It is not necessary to repeat the analysis.

[12] It was submitted on behalf of the appellants that, in contradistinction to certain other sections of the Act, s 14(1) does not specifically give the Registrar the right to apply to court to have a certificate wrongly granted by him, set aside; and that the Registrar accordingly does not have that power. It was further submitted that the appeal procedure for which provision is made in s 26(2) of the Financial Services Board Act, points to the same conclusion.

[13] The arguments are without merit. Section 14 deals with an important aspect of the regulation of pension fund organisations. It governs the amalgamation of any business carried on by a registered fund with any business carried on by any other person;

and the transfer of any business from a registered fund to any person, or from any person to a registered fund. The section provides that no such amalgamation or transfer 'shall be of any force or effect' unless the prescribed requirements are met. Subsection (2) correspondingly provides *inter alia* that the relevant assets of the bodies amalgamated or the relevant assets of the body transferring its assets shall vest in the body to which they are transferred, 'whenever a scheme for any transaction referred to in subsection (1) has come into force in accordance with provisions of this section'. 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 subsection (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. Compare in this regard what was said by this court in *Rajah and Rajah Ltd v Ventersdorp Municipality* 1961 (4) SA 402 (A) at 407E:

'Mr. *de Villiers* for the Council submitted that in the exercise of its statutory functions it has an administrative interest, on behalf of the public, in certificates for local trading. I agree: that is what gives it a *locus*, unlike a purely judicial tribunal.'

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 which 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.

[16] The Registrar's claim for repayment of the R9,2m was brought by way of an amendment granted subsequent to the insertion of s 6A into the Financial Institutions (Investment of Funds) Act 39 of 1984 by s 3 of Act 22 of 1997. The relevant part of s 6A reads:

'(1) Despite anything to the contrary contained in any other law, but subject to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and any provision in such other law relating to jurisdiction, procedure and evidence, the registrar has *locus standi in judicio* to institute and conduct proceedings in the High Court having jurisdiction (after this referred to as the court) in an instance where no other statutory provision makes such provision, if he or she has reasonable cause to believe that it is necessary or desirable for him or her to do so in order -

(a) …

(b) to compel any person to comply with any law or to cease contravening a law;

(c) …

(d) …

subject to any additional procedural requirements which the court may impose in any particular instance to ensure fair and equitable legal proceedings.'

[17] Counsel for the appellants accepted that the Registrar was entitled to rely on s 6A because that section was introduced before the claim for

repayment of the R9,2m was incorporated into the particulars of claim. The submission was that reliance on the section was misplaced because the transfer had already taken place.

[18] The R9,2m was paid by the Fund to the first appellant without the procedure prescribed by s 14(1) having been followed and therefore not only in contravention of that section, but also in contravention of s 5(2) of the Act which requires *inter alia* that 'all monies … belonging to a pension fund shall be kept by that fund'. In terms of s 14(2), it is only when 'a scheme for any transaction referred to in subsection (1) has come into force in accordance with the provisions of this section' that 'the relevant assets … of the body transferring its assets … or any portion thereof shall … vest in … the body to which they are to be transferred'. The Fund is not intent on reclaiming the R9,2m and the first appellant is intent on retaining it. The contravention by the Fund of s 5(2) of the Act and the contravention by the first appellant of s 14(2) of the Act are continuing and the Registrar accordingly has *locus standi* in terms of s 6 A(1)(b) to compel the Fund and the first appellant to cease the contraventions.

LOCUS STANDI OF THE FSB

[19] The functions of the FSB are set out in s 3 of the Financial Services Board Act, which, before its amendment on 12 May 2000

by s 2 of Act 12 of 2000[1], read as follows:

'The functions of the board are –

(a) to supervise the exercise of control, in terms of any law, over the activities of financial institutions and over financial services; and

(b) to advise the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the Minister.'

The term 'financial institution' is defined in s 1 of the FSB Act to include 'any pension fund organisation registered in terms of the Act' and the 'daughter' funds, the second to eighth defendants, were and are registered as pension funds in terms of the Act. It follows that the FSB is empowered by s 3(a) of the Financial Services Board Act, read with the definition of the term 'financial institution' in s 1 thereof, to supervise the

exercise of control, in terms of any law, over the activities of the Fund

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[1] In its amended form, s 3 of the Financial Services Board Act reads:

'**Functions of the board.**— The functions of the board are — (a) to supervise the compliance with laws regulating financial institutions and the provision of financial services; (b) to advise the Minister on matters concerning financial institutions and financial services, either of its own accord or at the request of the Minister; and (c) to promote programmes and initiatives by financial institutions and bodies representing the financial services industry to inform and educate users and potential users of financial products and services.'

and the ‘daughter’ funds.

[20] In terms of ss 3 and 14 of the Act, the Registrar, who holds that office because he is ‘the executive officer’ of the FSB, must exercise such control on behalf of the FSB by *inter alia* considering and determining proposed transfers of business such as those in issue in the present matter. Similarly, s 13(3) of the Financial Services Board Act provides that the Registrar ‘shall, subject to supervision by the board [the FSB], perform the functions entrusted to him by or in terms of this or any other Act’.

[21] The question which arises is whether the FSB’s power, conferred by s 3(a) of the Financial Services Board Act to supervise the exercise of such control, includes the power to seek judicial review of the Registrar’s decisions on transfers of business when the FSB considers such decisions to be invalid. In *Financial Services Board and Another v Pepkor Pension Fund and Another* 1999 (1) SA 167 (C) at 172G Conradie J held that:

‘Had it been the Legislature's intention that the Board's supervision should include a power to direct or to override, one would have expected the express conferment of such a power on the Board, a power, that is, to set aside a decision of the Registrar or to direct him how to decide. The wording of the Board Act suggests no such power.’

The learned Judge also said (at 173C-D):

‘[T]he expression ‘‘supervision of control over’’ in fact conveys well the general

stewardship of the Board over the (independently exercised) control functions of the Registrar.'

He concluded (at 173D) that

'the Board determines broad policy and may lay down guidelines, but that it is not empowered to participate in or interfere with decisions of the Registrar under the Pension Funds Act.'

[22] It was perhaps in response to this decision that s 1 of Act 12 of 2000 elaborated on s 13 of the Financial Services Board Act by inserting a definition of 'supervision',[2] in relation to the supervision by the FSB over the performance of functions by the Registrar in terms of any law.

[23] Neither the basis of Conradie J's judgment nor the amendment to the Act denies the FSB *locus standi* to institute proceedings for judicial review of decisions of the Registrar under the Act. The FSB is merely precluded from itself reviewing and setting aside such decisions by the Registrar, and from directing him how to decide matters which is his function to decide.

[24] The nature of the functions conferred on the FSB by s 3(a) of the Financial Services Board Act, both in its original form and in its amended

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[2] "Supervision", in relation to supervision by the board over the performance of functions by the executive officer in terms of any law, means— (a) the determination by the board that a particular function or category of functions— (i) may not be performed by the executive officer without the prior approval of the board; (ii) may be performed by the executive officer in accordance with guidelines issued by the board; or (iii) may be performed by the executive officer in his or her discretion; and (b) the periodical reporting to the board by the executive officer on the performance of his or her functions at such a time and in such a manner as may be determined by the board.'

form, entitle and oblige the FSB to seek the review by the High Court of

decisions of the Registrar under the Act which it considers to be invalid and which, if not reversed, would prejudice the public interest. The FSB has an administrative interest, on behalf of the public, in the proper exercise of the control vested in the Registrar and in this context, the quotation from *Rajah*, in para [13] above, is again apposite. The same prejudice which the Registrar has in respect of decisions incorrectly taken by him discussed in para [14] above, attaches to the FSB.

[25] The FSB does not, however, have the right in terms of the Financial Services Board Act, in its original or amended form, itself to institute proceedings for the recovery of the R9,2m. That is the function of the Registrar. If the Registrar were to decide not to perform this function, or simply failed to do so, the FSB could no doubt in the exercise of its supervisory function bring proceedings for the review of his decision, or a *mandamus* compelling him to do so. But the FSB cannot ignore the Registrar's decision or inaction and itself perform the function entrusted to him. Its function is to supervise, not to act in the stead of the Registrar.

[26] I therefore conclude that the FSB had the necessary *locus standi* to approach the court to review the decisions by the Registrar to grant the s 14(1)(e) certificates and to set those certificates and the transfers consequent upon them, aside; but that the FSB had no *locus standi* itself to seek an order that the

R9,2m be repaid.

CLAIM FOR REPAYMENT OF THE R9.2M

[27] The arguments raised on behalf of the appellants and which were dismissed by the court below, were repeated on appeal. I am unable to accept them. The only submission made on behalf of the appellants with which it is necessary to deal is that the Registrar did not have *locus standi* to bring the *condictio* necessary for the R9,2m to be repaid by the first appellant to the Fund. It was found by the court below (para [290]) that the Registrar's claim would be a type of *condictio*. This finding was not correct. A *condictio* would indeed be the remedy were the Fund itself to seek repayment. But the Registrar has the powers to which I have referred in para [13] above and it is those powers conferred on him *ex lege* which entitle and indeed oblige him to approach the High Court to order the money to be repaid. He cannot be remediless and obliged to tolerate a continuing statutorily prohibited retention of money which has been retained unlawfully from a pension fund's coffers when he is the very person whose consent to the removal was necessary to render it lawful.

THE S 14(1) TRANSFERS

[28] Had fraud been proved, that would have sufficed for the relief sought by the respondents because the certificates would have been void: cf *Principal Immigration Officer v Bhula* 1931 AD 323 at 330. But

fraud was not alleged and the review could only have succeeded on some other ground. The appellants' counsel made a particular submission on the facts, and another on the law.

[29] On the facts, it was submitted on behalf of the appellants that even had the correct information about the funding levels before and after the transfer been furnished to the Registrar, the Registrar's decision would have been no different. The learned judge in the court below, after a careful and detailed survey of the evidence, concluded (para [255]) that '[I]f the misrepresentations had not been made the initial transfers would not as a fact have been approved as they were'. I have carefully considered the detailed argument to the contrary submitted on behalf of the appellants but I am unable to fault the learned trial judge's conclusion. It appears to me to have been entirely justified.

[30] On the law, it was submitted on behalf of the appellants that the size of the surplus remaining in a defined benefit fund such as the Fund is legally irrelevant to the exercise by the Registrar of his powers under s 14(1). The submission was that because the Fund and the 'daughter' funds are defined benefit funds and not defined contribution funds,[3] transferring members can have an interest only in the security of the benefits to which they will become entitled; and once they are adequately secured, as they were in the present case, any

surplus

[3] As to the distinction, see *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 890F and 891B-C.

remaining in the Fund was effectively none of their business: the employer could use the surplus for a 'contribution holiday' but the members were not entitled to it. But s 14(1)(c) required at the time the transfer applications were approved, and still requires, that the Registrar 'be satisfied' *inter alia* that the scheme for the proposed transaction is 'reasonable and equitable'. In my view, if the Registrar were to conclude, in the exercise of the wide discretion conferred on him by s 14(1)(c), that the proposed transaction was neither just nor equitable, because the funding level of the transferring fund considerably exceeded the funding level of the transferee funds and there was a substantial surplus which would remain in the transferring fund, he would be acting fully within his regulatory powers and a court would not on review be able to interfere with his decision simply because it did not agree with it. *A fortiori* would this be so where, as here, the transferring members were unaware of the imbalance. It is true that they were not legally entitled to participate in the surplus, but they had not only the hope that the trustees might use the surplus to pay increased benefits but also the peace of mind in knowing that their benefits would be more than adequately protected. Actuaries are not infallible and no-one could have predicted the events of September 11 2001 and their worldwide economic consequences. And, of course, if the Fund should be liquidated (as it has been) they would have some prospect of sharing in a surplus should one

exist (as it does) ─ not because they had an existing legal right to do so, but because some arrangement would have to be made to deal with the surplus.

[31] I have pointed out that a public functionary may be entitled and even obliged to seek the review by a court of its own decision; and I have already held that the Registrar and the FSB are entitled to do so. The question which now arises is whether this should be permitted because of a material mistake of fact, even a mistake due to the functionary's own negligence (which the appellants submit was present in this case in as much as, according to the appellants, the Registrar should have realised that the information provided by Meyer could not have been correct and should have made further inquiries) and even if the mistake was not induced by the person who benefited by the decision.

> [32] Hitherto, where jurisdiction is not in issue and there is no obvious transgression of the boundaries within which the functionary has been empowered to make decisions, our courts have not permitted a review solely on the basis of a material mistake of fact on the part of the person who made the decision. Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary

misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter: *Johannesburg Stock Exchange v Witwatersrand Nigel Limited and Another* 1988 (3) SA 132 (A) at 152C-D; *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93B-C. There are decisions in other jurisdictions, however, which go further.

[33] In England there are two cases which are relevant: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and *Regina v Criminal Injuries Compensation Board, Ex Parte A* [1999] 2 AC 330 (H.L.(E.)).

[34] The facts in the *Tameside* case were in essence the following. A local education authority proposed to bring all the schools in their area under the comprehensive principle. Their scheme was approved by the Secretary of State for Education and Science in November 1975, and implementation of the scheme was envisaged by the beginning of the school year in September 1976. In May 1976 local government elections were held, and in the authority's area the survival of the grammar schools was a

strongly fought issue on which the opposition party took a stand. The opposition party gained control of the authority, and considered that they had a mandate to reconsider their predecessor's education policy, which they did. The Secretary of State, acting under s 68 of the Education Act 1944,[4] directed the authority to give effect to the proposals approved by him in November 1975. Subsequently, the Secretary of State applied for an order of *mandamus* ordering the authority to comply with his direction. The Divisional Court made the order of *mandamus*.

[35] The Court of Appeal quashed the order. Scarman LJ, in a judgment concurring in the result arrived at by the other two members of the court, summarised part of the argument put forward by Mr Bingham, leading counsel for the Secretary of State, as follows (at 1030A-B):

'[W]hile judicial review of the exercise of the [Secretary of State's] discretion is not excluded by the section [s 68], the court can declare the Secretary of State's direction unlawful only if there be proved to exist one or other of the following situations: bad faith on the part of the Secretary of State, misdirection in law, taking account of irrelevant matters or omitting to consider relevant matters, and finally a situation where the Secretary of State has taken a view which on the material and the information available to him no reasonable man could have taken.'

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[4] Section 68 provided *inter alia* : 'If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors, give such directions as to the exercise of the power or the performance of the duty as

The learned Lord Justice continued (at 1030E-H and 1031D-E):

'I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr. Bingham. I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact. Let me give two examples. The fact may be either physical, something which existed or occurred or did not, or it may be mental, an opinion. Suppose that, contrary to the minister's belief, it was the fact that there was in the area of the local education authority adequate school accommodation for the pupils to be educated, and the minister acted under the section believing that there was not. If it were plainly established that the minister was mistaken, I do not think that he could substantiate the lawfulness of his direction under this section. Now, more closely to the facts of this case, take a matter of expert professional opinion. Suppose that, contrary to the understanding of the minister, there does in fact exist a respectable body of professional or expert opinion to the effect that the selection procedures for school entry proposed are adequate and acceptable. If that body of opinion be proved to exist, and if that body of opinion proves to be available both to the local education authority and to the minister, then again I would have thought it quite impossible for the minister to invoke his powers under section 68.

…

I have already put in my own words the situation which I think, in addition to those more commonly described, enables the court to exercise its power of review. I would now try to put that situation into a formula; and my formula would be as follows: that the Secretary of State cannot lawfully be satisfied that the local education authority is proposing to act unreasonably unless upon the information that

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appear to him to be expedient…'.

was *or ought to have been* available to him the local education authority acting reasonably, could not have acted, or proposed to act, as it in fact did.' (Emphasis supplied.)

[36] The *Tameside* case went on further appeal to the House of Lords. Five speeches were delivered. Lord Wilberforce said at 1047C-F:

'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 …'.

[37] In *Regina v Criminal Injuries Board, Ex. p. A*, *supra,* the facts were the following (I quote from the headnote):

> 'In 1991 two men pretending to be C.I.D. officers entered the applicant's house, assaulted her, stole her money and valuables and vandalised the premises before leaving. The applicant called the police and when an officer arrived told him of the assault and burglary and showed him the damage. He took her to hospital where, on examination, she was found to be bruised. Three days later she contacted the police and alleged that in the course of the

burglary she had also been the victim of rape and buggery. Five days after the burglary the applicant was examined by a police doctor to whom she gave an account consistent with what she had told the police. The police doctor reported that her findings were consistent with the allegation of buggery but neither confirmed nor excluded vaginal intercourse. Subsequently, the applicant made a claim to the Criminal Injuries Compensation Board. At the hearing of her claim, the evidence did not include the police doctor's report and a police witness said that "the doctor could only see trauma to the back passage — the applicant had haemorrhoids." The board rejected the claim, concluding that the medical evidence gave no assistance in determining the applicant's claims.'

[38] In the House of Lords, Lord Slynn of Hadley said at 344G-345C:

'Your Lordships have been asked to say that there is jurisdiction to quash the board's decision because that decision was reached on a material error of fact. Reference has been made to *Wade & Forsyth, Administrative Law,* 7th ed. (1994), pp. 316-318 in which it is said:

> "Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact,' [*Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, 1030], or acting 'upon an incorrect basis of fact' … This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the court should be able to remedy. If a 'wrong factual basis' doctrine should become established, *it would apparently be a new branch of the ultra vires doctrine*,

analogous to finding facts based upon no evidence or acting upon a misapprehension of law." [Emphasis supplied in view of the conclusion in para [47] below.]

de Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 288:

"The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention."

For my part, I would accept that there is jurisdiction to quash on that ground in this case, but I prefer to decide the matter on the alternative basis argued, namely that what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness.'

[39] In Halsbury's *Laws of England* 4th ed (2001 reissue) vol 1 (1) para 76 p 164 the English law is stated as follows:

'**Errors of fact**. In exercising their functions, public bodies evaluate evidence and reach conclusions of fact. The court will not ordinarily interfere with the evaluation of evidence or conclusions of fact reached by a public body properly directing itself in law. The exercise of statutory powers on the basis of a mistaken view of the relevant facts will, however, be quashed where there was no evidence available to the decision maker on which, properly directing himself as to the law, he could reasonably have formed that view. *The court may also intervene where a body has reached a decision which is based on a*

material misunderstanding or error of fact.' (Emphasis supplied.)

The learned authors then point out that the courts adopt a different approach where the existence of a state of affairs is a statutory precondition to the jurisdiction of a public body. Whether this is still good law in England may be debatable. After the passage in Wade and Forsyth *Administrative Law* 7th ed pp 317-8 quoted by Lord Slynn (see para [38] above), the learned authors continue:

'A minister, for example, would have to show not only that he decided reasonably on the material before him, but that he had the relevant material before him in correct form. This would tighten still further the court's control over administrative findings of fact and would consign much of the old law about jurisdictional fact, etc., to well-deserved oblivion. It would make judicial review into a comprehensive system, able to correct serious errors of all kinds.'[5]

[40] In New Zealand in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 Cooke J (who was the only one of the three learned Judges of Appeal who incorporated this reasoning) quoted from the judgment of Scarman LJ in the *Tameside* case, and continued (at 147 lines 20-25):

'The speeches of their Lordships appear to show, not indeed unreserved acceptance, but at least a considerable degree of endorsement of Scarman LJ's views'

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[5] Lord Clyde and Denis Edwards in *Judicial Review* refer to these passages in Wade and Forsyth and say that 'a strong argument is presented for the recognition of broad and simple rules of review whereby erroneous and decisive facts may enable a decision to be quashed.'

and then, after quoting from or summarising the speeches of the learned Law Lords, concluded (at page 148 lines 45-50):

'Taken as a whole the observations of the House of Lords seem to me to provide a strong foundation for holding at least that the traditional duty to take into account relevant considerations extends to considerations which should have been within the knowledge of the Minister. Parliament would be unlikely to confer authority on the Minister on any other basis.'

[41] In South Africa we have a new constitutional dispensation. The consequence of this in the context of administrative law has been dealt with by the Constitutional Court in several decisions, including *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) and *Pharmaceutical Manufacturers Association of SA and Another : In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

[42] In *Fedsure* five of the learned justices held at 400F-G (para [59]):

> 'There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. '

[43] In *Sarfu* the court held at 71A-C (para 148):

'In the past, under the doctrine of parliamentary supremacy, the major source of

constraint upon the exercise of public power lay in administrative law, which was developed to embrace the exercise of public power in fields which, strictly speaking, might not have constituted administration. Now, under our new constitutional order, the constraints are to be found throughout the Constitution, including the right, and corresponding obligation, that there be just administrative action.'

[44] In *Pharmaceutical Manufacturers* the court held at 696E-H (para[45]):

'The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed.'

[45] The section which deals with 'just administrative action' in the 1996 Constitution is s 33. Subsection 33(1) provides:

'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

Administrative action based upon a material mistake of fact resulting in

the type of prejudice considered in para [14] above, cannot be categorised as complying with that subsection.

[46] The national legislation envisaged in s 33(3) of the Constitution has now been enacted in the Promotion of Administrative Justice Act, 3 of 2000; but that Act came into operation well after the present proceedings were instituted. Nevertheless it is relevant to note in passing that s 6(2)(e)(iii) provides that a court has the power to review an administrative action *inter alia* if 'relevant considerations were not considered'. It is possible for that section to be interpreted as restating the existing common law;[6] it is equally possible for the section to bear the extended meaning that material mistake of fact renders a decision reviewable.

> [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 before the functionary, the decision should (subject to what is said in para [10]

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[6] Cf the remarks of Mason J in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Ltd and Others* [1986-1987] 162 CLR 24 (HC of A) at 39 in regard to s 5(2)(b) of the Administrative Decisions (Judicial Review) Act which provides that an improper exercise of a power (a ground of review in terms of subsection (1)(e)) shall be construed as a reference to *inter alia* 'failing to take a relevant consideration into account in the exercise of a power'. The learned judge held 'The failure of a decision maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of *ultra vires* administrative action. That ground now appears in s 5(2)(b) of the A.D. (J.R.) Act which, in this regard, is substantially declaratory of the common

above) be reviewable at the suit 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 ie on the basis of the true facts; it should not be confined to cases where the common law would categorize 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 two 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

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law.'

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 fact. I am therefore, with respect, unable to share the opinion of Professors Wade and Forsyth (quoted in para [39] above) that 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. In the present appeal none of the considerations to which I have referred in this paragraph of the judgment arise. The Registrar was entitled to act on the assumption that the correct facts had been placed before him.

[49] Whether a review should succeed in a matter such as the present will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interests of the person in whose favour a decision has been made. Ultimately, a value judgment, balancing all the relevant factors, will be required. I turn to consider the factors relevant in the present case.

[50] The Registrar was misled on a fact material to his decision. I have already dealt with the public interest, and the interest of those

directly affected, in the proper performance by the Registrar of the functions entrusted to him by the Act, and s 14(1) in particular.

[51] There is no prejudice to the second appellant, Pepkor Limited, sufficient to warrant denial of the relief: the effect of the relief will be potentially to deny to it a windfall which it could not legitimately have expected and to which it has never become entitled. Nor can there be any question of prejudice to the Fund. The appellants' counsel submitted that it would be 'practically unworkable and legally indefensible to undo the transfers at this late stage'. Paragraphs 3 and 4 of the order of the court below (at 628F) which suspended the operation of the order and its consequences, were designed to ameliorate this difficulty; and although common sense dictates that considerable problems may arise in the implementation of the order made by the court *a quo*, there was no suggestion to any of the witnesses who testified (all of whom were called on behalf of the plaintiff), much less any evidence from the defendants (who included the liquidator of the Fund), that the order would be impossible to carry out.

[52] I therefore consider that the appeal against the setting aside on review of the s 14(1)(e) certificates and the resultant transfers of money from the Fund to the 'daughter' funds, and the 'daughter' funds to the defined contribution funds, should be dismissed.

COSTS

[53] I do not consider that the appellants' limited success in challenging the *locus standi* of the FSB to require repayment of the R9,2m is a reason for depriving the FSB of any part of its costs. It has been substantially successful on appeal and this finding is of academic interest only in as much as the money will have to be repaid at the suit of the Registrar. In addition the point was one of law which did not result in the record on appeal being more voluminous than it would otherwise have been and argument on the point was relatively brief.

[54] Although only one counsel appeared on behalf of the respondents to argue the appeal, the costs of two counsel were otherwise sought. The heads of argument were prepared by two counsel. The request is amply justified ─ indeed, the appellants asked for the costs of three counsel.

ORDER

1. The appeal against the order granted at the suit of the Financial Services Board for repayment of the amount of R9 223 118 paid by the Pepkor Pension Fund to the first appellant, is upheld.
2. The appeal is otherwise dismissed.
3. The appellants are ordered jointly and severally to pay the respondents' costs of the appeal, including the costs of two counsel where two counsel were employed.

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T D CLOETE

JUDGE OF APPEAL

Concur:

Vivier ADP

Marais JA

Navsa JA

Lewis JA