APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

CASE NO: A11/2016

In the matter between:

SECURITY EMPLOYEES NATIONAL
PROVIDENT FUND Appellant

and

REGISTRAR OF PENSION FUNDS First Respondent

PRIVATE SECURITY SECTOR PROVIDENT
FUND Second Respondent

Appeal panel: LTC Harms (chair), Ms NP Dongwana and Mr G Madlanga

Hearing: 11 November 2016

Judgment:

For appellant: Adv L Sisilana instructed by Norton Rose Fulbright SA Inc

For first respondent: Mr SR Rossouw, Financial Services Board

For second respondent: Adv S Khumalo instructed by Soonder Inc Attorneys

Summary: Pension Funds Act 24 of 1956 sec 12(4) – amendment of fund rules – obligation of Registrar to register

JUDGMENT

INTRODUCTION

1. Section 12 of the Pension Funds Act 24 of 1956 deals with the amendment of the rules of pension funds. In particular, sec 12(4) and (6) provide as follows:

> (4) If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.
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> (6) (*a*) The registrar may request such additional information in respect of any alteration, rescission, addition or consolidation of the rules of a registered fund transmitted or forwarded to the registrar for approval as the registrar may deem necessary.
>
> (*b*) If a registered fund fails to furnish the information requested by the registrar within 180 days from the date of that request, any submission for approval of an alteration, rescission, addition or consolidation of the rules of that fund lapses.

2. The issues in the appeal are whether the Registrar decided to refuse the registration of a number of amendments to its rules submitted by the appellant or merely asked for

information; and, if she did so refuse, whether the Registrar had the power to refuse the registration of an alteration which is "not inconsistent with" the Act.

3. The appellant, the Security Employees National Provident Fund, is a defined contribution provident fund. It was registered in terms of sec 4 of the Act with effect from 1 August 1996. It is an umbrella fund arrangement for the benefit of employees of various employers that are not related to each other by shareholding.

4. The appellant's rules make it clear that all participating employers and their employees operate in the private security sector.

5. The appellant functions in terms of (a) a set of general rules applicable to all participating employers and members employed by them, as well as (b) a number of individualised special rules which apply only to a specific employer and members employed by that employer. The special rules determine *inter alia* the contributions payable by those members and their employer on their behalf.

6. Sub-funds are not pension funds as defined in the Act and do not have separate legal personality and the special rules are no more than different chapters of the rules of the appellant.

7. During 2013 to 2016, the appellant submitted 31 applications for the amendment of its rules for the approval by the Registrar. There are two categories. The one group seeks to introduce new sets of special rules recording and regulating the participation in the appellant fund of a (new) particular employer and its employees. These special rules provide, inter alia, for compulsory membership for certain categories of employees of the new participating employers.

8. The other seeks to revise existing special rules that already provided for such compulsory membership and to cater for the changed status of particular current employers who had participated in the fund by making them paid up members.

9. During 2000, the Minister of Labour, in a sectoral[1] determination, determined minimum conditions of employment for employees employed in the private security sector. It has been amended from time to time.[2] The determination was done in terms of chapter 8 of the Basic Conditions of Employment Act 75 of 1997. The effect of a determination is set out in sec 57:

> "If a matter regulated in this Act is also regulated in terms of a sectoral determination, the provision in the sectoral determination prevails."

10. During 2002, the sectoral determination was amended to provide for the establishment of the second respondent ("the PSSPF") and make membership of the PSSPF a condition of employment for private security sector workers. The PSSPF's rules were drafted accordingly and are registered.

11. The practical effect of this is that employees in this sector and their employers are by law obliged to belong to the PSSPF and are obliged to pay the statutory contributions to the PSSPF. See sec 13A of the Pensions Act.

12. However, if an employer "joins" the appellant's fund, the employer and employees are at the same time obliged to pay the prescribed contributions to the appellant unless the

[1] The dictionary term is "sectorial" but for sake of consistency we use the statutory spelling.
[2] The latest revised version is Sectoral Determination 6: Private Security Sector, South Africa which was published on 1 September 2015.

employer was exempted from participation in the PSSPF. The determination and the rules of the PSSPF make provision for such exemption.

13. Based on the terms of the sectoral determination, the Registrar sent query letters to the appellant in response to each of the 31 amendment applications requesting confirmation and proof that the participating employers had been exempted from participation in the PSSPF.

14. The appellant responded in each case that the "duty to conform to the requirement of the Sectoral Determination rests with each Participating Employer and the Fund does not enquire into this as it does not affect the ability of the [Participating Employer] to participate in the SENPF."

15. On 23 February 2016, the appellant's attorneys addressed a letter to the Registrar enquiring about the registration of the 31 rule amendments. The letter referred to the requirements of sec 12(4) of the Act and "advised" the Registrar that the concerns raised regarding the exemption of employers from participation in the PSSPF "is not a [criterion] for consideration as contemplated in section 12(4) of the Act."

16. The Registrar responded in a letter dated 23 March 2016 ("the decision letter") and on or about 21 April the appellant lodged an appeal against the "decision" contained in the letter. The Registrar submitted her reasons on 30 May, and the grounds of appeal followed on 29 June.

THE DISPUTE

17. There is a dispute about the effect of her letter of decision. The Registrar contends that she requested information, as she was entitled to do in terms of sec 12(6), sec 21(1) and

sec 24, and that the appellant refused to provide the information. Her letters were preliminary steps towards a final decision. The decision letter was not a decision but an explanation of the reasons for her request. She will make her decision once that information is at hand.

18. The appellant disputes this, arguing that the issue is whether the Registrar is as a matter of law entitled to have regard to the information sought, in default of obtaining which she could in law refuse to register the special rules.

19. The letter of decision is somewhat ambivalent. The appellant points to the following passages that, in its view, indicate that the Registrar decided to reject the amendment absent the information.

> "Whilst we acknowledge that section 12(4) of the PFA provides that the registrar must register a rule amendment if it is not inconsistent with the PFA and is financially sound, we do note that the registrar cannot register a proposed rule amendment if it contravenes a law of South Africa, this would include the provisions of the sectorial determination in the private security sector. The reason for the queries that were raised with the fund was to determine whether or not the employers (and the fund, which is also bound to [*sic*] the law of the country) had complied with the strictures of the law."

> "The registrar cannot register rules that are non-compliant with the law, so for example, the rules cannot be registered in circumstances which would allow an employer to participate in the fund without having first received exemption in terms of the sectorial determination because such conduct would result in the

contravention of the law, not only by the fund and the employer, but also the registrar."

"The registrar again requests the fund to obtain information from the employers that they have obtained exemption from participating in the PSSPF. In the absence of this confirmation, the registrar cannot register rules that will result in contravention of the law."

20. Similar statements are contained in the Registrar's reasons but if read in context against the Act and the history of the matter it appears on balance the Registrar has not yet made a final appealable decision. However, in the light of what follows we prefer to assume in favour of the appellant that she in fact decided that in the absence of proof of the exemptions she cannot register the rules. We proceed to consider whether she could in those circumstances have refused to register the amendments.

21. Although the Registrar did not say as much, the information sought would, prima facie, have been relevant to a determination of the other jurisdictional fact for registration under sec 12(4), namely the satisfaction of the Registrar that the amendment is financially sound – something she has as yet not found,[3] which means that at best for the appellant the matter has to be remitted to the Registrar for reconsideration.

THE LEGALITY OF THE SECTORAL DETERMINATION

22. The appellants submitted that the Registrar should have ignored the determination because it is subordinate legislation which is invalid being in conflict with the

[3] The question she will have to consider is whether it would be financially sound to oblige employers and low earning wage earners in the security industry to contribute to two pension funds.

Competition Act, the Constitution and certain common-law principles. It is unnecessary to detail the argument because it is based on an unsustainable premise.

23. It is by now an established principle that a functionary may not ignore an administrative act on the ground that it is invalid unless and until it has been set aside by a competent tribunal. (There is no indication that the appellant, whose interests were since 2002 and still are materially affected by the determination, has taken any steps to set the determination aside.)

24. There is, obviously, the possibility of a collateral challenge but that, once again, is only possible before a competent tribunal.[4] Apart from the fact that the Registrar is not such a tribunal, there was no challenge before her of the legality of the determination. The issue was not raised in the grounds of appeal and is therefore, apart from our lack of jurisdiction, not one that we could consider.

THE CONFLICT BETWEEN THE DETERMINATION AND THE AMENDED RULES

25. The appellant submitted that there could not be a conflict between the amended rules and the determination because, so the submission went, there is nothing that prevents an employer and employee to belong to more than one pension fund.

26. Although it is possible for some-one to belong to more than one pension fund, that is not the issue.

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[4] See in general *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); *MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC); *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 (4) SA 403 (SCA); *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39.

27. The special rules of the appellant typically provide that participation in the appellant fund of certain categories of employees of the participating employer to whom the set of special rules applies is compulsory; that they are obliged to make the prescribed contributions to the appellant fund; and that the participating employer has to make a similar contribution.

28. The sectoral determination, on the other hand, makes membership of the PSSPF compulsory; and also the contributions by employers and employees. Without an exemption employees are entitled to belong to more than one pension fund but this is subject to a qualification: other pension contribution may only be deducted from the employee's wages with the written consent of the employee.[5]

29. In other words, the appellant's amended rules oblige a participating employer to deduct a member's contribution without the member's consent, something prohibited by the determination.

30. It follows that the approach of the Registrar that the rules would be in conflict with the determination and that their application would result in the contravention of a law is correct. But that is not the end of the matter.

"INCONSISTENT WITH THIS ACT"

31. It will be recalled that sec 12(4) states that "if the registrar finds that any such alteration . . . is not inconsistent with this Act . . . he shall register the alteration", the term "this Act" meaning the Pensions Act. The appellant argues that although the rules might be inconsistent with the sectoral determination it does not mean that they are inconsistent

[5] See also sec 34 of the Basic Conditions of Employment Act.

with the Act and that, consequently, the conflict with the determination is an irrelevant consideration – the Registrar is bound to register any alteration provided it is not inconsistent with the Act itself.

32. The appellant relied in this regard on *National Tertiary Retirement Fund v Registrar Pension Funds* 2009 (5) SA 366 (SCA), where the Court said at [16]:

> "The court below correctly did not endorse the finding by the Board of Appeal that section 12(1)(b), in requiring the approval of the respondent, conferred a broad and equitable discretion on the respondent to refuse to register a rule amendment. In terms of section 12(4) the respondent "shall" register the alteration if he finds that it is not inconsistent with the Act and if he is satisfied that it is financially sound. The respondent is thus obliged, in these circumstances, to register the alteration."

It added at [20] -

> "The alteration can only be inconsistent with the Act if it conflicts with the terms of the Act."

33. Judgments should be read in context. The issue in the case was whether the Registrar had a discretion to refuse an amendment where the amendment complied with the provisions of the Act. The court held that sec 12(4) does not provide the Registrar with an overriding discretion to refuse an amendment which complies with the Act. It did not deal with the case where the amendment would otherwise be illegal being in conflict with other statutory provisions. That is why the court added the obvious, namely that

"the terms of the Act are to be properly interpreted and when that is done 'a court is entitled to have regard not only to the words used by the Legislature but also to its object and policy'."

34. Could it then be said that the Act contemplated that the Registrar is entitled and obliged to register an amendment that is on its face illegal? We think not. One could postulate the following example. An amendment introduces a clause which discriminates between different employees in conflict with the Bill of Rights or the Basic Conditions of Employment Act. In terms of the argument the Registrar must register the amendment. It then becomes a binding administrative act which binds all until set aside by a court under the *Oudekraal* principle. We do not accept that this result could have been intended.

35. As said, the object of sec 12(4) was to deny the Registrar a general discretion, and not to require of the Registrar to register something that is unlawful in the broader sense of the term.

36. The respondents have a further answer to the appellant's submission. They rely on sec 7D(1)(f). It imposes the duty on the board of trustees of a pension fund to ensure that the rules and the operation and administration of the fund comply with all "other" applicable laws.[6] The amendments adopted by the board and submitted to the Registrar do not comply with the all other applicable laws, they say, and that therefore the Registrar could not have found that the amendments comply with the Act because the

[6] The Basic Conditions of Employment Act is an applicable Act because it provides for instance that a sectorial determination may regulate pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds – sec 55(4)(m).

board did not do what was required of it. This means that the Act does not operate in a bubble of its own. It is part of the wider legal landscape.

37. The appellant's answer is that the Registrar was obliged to register the regulations and thereafter take steps against the board because of their failure to have ensured that their rules are not in conflict with other applicable laws. It is not clear what steps are envisaged. Should the Registrar intervene in the management of the board under sec 26(1) and direct the board to amend the rules still not knowing whether exemptions have been granted? This is circuitous and would lead to the same impasse.

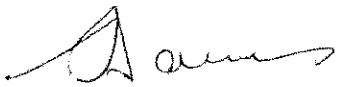
38. The appellant finally argued that the Registrar had failed to apply her mind to the second category of applications mentioned earlier in para 8. The category applies to existing employer members and the appellant seeks to make them fully paid-up by amending the existing special rules: the sub-fund is closed to new entrants, and members and employers are no longer to contribute to the fund. The appellant submits that this category has nothing to do with the sectoral determination and absent any other reason the Registrar was obliged to register the amendments.

39. These special rules may predate the determination and have become "illegal" as a result of the determination. They may also postdate the determination and may have been registered in error. To allow the amendment would then, as submitted by the Registrar, perpetuate the wrong – two wrongs do not make a right. Since the argument is dependent on facts that are not before us because the issue was never raised in the papers or in the grounds of appeal we cannot uphold the appeal on this ground.

DECISION

The appeal is dismissed with costs, including the costs of the joinder application.

Signed at Pretoria on 21 November 2016 on behalf of the appeal panel.



LTC Harms