IN THE COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

Case No 25945/11

In the matter between:

CITY OF CAPE TOWN MUNICIPALITY Applicant

And

SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND First Respondent

REGISTRAR OF PENSION FUNDS Second Respondent

Court: GRIESEL J
Hea rd: 26 November 2012
Delivered: 13 December 2012

JUDGMENT

GRIESEL J:

[1] On 21 December 2011 the applicant, the City of Cape Town Municipality ('the City'), launched a composite application seeking twofold relief:

• In *Part A*, an appeal is noted in terms of s 3OP of the Pension Funds Act, 24 of 1956 ('the Act'), against a determination made by the Acting Pension Funds Adjudicator ('the Adjudicator') that she had no jurisdiction to consider a complaint by the City against the management of the first

respondent herein, the South African Local Authorities Pension Fund ('the Fund').

• In *Part B*, the City brings an application in terms of Uniform rule 53 to review and set aside -

(a) the decision of the Fund's board of trustees ('the board'), embodied in a resolution dated 20 August 2003, to increase the employers' contribution rate from 18.07% to 20.78% of the members' annual salaries for an indefinite duration; and

(b) the decision of the second respondent, the Registrar of Pension Funds ('the Registrar'), taken on 5 July 2006, to approve and register the amendment to rule 4.2.2.1(B) of the Fund's rules which makes provision for the increased contribution rate mentioned above;

together with certain ancillary relief. (The City has at all material times participated in the Fund as a contributing employer.)

[2] The application is being opposed by the Fund, whereas the registrar abides the decision of this court, having filed a full and helpful affidavit in response to the application.

Regulatory framework

[3] The Fund is a defined benefit fund - one which undertakes to provide its members with the benefits defined in its rules - as opposed to a defined

contribution fund.[1] In the present instance, as pointed out by the Registrar, the Fund displays characteristics of both types of funds.

[4] The Fund is a juristic person. Its management structure comprises local authority committees, sub-regional committees and regional committees and a board of trustees. The Fund is controlled by the board, which is composed of employee and employer representatives in equal proportions. Rule 2.1.3 vests the trustees with 'an absolute and uncontrolled discretion in the exercise of the authority vested in them by these Rules'. This authority includes the power, by resolution, to amend the rules, provided that no amendment to the rules of the Fund may be made unless the amendment has been approved by the Registrar.[2]

[5] The Fund is funded by member and employer contributions. The amount, if any, to be paid by the employer had to be determined by the Fund's trustees from time to time but it could not be less than an amount calculated by the Fund's actuary to be necessary to ensure the financial soundness of the Fund and to provide the benefits for which the Fund undertakes liability under the rules. In terms of rule 4.2.2.2, the rate of the employers' contribution is subject to review at each actuarial investigation - ordinarily every three years.

[6] However, rule 4.5 provides that if at any time the balances in the accounts of the Fund are in the opinion of the valuator insufficient to provide the benefits in terms of the rules, the valuator, in consultation with the trustees, must require one or more of the following measures to be

[1] *Tek Corporation Provident Fund and Others* v *Lourentz* 1999 (4) SA 884 (SC A) para 4; *Ekurhuleni Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 6.

[2] Section 12(1) and (4) of the Act, read with rule 2.3.1.

adopted: either an additional employer contribution at such times and in such amounts as the valuator and trustees decide; an increase in the future rate of employer and/or member contributions; or a reduction in future benefits; or any combination of these alternatives.

[7] Section 16 of the Act requires of the Fund to cause its financial condition to be investigated and reported on at least once every three years by its valuator, appointed in terms of s 9A(1) of the Act. If such a report indicates, in the opinion of the Registrar, that the Fund is not in a sound financial condition, the Registrar must, in terms of s 18 of the Act direct the Fund to submit to him a scheme setting out the arrangements which have been made or which are intended to be made so as to bring the Fund into a financially sound condition within a reasonable time. In the event that the Registrar approves this scheme in terms of s 18(2) then, in terms of s 18(4), the Fund is obliged to implement the scheme. However, the Registrar may withdraw his approval and require the Fund to submit a new scheme if any return deposited during the currency of the scheme indicates, in his opinion, that the scheme is unlikely to achieve its objective.

Factual background

[8] On 20 August 2003 the board passed a resolution with a view to making a number of alterations to the rules. The one that is in issue in these proceedings is an amendment to rule 4.2.2.1(B), which had the effect of increasing participating employers' contributions from 18.07% to 20.78% of salary. This resolution was duly transmitted to the Registrar. After various exchanges between the Fund and the Registrar, an amended version of the resolution was submitted in May 2006 and approved by the Registrar in terms of s 12(4) of

the Act on 5 July 2006, with effect from 1 July 2003.

[9] It appears from the evidence that in the years leading up to the resolution of August 2003, the Fund was consistently underfunded. In October 1999, the Fund's valuator determined that the Fund was not in a sound financial position, being only 81% funded, and he submitted a proposed scheme of arrangement to the Registrar in terms of s 18(1) of the Act. Part of the scheme was the submission of annual valuations to the Registrar until the Fund's position improved. However, the scheme did not make provision for an increase in employer contributions. Instead, it envisaged that the deficit would be amortised over, at most, a 10 year period, from 1 July 1998 to 1 July 2008. The scheme of arrangement was duly approved by the Registrar in terms of s 18(2) of the Act.

[10] By 2002, it became apparent that the measures aimed at eliminating the deficit were inadequate. On 19 October 2002, the Fund's valuator submitted a revised scheme of arrangement to the Registrar. The valuator recommended negotiation of an increase in the rate of employers' contributions, in the following terms: 'The trustees intend asking the employers to fund the deficit that has emerged.. ..

The intention would be for the employers to fund the deficit over the next few years. In terms of the current scheme of arrangement, the deficit would need to be funded over 7 years from the last valuation (the remaining period initially negotiated).

It is therefore requested that the employer be allowed to fund the deficit on the basis of the following formula:

> 2.5% of pensionable salary until the deficit has been funded subject to the minimum contribution required to ensure that the deficit is funded within 10 years.5

[11] The 10 year period refers to the original scheme, being the period from July 1998 to July 2008. It was specifically proposed that, once conceptual approval had been obtained from the Registrar, the Fund would 'engage with the employers in order to agree an increase in contributions with effect from 1 July 2003'.

[12] Pursuant to the valuator's recommendation, the approach to employers was made by way of the Fund's letter dated 9 April 2003, addressed to all municipal managers in the country, in which it was stated:

'Employers will need to contribute an additional percentage until the deficit that has emerged in the fund has been settled (this will be for the next 5 years').

In order to comply with the requirements of the Scheme of Arrangement, the employer will therefore need to contribute an additional 2.5% of members' pensionable salaries for 5 years or until the Fund reaches a nosition of financial soundness if this should happen sooner.

Could you please confirm receipt of this letter and that the required contribution change will be made with effect from 1 July 2003.'
[My emphasis]

[13] In a letter, dated 25 November 2004, the Fund reiterated that the proposed increase would only endure for a 5 year period:

'It is unfortunate that many employers have declined to accede to the request therein of an increase to their contributions payable to the Fund by 2.71 % of the members' pensionable salaries for the five years envisaged in the Scheme of Arrangement agreed to with the Financial Services Board.' [Emphasis added]

[14] Following further discussions, and on the basis of advice received the City took a decision, on 4 May 2005, to pay the increased contributions on the basis that they would apply 'for the next five years or earlier if the Fund

reaches a position of financial soundness before then'.

[15] Unbeknown to the City, however, the board of the Fund had in the meantime, on 20 August 2003, resolved to amend its rules to effect an increase - without any limitation as to the period for which the increase would endure.

[16] The City ceased paying the increased employer contributions with effect from July 2008, relying on its assertion that the increased employer contribution rate was only to be operative for a period of five years.

[17] On 4 May 2009, the Fund addressed a letter to the City demanding continued payment of contributions at the increased rate. According to the City, this was the first time that it became aware of the fact that the increased rate was not limited to a 5-year period, or any period at all, but was binding indefinitely by virtue of the amendment to rule 4.2.2.1(B).

[18] When the letter failed to have the desired effect, the Fund, on 2 July 2009, instituted action in this court against the City under Case No 13407/09, claiming (a) a declaratory order that the City is obliged to pay to the Fund contributions at the rate as amended in terms of rule 4.2.2.1(B); and (b) payment of arrear contributions amounting to some R7,65 million arising post-1 July 2008.

[19] In its plea, dated 10 September 2009, the City denied liability for the increased contributions claimed. In elaboration, the City pleaded, *inter alia*, that the board of the Fund owed a duty of good faith to contributing employers, including the City; that it was under a duty to comply with the rules of natural justice vis-a-vis contributing employers; and that it was under a duty not to breach the right of contributing employers to fair administrative

action. It also pleaded that where any proposed amendment to the Fund's rules directly affected the defendant's rights and interests, the Fund was required to consult with the City over the proposed amendment; and/or to obtain the City's consent thereto, prior to effecting the amendment. The City pleaded that the amendment to rule 4.2.2 was passed in breach of the board's duties to contributing employers, including the City, with the result that the resolution is accordingly 'unlawful and/or invalid' and liable to be set aside in terms of ss 6(2)(c) and/or 6(2)(e)(iii) of PAJA. In its plea, the City also assailed the validity of the Registrar's approval of the board's resolution.

[20] On 22 July 2010, and while the above-mentioned action was pending, the City lodged a complaint with the Fund in terms of s 30A(1) of the Act, based on the factual background summarised above. The gravamen of the complaint was to the effect that the conduct of the Fund as aforesaid amounts to maladministration and/or an improper exercise of its powers and that its adoption of the amended rules was in any event unreasonable and procedurally irregular and unfair.

[21] In its response to this complaint, the Fund raised a point *in limine*, alleging that the Adjudicator did not have jurisdiction to hear the complaint by virtue of the operation of s 30H(2) of the Act, which provides:

'The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.'

[22] The City was not satisfied with the Fund's response and, on 15 September

2010, it accordingly lodged a complaint with the Adjudicator in terms of s 30A(3) of the Act.

[23] The Adjudicator, in her determination in terms of s 30M of the Act, issued on 15 November 2011, upheld the Fund's point *in limine*, coming to the following conclusion:

'The issues raised in the complaint and the court proceedings are similar in that they primarily require the determination of the complainant's liability to the respondent for the outstanding increased contributions....

The proceedings in the High Court constitute the subject matter of the investigation this Tribunal is asked to undertake. The tribunal therefore has no jurisdiction to investigate and determine the complaint.'

Part A: Appeal in terms of s 30P of the Act

[24] On appeal to this court, it was submitted on behalf of the City that the overriding purpose of s 30H(2) is to avoid forum-shopping by complainants. *In casu,* the City did not *institute* proceedings in the High Court. It has simply raised a defence to the claim brought by the Fund. There is thus no question of forum-shopping or a multiplicity of actions brought by the City, so it was argued. This argument proceeds from the assumption that s 30H(2) does not apply in a situation such as the present, as the section merely 'prohibits a litigant from *instituting* the same proceedings in more than one forum'. I do not agree with this narrow interpretation of the section. The sub-section does not require that the proceedings should have been instituted *by the complainant*; merely that 'proceedings have been instituted', whether by or against the complainant. Thus the sub-section affords priority in relation to the investigation of a complaint to a court if a complaint is initiated in that court before it is brought within the purview of the Adjudicator.[3]

[3] *Roestorf v Johannesburg Municipal Pension Fund* [2012] ZASCA 24 para

[25] A further argument raised on behalf of the City was that s 30H(2) only applies where the subject matter of the High Court action is the *same* as the subject matter of the complaint proceedings. In support of this perceived requirement, counsel relied on *Meyer* v *Iscor Pension Fund (1),*[4] where the Adjudicator held that for s 30H(2) to apply, 'the matter in respect of which proceedings were instituted would have to constitute the same cause of action (the subject matter) between the same parties to the complaint (of the investigation)'. This is so, according to the Adjudicator, because s 30H(2) 'appears to introduce a variant of the common law doctrines of *res judicata* and issue estoppel'.[5]

[26] Again, this is an unduly restricted interpretation of the section. The wording of the section makes it clear, in my view, that its application should not be restricted to the same cause of action between the same parties: all that is required is that the civil proceedings should relate to a matter 'which would constitute the subject matter of the investigation [by the Adjudicator] '.

[27] In any event, I disagree with the approach of the Adjudicator that the section introduces a statutory variant of the *exceptio rei judicatae*, as there is no requirement that there should have been any prior judgment or decision by a civil court. Although there is probably a large overlap in the relevant principles, it would, in my view, be more correct to regard the provisions of s 30H(2) as introducing a statutory variant of the common law defence of *Us alibi pendens*.[6] This seems to have been recognised by the parties, as they have agreed that the action in this court be stayed 'pending the determination of the Adjudicator and any appeal or review proceedings'. The necessary implication

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30. *A*

[4] [2000] 5 BPLR 533 (PFA) at 539B-C.

[5] At 537A-B.

[6] See N Jeram 'The Pension Funds Adjudicator - A Jurisdictional Nightmare' (2005) 26 *ILJ* 1825 at p 1839.

is that the two matters are intimately interwoven.

[28] Applying these principles to the facts of the present appeal, the subject matter of the investigation that the Adjudicator was required to undertake related to the conduct of the Fund, as summarised above and which, according to the City, amounted to 'maladministration'. In the
High Court action, the Fund's cause of action is a claim for a declarator and for payment of arrear contributions, based squarely on the amended provisions of rule 4.2.2.1(B). By way of defence, the City assailed the validity of the amendment to the rule, claiming that -

'Insofar as, and to the extent that, the resolution [of the Fund's trustees embodying the increased employer contributions] purported to oblige contributing employers, including [the City], to make the increased contributions beyond 30 June 2008, it was unlawful and invalid.'

In other words, from the Fund's perspective the court will have to determine whether the board's resolution containing the increased contribution rate was lawful and valid.

[29] It is correct, as pointed out on behalf of the City, that in the High Court action there is no counter-claim or prayer for setting aside the resolution or the registration of the applicable rule amendment. The court is not asked to review and set aside the Fund's resolution or the rule amendment on grounds of maladministration, or any grounds at all. However, in my view this is not conclusive: what the City's plea amounts to is effectively a collateral challenge to the validity of the amendment to the rules of the Fund, relying on the same grounds as those raised in the complaint to the Adjudicator. Reading the complaint and the City's plea side by side, it is clear to me that there is a large degree of overlap between the two.

[30] In the circumstances, I cannot fault the Adjudicator's determination that she had no jurisdiction to determine the complaint as the proceedings instituted in this court relate to the subject matter of the complaint lodged with the Adjudicator. It follows that the appeal against the determination of the Adjudicator cannot succeed.

Part B - Review

[31] I accordingly turn to Part B of the relief claimed, being the City's application for review of the board's resolution to amend the rules and the registrar's approval of such amendment.

[32] In support of its application, the City raised a host of review grounds based on various provisions of s 6(2) of the Promotion of Administrative Justice Act, 3 of 2000 (TAJA"'). In essence, the City takes issue with the conduct of the Fund, *inter alia*, in breaching the scheme of arrangement by failing to reduce the employer contribution rate during or before July 2008; and in failing to give the City an opportunity to be heard before adopting the resolution in question.

[33] As for the Registrar, his decision was assailed on the grounds that the Fund had misrepresented to him (the Registrar) that the contributing employers had agreed to the increase in contribution rates. The Registrar's decision to approve the amendment on the terms proposed by the Fund was therefore 'based on a material misapprehension', with the result (so it was claimed) that he took irrelevant considerations into account and ignored relevant ones. In addition, it was claimed that the decision was 'procedurally unfair'.

[34] In answer, the Fund raised certain points *in limine*, of which only one

requires attention for purposes hereof, namely the City's delay in instituting the present review proceedings.

Delay

[35] In terms of s 7(1) of PAJA, an application for review has to be instituted not later than 180 days after the date - (a) on which any proceedings instituted in terms of internal remedies have been concluded; or

b) where no such remedies exist, on which the person concerned 'was informed of the administrative action, became aware of the action and the reasons for it or might reasonable have been expected to have become aware of the action and the reasons'.

[36] It is common cause that this requirement was not met in this instance. The present application for review was instituted on 21 December 2011, whereas the resolution of the board to approve the amendment sought to be impugned was taken more than eight years earlier, on 20 August 2003. The Registrar's approval of the amendment, in turn, was taken on 5 July 2006. The City claimed, however, that it only became aware of the administrative action in question upon receipt of the Fund's letter, dated 4 May 2009.[7] The Fund took issue with this assertion, stating that 'the City knew about the decision of the Trustees since 2003 . . ., and the rule amendment since 2006'. Be that as it may, I do not find it necessary to resolve this dispute of fact as the City, on its own version, has not made out a proper case for condonation.

[37] In terms of s 9(2) of PAJA, the court may on application extend the period of 180 days contemplated by s 7(1) 'where the interests of justice so require'. I understand this phrase to mean - as at common law - that a court has a broad

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[7] See para [17] above.

discretion to be exercised in the light of all relevant facts.[8] In exercising this discretion, the court must bear in mind the rationale for the rule relating to unreasonable delay in applications for judicial review. In *Gqwetha* v *Transkei Development Corporation*,[9] Nugent JA summarised the position as follows:

'It is important for the efficient functioning of public bodies .. . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk* v *Munisipaliteit van Kaapstad* 1978(1)SA13 (A) at 41E-F (my translation):

> "It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium.* . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule".'

[38] In *Van Wyk v Unitas Hospital*,[10] the Constitutional Court held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice

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[8] *Oudekraal Estates v City of Cape Town* 2004 (6) 222 (SCA) para 57.

[9] 2006 (2) SA 603 (SCA) para 22.

[10] 2008 (2) SA 472 (CC).

and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.[11] With regard to the explanation for the delay, the court further held:

'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'[12]

[39] As in *Van Wyk's* case, the explanation given by the City in this case falls short of these requirements. In its founding affidavit, the City explained that it 'has at all material times been intent on challenging the decisions under review'. The primary reason for the delay in instituting review application, so it was explained, was that the City considered 'that the proper course was to approach the Adjudicator for relief against the decisions of the board of trustees and the Registrar', before approaching this court on review.

[40] This explanation does not withstand careful scrutiny. First, this reason does not explain why it took a further 14 months - from May 2009, when the City allegedly became aware of the administrative action in question - until July 2010, when a complaint in terms of s 30A(1) was submitted to the Fund. (As mentioned earlier, the complaint was subsequently lodged with the Adjudicator during September 2010 in terms of s 30A(3).) Thus, the City has failed to give a full explanation for the delay and the explanation also fails to cover the entire period of delay, as required. (This assumes, of course, that a complaint to the Adjudicator was in fact an internal remedy, which the City was obliged to exhaust - an aspect that I do not have to decide for purposes hereof.)

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[11] Para 20 (footnotes omitted).

[12] Para 22

[41] Secondly, the complaint submitted to the Adjudicator was not directed against the Registrar or his decision. The Adjudicator was in any event not the appropriate functionary to consider a complaint against the Registrar, nor did she have jurisdiction to set aside any rule approved by the Registrar. The reason advanced by the City for the delay thus does not explain or excuse the delay insofar as it relates to the review of the administrative action taken by the Registrar.

[42] Besides the failure of the City to give a full explanation for the entire period of the delay, there are further factors which I regard as relevant in the exercise of the court's discretion whether or not to condone the delay or to extend the statutory period of 180 days:

• The length of the period since the administrative action was taken, although not necessarily decisive, is a strong consideration against an applicant for review.[13] On the facts of this case, I am of the view that the overall period of the delay has been inordinately long.

• The extent to which the Fund and third parties have acted in reliance on the decisions sought to be impugned is 'an important - perhaps even decisive - consideration'.[14] In this instance, the Fund has many members across the country, being the employees of more than 140 local authorities. The vast majority of those local authorities have not assailed the decisions of the Fund and the Registrar. Pursuant to those decisions, the Fund has been levying the increased contributions from employers since 2003. As pointed out by the Registrar in his affidavit in response to the present application, granting the relief claimed by the City would *inter alia* render the Fund liable to repay all employers countrywide, with retrospective effect to 1 July 2008, the

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13 *Ondekraal,* n 8 above, para 46.

14 *Ibid.*

difference between the increased rate of 20,78% and the old rate of 18,07%, amounting to many millions of Rands. This would render the Fund 'unable to fully fund for its future service liabilities' and will 'immediately place the Fund in a financially unsound condition', according to the Registrar.[15] The public interest of finality accordingly weighs heavily in favour of the Fund in a case such as the present.

• When weighing up the potential prejudice to the Fund if the present application were to succeed, compared with the prejudice to City if it were to fail, I am of the view that the balance of hardship clearly favours the Fund and its members. In this regard, it should be borne in mind that in terms of the rules of the Fund the rate at which employers are to contribute is not cast in concrete, but is subject to constant revision. This is one of the essential characteristics of a defined benefit fund, where employers are required to fund the balance of the costs to provide for the defined benefit promised to the members. Thus, as noted earlier, rule *4.22.2* pertinently provides that 'the rate of contributions by employers shall be subject to review at each actuarial investigation', i.e. ordinarily, every three years. Seen from the Fund's perspective, had the present application for review been brought at an earlier stage, employers' contributions could have been reviewed at any of the interim valuations or the Fund's valuator could have called for increased contributions in terms of rule 4.5. Consent of the employers would not have been required for either of these processes.

[43] For these reasons, I am of the view that the delay of the City to institute review proceedings within the prescribed period should not be condoned. In view of this conclusion, it is not necessary to consider the *minutiae* of the various grounds of review raised on behalf of the City. Suffice it to state that,

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[15] Record p 725.

having heard full and well-presented arguments by Senior Counsel on both sides on these issues and having perused the very voluminous record on review, I am by no means satisfied that the administrative action is assailable on any of the grounds advanced by the City herein. This should be contrasted with the position in *Wolgroeiers, supra*, where the majority of the court declined to condone the delay, even though the prospects of success on the merits were strong. *A fortiori*, the City finds itself in a much worse position here, where the prospects of success on the merits are weak.

[44] By way of example, as far as the complaint against procedural unfairness is concerned, the City cannot be heard to complain. In *Nelson Mandela Bay Metropolitan Municipality* & *another v Registrar of Pension Funds & another*,[16] the FSB Appeal Board (chaired by former SCA President, Justice C T Howie) recently considered an appeal by two municipalities against the approval by the Registrar of the very same amendment to the rules of the Fund that is in issue in the present application. In its decision, handed down on 12 November 2012, the Appeal Board rejected a similar complaint of procedural unfairness for the following reasons, with which I respectfully agree:

> 'Accepting that the Registrar's function in question does constitute administrative action, the appellants' argument loses sight, in our view, of the context in which that function is performed and in particular who the parties involved in such action are. Essentially, the duty of a public functionary to act administratively fairly is owed to the person who requests the functionary to act - to issue a licence or permit, or to signify permission or approval as the case may be. And it is also owed to those on whose behalf that person acts. Here, however, that person was the Fund, a juristic person separate

[16] Decided on 12 November 2012. See http://www.fsb.co.za/ (accessed on 3 December 2012).

from its members and quite distinct from the participating employers. On its behalf and in its own interests (albeit that it exists for the benefits of its members) it sought the necessary approval. If the duty of fair administrative action was owed to anyone it was owed to the Fund - if, for example, the Registrar had been disposed to refuse approval.

There is the further consideration that the appellants, apart from their not having been the applicants for approval, had, with other employers, the opportunity afforded by the Funds' management structures to convey their point of view. The Act recognises the role and significance of a fund's rules in this respect. It cannot have been the intention of the legislature that a Registrar, in a s 12(4) situation, would be required to receive representations by or on behalf of every member (in the event of a benefit reduction) or every member and employer (in the event of contribution increases). The rules are there to channel such representations.'[17]

The Appeal Board accordingly concluded 'that the Registrar did not fail to afford due administrative fairness in the respect contended for'[18] In my view, a similar conclusion should follow in this case.

[45] Having said that, one feels a degree of sympathy for the City's position, as they have undoubtedly been misled by the clear and unambiguous statements emanating from the Fund,[19] to the effect that the scheme, including the increased contributions, would endure for a maximum period of five years. However, for the reasons set out above, this does not entitle them to the relief claimed herein.

Order

[46] It follows, therefore, that the appeal against the determination of the Adjudicator as well as the application for review falls to be dismissed with costs and it is ORDERED accordingly.

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[17] Paras 17 and 18.
[18] Para 21
[19] Paras 12 & 13 above.

B M GRIESEL

Judge of the High Court