

Which fund decisions (if any) are 'administrative action? And why is it important to know?

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A couple of statistics to set the scene

- Social grants were paid to approx **17,6 m people** each month in 2017, at a cost to the fiscus of approx **R170 billion** or **approx R9500.00 per person per year**
- Tax deductions on contributions to retirement funds were enjoyed by approx **3,17 million taxpayers** in 2017, at a cost to the fiscus of **approx R73 billion** or **approx R21 500 per person per year**

Section 33 of the Constitution

‘Just administrative action

- (1) **Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.**
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.’

Promotion of Administrative Justice Act, 2002 (PAJA)

“administrative action” means any **decision taken, or any failure to take a decision, by –**

- (a) **an organ of state**, when –
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) **a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,**

which **adversely affects the rights of any person and which has a direct, external legal effect**, but does not include

“Organ of state” as defined in the Constitution and PAJA

“organ of state” means

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) **any other functionary or institution** -
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) **exercising a public power or performing a public function in terms of any legislation**, but does not include a court or a judicial officer.’

[Emphases added]

“Organ of state” as defined in the Constitution and PAJA

- ‘If [an entity] performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle ... In our constitutional structure, **[the entity] does not have to be part of government or the government itself to be bound by the Constitution as a whole.**’

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another [2006] ZACC 9 at paras 40 and 41

See also AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others (No 2) [2014] ZACC 12 at para 52.

- What matters is the function, not the functionary

“Decision” as defined in PAJA

‘any **decision of an administrative nature made**, proposed to be made, or required to be made, as the case may be **under an empowering provision**, including a decision relating to–

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c);
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) **doing or refusing to do any other act or thing of an administrative nature ...’**

What have the courts said about fund decisions?

- **Decisions to amend rules**

- Not administrative action, so no duty to give members hearing first
- If decision had been made in exercise of disciplinary powers, answer might have been different

South African Association of Retired Persons & others v Transnet Ltd & others [1999] 4 All SA 25 (W) at 53

- **Decisions re benefit claims**

- Is administrative action because deceased was employed by public entity and required by his employment contract to belong to the fund

Khalimashe v Eskom Pension and Provident Fund [2011] JOL 26889 (ECM)

What have the courts said?

- **Decisions re benefit claims**

- While a distributive decision would be ‘administrative action’, a decision to reject a benefit in terms of the rules is not.

Gerson v Mondi Pension Fund & others 2013 (6) SA 162 (GSJ) at paras 46 and 47

- Fund’s failure to correct errors in its records when brought to its attention when claim made is administrative action – but finding not explained.

Hangana v Government Employees Pension Fund [2018] ZAECPEHC 78 at para 14.

What have the courts said?

- **Decisions re benefit claims**

- Rules are ‘contractual’ in nature and so cannot be enforced in terms of PAJA – but finding not explained.

Mmileng v Government Employees Pension Fund & others
[2016] ZAGPPHC 1067 at para 17

- **Decisions re conduct of medical scheme AGM**

- Not admin action because rules are contractual

Pennington v Friedgood 2002 (1) SA 251 (C)

(Decision criticised by Driver & Plasket on basis that regulation in terms of MSA suggests that medical scheme is an instrument for delivery of right of access to healthcare)

About the 'contract' nature of rules

...

- Many *obiter* judgments supporting this view

Nimed Medical Aid Society v Seipp & others NNO [1989] 2 All SA 119 (D) at 123, *Simpson v Selfmed Medical Scheme & another* 1992 (1) SA 855 (C) at 862 and 1993 (1) SA 860 (C) at 864, *City of Johannesburg v South African Local Authorities Pension Fund* [2015] ZASCA 4 at para 4 , *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) at para 38 *Mmileng v Government Employees Pension Fund & others* [2016] ZAGPPHC 1067 at para 17.

- But, with respect, they are not well-reasoned and are probably wrong.

About the 'contract' nature of rules ...

- Rules can be changed without consent
- Rules are a fund's constitution, given statutory force in terms of s 13 of the PFA and enforceable against even non-members

ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund (under curatorship) & others 2012 (3) SA 585 (SCA) at paras 26, 27 and 31

- They are thus 'coercive' in effect; and
- They relate to a legislative framework and purpose
- So the exercise of power in terms of those rules may still be 'administrative action'

AAA Investments v Micro Finance Regulatory Council & another at para 119

What have the courts said?

- **Decisions re surplus distribution**

- On the basis of *Gerson*, decision to distribute surplus is not ‘administrative action’

Rossing Uranium & another v Former Members of the Rossing Pension Fund [2017] NASC 23 (‘*Rossing Uranium*’) at paras 60 to 66 (obiter)

- s15C surplus distribution decision not ‘administrative action’ because it emanates from private, contractual relationships with no public interest implications.

Moor & another v Tongaat-Hulett Pension Fund [2018] ZASCA 83 at para 39 (obiter)

What have the courts said?

- **Distributive decisions – death benefits**
 - Is administrative action, affects ‘members of the public’
 - GEPF & another v Buitendag* 2007 (4) SA 2 (SCA) at para 9
 - Titi v Funds At Work Umbrella Provident Fund* [2011] JOL 28125 (ECM) at paras 14 and 41
 - Guarnier & others v FundsAtWork Umbrella Pension Fund & others* [2018] ZAGPPHC 579 at para 42

What is missing from these judgments?

... It is detailed reasoning in regard to the questions:

- which powers and functions of a pension fund, if any, may be properly described as ‘public powers’ or ‘public functions’;
- which decisions made by or on behalf of a fund in the exercise of a public power or the performance of a public function are decisions
 - of ‘an administrative nature’ such that they may be susceptible to review in terms of PAJA; or
 - not of an ‘administrative nature, such that they may only be susceptible to common law or ‘legality’ review.

Which pension fund powers and functions are 'public' powers and functions?

- Public interest in proper conduct of fund business is not decisive
- What is decisive is whether power or function-
 - exercised or performed on behalf of community as a whole or specific class of the public as a whole;
 - entails an element of public accountability e.g linked to functions and powers of government and/or woven into system of government control and/or entails privatisation of a part of the business of government and/or involves public money

Calibre Clinical Consultants (Pty) Ltd & another v NBC for the Road Freight Industry & another 2010 (5) SA 457 (SCA) at paras 36 and 39

The nature and purpose of a pension fund

- Special purpose, **not-for-profit** legal entities through which members make provision for retirement and risk benefits
- **Fund has its own interests** – the delivery and payment of ‘fit for purpose’, ‘value for money’ benefits to members and beneficiaries as a whole, including future members and beneficiaries, in an effective and cost-efficient manner and over the long term.
- Subject to **regulation and supervision in terms of the PFA** which imposes statutory duties on fund officers and office-bearers and gives the rules statutory force.
- If it falls within the scope of ‘pension fund’ as defined in the Income Tax Act, fund becomes a **vehicle for the delivery of social security benefits subsidised by the state** in the form of tax deductions
- It is not a ‘private, contractual arrangement’

State has a real interest in the manner in which a fund fulfils its objects

“This paper proposes the introduction of an approved funds framework that will determine which funds are eligible for tax-incentivised supplementary savings. This framework will establish standards relating to disclosure, investment strategy, risk management, administration and governance ... [to] minimise potential conflicts of interest. ... One of the proposed qualifying criteria for approved funds is that they meet certain cost-efficiency standards.”

**Inter-Ministerial Task Team discussion paper
Comprehensive Social Security in South Africa, 2012 at
p28.**

Powers and functions in terms of legislation are public powers and functions

- This 'legislation' may include the rules.
- Even if it doesn't, almost all substantive decisions by the board of a fund including those relating to-
 - the governance of the fund
 - the design of benefit offerings (must be consistent with legislative purpose i.e. be 'fit for purpose')
 - the appointment of providers of products and services
 - the management of its risks
 - the control of its costs (fund assets must be used to provide 'value for money')
 - the investment of its assets (to ensure ability to fulfil legislative purpose over the very long term)

are taken in terms of its duty in terms of section 7C(1) to 'direct, control and oversee the operations of the fund'.

Implications of this for purposes for which fund decisions must be taken

Fund decisions must be taken-

- principally in the **best interests of the fund, which includes the interests of the state and the public at large** in the partial fulfilment of social security rights for members and beneficiaries over the long term; and
- secondarily in the best interests of the fund's members and beneficiaries, including future members and beneficiaries – but only if and to the extent that those interests are not inconsistent with the interests of the fund.

City of Johannesburg v South African Local Authorities Pension Fund & others [2015] ZASCA 4 at para 13

Decision-maker as organ of state?

- In the exercise of these public powers and performance of these public functions, the fund, and those persons acting as its 'directing mind and will' are 'organs of state' – even if unlawfully appointed

AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others (No 2) [2014] ZACC 12 at para 52
- This means-
 - they are bound to protect and promote the rights in the Bill of Rights, including the right to social security
 - they must comply with section 195 by acting in a manner that is transparent, accountable, efficient and cost-effective and consistent with a high standard of professional ethics

Public powers and functions are susceptible to PAJA or common law review

- So these decisions entail the exercises of public powers or the performance of public functions and thus 'administrative action susceptible to review in terms of PAJA, the common law - or either
Pretorius & another v Transport Pension Fund & others 2018 ZACC 10 at para 39
- Whether obliged to apply in terms of PAJA will depend on whether
 - decision is of an 'administrative nature', has capacity to affect people's rights and is of final effect; and
 - prejudice to other party if PAJA is not the mechanism used

A PAJA 'decision' may be reviewed and set aside in terms of PAJA if ...

- The person who took it was **not authorized** to do so or was **biased**;
- A mandatory procedure or condition was not complied with or met;
- The decision was **procedurally unfair**, materially influenced by an **error of law or irrelevant considerations**, taken for an **improper purpose** or as a result of **undue influence**, in **bad faith or capriciously**;
- The decision was unlawful or unauthorised and/or was **not rationally connected the purpose of the empowering provision or the reasons given for the decision**, was so **unreasonable** that no reasonable person could have taken it or was otherwise **unconstitutional or unlawful**

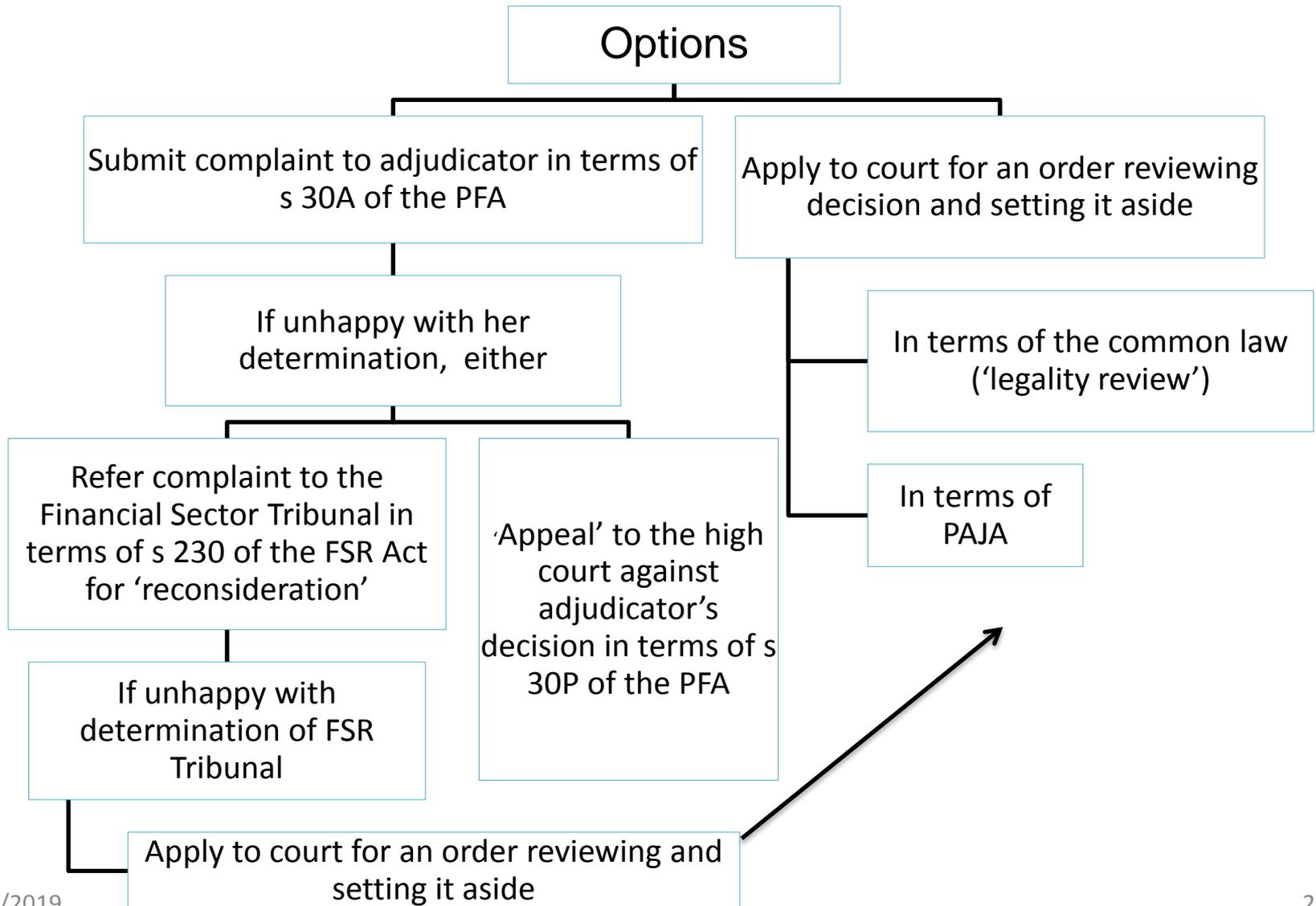
A non-PAJA 'decision' may be reviewed and set aside in terms of the common law if ...

- the **decision-maker did not have the power to make the decision** or a discretion was not in fact exercised; or
- in the exercise of the discretion, the **decision-maker has failed to act lawfully or its conduct was not rationally related to the purpose for which the powers to which they relate were given in statute or other empowering provisions**

Sentinel Retirement Fund v Bold & another [2017] ZAGPPC 83
at paras 29 to 33

*Association of Mineworkers and Construction Union & another
v Chamber of Mines of South Africa & others* [2017] ZACC 3at
paras 84 and 86

If aggrieved by fund decision ...



Conduct which could be made subject to review

- Decision by board of 'commercial' fund to always prefer sponsor-related providers of products and services over others, even if others could provide better 'value for money'
- Decision by sponsor to refuse to approve rule amendment allowing board to select providers on an 'arm's length' basis
- Decision by the board of a fund to amend the fund's rules to abdicate responsibility for the tracing and payment of people entitled to unpaid benefits and to transfer accrued unpaid benefits which can't be reduced by the deduction of expenses to an unclaimed benefit fund the rules of which allow such deductions, when the first fund could deal with the unpaid benefits itself
- Decision by board to debit monthly admin fees from individual 'fund credits' of members to whom accrued but unpaid benefits are payable rather than from fund expense account

Conduct which could be made subject to review

- Decision by board not to trace those to whom unpaid benefits in amounts less than R2000 are payable
- Decision by board to procure fund investments in assets which may be very lucrative in the short term but which-
 - will not make a meaningful contribution to financial, social and economic stability – and thus the long-term resilience of the fund - by promoting employment and economic growth in South Africa and the SADC region
 - on the contrary, may expose the fund and the country as a whole, to environmental, social and governance risks over the long term

Conclusion

- For those who have-
 - appreciated the importance of the roles that they play in the provision of social security,
 - exercised their funds' public powers and performed their funds' public functions properly and for the right reasons-
No worries!
- For the others, time to fix their errors and remedy all prejudice