THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 222/2015

In the matter between:

REGISTRAR OF PENSION FUNDS	**Appellant**
and	
C T HOWIE NO	**First Respondent**
D L BROOKING NO	**Second Respondent**
G O MADLANGA NO	**Third Respondent**
ROY ALAN HUNTER	**Fourth Respondent**
TELLUMAT PENSION FUND	**Fifth Respondent**

Neutral citation: *Registrar of Pension Funds v Financial Services Appeal Board* (222/2015) [2015] ZASCA 203 (2 December 2015)

Coram: MPATI P, LEACH, WALLIS and MATHOPO JJA and BAARTMAN AJA

Heard: 24 November 2015

Delivered: 2 December 2015

Summary: *Locus standi* – Board of Appeal established by section 26A of the Financial Services Board Act 97 of 1990 overturning decision by the

Registrar of Pension Funds — Registrar does not have *locus standi* to review the decision of the Appeal Board.

ORDER

On appeal from: Gauteng Division, Pretoria (Mavundla J, sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Wallis JA (Mpati P, Leach and Mathopo JJA and Baartman AJA concurring)

[1] This appeal is joined with that in *Tellumat*,[1] judgment in which is to be handed down simultaneously with this judgment. The two appeals arise out of the same decision by the Board of Appeal (the Appeal Board) established in terms of s 26A of the Financial Services Board Act (the FSB Act).[2] The Appeal Board overturned a decision made under s 14 of the Pension Fund Act (the Act) [3] by the appellant, the Registrar of Pension Funds (the Registrar), to permit a transfer of business by the Tellumat Pension Fund (the Fund). Both the Registrar and Tellumat (Pty)

[1] *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and Others* [2015] ZASCA 202.
[2] Financial Services Board Act 97 of 1990.
[3] Pension Funds Act 24 of 1956.

Ltd (Tellumat), the employer in relation to the Fund, challenged the decision of the Appeal Board by way of review in the high court. Those challenges were dismissed by the high court but it gave leave in both cases to appeal to this court.

[2] Ordinarily it would not be necessary to write separate judgments in these two cases as they raise the same issues on the merits of the review. But there is a separate issue, arising in this case and not common to *Tellumat*, that necessitates a separate judgment. The issue is whether the Registrar has the necessary *locus standi* to challenge on review a decision of the Appeal Board with which the Registrar does not agree. That issue warrants a separate judgment, which will be confined to that question alone. As regards the basis for and merits of the review they are dealt with in the judgment in *Tellumat.*

[3] This court raised the question of the Registrar's *locus standi* prior to the appeal and we have received full argument from counsel on the point. Before considering that argument it is helpful to set out the statutory background against which the question must be decided.

[4] The Registrar's functions are set out in the Act. The function with which we are concerned is that of approving amalgamations of pension

funds and the transfer of any business from a pension fund to any other person in terms of s 14 of the Act. In this case the Registrar approved a transfer of part of the business of the Fund. The transfer involved the cession to pensioners of annuities taken out at their election with an insurer in order to provide them with the benefits that they would otherwise have had to look to the Fund to provide. The mechanism by which this was done is described in the *Tellumat* judgment.

[5] If anyone is aggrieved by any decision by the Registrar, including any decision pursuant to s 14 of the Act, they are entitled to lodge an appeal against that decision with the Appeal Board in terms of s 26(1) of the FSB Act. The composition of the Appeal Board is set out in s 26A of the FSB Act. It must be chaired by a retired judge or an advocate or attorney with a minimum of ten years experience. Its proceedings must be heard in public (s 26B(9)) and parties are entitled to representation by a legal representative (s 26B(8)). An appeal is decided on the written evidence, factual information and documentation submitted to the Registrar before the decision that is the subject of the appeal was taken (s 26B(10)).

[6] The powers of the Appeal Board are set out in s 26B(15) of the Act. These read as follows:

'The appeal board may—

(*a*) confirm, set aside or vary the decision under appeal, and order that any such decision of the appeal board be given effect to; or

(*b*) remit the matter for reconsideration by the decision-maker concerned in accordance with such directions, if any, as the appeal board may determine.'

The appeal is accordingly of the second type referred to in *Tikly*.[4] The Appeal Board decides whether the Registrar's decision was right or wrong. Its decision either affirms or replaces that of the Registrar.

[7] If the Appeal Board did not exist the only way to challenge a decision by the Registrar would be by way of judicial review. In such a review the Registrar would be cited and would be able to enter the lists to defend the challenged decision.[5] Where the Appeal Board endorses the decision by the Registrar and an aggrieved party wishes to challenge it, they may do so by way of judicial review in terms of PAJA[6] for the reasons explained in *Tellumat*. In such a case, as the decision under challenge is effectively that of the Registrar, endorsed by the Appeal Board, both the Registrar and the Appeal Board are cited as parties to the review and it is customary for the Registrar to appear and defend the

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[4] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-H.
[5] *S A Medical & Dental Council v McLoughlin* 1948 (2) SA 355 (A) (*McLoughlin*) at 370-1.
[6] The Promotion of Administrative Justice Act 3 of 2000.

decision.[7] That is not a problem. Where the decision by a functionary or body is challenged by judicial review, and that functionary or body is cited in the review proceedings, it is clearly open to them to participate in the review and defend the challenged decision. There are many cases that illustrate this principle.

[8] But the present case is different. Here the Registrar is adopting an adversarial position towards the Appeal Board. The dispute is not between the Registrar and an outside party aggrieved by the decisions. It is an internal quarrel between the Registrar and the Appeal Board over the correctness of the Registrar's decision. It is immaterial to this review whether other interested parties also wish to challenge the decision of the Board. The Registrar is challenging it in her own right.[8] In the submissions on her behalf it was contended that in an appeal the Registrar is a party to the proceedings and as such enjoys the same right as any other party to challenge the outcome by way of judicial review. The issue dealt with in this judgment is whether that proposition is correct.

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[7] *Edcon Pension Fund v Financial Services Board of Appeal and Another* [2008] ZASCA 65; 2008 (5) SA 511 (SCA); *National Tertiary Retirement Fund v Registrar of Pension Funds* [2009] ZASCA 41; 2009 (5) SA 366 (SCA); *Registrar of Pension Funds v ICS Pension Fund* [2010] ZASCA 63; 2010 (4) SA 488 (SCA) are all cases of this type,

[8] The decision in question was taken by the previous registrar, Mr Jurgen Boyd, but the current registrar, Ms Rosemary Hunter, is pursuing the review.

[9] The point made in the previous paragraph, that the Registrar's challenge is independent of the attitude of other interested parties, is indicative of the problem that lies in accepting that the Registrar has l *locus standi* to challenge the decision of the Appeal Board on appeal from one of her decisions. The problem does not arise in this case because Tellumat brought review proceedings in its own right. But, had it not done so, the position would have been that all the parties concerned in practical terms with the Appeal Board's decision would have accepted it, but it would be susceptible to being overturned at the instance of the Registrar. That would be a most unusual situation. There are any number of reasons why parties will be prepared to accept the decision of the Board of Appeal after it is made. Indeed they might have had an agreement prior to the appeal hearing that they would do so. Why should their acceptance be subject to the Registrar wishing to establish that the original decision was correct and that the Appeal Board has erred?

[10] It was submitted that the Registrar was a party to the proceedings before the Board of Appeal, using 'party' in its litigious sense of one of the adversaries in a dispute. Our attention was drawn in this regard to the provisions of s 26B(12) of the FSB Act. Under s 26B(11) the Appeal Board is confined to the material that was before the Registrar in

considering the appeal. But s 26B(12) authorises a departure from this principle. It reads:

(*a*) Despite the provisions of subsection (11) the chairperson of a panel designated to hear an appeal may on application by—

(i) the appellant concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation not made available to the decision-maker prior to the making of the decision against which the appeal is lodged; or

(ii) the decision-maker concerned, and on good cause shown, allow further oral and written evidence or factual information and documentation to be submitted and introduced into the record on appeal.

(*b*) If further oral and written evidence or factual information and documentation is allowed into the record on appeal under paragraph (*a*) (i), the matter must revert to the decision-maker concerned for reconsideration, and the appeal is deferred pending the final decision of the decision-maker.

(*c*) If, after the decision-maker concerned has made a final decision as contemplated in paragraph (*b*), the appellant continues with the appeal by giving written notice to the secretary, the record on appeal must include the further oral evidence, properly transcribed, written evidence or factual information and documentation allowed, and further reasons or documentation submitted by the decision-maker concerned.'

[11] I do not think that this section bears the construction suggested by the Registrar. The reference to an application is merely a convenient way of describing the mechanism whereby the appellant or the Registrar may

escape the constraints of s 26B(11). It does not necessarily bear any connotation of a form of legal procedure. It means nothing more than that the appellant may ask the Appeal Board for permission to submit additional material that was not before the Registrar when the decision was made. If there is a good reason for permitting it to do so the Appeal Board may permit it to be admitted, but must then remit the matter to the Registrar for a reconsideration of the original decision. In the same way the Registrar may ask to submit additional material, either on the basis that it is necessary to elucidate an issue that the Appeal Board must consider, or because it is relevant and has only recently become available.[9] The Board of Appeal has a discretion to permit the introduction of additional material taking into account its relevance and questions of prejudice that may be caused by permitting it to be introduced.

[12] In my view none of that means that the Registrar becomes a party to the appeal proceedings in the sense that would permit it now to adopt an adversarial position vis-à-vis the Appeal Board. Such a status would be inconsistent with the role of the Registrar as an impartial regulator acting in the interests of the industry generally and, when dealing with an

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[9] This is not intended to be an exhaustive statement of the circumstances in which additional material may be introduced.

application such as this, acting as a neutral decision maker, bearing in mind the interests of all parties to the fund in question. That the Registrar is obliged to adopt an impartial stance when considering an application under s 14 of the Act goes without saying. Indeed if the Registrar did not do so that would be a ground of review under s 6(2)(*a*)(iii) of PAJA.[10] As that is undoubtedly the case, I find it difficult to see on what basis the Registrar can become a party to the merits of the decision in an adversarial sense when that decision is taken on appeal. The position is wholly different from that which pertains in a review, where the lawfulness of the procedure adopted by the Registrar would be attacked. Recognising that a decision maker has *locus standi* to defend the lawfulness of their conduct is different from recognising them as having *locus standi* to defend the correctness of their decision. But in an appeal to the Board of Appeal the latter is the issue.

[13] There is a further problem that arises if the Registrar has *locus standi* to challenge the decision of the Appeal Board on review. It is well illustrated by this case. In the Registrar's founding affidavit she charged the Appeal Board with misdirections of fact and law; of taking into account irrelevant considerations and ignoring relevant considerations;

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[10] The Promotion of Administrative Justice Act 3 of 2000.

and finally of taking a decision that was so unreasonable that no reasonable person could have so exercised their powers. These allegations were addressed to an Appeal Board chaired by a former President of this court. While that does not render the Appeal Board immune from criticism, if the Registrar is free to challenge in the courts the decisions of the Appeal Board established by Parliament to hear appeals against her decisions, that will serve to undermine public confidence in the Appeal Board. After all, if the Registrar regards the decisions of the Appeal Board as grossly unreasonable, why should the public have any faith in them?

[14] But the Registrar's claim lies under PAJA and the question of *locus standi i*s therefore to be answered in terms of s 38 of the Constitution.[11] Two possible grounds for *locus standi* arise there. The first would be that the Registrar is acting in her own interest.[12] In *Giant Concerts*[13] the Constitutional Court held that whilst this might not require the same sufficient, personal and direct interest as the common law, it still required that the litigant must show that the contested legal decision directly affects their rights or interests, or potential rights or interests. But the

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[11] See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) paras 41 and 43; *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* [2013] ZACC 19; 2013 (10) BCLR 1180 (CC) para 31.
[12] Section 38(*a*) of the Constitution.
[13] Para 41.

Registrar's rights and interests, actual or potential, are not affected by the Appeal Board's decision. She has no interest in the Fund other than as regulator and this case raises no regulatory concerns. The parties interested in the decision are the Fund, the pensioners and Tellumat, as the employer.

[15] It was suggested that the Registrar would be bound by any underlying principle articulated by the Appeal Board in its decision. But the principle of *stare decisis* is not applicable in relation to the decisions of the Appeal Board.

[16] The other possibility recognised in the Constitution is that the Registrar is acting in the public interest.[14] Counsel urged upon us that the Registrar performs important functions and has an interest, shared by the public, in the correctness of her decisions. My difficulty with this is that the existence of the Appeal Board presupposes that the legislature was of the view that some of the decisions by the Registrar might be incorrect, and that there needed to be a mechanism to challenge and correct those decisions. The view of the legislature was that when an appeal against a decision of the Registrar succeeds, the Registrar is wrong and the Appeal

[14] Section 38(*d*) of the Constitution.

Board right, or expressed more charitably, as between the Appeal Board and the Registrar the Appeal Board's decision is to be taken as correct.[15]

[17] Counsel referred us to a number of cases dealing with *locus standi* while accepting that none of them were on all fours with this case. He cited *McLoughlin*,[16] but the question in issue there was whether a statutory council that had conducted disciplinary proceedings against a medical practitioner and imposed sanctions, could appeal to the then Appellate Division against a judgment setting aside its decisions on review. Not surprisingly the court held that, as a party to the review proceedings it had a right to do so.

[18] Of rather more relevance to the situation in the present case is the earlier decision in *Minister of Labour*.[17] The Industrial Registrar, under the old Industrial Conciliation Act,[18] refused to register certain amendments to a trade union's constitution. An appeal to the Minister of Labour was dismissed and the union pursued a statutory appeal to the Supreme Court. Under the terms of the statute the decision of the court was deemed to be that of the Minister, and the decision of the Minister

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[15] This is reminiscent of Justice Jackson's aphorism about the United States Supreme Court that 'We are not final because we are infallible, but we are infallible only because we are final'. *Brown v Allen* 344 US 443 at 540.
[16] At 370-1. See also *Maske v The Aberdeen Licencing Court* 1930 AD 30.
[17] *The Minister of Labour v Building Workers' Industrial Union* 1939 AD 328.
[18] Industrial Conciliation Act 36 of 1937.

was deemed to be the decision of the Registrar. This court held that this necessarily excluded a further appeal by the Minister. The parallel with this case lies in the fact that under s 26B(15) the decision of the Appeal Board either confirms or replaces the decision of the Registrar. Although there is no equivalent deeming provision, permitting the Registrar to challenge that decision in effect means that the Registrar is challenging her own decision.

[19] The other case on which counsel placed considerable reliance was *Brits Town Council v Pienaar NO.*[19] He particularly stressed a sentence in the judgment of Roper J,[20] where the judge said that a town council, as the body having jurisdiction over the issue of trading licences, had an interest in the grant or refusal of a certificate by the Administrator of the province compelling it to issue such a licence. But the context was different and did not involve an appeal against the council's refusal of a licence. Three times the council refused an application for the issue of a motor garage and general dealer's licence. Under the Ordinance the Administrator could issue a certificate compelling the council to issue a licence if its grounds for refusal had been that there were sufficient such licences in the municipality. Purporting to act in terms of this provision,

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[19] *Brits Town Council v Pienaar NO and Another* 1949 (1) SA 1004 (T).
[20] At 1024-5.

but without asking the council why it had refused the licences, the Administrator issued a certificate. The council challenged that decision as unlawful and beyond the powers of the Administrator. It was in that context and in relation to a challenge to the council's *locus standi* that Roper J said that it had an interest in the grant or refusal of a certificate because it was the authority responsible for licencing in the town. The case is entirely distinguishable.

[20] There is a brief statement in *Rajah & Rajah*,[21] that indicates that a local authority with a licencing function may have *locus standi* to review and set aside the grant of a licence on the basis that it is in the public interest for it to oversee the issue of such licences. But the context is again different and the case was decided on the basis that the council had suffered no prejudice as a result of the issue of the licence. As it was not prejudiced, and on the face of it could not be prejudiced, by the issue of the licence it is not clear why its licencing function should have given it *locus standi* to bring review proceedings.

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[21] *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407E.

[21] Lastly, it is necessary to have regard to the decision in this court in *Pepcor*.[22] The case also arose from an application to the Registrar under s 14 of the Act. Some years after the Registrar issued a certificate under that section it appeared that the certificate had been issued on the basis of information that was inaccurate and misleading. The Registrar accordingly applied to set the certificate aside. His *locus standi* to do so was challenged. The court held that he had *locus standi* on the basis that he had committed an irregular act in issuing the approval in the first instance and therefore had *locus standi* in the public interest to remedy the situation by seeking to set the approval aside by way of review proceedings. This constitutes an exception to the principle that once a public body or functionary has exercised their powers they are *functus officio* and their decision may only be set aside by a court at the instance of a third party having a legal interest in that decision.[23]

[22] Once again that case is distinguishable from this situation. The Registrar was seeking to set aside his own decision that had been made irregularly. Here the Registrar seeks to set aside a decision of the Appeal Board in order to vindicate a decision that the Appeal Board decided was

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[22] *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2002] ZASCA 198; 2003 (6) SA 38 (SCA) [2003] 3 All SA 21 (SCA) at para 13.
[23] See also *Transair (Pty) Ltd v National Transport Commission and another* 1977 (3) SA 784 (A) at 792H–793G; *Municipal Manager: Qaukeni Local Municipality v F V Guard Trading CC* [2009] ZASCA 66; 2010 (1) SA 356 (SCA); [2010] 4 All SA 213 (SCA) at paras 23-24.

incorrect. Counsel argued that because there was *locus standi* in the former situation and also when the Appeal Board was taken on review after upholding the Registrar's decision, it necessarily followed that the Registrar had *locus standi* in this case. I do not agree. The answer to the question whether a party has *locus standi* will vary depending on the nature of the interest that the party seeks to vindicate.

[23] In order to determine the nature of that interest one must go back to the purpose behind the establishment of the Appeal Board and its powers under s 26B(15) of the FSB Act. The purpose is clear. It is to enable persons affected by decisions of the Registrar[24] to challenge those decisions before a specially constituted body. The Appeal Board is to decide, on the information before the Registrar, what decision the Registrar should have made. And, once the Appeal Board has spoken, either the Registrar's decision stands, because it has been confirmed, or it is substituted by the Appeal Board's decision. In the latter event the Appeal Board's decision stands in the place of the decision of the Registrar. In effect it becomes the Registrar's decision. That much is

[24] The definition of 'decision maker' in section 1 means that the right of appeal in s 26 is far wider than a right of appeal against decisions of the Registrar and extends to the registrars of other financial institutions.

clear from the fact that it does not direct the Registrar to act differently, but directs that its own order be given effect.[25]

[24] Recognising that the Registrar has *locus standi* to challenge the decision by the Appeal Board would upset the statutory relationship between the two as set out in the FSB Act. It would be inconsistent with the purpose of creating the Appeal Board and has the potential to undermine it in performing its function. If one of the parties affected by it is unhappy with a decision by the Appeal Board they are free to review it. Recognising an independent right in the Registrar would permit of challenges to a decision accepted by the parties affected thereby. The Registrar does not point to any aspect of her regulatory functions that would be detrimentally affected if she cannot challenge decisions by the Appeal Board. Whilst the absence of authority to support the Registrar's position is not of itself fatal it provides a further pointer to the conclusion that the Registrar does not have *locus standi* in this situation.

[25] This conclusion should not be a hindrance to the performance by the Registrar of her functions. It relates only to a narrow area where the Registrar disagrees with a decision of the Appeal Board overturning one

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[25] Section 26B(15)(*a*) of the FSB Act.

of her decisions. It will not affect the Registrar's ability when she and the Appeal Board see eye to eye to defend that position in review proceedings. Nor will it prevent the Registrar from bringing proceedings in other instances relating to her performance of her statutory functions.

[26] In the result I hold that the Registrar lacked *locus standi* to institute the review proceedings in this case. The appeal is dismissed.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: F C SNYCKERS SC (with him S KHUMALO

Instructed by:

Rooth & Wessels Attorneys, Pretoria;

McIntyre & Van der Post, Bloemfontein

For respondents: No appearance.