

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 74/01

DATE: 11 APRIL 2001

In the matter between

JOHANNESBURG MUNICIPAL PENSION FUND

AND ANOTHER

Applicants

and

NBC EMPLOYEE BENEFITS (PTY) LIMITED First Respondent

THE REGISTRAR OF PENSION FUNDS Second Respondent

J U D G M E N T

BORUCHOWITZ, J: The applicants are two pension funds, established and registered in terms of the Pension Funds Act, 24 of 1956 ("the Act").

Since 1998 the first respondent has acted as the administrator of the applicants. In December 1998 at a combined meeting of the board of trustees or committees of the applicants it was resolved to appoint the first respondent as caretaker administrator for a period of six months, with effect from 14 December 1998 until 30 June 1999.

The first respondent's entitlement to administer the applicants was purportedly extended for a further period of 3 years by virtue of a resolution of the executive committee of the City of Johannesburg, which was then known as the Greater Johannesburg Metropolitan Council. Subsequent to

that resolution, written administration agreements were purportedly entered into between the applicants and the first respondent. One such agreement was executed on behalf of the second applicant by its principal executive officer on 23 February 2000, and on behalf of the first respondent on 8 March 2000, and purports to appoint the first respondent as administrator to the City of Johannesburg Pension Fund for a period of 3 years, with effect from 1 July 1999. (See annexure F11 to the founding affidavit).

The applicants deny the validity and enforceability of the administration agreements. They assert that they were never validly executed alternatively are unenforceable for want of compliance with certain statutory, regulatory and fund requirements. The applicants also level serious allegations of misconduct against the first respondent. These include, an allegation that the first respondent has unauthorisedly appropriated to itself commissions from an insurance company in amounts of approximately R24 million, this at the expense of members of the funds; Further, that there exists a conflict of interest which precludes the first respondent from properly carrying out its fiduciary responsibilities. All these allegations are vehemently disputed by the first respondent.

It is common cause that on 15 November 2000, at a duly convened joint meeting of the boards of trustees, or committee of the funds, a resolution was passed purporting to terminate the first respondent's entitlement to act as administrator with effect from 30 November 2000, and on 22 November 2000 the funds attorneys of record wrote to the first respondent communicating this decision.

All attempts to remove the first respondent as administrators have proved unsuccessful, and this has precipitated the launch of the instant proceedings.

The applicants seek an order in the following terms: "1. *Declaring that the first respondent is not entitled to administer the applicants' funds, whether as administrator, agent or in any other capacity, and ordering the first respondent to desist forthwith.*

21 Directing first respondent within 24 hours of service of this order upon it to hand over to Messrs Ernst and Young,

on behalf of applicants, all books, documents, records and data in their possession relating to applicants' affairs, including those listed in annexure A hereto; alternatively, permit same to be copied or duplicated; alternatively

22directing first respondent within 24 hours of service of this order upon it to produce to Messrs Ernst and Young, for their inspection on behalf of applicants, all books, documents, records and data in their possession relating to applicants' affairs, including those listed in annexure A hereto, and permit same to be copied or duplicated. " An order for costs is also sought.

The first respondent counter applies for an order in these terms: " 1. *Declaring the agreement between NBC Employee Benefits (Pty) Limited and the City of Johannesburg Pension Fund ('the administration agreement') dated 23 February 2000, to be valid.*

2.Declaring the agreement between NBC Employee Benefits (Pty) Limited and the Johannesburg Municipal Pension Fund ('the administration agreement') dated 23 February 2000, to be valid.

3.Ordering the first and second respondents to do all such necessary things in compliance with the administration agreement.

4.Interdicting the first and second respondents from proceeding with the invitation for tenders for the administration of the funds of the first and second respondents.

5.Costs of suit against the first and second respondents and as against the third and fourth respondents only in the event of them opposing the relief claimed. "

In an amended notice of motion the first respondent seeks to claim damages and other related relief, in the alternative to the order for specific performance. (See prayers 5A, B, C and D). Counsel for the first respondent has indicated that first respondent does not persist with such alternative relief in these proceedings.

The crisp issue that falls for determination is whether the applicants are in law entitled at their option to revoke the first respondent's authority to administer the funds. Apart from contesting the factual allegations relating to alleged invalidity and misconduct, first respondent raises the dilatory defence that the dispute between the parties ought to have been referred to arbitration in terms of an arbitration clause contained in the administration agreements. For reasons that will later become apparent, this dilatory defence cannot succeed as the issues are not in my view arbitrable.

I have read the papers and am satisfied that there are material disputes of fact, particularly in relation to the following matters: the earning of unauthorised commissions, the alleged conflicts of interest, and the authority of the principal executive officer of the applicants to have entered into the administration agreements. These disputes are incapable of resolution on the papers, and I will not attempt to do so.

It is unnecessary however to resolve these factual disputes as the matter can in my view be decided on the basis of two legal contentions advanced by counsel for the applicants. To facilitate a proper understanding of these issues it is necessary to set out the statutory and regulatory framework against which the dispute falls to be considered.

Every pension fund is required to be registered in terms of the Pension Funds Act, 24 of 1956 ("the Act"). Section 7A provides, that every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect. The object of the board is dealt with in section 7C, which provides as follows:

"(1) The object of the Board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund. (2) In pursuing its object the Board shall -

a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a

fund by an employer, increase of contributions of members, a withdrawal of an employer who participates in a fund;

b)act with due care, diligence and good faith;

c)avoid conflicts of interest;

d)act with impartiality in respect of all members and beneficiaries."

The duties of the board are outlined in section 7D, which reads:

"The duties of the Board shall be to -

(a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the Board;

b)ensure that proper control systems are employed by or on behalf of the Board;

c)ensure that adequate and appropriate information is communicated to the members of the fund, informing them of their rights, benefits and duties in terms of the rules of the fund;

d)take all reasonable steps to ensure that the contributions are paid timeously to the fund in accordance with this Act;

e)obtain expert advice on matters where Board members may lack sufficient expertise;

(f) ensure that the rules and operations and administration of the fund comply with this Act, The Financial Institutions (investment of funds) Act, 1984 (Act 39 of 1984) and all other applicable laws." Sections 8 and 9 provide for the appointment of a principal officer and auditor. Every fund is required, in terms of sections 11 and 13, to have a set of rules which shall be binding on the fund. Section 13 specifically provides:

"Subject to the provisions of this Act the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof and on any person who claims under the rules or whose claim is derived from a person so claiming. "

Certain restrictions on the administration of pension funds are

contained in section 13B of the Act. That section provides:

"13B Restrictions on administration of pension funds:

- 1) No person shall administer on behalf of a pension fund the investments of such a pension fund, or the disposition of benefits provided for in the rules of the fund, unless the registrar has in a particular case, or in general, granted approval thereto, and the person complies with such conditions as the registrar may from time to time determine in the particular use, or in general.*
- 2) Approval in terms of subsection (1) may be limited to the performance of specified functions.*
- 3) Application for approval in terms of subsection (1) shall be made in the manner and be accompanied by the fee prescribed by regulation.*
- 4) If the registrar deems it desirable and in the public interest he may, on such conditions, to such extent and in such manner as he may deem fit, exempt any person or category of persons from the provisions of this section, and may at any time revoke or amend any such exemption in a similar manner."*

What is immediately apparent from the foregoing provisions is that the sanctity of the administration of pension funds is jealously guarded by statute, and section 13B constitutes a limited exception to the duty of the Board of the fund itself to direct, control and oversee the operations of the fund, and the additional duties imposed in Chapter III of the Act.

In addition to the statutory duties of the Board, it is also bound by the rules of the fund, which place all responsibility and power in respect of the administration of the funds in the hands of the committee (the Board).

If one has regard to the rules of the fund, the following aspects are apparent: The object of the fund is set out in rule 2(2), which provides that:

"The objects of the fund shall be the provision of benefits for members and pensioners....."

Rule 4(1) provides that the fund shall be administered by a committee consisting of 12 representatives, 5 of whom shall be elected by

ballot by members who are employees of the council (the council meaning, "the City Council of Johannesburg") with 5 alternates who shall act in their absence, 1 of whom shall be a pensioner who has not attained the age of 70 years and who is resident in the Pretoria, Witwatersrand, Vereeniging Province, elected by ballot by pensioners who were employees of the council at retirement, with an alternate who shall act in his absence and 6 of whom shall be nominated by the council, with 6 alternates who shall act in their absence.

The committee has the powers outlined in rule 13, which include the power to adjust and decide upon claims made upon the fund, to receive, administer, invest and apply the moneys of the fund, to adopt regulations for its own guidance to facilitate the business of the fund, and to carry out and perform several duties described by the rules, and all things necessary for the proper functioning of the fund.

Rule 5(4) provides for the establishment of an executive committee, consisting of 2 elected representatives and 2 nominated representatives. In terms of subrule (4) it is provided that during the intervals between the meeting of the committee the affairs of the fund shall, subject to directions as the committee may from time to time give, be administered by the executive committee.

The duties and responsibilities of the principal executive officer and staff are dealt with in rule 6. In rule 6(1) it is provided that the principal executive officer shall carry out and comply with all the duties and responsibilities required of a principal officer in terms of the Act. Furthermore, he shall be responsible for the performance of all other duties prescribed by the rules, which the committee or the executive committee may from time to time direct, for the proper functioning of the fund.

What is plain from the provisions of the Act and the rules, to which I have referred, is that the committee of the fund (the Board as envisaged in the Act) occupies a position of trust. It has a fiduciary duty towards the members of the fund on whose behalf the assets of the fund are administered. The committee's primary responsibility is the direct control and overseeing of the operations of the fund, and they are required at all times to do everything that is necessary for its proper functioning.

There is no dispute that the committee, or Board, has the power to delegate, but not to abdicate, its responsibilities to third parties. The administration agreement upon which the first respondent relies, is a purported delegation of such duties.

For present purposes, I will assume, without deciding, that the agreement was validly entered into.

That a delegation was intended is clearly intended from the preamble of the agreement (annexure F11 to the founding affidavit.) The preamble expressly provides:

"The trustees of the fund shall delegate those responsibilities to NBC as provided for in this agreement. NBC shall at all times act on the instructions of the fund. " It is also provided in the preamble that the agreement is drawn up in accordance with the provisions of section 13B of the Act, and that NBC is to provide consulting, administration, investment, advisory, asset consulting and actuarial services to the fund, as provided for in the agreement.

It is a well established principle that where trustees choose to delegate any part of their functions, they are at liberty at any time to revoke such delegation of authority. (See *Soofie v Hajee Shah Goo/am Mohamed Trust and Others* 1985 (3) SA 322 (N); *Alexander and Others v Opperman* 1952 (1) SA 609 (O); *Barry NO v Bloemfontein Town Council* 1953 (2) SA 105 (O) at 114).

In *Soofie's* case, Kumleben J, relying on what was stated in *Alexander v Opperman*, and *Barry NO v Bloemfontein Town Council*, concluded at 328F that:

"A trustee who has delegated the exercise of his authority may revoke such authority at any time without having to show good cause for doing so. "

The underlying reason for this principle is that a delegation does not release the committee, board or trustee from liability for wrongs committed in the administration of the funds, and the committee retains its office as controllers, with primary responsibility to members of the fund. (See also in this regard Honoré, *South African Law of Trusts*, 4th ed. s.201, p.269).

Counsel for the first respondent sought to argue that the above

dictum of Kumleben J was incorrect to the extent that he had held that a delegation of authority could be revoked without having to show good cause. It was submitted that the cases relied upon, namely *Alexander v Opperman*; *Stowe v Royal Insurance Co* 5 EDC 37, at 41; and *Barrie NO v Bloemfontein Town Council*, did not support the conclusion that there could be a revocation without having to show good cause.

I do not agree with that submission. Kumleben J's *dictum* is indeed supported in the cases relied upon in the judgment. No countervailing authority has been produced on behalf of the first respondent to support its submission. In my view *Soofie's* case was correctly decided on the point, and I am inclined to follow it.

The circumstances of this case fall within the general principle to which I have referred. Notwithstanding the purported delegation to the first respondent in terms of the administration agreement, the committee, or board, of the funds carries the primary fiduciary responsibility to administer the funds, and is entitled, for whatever reason, to revoke the delegation. In my view therefore, the resolution of the applicant's committees (boards) on 15 November 2000, to terminate the first respondent's mandate to act as administrator of the funds with effect from 30 November 2000, is valid, this notwithstanding the fact that first respondent may suffer loss or damage as a result of the premature termination of the administration agreement.

For these reasons the applicants are entitled to the relief which they seek.

There is yet a further reason why first respondent cannot continue to administer the affairs of the funds. This is to be found in the statutory and regulatory framework under which the funds operate. As indicated, section 13B provides that no person shall administer on behalf of a pension fund, the investments of such fund, or dispose of benefits provided from the rules of the fund, unless the registrar has granted approval, and the person complies with such conditions as the registrar may from time to time determine, in a particular case or in general.

It is common cause that on 14 January 1999 the Registrar of Pension Funds granted conditional approval to the first respondent to act

as an administrator of the applicants. The approval is embodied in a letter, annexure GN11 to the founding affidavit. The relevant portion thereof reads:

"NBC Employee Benefits (Pty) Limited, hereinafter referred to as 'the administrator' is hereby approved to act as the administrator in terms of section 13B(1) of the Pension Funds Act, 24 of 1956, as amended, and is authorised to administer on behalf of the pension funds the distribution of benefits

provided for in the rules of the funds. Please note that this

approval is for the disposition of benefits on behalf of pension funds, and that you may not administer the investments of such pension funds:

1. *This approval is granted on condition that the following is adhered to:*

1.1 *The administrator complies with the conditions published under Government Notice No.R1838 in the Government Gazette No. 16833, dated 24 November 1995, and the Board Notice 101 of 1995 in Government Gazette No. 16830, dated 24 November 1995, and any future amendments thereto (hereinafter referred to as 'the conditions')."* At the foot of the letter the following is recorded: *"Please note that should the administrator fail to adhere to the conditions set out above, the registrar shall be entitled in terms of section 13B(4) in paragraph 2 of the conditions to revise or to withdraw if deemed necessary, your approval at any time, after which the administrator may not conduct business as an administrator in terms of section 13(b) of the Pension Funds Act, 24 of 1956 (as amended). "*

In Board Notice 101 of 1995 the second respondent (The Registrar of Pension Funds), laid down certain conditions for the administrators of pension funds. Section 3 of this notice provides:

"Agreements in respect of administration.

3. *Prior to the commencement of administrative functions with regard to a particular fund, an administrator shall enter into a written agreement with the relevant fund, recording the*

specific arrangements for the required administration.

3.1 Any such agreement shall -

a)...

b)...

c)...

*d)empower each party to the agreement to terminate
the agreement after notice in writing by one
party to the other of a period of not more than
90 days. "*

Clause 4.4 of the administration agreement upon which the first respondent seeks to rely, provides as follows: "*4.4 Conditions of appointment.*

The appointment of NBC in terms of this agreement shall be for an initial period of 3 years. Thereafter the agreement shall remain in force until terminated by 3 calendar months' written notice by either party. "

The applicants contend that the condition imposed by the registrar, in section 3.1(d) of Board Notice 101 of 1995, has not been fulfilled, with the consequence that first respondent has no lawful power to administer the investments of the funds, or to dispose of

benefits provided for in terms of the rules of the funds. It is argued that on a proper construction thereof, clause **4.4** of the administration agreement does not empower or entitle the funds, or parties thereto, to terminate the agreement after notice in writing as envisaged in section 3.1 (d) of the Board Notice. What the contract stipulates for is for an initial fixed term of 3 years, and only thereafter the right to terminate on the giving of notice.

In opposing this contention, counsel for the first respondent makes three submissions:

1.That the requirement in section 3.1(d) of the Board Notice is merely procedural, and does not afford a substantive ground permitting a party to terminate an agreement.

2.That on a proper construction of clause **4.4** of the administration agreement, termination by the giving of notice is permitted during the first 3-year period. The first sentence in clause **4.4**, so it is submitted, merely records the duration of the agreement, and does not exclude

the possibility of termination as envisaged under the Board Notice, that is by the giving of notice.

3. That there is no Indication that a failure to comply with the condition imposed by the registrar would render first respondent's authority to administer the affairs of the funds void, A noncompliance would not be visited with nullity. Counsel for the first respondent points to the final paragraph in the registrar's letter dated 14 January 1999 (annexure GN11) to the effect that where the conditions are not adhered to, the registrar shall be entitled to revise or withdraw, if deemed necessary, the approval at any time. Reliance is also placed on the provisions of section 13B(4) of the Act, which provides, that if the registrar deems it desirable and in the public interest, he may exempt any person or category of persons from the provisions of the section, and may at any time revoke or amend any such exemption. These, so it is submitted, are *induciae*. that noncompliance with the condition would not be visited by a nullity.

In my view none of these submissions have any merit. The language of section 3.1 (d) of the Board Notice makes it plain that any agreement for the performance of administrative functions shall in fact empower the parties to terminate the agreement by the giving of notice. Notice is itself a substantive ground of termination. The section does not provide for a procedural device, as contended for on behalf of the first respondent. To construe same as a mere procedural device, is to strain the language. What is provided is the right **"to terminate the agreement after notice in writing..."** Having regard to the objects of the Act, the provision was obviously inserted to permit the registrar and the board greater control over the administration of pension funds.

The second submission is equally without substance. The first and second sentences of clause 4.4 of the administration agreement must be read together. What is plainly envisaged is that the agreement is to endure for an initial period of 3 years, whereafter it will be capable of termination by the giving of 3 calendar months' written notice. What is stated in the first sentence is a provision often found in fixed term contracts.

Furthermore, the giving of 3 calendar months' notice is itself

noncompliance with the Board Notice. What is required is that the agreement should permit of notice in writing, for a period of not more than 90 days. There is no provision in section 3.1(d) of the Board Notice for the giving of 3 calendar months' notice.

As regards first respondent's third submission, the following observations need to be made.

What is stated in the final paragraph of the second respondent's approval, dated 14 January 1999 (GN11), does not form part of the condition itself, it is a discrete aspect of the approval. The condition is embodied in paragraph 1, which comprises three subparagraphs, 1.1, 1.2 and 1.3. What is recorded at the foot of the second respondent's approval is clearly a reiteration of the latter's general right to revise or withdraw an approval, should there be any noncompliance with the condition. The condition itself is limited in scope in what is set out in paragraph 1 of the approval dated 14 January 1999.

The following authorities support the proposition that a failure to comply with a statutory condition is likely to result in invalidity. (Cf *Springs Town Council v MacDonald* 1968 (2) SA 114 (T) at 120A-F; *R v Poorbhai* 1945 AD 58; *Nochomowitz v Bellville Liquor Licensing Board and Another* 1956 (2) SA 228A, at 235).

It was emphasised in *Nochomowitz's* case, quoting from Maxwell, *Interpretation of Statutes*, 8th ed. pp.321, 326, at 235, *Board and Another* 1956 (2) SA 228A, at 235).

It was emphasised in *Nochomowitz's* case, quoting from Maxwell, *Interpretation of Statutes*, 8th ed. pp.321, 326, at 235, that where powers are granted with the direction that certain conditions be complied with, the law expects exact and rigorous observance of such conditions as a condition precedent to the exercise of such power.

There are in addition further indications that the failure to comply with the condition would be visited with a nullity. A penalty is imposed for noncompliance. See section 37(1) of the Act. The prohibition in section 13B of the Act, is couched in peremptory terms. It is there provided, that no person shall administer on behalf of a pension fund, the investments of such fund or disposition of benefits, unless the registrar has granted

approval, and the person concerned complies with such conditions as the registrar imposes.

It is an established principle that anything done contrary to a direct prohibition of the law is generally void and of no effect. The prohibition operates to nullify the Act. (Cf *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Hochfield (Pty) Ltd v Carheldine Investments (Pty) Ltd* 1955 (4) SA 296 (W) at 299A; also *York Estates Ltd v Wereham* 1950 (1) SA 125 (SR) at 126; and *Swart v Smuts* 1971 (1) SA 819 (A)).

I accordingly hold that first respondent's failure to comply with the condition imposed by the registrar, in terms of section 3.1(d) of Board Notice 101 of 1995, precludes the first respondent from exercising the authority to administer the funds granted by the registrar.

For all of these reasons, therefore, the application ought to be allowed.

O R D E R

In the result, the following order is granted:

1. It is declared that the first respondent is not entitled to administer the applicants' funds, whether as administrator, agent or in any other capacity, and ordering the first respondent to desist forthwith.
2. The first respondent is directed within 24 hours of service of this order upon it to hand over to Messrs Ernst & Young, on behalf of the applicants, all books, documents, records and data in their possession, relating to the applicants' affairs, including those listed in annexure A to the notice of motion. Alternatively, to permit same to be copied or duplicated.
3. Save for prayer 5A, the counter-application is dismissed. No order is made in respect of prayer 5A.
4. The first respondent is to pay the costs of the main and counter-applications, which costs are to include the costs consequent upon the employment of two counsel.