**THE SUPREME COURT OF APPEAL**
**OF SOUTH AFRICA**

**CASE NO: 467/04**

**REPORTABLE**

In the matter between

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| **ARCHIBALD BARRY NICHOL** | First Appellant |
| **THE SAGE SCHACHAT PENSION FUND** | Second Appellant |

and

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| **THE REGISTRAR OF PENSION FUNDS** | First Respondent |
| **THE FINANCIAL SERVICES BOARD** | Second Respondent |
| **THE SAGE GROUP LIMITED STAFF PENSION FUND** | Third Respondent |
| **THE SAGE LIFE LIMITED STAFF PENSION & LIFE ASSURANCE SCHEME** (now known as The Sage Group Pension Fund) | Fourth Respondent |
| **SAGE LIFE LIMITED** | Fifth Respondent |
| **THE PENSION FUNDS ADJUDICATOR** | Sixth Respondent |
| **RONALD HENRY CECIL SMALL** | Seventh Respondent |

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Coram**:** Mpati DP, Navsa et Van Heerden JJA, Maya et Cachalia AJJA

Heard: 13 September 2005

Delivered: 29 September 2005

***Summary:*** ***Promotion of Administrative Justice Act 3 of 2000, s 7(2) – failure to exhaust internal remedies before institution of judicial review proceedings – application for exemption in terms of s 7(2)(c) of PAJA – meaning of 'exceptional circumstances'***

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**JUDGMENT**

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**VAN HEERDEN JA:**

## *Introduction*

[1] The main issues in this appeal are the interpretation and application of the provisions of s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Both the first and the second appellants appeal against an order made by the Pretoria High Court (*per* Legodi AJ) dismissing an application, brought by the former in terms of s 7(2)*(c)* of PAJA, to exempt him from the obligation[1] to exhaust an internal remedy available to him before pursuing review proceedings which he had previously instituted in the same high court. The first, second, fourth and fifth respondents cross appeal against the order of the Pretoria High court postponing the review application *sine die*, the costs of such application to be reserved. Both the appeal and the cross appeal are with the leave of this court.

## *Parties*

[2] The first appellant, Mr Archibald Barry Nichol ('Nichol'), is a pensioner who, until his retirement in 1994, was an active, contributing member of the second appellant, the Sage Schachat Pension Fund ('the Sage Schachat Fund'), a pension fund registered in accordance with the Pension Funds Act 24 of 1956 ('the PF Act'). The first respondent is the Registrar of Pension Funds ('the Registrar'), appointed in terms of the PF

[1] Imposed on him by s 7(2)*(a)* of PAJA.

Act and vested with extensive powers and functions in terms thereof. The second respondent is the Financial Services Board ('the FSB'), a statutory body established in terms of the Financial Services Board Act 97 of 1990 ('the FSB Act') with the primary function of supervising the compliance with laws regulating financial institutions and the provision of financial services.[2] This supervisory function includes compliance with the PF Act by pension fund organisations registered in terms of such Act.[3] Section 3 of the PF Act provides that the executive officer of the FSB and his or her deputy shall, respectively, also be the Registrar and Deputy-Registrar of Pension Funds. The fourth respondent is the Sage Life Limited Staff Pension and Life Assurance Scheme, now known as the Sage Group Pension Fund ('the Sage Group Fund'), also a pension fund registered in accordance with the PF Act. The fifth respondent is Sage Life Limited ('Sage), a public company which, for present purposes, may be described as the employer of persons employed within the Sage Group of companies.

## ***Factual background***

[3] The present dispute between the parties has a long and convoluted history, most of which is dealt with in considerable detail in the Cape High

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[2] Section 3*(a)* of the FSB Act.

[3] In terms of s 1 of the FSB Act, 'financial institution' is defined as meaning, inter alia, 'any pension fund organisation registered in terms of the Pension Funds Act', while 'financial service' is in turn defined as 'any financial service rendered by a financial institution to the public or a juristic person…'.

Court judgment in *Sage Schachat Pension Fund & others v Pension Funds Adjudicator & others.*[4] It began in 1997 with a regrouping of operational activities within the Sage Group of companies. This resulted in a decision taken in August 1998 by the management of the Sage Group to amalgamate the Sage Schachat Fund, the Sage Group Limited Staff Pension Fund (the third respondent) and the Sage Group Fund by transferring the businesses (members, pensioners, assets and liabilities) of the first two pension funds to the third in accordance with the provisions of s 14 of the PF Act. On 9 and 10 December 1998 the boards of trustees of all three pension funds adopted resolutions approving the proposed amalgamation.

[4] The three funds were merged with effect from 1 December 1998, from which date the merged fund has been operating under the name of the Sage Group Fund. It was, however, only in October 1999 that the three funds applied to the Registrar in terms of s 14 of the PF Act for retrospective approval of the transfers.[5] In the meantime, on 2 April 1999, Nichol, acting in terms of s 30A(3) of the PF Act, had lodged a complaint regarding the transfer of the Sage Schachat Fund with the sixth respondent, the Pension Funds Adjudicator appointed in terms of Chapter VA of that

[4] [2003] 4 All SA 394 (C).

[5] It is not necessary for present purposes to consider Nichol's contention that the boards of trustees of the funds were not, at that time, lawfully constituted in that there had not been compliance with s 7A of the PF Act providing for the right of members of a pension fund to elect at least 50 per cent of the members of its board of trustees.

Act ('the Adjudicator').[6] The basis of Nichol's complaint was that he (and others in the same position) had not been consulted on the proposed merger of the Sage Schachat Fund with the other two funds. The Sage Schachat Fund was smaller and in a much more favourable surplus position than either of the other funds. Nichol thus opposed the merger on the ground that, should it take place, the Sage Schachat Fund surplus would 'effectively be diluted by the cross-subsidisation of the other funds' as a result of 'the pooling of resources'.

[5] On 13 November 2001 the Adjudicator made his determination, holding that, since the Registrar had not yet approved the merger of the funds by issuing the requisite certificates in terms of s 14(1)*(e)* of the Act, an 'indispensable requirement for the legal validity of the new scheme' had not been met. Thus, according to the Adjudicator, 'the legal position is that the funds are still three separate legal entities, no matter what may be occurring in practice'. The Adjudicator accordingly declared that the Sage Schachat Fund 'still exists as an independent pension fund organisation as defined in the Act'.[7]

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[6] On 27 May 1999, the seventh respondent, Mr Ronald Henry Cecil Small ('Small'), a pensioner in exactly the same position as Nichol, lodged a similar complaint with the Adjudicator. Small passed away in December 2004.

[7] For the full order made by the Adjudicator, see *Sage Schachat Pension Fund & others v Pension Funds Adjudicator & others* n 4 above para 21 at 400*e-j*.

[6] On 18 December 2001 the Registrar approved the amendments to the rules of the Sage Group fund and also issued certificates under s 14(1)*(e)* of the PF Act approving the transfer of the businesses of the Sage Schachat Fund and the Sage Group Limited Staff Pension Fund to the Sage Group Fund. The effect of these decisions was made retrospective to 1 December 1998, from which date the *de facto* merger had been in operation.

[7] An application to the Cape High Court, launched on 27 December 2001 by the Sage Schachat Fund, the Sage Group Limited Staff Pension Fund, the Sage Group Fund and Sage to set aside the Adjudicator's determination, was ultimately dismissed with costs by Van Zyl J on 17 October 2003.[8]

[8] On 7 January 2002 Nichol became aware of the fact that the Registrar had issued the s 14(1)*(e)* certificates giving retrospective approval to the transfers of business, as set out above. A month later, on 8 February 2002, Nichol launched review proceedings in the Pretoria High Court, seeking the following relief:

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[8] See *Sage Schachat Pension Fund & others v Pension Fund Adjudicator & others* n 4 above.

'1. To review and set aside the decision or decisions referred to in the letter of JEREMY ANDREW (Chief Actuary) addressed to Mr JOHN MURPHY, Pension Funds Adjudicator, dated 29 November 2001…

2. To review and set aside the certification in terms of section 14 (1)*(e)* of the Pension Funds Act, No 24 of 1956, that the requirements referred to in paragraph *(a)* to *(d)* of the above section with regard to the transfer of business with effect from 1 December 1998 of 17 Members and 52 Pensioners from the SAGE SCHACHAT PENSION FUND to the SAGE GROUP PENSION FUND have been satisfied'.

The review application (' the main application') was brought in terms of Uniform Rule 53, but it is now common cause that, notwithstanding the fact that no mention is made anywhere in the papers filed in the main application of PAJA or any of its provisions, the review would fall to be decided in terms of PAJA.[9]

[9] According to Nichol, at the time when the review application was lodged, his attorney of record advised him that 'all forms of internal appeal against administrative acts must be exhausted before a court may be approached to review an administrative act'. It was explained to him, however, that 'in the event of the administration acting in bad faith, the court may be approached directly'. As Nichol 'firmly believed that the

[9] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 20 – 27.

Registrar and the FBS acted in bad faith', he apparently instructed his attorney to lodge the review application with High Court.

[10] In the answering affidavit filed in April 2002 on behalf of the Registrar and the FSB, it was specifically pointed out that the relief sought by Nichol was inappropriate in that any person aggrieved by a decision of the Registrar had a right of appeal against such decision to the Board of Appeal constituted under s 26(1) of the FSB Act ('the FSB Appeal Board') and that 'the nature and intricacies of this matter more appropriately fell to be dealt with by [this] expert tribunal'. Nichol's response to this, in his replying affidavit filed during March 2003, was simply to state that he 'honestly believed' that the High Court was 'the right tribunal to address [his] grievances'.

[11] In the respondents' heads of argument filed in the court below in late March and early April 2004 it was pointed out that, as Nichol had an internal remedy provided for in another law (ie an appeal to the FSB Appeal Board), s 7(2)*(a)* of PAJA rendered it impermissible for a court to review the decision of the Registrar before such internal remedy had been exhausted. It was also pointed out that Nichol had not made any application in terms of s 7(2)*(c)* of PAJA for exemption from the obligation to exhaust his internal remedies. This provoked a response from Nichol in

the form of an application in terms of s 7(2)*(c)*, filed on 8 April 2004, for an order 'granting the applicant exemption from the obligation to exhaust the internal remedy available to him in terms of section 26 of the Financial Services Board Act, No 97 of 1990, on the grounds that exceptional circumstances exist and that such exemption is in the interest of justice'. Unsurprisingly, this application was opposed by the Registrar, the FSB, the Sage Group Fund and Sage.

[12] The s 7(2)*(c)* application was heard by the Pretoria High Court on 28 and 29 April 2004 and, on the latter date, Legodi AJ dismissed the application with costs; directed Nichol to exhaust the internal remedy as provided for under s 26 of the FSB Act, and postponed the main application *sine die*, reserving the costs thereof. As indicated above, these orders form the subject of the present appeal and cross appeal.

[13] The affidavits filed on behalf of Nichol in the s 7(2)*(c)* application make it clear that, at the time the main application was launched, he and his legal advisers were aware of the possibility of an appeal to the FSB Appeal Board in terms of s 26(2) of the FSB Act. However, as Nichol's attorney of record stated in the replying affidavit deposed to by him on Nichol's behalf in the s 7(2)*(c)* application, this subsection 'only came to [his] attention when the Respondents filed their Heads of Argument' in the main

application and he was then 'obliged to inform [Nichol] of the problem and the need to bring this [s 7(2)*(c)*] application.' Nichol's attorney of record stated further that, this notwithstanding, he would have advised Nichol to bring the exemption application at the outset, had he been aware of the provisions of s 7(2)*(c)*. The decision not to pursue the internal remedy provided in s 26(2) of the FSB Act was thus a deliberate one. It is clear that Nichol's legal advisors were simply unaware of the provisions of PAJA until a very late stage of the review proceedings.

***Section 7(2) of PAJA***

[14] Section 7(2) of PAJA provides as follows:

'*(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

*(b)* Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

*(c)* A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[15] Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted.[10] However, as is pointed out by Iain Currie and Jonathan Klaaren,[11] 'by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law'. It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)*(c)*. Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given.[12]

### *The meaning of exceptional circumstances*

[16] Counsel for the Registrar and the FSB submitted that, while there is no definition of 'exceptional circumstances' in PAJA, these must be circumstances that are out of the ordinary and that render it inappropriate

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[10] See eg *Shames v South African Railways & Harbours* 1922 AD 228 at 233-234; *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502D-503D; *Local Road Transportation Board & another v Durban City Council & another* 1965 (1) SA 586 (A) at 592F-594C. See also Daniel Malan Pretorius 'The Wisdom of Solomon: The Obligation to Exhaust Internal Remedies in South African Administrative Law' (1999) 116 *SALJ* 113 and the other authorities there cited.

[11] *The Promotion of Administrative Justice Act Benchbook* p 182.

[12] See *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism & another* 2005 (3) SA 156 (C) para 45.

for the court to require the s 7(2)*(c)* applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy. I agree with this contention. In the words of Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati*:[13]

'By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.'

[17] The exceptional circumstances upon which reliance is placed in support of an application for exemption in terms of s 7(2)*(c)* should primarily be facts and circumstances existing before or at the time of the institution of the review proceedings. This does not mean that the court may not, in principle, take into consideration events occurring after the launch of such proceedings. Apart from the judgment of the Cape High Court handed down on 17 October 2003 – the relevance of which I will discuss below – the alleged 'exceptional circumstances' ultimately relied upon by Nichol all existed prior to the commencement of the main application.

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[13] [1986] 1 All ER 717 (CA) at 724*a-b*, as cited with approval in *Earthlife Africa* para 31.

[18] As 'exceptional circumstances' which might justify an exemption in terms of s 7(2)*(c)* would exist where the available internal remedy would not be able to provide the applicant with effective redress for his or her complaint,[14] it is necessary to examine more closely the nature of the internal remedy provided for in the FSB Act.

***The internal remedy***

[19] Section 26(2) of the FSB Act –

'Any person aggrieved by a decision by the executive officer [the Registrar] under a power conferred or a duty imposed upon him by or under this Act or any other law may within the period and in the manner and upon payment of the fees prescribed by the Minister [of Finance] by regulation, appeal against such decision to the board of appeal.'

[20] The FSB Appeal Board, established in terms of s 26(1) of the FSB Act, is a specialist tribunal with a wide range of expertise available to it. It consists of three persons appointed by the Minister of Finance on the basis of their 'wide experience' and 'expert knowledge' of, respectively, law,[15] financial institutions and financial services, and the accountants' and auditors' profession. In addition the Board may co-opt an assessor having

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[14] See eg *Marais v Democratic Alliance* [2002] 2 All SA 424 (C) paras 59-62 and cf *Governing Body, Mikro Primary School & another v Minister of Education, Western Cape , & others* 2005 (3) SA 504 (C) at 515F-G. On the common law position in this regard, see Lawrence Baxter *Administrative Law* p 721-722 and the authorities there cited.

[15] This person is the chair of the Appeal Board.

'expert knowledge of a particular matter' to assist it where this is deemed necessary for the hearing of a particular appeal.[16] It has been held to be an independent tribunal as contemplated in s 34 of the Constitution.[17]

[21] In terms of s 26(7), the Commissions Act 8 of 1947 applies to the Appeal Board and it thus has all the powers of a High Court to summon and examine witnesses and to call for the production of books, documents and objects.[18] It has very wide powers on appeal, including the power to confirm, set aside or vary the decision of the Registrar against which the appeal is brought; to refer the matter back for consideration or reconsideration by the Registrar in accordance with such directions as the Board may lay down; or to order that its own decisions be given effect to.[19] In addition, it is empowered under s 26(2A) to grant interim relief by suspending the operation or execution of the decision appealed against and, under s 26(14), it can make an appropriate order as to costs.

[22] The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar's decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new

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[16] Section 26(1B) of the FSB Act.
[17] *Financial Services Board & another v Pepkor Pension Fund & another* 1999 (1) SA 167 (C) at 175I-J.
[18] Section 3 of the Commissions Act 8 of 1947.
[19] Section 26(10) of the FSB Act.

evidence or information.[20] This is not disputed by Nichol. It has also never been suggested that the Appeal Board has been tainted by any of the alleged procedural or substantive irregularities of which Nichol complains.[21] I therefore cannot agree with the argument advanced by counsel for the appellants to the effect that the Appeal Board would be unable to give effect to their constitutional rights to fair administrative action and would not be able to 'make a declaration of invalidity' in respect of the impugned decisions of the Registrar, as opposed to 'simply setting aside' such decisions. As detailed in the previous paragraph, the powers of the Appeal Board are certainly extensive enough to afford Nichol the same relief (if justified) as that sought by him in the main application, namely an order 'reviewing and setting aside' the relevant decisions of the Registrar, in particular the issue of a certificate in terms of s 14(1)*(e)* of the PF Act in respect of the transfer of business from the Sage Schachat Fund to the Sage Group Fund.

### *The grounds for Nichol's s 7(2)(c) application*

[23] In his founding affidavit in support of the exemption application, Nichol contended that all of the grounds of review on which he relied in the

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[20] See eg *Paarlse Munisipale Weduwee-en Wese-Pensioenfonds v Registrar of Pension Funds* [2000] 3 BPLR 247 (PFA).

[21] Cf *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs & Tourism & another* n 12 above para 40.

main application in themselves constitute 'exceptional circumstances'. This submission was elaborated upon in great detail in the heads of argument filed on his behalf in this court, reference being made (inter alia) to the majority of the grounds of review listed in s 6 of PAJA. Not only are the numerous grounds of review canvassed in Nichol's heads of argument by and large *not* the grounds relied upon in his affidavits in the main application, but he also failed dismally to demonstrate why the FSB Board of Appeal would not be able effectively to consider and remedy each of these 'complaints'.

[24] Moreover, as was pointed out by counsel for both sets of respondents, Nichol's contention in this regard 'puts the cart before the horse'. It is based on the proposition that Nichol is entitled to be exempted from complying with the requirements of s 7(2)*(a)* of PAJA and exhausting his internal remedies *merely* because – so it is contended – his case on the merits of the main application is strong. This cannot be so. Taken to its logical conclusion, such an approach would defeat the purpose of s 7(2), which requires an applicant for judicial review to have exhausted his or her internal remedies *before* resorting to review proceedings. Allegations of procedural or substantive administrative irregularities *per se* are not 'exceptional' in review proceedings.

[25] So too, Nichol's allegations of *mala fides* on the part of the Registrar and the FSB in various forms do not take his case any further. One of the listed grounds of review in s 6(2) of PAJA is that the relevant administrative action 'was taken in bad faith'.[22] As pointed out above, there was no suggestion that the FSB Appeal Board was itself tainted or the appeal procedure compromised in any way. For the purposes of the exemption application under discussion, the allegation of bad faith does not *per se* constitute an 'exceptional circumstance'.

[26] For the same reasons as those set out in the three preceding paragraphs, Nichol's contention that the alleged failure on the part of the Registrar and the FSB to comply with the provisions of s 3 of PAJA also constitutes an 'exceptional circumstance' in terms of s 7(2)*(c)* must be rejected. Even assuming there to have been non-compliance with the requirements for procedural fairness set out in s 3, this would simply afford the aggrieved party grounds for review on the basis that the administrative action in question 'was procedurally unfair'.[23] As with any of the other grounds of review listed in s 6 of PAJA, however, the manner of review of such procedurally unfair administrative action is still governed by s 7(2), in

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[22] Section 6(2)*(e)*(v).
[23] Section 6(2)*(c)*.

terms of which the aggrieved party is obliged to exhaust his or her internal remedies before bringing review proceedings.

[27] Nichol also contended that the existence of the determination by the PFA precluded the Registrar from issuing the s 14(1)*(e*) certificate and that, in so doing, the Registrar acted in 'clear and deliberate disregard of an existing court order'. He relied in this regard on the provisions of s 30O of the PF Act, in terms of which 'any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court'. Nichol argued further that, as the application to the Cape High court to have the Adjudicator's determination set aside was dismissed, albeit after the launch of the review proceedings, the s 14(1)*(e)* certification by the Registrar was in direct contravention (and in contempt) of 'an Order deemed to be an Order of Court and confirmed as such by the Cape High Court'. According to Nichol, this 'anomaly' constituted an 'exceptional circumstance' entitling him to exemption in terms of s 7(2)*(c)*.

[28] Counsel for the Registrar and the FSB argued, on the other hand, that, once the rules of the Sage Group Fund had been amended and the s 14(1)*(e)* certificates had been issued, the necessary result was that the amalgamation of the three funds became lawful, even if this might have

had the result of rendering redundant some or all of the terms of the Adjudicator's determination. Counsel contended that this position was not altered in any way by the judgment in the proceedings before the Cape High Court.

[29] The relationship between the PFA and the Registrar, and the status of the determination made by the former in the light of the issue of the s 14(1)*(e)* certificates by the latter, are clearly central to the dispute between the parties. However, for present purposes, it is not necessary to decide these issues one way or the other. Suffice it to say that these are exactly the sort of issues that can – and should – be addressed by the FSB Appeal Board. They do not, in my view, constitute exceptional circumstances entitling Nichol to ask the court to exempt him from the obligation to comply with s 7(2)*(a)* of PAJA and exhaust his internal remedy before instituting review proceedings.

[30] In terms of the *Regulations in Respect of Appeals to the Board of Appeal* made by the Minister of Finance under s 26(2) of the FSB Act,[24] any person aggrieved by a decision of the Registrar 'shall within twenty business days after the date of the decision in writing note an appeal against

[24] Government Notice R6 in *GG* 14514 dated 8 January 1993, as amended by Government Notice R1024 in *GG* 14870 dated 18 June 1993 and Government Notice R1666 in *GG* 15096 dated 3 September 1993.

the decision' to the FSB Board of Appeal.[25] Nichol contended that by the time he became aware of the decision of the Registrar on 7 January 2002, the 20 day time period provided for appeals to the Board of Appeal had already expired. This, according to Nichol, precluded him from pursuing his internal remedy under the FSB Act and constituted exceptional circumstances making an exemption in terms of s 7(2)*(c)* clearly in the interests of justice.

[31] As was pointed out by counsel for both sets of respondents, this contention was not raised in Nichol's exemption application, but surfaced for the first time in Nichol's second set of supplementary heads of argument filed a day before the hearing in the court *a quo.* This meant that none of the respondents had the opportunity of responding to this matter in the course of the exemption application. In addition, on the facts, counsel for the respondents disputed the contention that the time period within which to lodge an appeal had passed by the time Nichol became aware of the Registrar's decision.

[32] Counsel also submitted that, although the regulations do not make explicit provision for the Appeal Board to condone non-compliance with the prescribed time period, the regulations are capable of an interpretation

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[25] Regulation 2.

that the Appeal Board *does* have such powers of condonation. In any event, as pointed out above, it is clear from the affidavits deposed to by Nichol and his attorney that consideration was given to pursuing an internal appeal and that the decision not to do so and to proceed by way of judicial review was a deliberate one. There is no suggestion whatsoever in the papers that the reason for this decision was that the internal appeal was out of time. Nichol's case is that he was unaware of the provisions of s 7(2) of PAJA, but that had he been made aware of those provisions at an earlier stage, he would still have proceeded by way of judicial review and not by way of an appeal to the Appeal Board. This being so, he cannot now raise the expiry of the time limit for the lodging of such an appeal as an exceptional circumstance for the purposes of an exemption application in terms of s 7(2)*(c)* of PAJA.

[33] It is thus not necessary to decide whether or not the FSB Appeal Board does have the power to condone non-compliance with the time limit prescribed for the lodging of appeals to it. It should, however, be noted that, in argument before this court, counsel for the Registrar and the FSB gave an undertaking on their behalf that, should Nichol lodge an appeal

with the Appeal Board in terms of s 26(2) of the FSB Act, they would not rely on the expiry of the twenty day time period as a bar to such appeal

[34] It follows from the above that, in my view, the court below correctly held that there were no exceptional circumstances in terms of s 7(2)*(c)* of PAJA for exempting Nichol from his obligation to exhaust his internal remedy prior to instituting review proceedings. Accordingly the appeal should be dismissed with costs.

[35] It is apparent from what I have already said that the question of the continued existence as separate entities of the Sage Schachat Fund, of the third respondent and of the fourth respondent (as a 'merged fund') after the issue of the s 14(1)*(e)* certificates by the Registrar is one of the main issues that will have to be decided by the FSB Appeal Board. This question cannot be resolved in the present appeal. So too, the correctness of the contention by counsel for both sets of respondents that the Sage Schachat Fund had no standing to prosecute this appeal cannot be determined at this stage.

***The cross appeal***

[36] In my view, the cross appeal against the order of the court *a quo* postponing the main application *sine die* and reserving the costs thereof is

misconceived. This 'order' does not satisfy the first jurisdictional requirement for appealabilty under s 20 of the Supreme Court Act 59 of 1959 in that it lacks the attributes of a 'judgment or order' within the meaning of those words in s 20(1). It is not final in its effect and is susceptible of alteration by the court of first instance; it is not definitive of the rights of the parties; and it does not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[26] That being so, the cross appeal should be struck from the roll.

***Order***

[37] In the circumstances, the following order is made:

(a) The appeal is dismissed with costs.

(b) The cross-appeal is struck from the roll with costs.

**B J VAN HEERDEN**
JUDGE OF APPEAL

Concur: **Mpati DP, Navsa JA, Maya AJA, Cachalia AJA**

[26] See in this regard *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); see further LTC Harms *Civil Procedure in the Superior Courts* paras C1.15-C1.18 and the other authorities there cited.