IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 67954/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

In the application of:

FREE STATE MUNICIPAL PENSION FUND First Applicant

and

THE MINSTER OF FINANCE First Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY Second Respondent

CHIEF MASTER OF THE HIGH COURT Third Respondent

CHRISTOPHER HENRY BÖSENBERG N.O.

IN HIS CAPACITY AS THE FORMER MEMBER

REPRESENTATIVE Fourth Respondent

Coram: WEPENER J

Heard: 23 and 24 April 2018

Delivered: 6 June 2018

Summary: Review of Regulations issued 12 years earlier. Delay in launching application for review may be a bar to such application. A delay may be condoned or the time limits varied if it is in the interests of justice to do so. In such cases, the requirements for the interests of justice to be served, need to be complied with fully.

JUDGMENT

WEPENER J:

Introduction

[1] The issue in this matter is a decision of the Minister of Finance (the Minister) to publish regulations[1] and, in particular, regulation 35(4) which was issued under s 36 of the Pension Funds Act (PFA),[2] in which regulation, the Minister provided that money may not be released from a contingency reserve account, except as a result of payment to a category of former members as a result of crediting the Guardian's Fund or some other fund[3] established by law to include such amounts. The Fund contends that the publication of the regulation is an administrative act pursuant to the provisions of PAJA[4] and that it is entitled to review the promulgation of the regulation by the Minister. In a later affidavit, the Fund contended that its application for a review is a collateral challenge to the promulgation of the regulation with the result that it is not bound to the time constraints set out in s 7 of PAJA.[5] Nevertheless, the Fund

[1] Promulgated in Government Notice no 558 of 22 April 2003.
[2] Act 24 of 1956.
[3] Such other fund may be established by a Fund – see definition of contingency reserve account in the PFA.
[4] Promotion of Administrative Justice Act 3 of 2000.
[5] '**Procedure of judicial review**

conditionally applied for a variation of the time limits contained in s 7 of PAJA pursuant to the provisions of s 9 of the Act.[6]

Background and history

[2] The applicant is the Free State Municipal Pension Fund, a pension fund registered in terms of s 4 of the PFA and it is a closed pension fund, having members who are employees and former employees of local authorities in the Free State province. The first respondent is the Minister of Finance, who in his official capacity, promulgated reg 35(4) pursuant to the powers conferred on the minister in s 36(1) of the PFA.[7] This was promulgated by the Minister on 22 April 2003 and as can be seen from the wording of the regulation, it regulates how the funds of certain categories of former members of that Fund shall be placed into a contingency reserve account specific for that purpose.[8] The third respondent is the Chief

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7. (1) Any proceeding for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded;
(2)(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) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[6] **'Variation of time**
9. (1) The period of—
(a)
(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,
by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[7] **Regulations**
(1) The Minister may make regulations, not inconsistent with the provisions of this Act
(a) in regard to all matters which by this Act are required or permitted to be prescribed by regulation;
(b)
(bA)...
(bB)...
(bC)
(bD)...
(c) generally, as to all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.'

[8] Regulation 35(4)
'Where a board is able to determine the enhancement due in respect of a particular former member in terms of section 15B(5)(b) or (c) of the Act, but is unable to trace that former member in order to make payment, the board shall put the corresponding enhancement into a contingency reserve account specific for the purpose.

Master of the High Court who is in control of the Guardian's Fund and the fourth respondent, the former member representative of former members of the Fund in terms of s 15B(3) of the PFA. Neither the third and fourth respondents participated in the proceedings.

[3] The Fund did not adhere to the provisions of the regulation and submitted that it was led to believe that the second respondent, whose former name was the Registrar of Pensions Funds (the Registrar), created the impression that the Registrar would not enforce the provisions of the regulation. It is not alleged nor shown that the Minister at any stage indicated or created the impression that the regulation would not be enforced. The Fund relies solely on the fact that the Registrar created such impression. I will return to this issue later in the judgment.

[4] The background facts furnished by the Minister in his answering affidavit are not seriously disputed. Sections 15A to 15K were provisions that were introduced into the PFA by the Pension Funds Second Amendment Act.[9] These provisions were inserted following amongst others, the judgment of the Supreme Court of Appeal (SCA) in *TEK Corporation Provident Fund and Others v Lorentz*[10] where the SCA stated that the controversial issues regarding the ownership of a surplus in pension funds and the rights of stakeholders thereto must ultimately be resolved by legislation. Prior to the promulgation of the Pension Funds Second Amendment Act, most pension funds penalised members who left employment and changed pension funds prior to retirement by paying those members or transferring on their behalf a portion of what the Pension Fund held on their behalf. This resulted in the former members not receiving 100 percent of the amount which the Pension Fund held on their behalf. Most Pension Funds also did not have pension increase policies, which ensured that pensioners were granted inflation related increases to their pensions.

[5] To deal with these issues affecting former members and pensioners amongst

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Notwithstanding anything in the rules of the fund, monies may not be released from such contingency reserve accounts except as a result of payment to such former members or as a result of crediting the Guardians Fund or some other fund established by law to include such amounts.'

[9] Act 39 of 2001.
[10] 1999 (4) SA 884 (SCA).

others, the legislator introduced the surplus provisions into the PFA with effect from 7 December 2001. The legislator required that all Pension Funds that had actuarial surplus as at their next statutory actuarial valuation date after 7 December 2001 ('surplus apportion date') must distribute that surplus to the stakeholders (members, formers members and employers) in accordance with the provisions of s 15B of the PFA. In order to address the manner in which the former members and pensioners were treated prior to 2001, s 15B(5)(b) of the PFA expressly requires that the available surplus be first used to ground minimum benefit enhancements to former members and minimum pension increases to pensioners as a prior charge on the surplus available for distribution. If there is any distributal surplus remaining after provision has been made for the minimum benefit enhancements to former members and minimum pension increases for pensioners, then that surplus can be distributed on an equitable basis among all stakeholders. If there is only sufficient surplus to make provision for the minimum benefit enhancements to former members and minimum pension increases for pensioners then the other stakeholders, being the employers and the members, would not receive the surplus. Section 15B requires that the surplus apportionment scheme prepared by the board of the pension fund be submitted to the Registrar for approval. Upon approval by the Registrar, the surplus apportionment scheme acquires legal force and the scheme must be implemented. Against this background, the Fund submitted an apportionment scheme to the Registrar on 29 November 2013 reflecting the financial position of the Fund as at 30 June 2011. However, on 18 May 2015 the Registrar advised the Fund as follows:

> 'In terms of section 33A(1) the Registrar directs the board of the fund within two months of the date of this letter to
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> 19.1 Reverse the decision to revert the R83.357 million of section 15B surplus payable to its former members in terms of the surplus apportionment scheme and calculated as at 31 October 2008 and restore the fund to financial neutrality, i.e. in the same position it was prior to the reversion of the said amount; and
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> 19.2 Implement the provisions of Regulation 35(4) made in terms of section 36(1) of the PFA in respect of section 15B surplus mentioned on paragraph 18.1'

The effect of the Registrar's letter is that the Fund was to reverse the s 15B surplus allocated to former members, contrary to reg 35(4) of the PFA. It is this directive of the Registrar to the Fund to comply with the provisions of reg 35(4) that lead to the present application.

[6] Counsel for the Minister submitted that the Fund is non-suited. The argument was that the applicant brought an application for review under the provisions of PAJA in circumstances where the direct attack on the provisions of reg 35 is not permissible in law. This is so by virtue of the provisions of s 7 of PAJA. However, it is settled law that the party may also launch a collateral challenge or reactive challenge to a provision under scrutiny by relying on the constitutional invalidity of the provision. But, argued counsel for the Minister, the collateral challenge was never the case it had to meet. If regard is had to the wording of the relief sought[11] and the manner in which the affidavit was presented, one is driven to agree with the Minister that the application is couched as a review under PAJA. It is only after all papers were filed that the applicant brought a conditional application wherein it sought condonation for the delay pursuant to the provisions of s 9 of PAJA. The issue of a collateral challenge is mentioned in this conditional application for an extension of time pursuant to the provisions of s 9(2) of PAJA. Indeed, the affidavit in support of the application for condonation regarding the delay is specific; that the application is conditional because it had in the past been advised that s 7 of PAJA does not apply to the making of regulations. Contrary to the founding affidavit wherein it is alleged that

> 'the regulation therefore falls to be reviewed and set aside under the Promotion of Administrative Justice Act no 3 of 2000 ("PAJA")'

Save for this contradictory allegation in the affidavit in support of the conditional application, and setting out the facts why the Fund believed that the Registrar would not implement the Regulation promulgated by the Minister, it then introduced a

[11] 'Prayer 1: Declaring the Regulation 35(4) issued by the first respondent ('the Minister of Finance') under section 36 of the Pension Funds Act 24 of 1956 ("the PFA") in terms of Government Notice number 558 of 22 April 2003 to be unconstitutional and I or ultra vires the PFA and / or ultra vires the powers of the Minister of Finance under the PFA.'

collateral challenge to the validity of reg 35(4), virtually *en passant.*

[7] Counsel for the Minister, in my view, correctly pointed out that the applicant presented its case on the basis of PAJA for review of reg 35(4). However, because of the view that I take of the matter, it is unnecessary to determine whether the applicant is non-suited for instituting proceedings clothed as a review in terms of PAJA and later changing course to clothe it as a collateral challenge. There is a difference in approach and principles applicable to the two remedies.[12] The collateral challenge was later raised in order to argue that the time bar contained in s 7 of PAJA is not applicable to the review proceedings. But whether the provisions of s 7 of PAJA should apply or whether an extension of time should be granted in the interests of justice,[13] the same result follows in this matter as I shall elaborate below. The Fund's contention is that there is absolutely no time bar for it to embark on the collateral challenge[14] to determine whether the delay in bringing these proceedings does indeed play a role. It is important to analyse the nature of the collateral challenge, belatedly, introduced into the proceedings. Relying on *Merafong*, the Fund argued that it may introduce a collateral challenge with impunity, but that is not what Cameron J held in *Merafong*. Cameron J found in 'classical' collateral challenges that a delay plays no role. The classical collateral challenge is one where 'a subject raises (it) when the State threatens imprisonment or coerces payment'[15] Cameron J said:[16]

> 'First, we must note that Merafong's reactive challenge has distinctive attributes. These render it different from those a subject raises when the state threatens imprisonment or coerces payment. In these cases, which we may call "classical" collateral challenges, delay plays no role. The subject is entitled, as of right, to scrutinise the lawfulness of coercive action because the rule of law requires that official power not be exercised against the liberty or property of a subject unless it is

[12] But it is not necessary to analyse these at this stage as I will only refer to the applicable principles as far as is necessary in this judgment.
[13] Section 9 of PAJA.
[14] *Merafong City Local Municipality v Anglo Gold Ashanti Limited* 2017 (2) BCLR 182 (CC); (2017 (2) SA 211 (CC) para 69.
[15] *Merafong* para 69.
[16] *Merafong* para 69.

lawfully sourced.'

[8] The learned judge continued

'[70] The virtue of "classical" reactive challenges lies precisely in the fact that they provide a defence to parties who face the enforcement of the law but who never previously confronted it. And it is for this reason that they may sometimes be disallowed. Where a statute provides for an appeal or other remedy, and the disputed decision was specifically directed to the challenging party, our courts have forbidden a collateral challenge.

[71] The point of these cases is that the ruling or decision was not directed to the world at large. It was specific. It was known to the subject. They stand in contrast to instances where the law is of general application, and is possibly unknown to the person against whom it is sought to be enforced. There, delay cannot be a disqualifying consideration.' (footnotes omitted) (emphasis added)

What is important is that Cameron J held[17] that *Merafong* was well aware of the Minister's decision and that it knew that it had a legal challenge available to it since the decision was taken. That meant that the reactive challenge is of the category that necessitates scrutiny in regard to delay.[18] As in the case of *Merafong*, in this matter, the Fund accepts that the promulgation of the regulation was administrative action. Cameron J said[19]:

'. . . Whether under PAJA, or legality review, it was obliged to institute proceedings to review the decision without unreasonable delay. The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decisionmaking body itself. Had Merafong instituted a review application, as it ought, the court hearing it would have had to consider whether the delay precluded its challenge. (footnotes omitted)

[9] Counsel for the applicant accepted at the outset of the hearing that the

[17] At para 72.
[18] *Merafong* para 72.
[19] *Merafong* para 73.

provisions of PAJA apply and should be applied by this court. It was, however, submitted that due to the applicant's reliance on a collateral challenge, it is not time barred.

[10] Accepting, as the applicant does, that it knew of the regulations and its impact shortly after it was promulgated, this court must determine whether the applicant has satisfied the provisions of s 9 in order to grant the applicant condonation or whether it is not time barred at all due to the collateral challenge, should it be able to rely thereon despite the manner in which it was introduced into the papers.

[11] In order to satisfy the provisions of s 9 of PAJA, the applicant is enjoined to satisfy a court that the interests of justice require the granting of an extension of the time period during which it may institute proceedings. In *Aurecon South Africa (Pty) Ltd v City of Cape Town*[20] the court said[21] that the test, whether it is in the interests of justice to condone a delay, depends entirely on the facts and circumstances of each case. The relevant factors in the enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, the latter which must cover the whole period of the delay; the importance of the issue to be raised; the prospects of success and the reasonableness of the explanation[22]

[12] It was common cause between the parties, and the applicant conceded, that the test to be applied in order to determine the merits of the delay is that which is set out in *Mostert* by the SCA[23]. Having regard thereto, it is common cause that the commencement date to determine the delay is 2003. The application was launched in 2015 resulting in a delay of some 12 years before the review of the regulation was

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[20] 2016 (2) SA 199 (SCA).
[21] At para 17.
[22] *Price Waterhouse Coopers Inc and Others v van Vollenhoven NO and Another* [2010] 2 All SA 256 (SCA) para 7.
[23] *Mostert NO v The Registrar of Pension Funds and Others* (986/2016) [2017] ZASCA 108; 2018 (2) SA 53 (SCA) (15 September 2017) para 48 (*Mostert* SCA). In *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) it was held at para 51 that: 'In my view there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both s 7(1) of PAJA and in the provisions of s 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case.'

sought. The applicant accepted that it delayed but submitted that its collateral challenge is not time barred by the provisions of s 7 of PAJA. That is however, not the end of the matter. The applicant who launches an application wherein it relies on a collateral challenge, must show that, despite its delay, the interests of justice require the challenge to be entertained. This, in turn, requires of the applicant to satisfy the aforesaid requirements.

[13] A delay of 12 years is indeed excessive. In addition, by alleging that it thought that the Registrar (and not the Minister who promulgated the regulation) created an impression that it will not apply the law and therefore the Fund ignored the law is, in my view, an unreasonable approach in the extreme. It is more so by virtue of the Registrar's evidence, which cannot be disputed, that it had not ignored the provisions and indeed it applied the regulation and that the majority of funds had adhered to it. It also flies in the face of the principle that administrative action remains enforceable unless and until it is set aside by a competent court.[24] The Minister too confirmed that the regulation was not ignored. The applicant has failed to set out a factual basis for its contention that the regulation was ignored by any of the affected Funds or administrators. The administrative act has legal consequences and unless legal proceedings are taken at law to establish a cause of invalidity and to get quashed or upset, it will remain effective for its ostensible purpose.[25] The belief that the registrar would not implement the law has no factual basis and is consequently not a factor which can assist the applicant in this matter. In *Grootboom,*[26] Zondo J said the following about the assessment of the relevant factors and the weight to be given to each[27]:

'. . . However, some of the factors may justifiably be left out of consideration in certain

[24] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA) para 27.
[25] *South African Broadcasting Corporation SOC Limited and Others v Democratic Alliance and Others (Corruption Watch as amicus curiae)* [2015] 4 All SA 719 (SCA) para 45; *Member of the Executive Council of Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (5) BCLR 547 (CC) para 103; *President of the Republic of South Africa and Others v South African Dental Association and Another* 2015 (4) BCLR 388 (CC) para 12; *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC); *Democratic Alliance v Speaker of the National Assembly and Others (Corruption Watch (RF) MPC as amicus curiae)* 2016 (5) BCLR 618 (CC) para 74.
[26] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC).
[27] At para 51.

> circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of the delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be grated. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party.'

Having regard to the excessive delay, it is necessary to consider the reasons proffered by the applicant and what it says regarding the whole period of the delay[28]. It is in this part of the matter where the applicant fails to such an extent, that its application cannot be said to satisfy in the interests of justice. The explanation not only fails to deal with lengthy periods during the 12 year period of delay, its reasons are also unimpressive. The reasons why the applicant only brought these proceedings after a period of 12 years are set out in a further affidavit wherein the condonation is conditionally sought. It cannot be gainsaid that the applicant failed to deal with the entire period of 12 years during which the delay occurred. In fact, several periods of some years are just not dealt with at all. Of the 12 year period, there are eight years that are not explained. Indeed, there are lengthy periods of inaction by the applicant.

[14] The final matter that weighs heavily against the applicant is its own assertion that, despite the principles expoused in *Oudekraal*, it ignored the provisions of the regulation. The applicant's explanation in so far as it is one, does not pass muster and does not cover the larger portion of the period of delay. It is a self-serving explanation and exhibits a refusal to comply with the law and seeks to blame the registrar for its own failure to comply with the law without utilizing its legal remedies. The explanation was also based on incorrect facts. It sought to explain the delay with reference to a letter issued by the registrar in 2012 when it was advised and required

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[28] See *South African Transport and Allied workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC): 'Holding parties to pleadings ir not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

to comply with regulation 35. This was clearly an incorrect reliance.[29]

[15] On the basis that the collateral challenge was indeed properly raised (and I find that it was introduced *en passant* and belatedly)[30] the matter also falls to fail on the basis of the unexplained delay of some 8 years.[31] In addition, it is for the applicant to show that there is no prejudice to other parties should condonation be granted. In my view, there is severe prejudice for the respondents and well as other Funds, the latter which have adhered to the regulation. The majority of the Funds have complied with the regulation. That, in turn, resulted in surplus funds having been allocated as prescribed over a period of 12 years. There would be manifest prejudice to those employees who were identified and were recipients of allocations over the years. The applicant failed to set out specific facts, even boldly, to show that there is no prejudice to other parties. I am driven to the opposite conclusion. Since the promulgation of reg 35, the vast majority of Funds (and there are approximately 500 of them with only three that have not complied with the regulation) have indeed complied with the regulation and allocated funds in accordance with its provisions. Should the regulation be set aside, these Funds will have to reallocate the funds retrospectively and also amend their records since 2003 in order to comply with a new regime since reg 35. Such refunds and reallocation will be made despite the vested rights of former members, an aspect to which I will return. These rights would be annulled despite having accrued to former members and will be to the prejudice of such former members. The prejudice will also be for those Funds who complied with the regulation and they, if the regulation is set aside, will have to reallocate funds and re-do all the allocations since 2003. This, too, will affect the rights of those former members who acquired rights due to the allocation to them pursuant to the provisions of the regulation. These members are entitled to protection rather than action that would deprive them of their rights. The applicant has failed to show that the problem of acquired rights can be accommodated should the regulation be set aside. That it would constitute an onerous task on the Funds

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[29] *Mostert* (SCA) para 48.
[30] *Tasima* para 153.
[31] *Grootboom ibid*.

who complied with the regulation is apparent if regard is had to the various prescriptive provisions and the manner in which the boards of Funds are required to consider the issues when allocating funds.

[16] The position, should s 9 of PAJA not apply, is no different. Delaying may not be a bar to a collateral challenge in many cases. But as held by Cameron J in *Merafong*, it is available to a party 'who never previously confronted' the legal issue[32] and where the law was possibly unknown to the person it is sought to be enforced against.[33] The applicant falls in neither category. It is common cause that the applicant was confronted with the regulation over 12 years ago but elected to ignore it. It was therefore well aware of the promulgation of the regulation and delay can indeed be a disqualifying consideration. In addition, the applicant is disqualified from attacking the regulation for the same reasons that were set out why an extension of time would not be in the interests of justice. The applicant's gross failure in so far as its delay is concerned makes its unnecessary to consider the prospects of success.[34]

[17] In my view, the applicant failed to make a case that it would be in the interests of justice to allow it to embark on the collateral challenge belatedly introduced after all parties had filed their affidavits dealing with the merits of the review matter. The application falls to be dismissed on this basis alone.

[18] If I am wrong in this conclusion, the question of the prospects of success should also be considered. In previous litigation regarding the same issue, Van der Linde J held, albeit obiter, that the review of the regulation would fail on the merits. This issue goes to the root of the matter in this court as well. An appreciation of the issues dealt with in the PFA and the regulations is required to determine both the merits of the application and whether the interests of justice require condonation of the application to embark on a collateral challenge regarding the validity of the regulation. If the prospects of success are poor, it strengthens the finding that the applicant not be granted condonation as the interests of justice will not thereby be served.

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[32] Para 8 above. See also *Department of Transport v Tasima (Pty) Ltd* 2017 (1) BCLR 1 (CC) para 150.
[33] Para 8 above.
[34] *Grootboom supra* para 14.

[19] As far as the prospects of success are concerned, I find that the Minister had the authority to make the Regulation. Section 36 of the PFA grants the Minister wide powers of regulation. A limitation would have to meet the general principles of legality and rationality that have to be met.

[20] The applicant failed to have regard to the distinction between the various provisions of the PFA and reg 35(4). In my view, it failed to acknowledge the different categories of members dealt with by the PFA and the regulation[35] and the effect and purpose of the regulation but dealt with the different categories generically. A failure to appreciate that distinction led to the challenge based on legality or that it is ultra vires the Minister's powers, and a challenge based on rationality. [36] An analysis of the legislative scheme of the PFA leads to an understanding of, which counsel for the second respondent submitted, the distinction between the 'calculation problem' and the 'payment problem' that is evident from s 15B(4)(b) and s 15B(5)(e) on the one hand and reg 35(4) on the other. These provisions provide for two different situations in which actuarial surplus can be placed into a contingency reserve account. The sections confer a discretion on a Board whilst the regulation imposes an obligation.

[21] The first situation arises where the benefits that are due to a former member are incapable of calculation because of inadequate records that exist regarding that member. This results in a board of a Fund being unable to apportion an actuarial surplus to such former member because it is unable to determine what period the former member was a member of the Fund. This leads to a difficulty in calculating the amount to apportion to such a member. A second situation arises when the benefits of former members can be calculated but payment cannot be made because the member cannot be traced. In such a case a board is able to apportion actuarial surplus to the members' surplus account and, importantly, the former member acquires a right to such surplus.[37] However, payment cannot be made to the former

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[35] *Mostert v Registrar of Pension Funds and Others* (07352/2015) [2016] ZAGPJHG 209; [2016] 4 All SA 131 (GJ) (24 June 2016) (*Mostert* High Court) para 48.

[36] *Mostert* High Court para 9.

[37] Section 15A(2) 'Once actuarial surplus is apportioned to either the member surplus account, or the employers surplus account in terms of sections 15B and 15C, or directly for the benefit of members and former members

member because the member's whereabouts are unknown. This leads to a payment problem for the Fund since it involves the payment of a benefit that has been calculated. The right to the allocation vests in the former member 'once the actuarial surplus in apportioned. . . .'[38] This is different from other members who have been excluded from apportionment in terms of s 15B(4)(a)[39] due to the fact that there are insufficient records available. These members do not acquire rights to actuarial surplus.

[22] This analysis is not seriously in dispute and despite the applicant's reliance on *British American Tobacco Pension Fund v Howie NO and Others,*[40] the authority that the former members to whom an allocation was made, acquire accrued rights when the allocation of the surplus is made to the surplus account, lies in the judgment of the Supreme Court of Appeal in the *British Tobacco* matter[41] where it was held as follows[42]:

> 'But even if we accept the fact of the credit balance in the MSA [i.e. the member surplus account], it does not necessarily follow that it could lawfully have been used to reduce the deficit. For, this would mean ignoring or overriding the rights of the beneficiaries to the actuarial surplus that had accrued as at the surplus apportionment date, which was 31 March 2002. Once the right had accrued and the MSA was credited with the surplus amount, the beneficiaries immediately became entitled to it, and a liability of the fund thus arose simultaneously. The MSA had to be debited to reflect this liability, which follows as a matter of law. The fact that the scheme had not been implemented, and that the MSA therefore had what in reality was a notional credit balance at a later date when the fund invoked s 15H(1), has no bearing on the

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subject to the uses specified in section 15D(1), members, formers members and the employer acquire rights to such actuarial surplus as provided for in this section.'

[38] Section 15A2.

[39] 'The board shall determine who may participate in the apportionment of actuarial surplus, and shall include in such apportionment existing members and any former members who left the fund in the period 1 January 1980 to the surplus apportionment date: provided that

(a) The board may exclude from participation former members in respect of whom the board satisfies the registrar that insufficient records are available to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps. . . .'

[40] 2016 (1) SA 398 (GP).

[41] *Registrar of Pension Funds v British American Tobacco Pension Fund* [2016] ZASCA 138 (28 September 2016); [2016] 4 All SA 812 (SCA).

[42] At para 28.

> legal question whether the fund was permitted to do so; the effect of using 15H(1) to reduce the deficit in this manner would eviscerate the right of beneficiaries to the use of the surplus allocation and defeat the purpose for which the surplus was allocated.'

[23] The position of such a member, who acquires a vested right to accrued surplus, is different to a former member in respect of whom a board is unable to calculate the additional benefit due because that member does not acquire any right to the actuarial surplus.

[24] Once the distinction between the two categories of former members is made the arguments submitted by the applicant can be considered. The first argument (the legality argument) is that reg 35(4) is inconsistent with the PFA because it fetters the statutory discretion of the board by obliging it to establish a contingency reserve account contrary to the Act, the latter which gives the board a discretion whether or not to do so. But the argument suffers from a lack or reliance on a source for the board's power to elect whether to establish a contingency reserve account or whether to pay money into a contingency reserve account. The reliance on the definition section[43] where a contingency reserve account is defined, is misplaced. A definition explains what is meant by the phrase 'contingency reserve account' when the phrase is used in the Act but it does not purport to confer a power on a board. The reliance is on s 15B(5)(e) to support an argument that it empowers a board 'to determine how (in the case of former members for whom a benefit enhancement has been determined but who cannot be found) the allocated portion of actuarial surplus shall be applied for their benefit. But, so the argument goes, reg 35(4) dealt with the same category of members as those referred to in s 15B(5)(e), namely those former members for whom enhancement has been calculated but who cannot be traced in order to be paid. The applicant conflates the categories of former members referred to in reg 35(4) on the one hand and s 15B(5)(e) on the other, as the same category of former members and argued that the Minister had acted ultra vires his powers in

[43] Section 1 of the PFA reads: 'Contingency reserve account' in relation to a fund, means an account provided for in the rules of the fund, which has been amended in accordance with the requirements of the registrar, or which has not been disallowed by the registrar, and to which shall be credited or debited such amounts as the board shall determine, on the advice of the valuator where the fund is not valuation exempt, in order to provide for a specific category of contingency'.

treating this category of former members in a manner that differs from the treatment afforded them by s 15B(5)(e). The argument must fail because reg 35(4) and s15B(5)(e) are directed at different categories of former members. Section 15B(4)(b) also addresses those members affected by the calculation problem. Regulation 35(4) addresses the payment problem, one in which a board has no discretion to exclude former members from apportionment in terms of s 15B(4). Upon approval of the surplus apportionment these former members acquire a vested right to payment of the benefit.

[25] The very purpose reg 35(4) is to cater for the former members for whom a benefit can be calculated but who cannot be traced. In the result, since reg 35(4) does not deal with the same category of former members as s 15B(5)(e), there is no inconsistency between the two provisions[44] and the regulation is therefore not ultra vires as it does not fetter the board's discretion when it comes to dealing with the former members as contemplated in s 15B(5)(e).

[26] As a second argument, the applicant submitted that the PFA affords a board a discretion to debit monies from a contingency reserve account whilst the regulation prohibits the release of surplus monies held in such an account as a result of crediting the Guardian's Fund. Reliance for the argument is placed on the definition 'contingency reserve account' which I have indicated is not a source of substantive rights and obligations.

[27] In *National Tertiary Retirement Fund v Registrar of Pension Funds*[45] the Supreme Court of Appeal said:

> 'The Board of Appeal held that the requirement in s 12(4) that the alteration of the rules should not be inconsistent with the Act meant that the alteration should be in agreement with the whole Act, ie "its object, purpose and policy as gathered from a comparison of its several parts, as well as from the history of the Act and from the circumstances applicable to its subject matter to ensure that pension funds are operated fairly, properly and successfully". The alteration can only be inconsistent with

[44] *Mostert* High Court para 48.
[45] 2009 (5) SA 366 (SCA) para 20.

> the Act if it conflicts with the terms of the Act. Naturally the terms of the Act are to be properly interpreted and when that is done "a court is entitled to have regard not only to the words used by the Legislature but also to its object and policy".'

In the circumstances the argument that reg 35(4) is inconsistent with the PFA must fail.

[28] In a further argument the applicant contended that reg 35(4) should be set aside on the ground that it is irrational. The approach to determine whether administrative act is rational or otherwise, was explained by the Constitutional Court in *Law Society of South Africa and Others v Minister of Transport and Another*[46] as follows:

> '. . . [W]hen making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose.
>
> . . .
>
> It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.
>
> It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at the deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.'

[29] Counsel for the second respondent with whom counsel for the first respondent made common cause, submitted, in my view correctly, that the threshold is low and surmounted by most governmental regulations if regard is had to the matter *Ex Parte*

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[46] 2011 (1) SA 400 (CC) paras 32, 34 and 35.

President of the Republic of South Africa[47] where it was said:

> '. . . The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.'

[30] All that this court should be concerned with is whether there is a rational relationship between the means chosen and the result sought to be achieved.[48] If the decision furthers a legitimate purpose then it is a rational one and it does not matter that the same purpose might be achieved by less restrictive means. The principle as thus been set out as follows in *Scalabrini*[49]:

> '. . . rationality entails that the decision is founded upon reason — in contra-distinction to one that is arbitrary — which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare.'

[31] Applying this test, I am of the view that the applicant failed to show that the promulgation of reg 35(4) is not rationally connected to a legitimate purpose. The regulation ensures that the Fund would have sufficient assets to meet obligations to a category of former members. It accords with common sense and a sound business practice requirement for a Fund to be financially sound and be able meet claims by former members who the Fund has been unable to trace.

[32] As a last resort the applicant submitted that the reg 35(4) conflicts with the law

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[47] *Ex parte President of the Republic of South Africa, In re: Pharmaceutical Manufacturers Association of South Africa and Another* 2000 (2) SA 674 (CC) para 90.

[48] *Affordable Medicine's Trust v Minister of Health* 2006 (3) SA 247 (CC) para 78; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51; *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 32.

[49] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) para 65.

of prescription because the regulation requires that money be held ad infinitum unless released to the Guardian's Fund even though a debt prescribes three years after the date upon which it became due. The argument can be shortly dealt with. Section 12(3) of the Prescription Act [50] provides that the commencement of prescription is delayed until a creditor has knowledge of the identity of the debtor and the facts from which the debt arises. Claims may only prescribe after the date provided for in s 12(3) and have not, as a fact, become prescribed on 24 October 2009 as the applicant would have it. As such, the allegation that the decisions suffered from irrationality cannot be upheld on the grounds advanced by the Fund.

[33] In all the circumstances the application cannot succeed on the merits, which strengthens the finding that the delay in bringing the application or purported collateral challenge should be condoned.

[34] Save for the Minister who left the question of costs in the hands of the Court, the parties were in agreement that no cost order should be made in the event of the application being unsuccessful.

[35] In all the circumstances, the application is dismissed.

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Wepener J

Counsel for Applicant: A.E. Franklin SC with P.A. Buirski

Attorneys for Applicant: Hlathswayo Du Plessis Van der Merwe Nkaiseng

Counsel for First Respondent: N.M. Maene tje SC with Khumalo

Attorneys for First Respondent: State Attorney

Counsel for the Second Respondent: A. Cockrell SC with N. Mbelle

Attorneys for the Second Respondent: Rooth & Wessels Inc.

[50] Act 68 of 1969.