REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 349/07
Reportable

In the matter between:

EDCON PENSION FUND **APPELLANT**

and

THE FINANCIAL SERVICES BOARD OF APPEAL **FIRST RESPONDENT**

THE DEPUTY REGISTRAR OF PENSION FUNDS **SECOND RESPONDENT**

CORAM: SCOTT, FARLAM, NAVSA, MTHIYANE JJA et MHLANTLA AJA

HEARD: 20 MAY 2008

DELIVERED: 29 MAY 2008

SUMMARY: Pensions – whether right to bring transfer application under s 14 of Pension Funds Act 24 of 1956 accrued to appellant before Act 39 of 2001 came into operation.

Neutral citation: This judgment may be referred to as *Edcon Pension Fund v The Fianancial Services Board of Appeal and Another* (349/07) [2008] ZASCA 65 (29 May 2008).

JUDGMENT

FARLAM JA

Introduction

[1] This is an appeal against a decision of Preller J, sitting in the Pretoria High Court, in which he dismissed a review application against a decision of the first respondent, the Financial Services Board of Appeal.

[2] The appellant, the Edcon Pension Fund, is a pension fund organization registered as a pension fund in terms of the Pension Funds Act 24 of 1956, as amended (to which I shall refer in what follows as 'the Act'). The first appellant is the Board of Appeal constituted in terms of s 26 of the Financial Services Board Act 97 of 1990, which heard and dismissed an appeal from a decision taken by the second respondent, the Deputy Registrar of Pension Funds, to reject certain transfer applications submitted to him in terms of s 14 of the Act. The second respondent's decision to reject the transfer applications was based on his view that they were incompatible with the provisions of the Pension Funds Second Amendment Act 39 of 2001 (which I shall call in what follows 'the surplus legislation').

[3] The appellant does not dispute that the transfer applications are incompatible with the provisions of the surplus legislation but contends that it had acquired a vested right to have the applications determined in accordance with the provisions of the Act as they were before the surplus legislation came into effect.

Facts

[4] Before I summarise the arguments advanced before us by the appellant and the second respondent it is necessary to summarise the main facts.

[5] On 7 July 1997 the fund was closed to new entrants and its members were offered the opportunity of transferring to certain provident funds which had been established by the employer. Thereafter the fund embarked upon an exercise which

involved a restructuring and distribution of the surplus in the fund. This exercise, which started before the advent of the surplus legislation, was designed and implemented in accordance with the legal position at that time. The restructuring part of the exercise involved the transfer of members to the provident funds and the outsourcing of the benefits payable by the fund to pensioners. Transferring members, pensioners and certain members were offered benefit enhancements funded out of the surplus but were required to renounce their employer post-retirement medical aid benefits. Former members who had already transferred to the provident funds were also offered the opportunity of renouncing their post-retirement medical aid benefits in exchange for an enhanced benefit. In order to match an enhancement which former members who had already transferred to the provident funds had received when the transfer occurred transferring members and pensioners were also offered an additional 25 per cent enhancement. It was thereafter envisaged that the balancing surplus would be transferred to the Edcon Provident Fund for specified uses by the employer.

[6] In order to give effect to the restructuring certain amendments to its rules were adopted by the fund and submitted to the Registrar's office on 7 December 2000 for approval in terms of s 12 of the Act. The Registrar was not happy with the amendments, primarily because they had not been adopted pursuant to a negotiated settlement. In May 2001 at a meeting at the Registrar's office it was agreed that the fund would enter into a negotiated agreement concerning the distribution of the surplus with all stakeholders and that certain consequential amendments would be made and that the amendments, as modified in the light of the negotiated agreement, would be resubmitted for approval. On 14 June 2001 the negotiated agreement was submitted to the Registrar's office, together with further draft amended rules for advance approval. On 18 June 2001 the Registrar's office advised that it could not approve rules in advance but that it could not see anything untoward in principle in the draft rules.

[7] During August 2001 the amended rule amendments, which gave effect to the negotiated settlement, were submitted to the Registrar's office, together with certificates from the actuary of the fund and the trustees stating that they regarded the distribution as reasonable.

[8] No response regarding the amendments was received from the Registrar's office before 7 December 2001, when the surplus legislation came into effect. Subsequently, in March 2002, the Registrar's office advised the fund that in view of the surplus legislation it was obliged to reject all applications for rule amendments that failed to give effect to the reasonable expectations of members and former members arising from the surplus legislation. The fund was further advised that it had to retain a contingency reserve sufficient to address any claims that were likely to arise as a result of the surplus legislation. A further set of amendments was then drafted and submitted by the fund on 6 June 2002 so as to comply with the Registrar's further demands. Eight days later the Registrar's office issued a circular stating that rule amendments and transfer applications submitted before 7 December 2001, (when, it will be remembered, the surplus legislation came into operation), would be considered in the light of the legal position as it was when they were submitted. Applicants whose applications were submitted before 7 December 2001 but were rejected after that date because of non-compliance with the surplus legislation were invited to resubmit applications.

[9] The fund responded to this invitation and to certain other advice it received from the Registrar's office and requested the Registrar to consider the rule amendments it had submitted in August 2001. As a result these amendments, which provided that they were effective from 1 September 2001, were registered. In terms of s 12 of the Act they were deemed to have come into effect on the date stated, ie, over three months before the surplus legislation came into operation.

[10] After the rule amendments were registered the fund implemented what the chairman of its trustees called in the founding affidavit 'an extensive communication exercise' to advise stakeholders about the rule amendments and steps were taken to begin implementing the scheme.

[11] On or about 17 February 2003 each of the members was provided with what was described as 'an option', either to remain a member of the fund or to transfer to one of the provident funds, effective from 1 March 2003. Those members who elected to transfer were to receive a 25 per cent enhancement to their actuarial

reserve values, but were to forfeit their entitlements to have their post-retirement medical aid contributions, as well as other medical costs, subsidised by the employer. 155 active members were communicated with, of whom 29 elected to remain members of the fund, 35 did not reply (and thus by default also remained members of the fund), 87 accepted the offer to transfer to one of the provident funds, and there were what were described as four ‘exits’ from the fund. Pensioners of the fund were also given options in respect of future payments and funding of their pensions, either to remain pensioners of the fund and thus continue to receive their monthly pension payments from the fund and to receive their post-retirement medical aid contribution subsidy from the employer, or to purchase annuities in their own names with an enhancement to their pensioner liabilities of 25 per cent and to agree to discharge their former employer from its post-retirement medical aid contribution subsidy liability. From 1 March to 1 May 2003 560 pensioners appear to have elected to choose the second alternative.

[12] On 4 June 2003 the fund submitted the relevant transfer applications to the Registrar’s office for approval in terms of s 14 of the Act.

[13] On 13 August 2003 the Registrar’s office wrote a letter to Alexander Forbes Financial Services, the fund’s consultants, stating that the Registrar could at that stage only approve the transfer of 100 per cent of Member’s accrued liabilities and that any surplus in the fund should be dealt with in terms of the surplus legislation.

[14] On 14 August 2003, the chairman of the fund’s trustees sent a letter to the Registrar’s office in which he stated that he had been informed by the fund’s consultants of the decision to decline to approve the s 14 applications. After expressing his concern and frustration at this outcome, given the long and protracted negotiations and dealings the fund had entered into with the Registrar’s office in relation to the transfer applications, he requested a formal response from the Registrar.

[15] The second respondent’s reply to this letter was sent to the appellant on 28 August 2003. It reads as follows:

‘Amendment No 14 to the Rules of the Edcon Pension Fund and Amendment No 1 to the Rules of the Edcon Provident Fund were, as you state in your letter, registered by this office on 10 September 2002, i.e. after the commencement of the Pension Funds Second Amendment Act, 39 of 2001, on 7 December 2001.

These amendments were registered at the request of the Fund, as evidenced by an e-mail dated 2 September 2002. A copy is attached as Annexure A. The request followed a letter dated 28 August 2002 in which Rule Amendment 14 as submitted under cover of a letter dated 6 June 2002, was formally rejected. In spite of this, the Registrar agreed to reconsider registration of Amendment No 14 as submitted prior to 7 December 2001, but never formally rejected. A copy of this letter is attached as Annexure B.

It is clear that the officials concerned did everything possible to be helpful and to comply with the requests of the Fund.

Registration of these rule amendments did not guarantee approval of the applications submitted thereafter in terms of section 14 of the Act. Unfortunately, in view of the amendment of the Pension Funds Act, it was not possible to approve the subsequent transfer applications, as these applications provided for an apportionment of surplus, after 7 December 2001, in a manner not consistent with the Act as it was not reasonable and equitable to all stakeholders.

Whilst I appreciate that the Fund, as stated in your letter, communicated often with the Registrar’s office and endeavoured to make full and transparent disclosure regarding the intention, basis and consequence of the reconstruction of the Fund, the Registrar now finds himself in the invidious position that he is not empowered to approve the section 14 applications due to the amendment of the Act with effect from 7 December 2001.

This was explained at a meeting held on 11 August 2003 at 16:30.

A letter was sent to Alexander Forbes Financial Services on 13 August 2003, informing them that the Registrar can at this stage only approve the transfer of 100% of Member’s accrued liabilities and that any surplus in the Fund should be dealt with in terms of the Act as amended. This was not a formal rejection of the section 14 applications, but rather an opportunity to amend the application and get the 100% of accrued liabilities approved.

The Registrar does not have discretionary powers in this matter. The section 14 applications for transfer as submitted can therefore not be approved whilst the transfers include the transfer of surplus.’

[16] On 15 September 2003, the appellant lodged an appeal to the first respondent

against the refusal to approve the transfers. In the formal reasons furnished by the second respondent pursuant to Regulation 4 of the Regulations issued under s 26(2) of Act 97 of 1990 the following points were made:

(a) the rule amendments submitted before the surplus legislation came into operation had to be considered in accordance with the legal position then prevailing;

(b) by registering the amendments the Registrar did not undertake to approve the s 14 applications;

(c) the s 14 applications were only submitted on 4 June 2003, after the surplus legislation came into force, and they had to be considered in accordance with the surplus legislation; and

(d) the benefits accruing to members were not automatically enhanced by the registration of the amendments. 'Enhancement would only take place on a case by case basis if and when a member of the fund agreed to transfer to another fund. After 7 December 2001 such *ad hoc* enhancement from surplus was no longer possible.'

[17] On 7 December 2004 the first respondent handed down its written decision dated 14 November 2004, dismissing the fund's appeal. In its reasons it found, *inter alia,* that the second respondent had not erred in applying the provisions of the surplus legislation to the transfer applications and (as it was put in the reasons) 'in finding that the benefit enhancements did not vest before 7 December 2001 . . . [and] that the transfer applications were not reasonable and equitable to all stakeholders'.

[18] The fund then launched an application in the Pretoria High Court for an order reviewing and setting aside the first respondent's decision, relying on a number of grounds set out in s 6 of the Promotion of Access to Justice Act 3 of 2000, (commonly known as 'PAJA'), *inter alia,* that the decision was materially influenced by an error of law (section 6(2)(d) of PAJA) and that the decision was taken because relevant considerations were not taken into account (s 6(2)(e)(iii) of PAJA).

Judgment of court a quo

[19] With the approval of counsel for the parties Preller J in the Court *a quo,* approached the matter on the basis that if the case could be distinguished from the majority judgment of this court in *Chairman, Board of Tariffs and Trade v Volkswagen of South Africa (Pty) Ltd* 2001 (2) SA 372 (SCA) (which I shall call in what follows 'the *Volkswagen* decision'), the application should fail but that if the majority decision in that case could not be distinguished then the application had to succeed. In the result the learned judge came to the conclusion (for reasons which will appear presently) that the *Volkswagen* decision was distinguishable and he dismissed the application.

Relevant statutory provisions and summary of the Volkswagen decision

[20] Before I summarise the submissions of counsel for the appellant it will be appropriate to set out the relevant portions of sections 12 and 14 of the Act as well as the facts and the reasons for the majority judgment in the *Volkswagen* decision.

[21] Sections 12 and 14 of the Act, as far as material, provide as follows:

'12 (1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid—

(a) if it purports to effect any right of a creditor of the fund, other than a member or shareholder thereof; or

(b) unless it has been approved by the registrar and registered as provided in subsection (4).

(2) Within 60 days from the date of passing of a resolution for the alteration or rescission of any rule or for the adoption of any additional rule, a copy of such resolution shall be transmitted by the principal officer to the registrar, together with the particulars prescribed by regulation.

(3) If any such alteration, rescission or addition may affect the financial condition of the fund, the principal officer shall also transmit to the registrar a certificate by the valuator or, if no valuator has been employed, a statement by the fund, as to its financial soundness, having regard to the rates of contributions by employers and, if the fund is not in a sound financial condition, what arrangements will be made to bring the fund in a sound financial condition.

(4) If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.

. . .

14 (1) No transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless–

(a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar;

(b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection;

(c) the registrar is satisfied that the scheme referred to in paragraph *(a)* is reasonable and equitable and accords full recognition–

(i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer;

(ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and

(iii) to the payment of minimum benefits referred to in section 14A,

and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory;

(d) the registrar has been furnished with such evidence as he may require that the provisions of the said scheme and the provisions, in so far as they are applicable, of the rules of every registered fund which is a party to the transaction, have been carried out or that adequate arrangements have been made to carry out such provisions at such times as may be required by the said scheme;

(e) the registrar has forwarded a certificate to the principal officer of every such fund to the effect that all the requirements of this subsection have been satisfied.

. . .'

[22] The *Volkswagen* decision concerned an application for a rebate on excise duty payable on motor vehicles manufactured in the Republic, for which provision was made in s 75 of that Act. In terms of that section a motor vehicle manufacturer was allowed to claim a rebate on excise duty for the purpose of the Export Incentive Scheme for the Motor Industry (Phase VI). The calculation of the amount of the rebate depended on the extent of the manufacturer's foreign currency earnings, which in turn depended on the volume of its exports of locally manufactured vehicles

and component parts.

[23] Because the rebate was subject to a ceiling a manufacturer's earnings above the ceiling would have been of no value to it. To cater for this a note was enacted to the relevant rebate item in Schedule 6 to the Customs and Excise Act, which permitted a customs and excise warehouse, such as Volkswagen of SA (Pty) Ltd, (which I shall call 'Volkswagen' in what follows) the first respondent in the case, to cede 'any specific amount of foreign currency earnings in respect of motor vehicles exported by such warehouse, as specified in a certificate issued by the Director-General: Trade and Industry, on recommendation of the Board on Tariffs and Trade, to other customs and excise manufacturing warehouses . . ..' The note was repealed with effect from 1 September 1995. Prior to the repeal Volkswagen had applied for and been granted a rebate in respect of vehicles manufactured and exported by it. It also applied for and was granted certificates permitting cessions of excess earnings. It was unable, however, to take advantage of the full extent of the rebates to which it was entitled due to an erroneous method required by the Commissioner of Customs and Excise in calculating the surplus. After the repeal of the note Volkswagen requested permission from the Commissioner to extract exports previously included in its quarterly accounts and to cede them to another motor manufacturer for inclusion in its accounts for the same quarters. It accordingly sought permission to cede, notwithstanding the repeal of the relevant note, that part of its foreign currency earnings which it had previously been obliged to commit to its own account because of the Commissioner's insistence on the employment of an erroneous method to calculate the surplus. The Commissioner conceded the correctness of Volkswagen's standpoint and granted permission for the cession. In terms of the repealed note the cession could only take place after the Director-General had issued the relevant certificate upon the recommendation of the Board on Tariffs and Trade, which resolved not to make a recommendation, as it was of the view that in doing so it would be required to exercise powers in terms of legislation that was no longer applicable. The majority in this court (Nienaber JA, with whom Smalberger JA and Mthiyane AJA concurred) held that the right to approach the Board for a recommendation in respect of the additional surplus had accrued to Volkswagen before the note was repealed, and that the Board's view that it was no longer empowered to make recommendations to the Director-General in terms of the

repealed note was not correct.

Appellant's submissions

[24] Counsel for the appellant in this case relied on the principle that an applicant has a right to have his or her application determined in accordance with the law as it was prior to the amendment or repeal of the law in terms of which the application is brought where the applicant has taken sufficient steps prior to the commencement of the amending or repealing law to assert the right relied on. It was contended that a right to have the s 14 applications considered in the light of the legal position as it was before the surplus legislation came into operation accrued to the appellant in this case. It was submitted that the fund had taken sufficient steps to satisfy the test for the accrual of the right contended for as laid down in a series of decisions of this court, culminating in the *Volkswagen* decision. The facts in that case, so it was argued, were closely analogous to those in the present matter and there is no legitimate basis for distinguishing between them.

[25] Counsel for the appellant also advanced an alternative contention to the effect that the second respondent erred in finding that no vested right to a benefit enhancement could be said to have accrued to the members before 7 December 2001. In this regard it was pointed out that the rule amendments which were registered must be deemed to have taken effect from 1 September 2001. This was in accordance with the express wording of the rule amendments, which specifically stated that they were to take effect on 1 September 2001, and s 12 (4) of the Act, which provides that an amendment to existing rules may take effect 'as from the date determined by the fund concerned or, if no date has been so determined, as from the . . . date of registration.'

[26] Counsel submitted further that the elections which had to be made by members as to whether to opt for the benefit enhancements provided for in the rule amendments must by the same fiction of law be deemed to have been made within a period calculated to have commenced on 1 September 2001, notwithstanding that they were in fact exercised after registration of the amended rule in September 2002. Such elections as were made by members were, so it was argued, accordingly, for purposes of the law, deemed to have been made prior to the commencement of the

surplus legislation. Accordingly, so the argument proceeded, the members acquired a vested right in terms of a duly registered rule to receive payments of the enhancements therein promised and the s 14 applications did not in these circumstances facilitate the distribution of a surplus but catered for the payment of accrued liabilities.

Second respondent's submissions

[27] Counsel for the second respondent submitted that Preller J had correctly distinguished the facts of the present case from those in the *Volkswagen* case. They drew attention to the fact that it took the appellant approximately nine months, after the rule amendments were approved, to submit the transfer applications and submitted that it was not possible to find that if the rule amendments had been approved in August or September 2001 the transfer applications would have been submitted before 7 December 2001.

Discussion

Did the right contended for accrue?

[28] In my opinion the appellant's contention that it had the right to have its s 14 application considered in terms of the law as it was before 7 December 2001, because this right had accrued to it before that date cannot be upheld. The test to be applied when an answer is sought to the question as to whether a right has accrued appears from para 13 of Nienaber JA's judgment in the *Volkswagen* case (at 380 E):

'A right "accrues" when all the conditions for its existence in relation to the particular beneficiary are met.'

In my view in the present context the election by the member in respect of whom the transfer is sought is one of the conditions which must be met before it can be said that the right to bring s 14 application for the transfer in question accrues. This patently did not happen until well after 7 December 2001.

[29] Counsel for the appellant endeavoured to meet this point by pointing to the fact that in the *Volkswagen* case Volkswagen had sought permission, after the repeal of the note, to cede that part of its foreign currency earnings which previously,

because of the Commissioner's erroneous view, it had been obliged to commit to its own account. In this regard they relied on passages in paras 6, 14, 15 and 20 of Nienaber JA's judgment. Preller J distinguished the *Volkswagen* case essentially on the ground that what happened in that matter was that the relevant accounts were 'historically' amended whereas in the present case an entirely new application was brought by the appellant. I agree that the *Volkswagen* decision is to be distinguished on this basis. While in a formal sense it is correct to say that Volkswagen was proposing to bring a further application to cede what was called 'the super-surplus' in essence what it was doing was seeking to correct the amount of the surplus to be ceded. This appears clearly in my view from the following paragraphs in Nienaber JA's judgment (at 381H-382B):

'[16] What VW now sought to do after the Commissioner acknowledged that not all royalties had to be taken into account in calculating the surplus it sought permission to cede was to rectify the pre-repeal position by seeking supplementary permission to cede what had now been determined to be the correct amount. As such the permission sought went to the amount rather than to the entitlement. This is not, therefore, a situation where VW, never having applied for permission to cede its excess foreign currency earning prior to the repeal, now seeks to do so for the first time after the event.

[17] Prior to the repeal VW had fulfilled all the requirements which in fact and in law entitled it to approach the Board for permission to make its recommendation in respect of the super-surplus; and from its side VW had taken all the steps realistically open to it to advance its request for permission to effect such a cession. After the repeal it remained, as it would have been before the repeal, a matter for consideration by the Board and the Director-General.

[18] Seen in this light the right to approach the Board for a recommendation in respect of the super-surplus in order that "the relevant accounts be historically amended" (see para [6] above) accrued to VW prior to the repeal of the relevant note.'

The legal fiction point

[30] I turn now to consider the appellant's alternative contention, viz that by a legal fiction the members who elected to accept the enhanced benefit and to transfer to one of the provident funds and pensioners who elected to have the benefits payable to them by the fund outsourced must be deemed to have made the relevant elections before 7 December 2001.

[31] In what follows I am prepared to assume, without deciding, that the elections made by the members and pensioners must by a legal fiction be deemed to have been made within a period calculated to have commenced on 1 September 2001. Even if that assumption is made in favour of the appellant, I do not think that it assists the appellant because it is not possible to hold, as the appellant's counsel contended, that the elections must be deemed to have taken place within a period of three months and one week (from 1 September to 7 December) after the notional commencement date of the period. We know that the rule amendments were registered in September 2002 and the elections were made between 17 February and 1 March 2003. Indeed counsel for the appellant, when pressed on the point, conceded that it was not possible to find by when the elections would have been made if the rule amendments had been registered on 1 September 2001. This concession, which I am satisfied was correctly made, effectively destroys the alternative argument.

[32] In the circumstances I am satisfied that the appeal must fail.

Order

[33] The following order is made:

The appeal is dismissed with costs, including those occasioned by the employment of two counsel.

……..
IG FARLAM
JUDGE OF APPEAL

CONCURRING
DG SCOTT JA
MS NAVSA JA
KK MTHIYANE JA
NZ MHLANTLA AJA