THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 221/08

NATIONAL TERTIARY RETIREMENT FUND **Appellant**

and

REGISTRAR OF PENSION FUNDS **Respondent**

Neutral citation:	*National Tertiary Retirement Fund v Registrar Pension Funds* (221/08) [2009] ZASCA 41 (31 March 2009)
Coram:	HARMS DP, STREICHER, CLOETE, JAFTA JJA and BOSIELO AJA
Heard:	9 MARCH 2009
Delivered:	31 MARCH 2009
Summary:	**Pension Funds Act 24 of 1956 – amendment of rules – benefits payable upon retirement reduced – reduction affecting benefits payable upon cessation of membership prior to retirement – amendment not inconsistent with s 37A and s 14A – no discretion to refuse registration conferred on registrar by s 12(1)(b).**

ORDER

On appeal from: High Court, Pretoria (Rasefate AJ sitting as court of first instance)

The following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order by the court below is replaced with the following order:

‘(i) The decision by the Board of Appeal is reviewed and set aside.

(ii) The following order is substituted for the order by the Board of Appeal:

“(a) The appeal is upheld with costs including the costs of two counsel.

(b) The registrar is directed to register, in terms of s 12 of the Pension Funds Act 24 of 1956, amendment number 31 to the appellant’s rules.”

(iii) The costs of the application including the costs of two counsel are to be paid by the registrar.’

JUDGMENT

STREICHER JA (HARMS DP, CLOETE, JAFTA JJA and BOSIELO AJA concurring)

[1] The appellant is a pension fund which applied to the Registrar of Pension Funds, the respondent, for the approval and registration of an alteration to its rules. When such approval and registration was refused the appellant appealed to the Board of Appeal established in terms of

s 26(1) of the Financial Services Board Act 97 of 1990 ('the FSB Act'). The Board of Appeal dismissed the appeal. The appellant thereupon applied to the Pretoria High Court for an order reviewing and setting aside the decision of the Board of Appeal and replacing it with an order directing the respondent to register the alteration of the appellant's rules. The Pretoria High Court, per Rasefate AJ, dismissed the application. It is against this dismissal of its application that the appellant, with the leave of the court below, now appeals to this court.

[2] The appellant is registered as a pension fund in terms of s 4 of the Pension Funds Act 24 of 1956 ('the Act'). It was established with effect from 1 December 1994. The employers participating in the appellant are all higher educational institutions previously known as 'Technikons'. Members of the Associated Institutions Fund ('AIPF') and the Temporary Employees Pension Fund ('TEPF') were given the option to join the appellant with effect from its inception on 1 December 1994. In terms of specific regulations under the Associated Institutions Pension Fund Act 41 of 1963 only the funding portion of the actuarial reserve values of the members and pensioners of the AIPF and the TEPF who elected to join the appellant, were transferred to the appellant. This resulted in these members having only 60,8 cents in the Rand value of their actuarial reserve transferred. Although only the funded portion of the actuarial reserves were transferred the full value of the actuarial reserves were taken as the opening balances of the AIPF and TEPF members in the appellant. The deficit so created, referred to as the pure deficit, was eliminated by the appellant in 2002.

[3] The pure deficit was not the only deficit which arose upon the transfer of the AIPF and TEPF members. In terms of rule 4.1 of the

appellant's rules a member who retires from service on his or her normal retirement date must receive a pension vesting on the following day secured by his or her member's share at that date, less the amount of any lump sum benefit paid in terms of rule 4.5. A member's share consists, among others, of an opening balance comprising the member's nett actuarial liability in the previous fund, the member's and the employer's contributions in terms of the rules and investment earnings transferred from the Reserve Account, less certain debits to that account, such as attributable valuation losses and lump sum payments in terms of rule 4.5. However, rule 4.6 provides certain guarantees to the members who transferred from the AIPF and the TEPF. The relevant portion of the rule reads as follows:

'4.6(1) A Member, who was a Member of the Associated Institutions Pension Fund, . . . shall be guaranteed the following minimum benefits when he or she retires on his or her Normal Retirement Date, . . .

(a) A Pension of 1/50th of the Member's Average Final Salary per year of Pensionable Service; and

(b) A gratuity of 7,25% of the Member's Average Final Salary per year of Pensionable Service; provided that such gratuity shall never be greater than one-third of the Member's total benefit at retirement (or up to the whole thereof if allowed by income tax legislation).

(2) A Member, who was a Member of the Temporary Employees Pension Fund, shall be guaranteed the following minimum benefits when he or she retires on his or her Normal Retirement Date . . .:

A pension of 2,75% of the Member's Average Final Salary per year of Pensionable Service.'

[4] On 31 December 2003, the effective date of the appellant's last statutory actuarial valuation, 2 979 members who had transferred to the appellant on 1 December 1994 from the AIPF and the TEPF qualified for the guaranteed benefits. There is a substantial difference between the

value of the guaranteed benefits and the relevant members' shares of the appellant ('the guaranteed benefit deficit'). The deficit was partly caused by the investment performance of the Fund having been lower than expected and salaries having been increased at rates higher than the increase in the rate of inflation. Whether the appellant will in future have sufficient assets to pay for these guarantees is dependent on investment returns and salary increases.

[5] Yet a further deficit was created when the Act was amended by the introduction of s 14A in terms of the Pension Funds Second Amendment Act 39 of 2001 which came into effect on 7 December 2001. Whereas the guaranteed benefits in terms of rule 4.6(1) and (2) apply upon retirement, s 14A makes provision for minimum benefits to a member who ceases to be a member prior to retirement. Subsection (1)(a) thereof provides:

'Every registered fund shall provide the following minimum benefits:

(a) The benefit paid to a member who ceases to be member of the fund prior to retirement in circumstances other than liquidation of the fund shall not be less than the minimum individual reserve; . . ..'

The minimum individual reserve of the AIPF and TEPF members is, in terms of s 14B(2)(a), to be determined with reference to the guaranteed benefit.

[6] At a meeting held in November 2002 between the appellant and the committee of the employers participating in the appellant, being Technikon principals, it was decided that every Technikon should take financial responsibility for the portion of the guaranteed benefit deficit in respect of the members of the appellant who were its employees. All the technikon employers, except one, signed agreements with the appellant giving effect to the decision. They agreed to make good the shortfall between the guaranteed minimum retirement benefit and the normal

retirement benefit of any of their employees who qualified for the guaranteed benefits as and when those employees retired. The exception referred to was the Border Technikon which has only one employee who qualifies for the guaranteed benefits.

[7] The new benefits in terms of s 14A became payable by the appellant on early withdrawals as from 1 January 2005. As a result a deficit of about R69 million arose in the appellant ('the minimum benefit deficit'). From discussions by the appellant with the participating employers it became clear that they were not in a financial position to fund the additional minimum benefit deficit.

[8] As a result of these deficits the appellant resolved to amend its rules so as to provide that the 'guaranteed benefits' would remain payable on the retirement of a member only if the employer of the member pays the portion of the guaranteed benefit applicable to that member. The amendment had the effect of reducing the benefits payable by the appellant upon the retirement of a member and because the minimum benefits upon early withdrawal are to be determined by reference to the guaranteed benefits, those benefits were also reduced. According to the appellant it is unable itself to meet the guaranteed benefits; the rules of the appellant do not require the participating employers to fund the deficit and the amendment is the result of the appellant having secured a contractual commitment from the employers to fund the benefit as and when affected members retire. The only alternatives would be, so the appellant contends: (a) an amendment which deletes any entitlement whatsoever to the guaranteed benefit; or (b) the liquidation of the Fund.

[9] The appellant thereupon submitted the resolution to the respondent for approval and registration in terms of s 12 of the Act. The section provides 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) . . ..

(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.'

[10] It is not in issue that the amendment was done in the manner directed by the appellant's rules. But the respondent refused to approve the amendment for the following reasons:

(i) The amendment would have the effect of reducing the minimum benefits payable to those members who resign from the Fund.

(ii) If the responsibility for the retirement benefit is passed on to the employers, the members would be at the mercy of their employers and would no longer have the protection of the respondent.

(iii) Not all participating employers agreed to take on the additional responsibility.

(iv) The effect of the amendment had not been explained to members.

(v) The respondent was not satisfied that the employers appreciated that if the amendment were to be registered there would be a surplus at the surplus apportionment date which would not be available to employers but would have to be paid to former members.

(vi) The respondent did not believe that the employers realised that should the appellant be put into liquidation after 1 January 2005, then, in terms of s 30(3) of the Act, they would be responsible for paying into the appellant enough money to cover the minimum benefit forthwith.

[11] The appellant thereupon lodged an appeal against the respondent's decision with the Board of Appeal established in terms of s 26 of the FSB Act. In terms of s 26(2), any person aggrieved by a decision by the executive officer of the Financial Services Board, under a power conferred or a duty imposed upon him by or under the FSB Act or any other law, may appeal against such decision to the Board of Appeal. The executive officer of the Financial Services Board is also the Registrar of Pension Funds (the respondent)[1]. Accordingly any person aggrieved by a decision of the respondent under a power conferred or a duty imposed upon him by or under the Act, may appeal against such decision to the Board of Appeal.

[1] Section 3 of the Act.

[12] In a second statement the respondent elaborated on his reasons as follows:

(i) What the legislature had in mind is that a fund should be self-contained and should be able to meet its obligations as and when they arise, without having to rely on promises made by or contracts concluded with third parties, such as employers, whose financial position is not subject to scrutiny by the Registrar.

(ii) The amendment effectively removes the existing guarantee to members by the Fund and replaces it with a conditional guarantee, conditional upon a payment by a third party to the Fund.

(iii) Where a rule amendment erodes the right of a member to receive such payment on retirement by making an existing unconditional guarantee conditional upon payment by a third party who may or may not be contractually obliged to make such payment to the Fund, this amendment is inconsistent with the Pension Funds Act.

[13] The provisions of the Commissions Act 8 of 1947, particularly the provisions relating to witnesses and their evidence, applied to the Board of Appeal[2] and it could, after the hearing of the appeal confirm, set aside or vary the decision against which the appeal was brought, order that the decision of the Board of Appeal be given effect to or refer the matter back for consideration or reconsideration by the respondent in accordance with such directions as the Board of Appeal laid down.[3] The Board of Appeal was therefore 'not restricted at all by the [respondent's] decision and [had] the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the [respondent], with or without new evidence or information'.[4]

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[2] Section 26(7) of the FSB Act.
[3] Section 26(10).
[4] *Nichol and Another v Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) at para 22.

[14] The Board of Appeal dismissed the appeal. It held that s 12 of the Act conferred a wide and equitable discretion on the respondent to refuse the registration of rule amendments. When deciding whether or not to approve a rule amendment in terms of s 12(1)(b) the respondent must take cognisance of the purpose of the Act namely to ensure that pension funds are operated fairly, properly and successfully. It held furthermore that the rule amendment is inconsistent with the Act and that the respondent was for that reason entitled to refuse to approve and register it. The rule amendment is inconsistent with the Act because it reduces the benefits provided for, contrary to the provisions of s 37A and s 14A and takes away from the Fund the responsibility to pay the guaranteed benefits. Having so taken away the responsibility to pay the guaranteed benefits the responsibility is transferred to the employers of the members, thereby depriving the members of the protection of the respondent.

[15] An application by the appellant to the court below for an order reviewing and setting aside the decision of the Board of Appeal was dismissed. The court below held that the respondent exercises a discretion in terms of s 12(4) when deciding whether or not to approve a rule amendment. It has to make a value judgment as to whether the rule amendment is not inconsistent with the Act. The respondent is also 'enjoined to consider, evaluate and satisfy himself of the financial soundness of the proposed rule amendment'.

[16] The court below correctly did not endorse the finding by the Board of Appeal that s 12(1)(b), in requiring the approval of the respondent, conferred a broad and equitable discretion on the respondent to refuse to register a rule amendment. In terms of s 12(4) the respondent 'shall'

register the alteration if he finds that it is not inconsistent with the Act and if he is satisfied that it is financially sound. The respondent is thus obliged, in these circumstances, to register the alteration. A finding on the part of the respondent that an alteration is not inconsistent with the Act and satisfaction on the part of the respondent that the alteration is financially sound would therefore constitute his approval of the alteration. I agree with the appellant that if the legislature intended to confer a broad and equitable discretion on the respondent it would have made that intention clear and would have given an indication as to the factors to be taken into account in exercising that discretion, as was done in the case of s 14(1)(c). The section deals with the amalgamation of a business carried on by a registered fund with the business of another person and provides that it shall have no effect unless 'the registrar is satisfied that the scheme . . . is reasonable and equitable and accords full recognition' to a number of factors mentioned in the section.

[17] It follows that what the respondent and, on appeal to it, the Board of Appeal had to consider was whether it was satisfied that the amendment was financially sound and whether it was not inconsistent with the Act.

Financial soundness of the amendment

[18] The court below considered the rule amendment to be offensive to the notion of financial soundness because it creates a surplus which stands to be shared by past members who have no claim to the funds. It said: 'The expending of already contributed funds in this way through an artificially created surplus, in the face of a deficit situation cannot, in my view, clothe the rule amendment with financial soundness: These are funds which would otherwise have been applied to the deficit. The

Registrar correctly refers to the scheme as creating financial soundness at a cost, and it is a situation that does not accord with the dictionary meaning of soundness . . ..'

[19] In terms of s 12(4) it is the respondent and on appeal, it is the Board of Appeal, that has to be satisfied that the rule amendment is financially sound. The respondent was satisfied that that was the case although he thought that it had been achieved at a cost. That finding of the respondent was not disturbed on appeal to the Board of Appeal and could not be interfered with by the court below simply on the basis that it is considered to be wrong on the facts.[5] In any event the fact that the rule amendment creates a surplus cannot render the rule amendment financially unsound. Counsel for the respondent was specifically instructed on appeal to accept that it was financially sound.

Inconsistency with the Act

[20] 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 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

[5] Section 6 of the Promotion of Administrative Justice Act 3 of 2000.

also to its object and policy'.[6] The only sections of the Act which came up for discussion in this regard were s 37A and s 14A.

[21] The Board of Appeal held that the rule amendment was inconsistent with the Act because it reduces the benefits provided for in the rules of the appellant contrary to the provisions of s 37A of the Act. Section 37A(1) and (2) read as follows:

'(1) Save to the extent permitted by this Act . . . no benefit provided for in the rules of a registered fund . . . shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided . . ..

(2)(a) If in terms of the rules of a fund the residue of a full benefit, after deduction of any debt due by the person entitled to the benefit, represents the benefit due to that person, such reduction shall for the purposes of subsection (1) be construed as a reduction of the benefit.

(b) The set-off of any debt against a benefit shall for the purposes of subsection (1) be construed as a reduction of the benefit.'

[22] The court below did not agree with the Board of Appeal that the rule amendment is inconsistent with the Act because it reduces the benefits provided for in the rules of the appellant. Referring to the provision in s 37A that no benefit provided for in the rules of a registered fund shall be capable of being reduced, it held that such a reduction by way of a rule amendment in terms of s 12(1) is excluded by the words

[6] *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 558.

preceding the prohibition ‘save to the extent permitted by this Act’. The court below also agreed with the submission advanced by the appellant that the combination of ‘reduced’ with ‘transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law’ indicated that what the legislature had in mind was not a reduction effected by a rule amendment, but a reduction in consequence of factors external to the rules.

[23] Before us the respondent, correctly in my view, did not attack these findings by the court below. Prior to the enactment of s 37A an amendment of the rules with the approval of the registrar was permissible and not qualified so as to exclude a reduction in benefits provided for in the rules of the Fund. The legislature must have been aware of that position when it qualified the provisions of s 37A with the words ‘save as permitted by this Act’ and would have made it clear if it also wanted to exclude a reduction of benefits provided for in the rules of a pension fund by way of an alteration in terms of s 37A. Moreover, there may well be circumstances where a reduction of benefits may be required in the interests of all the members of a pension fund and it is highly unlikely that the legislature could have intended to prohibit a rule amendment in terms of s 12 in these circumstances.

[24] However, the court below proceeded to hold that it was difficult to conceive how a rule amendment which had the effect of removing the responsibility to pay a pension benefit from of the appellant and out of the reaches of the Act, could still remain consistent with the Act. Having found the rule amendment to be inconsistent with the Act the court below held that the Board of Appeal had correctly dismissed the appeal against

the respondent's refusal to register the rule amendment. As was submitted by the respondent this finding of the court below is inconsistent with its finding that rule 12 (1) permitted a reduction in benefits provided for by way of a rule amendment. If a pension fund, consistent with the Act, can amend its rules so as to diminish or delete benefits provided for by the rules of the fund, it cannot be inconsistent with the Act to retain those benefits but to make them conditional on funding from the employer.

[25] The respondent submitted that the Board of Appeal correctly held that the rule amendment is inconsistent with the Act in that it also reduces the benefit to which the members are entitled in terms of s 14A whereas such a reduction is, according to the submission, not allowed by the section. As stated above, the section provides that the benefit paid to a member who ceases to be member of a registered fund prior to retirement, in circumstances other than liquidation of the fund, shall not be less than the minimum individual reserve. In terms of s 14A(2) the minimum individual reserve shall, subject to certain qualifications, not be less than the fair value equivalent of the present value of the member's accrued deferred pension ie the discounted value of the guaranteed pension. The section does not provide that the guaranteed value as at date of retirement may not be reduced. It simply provides that the discounted value of the guaranteed pension is, subject to the qualifications mentioned, the minimum benefit that may be provided to a member who ceases to be a member prior to retirement. The rule amendment does not purport to provide otherwise.

[26] The rule amendment is not inconsistent with any other provision of the Act. It follows that the dismissal of the appeal against the respondent's refusal to register the rule amendment by the Board of

Appeal on the ground that it was inconsistent with the Act was materially influenced by errors of law and must be reviewed and set aside in terms of s 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). In terms of s 8(1)(c)(ii) of PAJA a court may in exceptional circumstances substitute administrative action with the action that should have been taken. This is such a case. Had the Board of Appeal not made these errors of law it would have held that the rule amendment should have been registered by the respondent. In the circumstances it would serve no purpose to refer the matter back to the respondent as the respondent urged us to do. Moreover, the rule amendment was submitted to the respondent more than four years ago and the registration thereof should not be delayed any further.

[27] In the result the following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order by the court below is replaced with the following order:

'(i) The decision by the Board of Appeal is reviewed and set aside.

(ii) The following order is substituted for the order by the Board of Appeal:

"(a) The appeal is upheld with costs including the costs of two counsel.

(b) The registrar is directed to register, in terms of s 12 of the Pension Funds Act 24 of 1956, amendment number 31 to the appellant's rules."

(iii) The costs of the application including the costs of two counsel are to be paid by the registrar.'

P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For appellant:	O L Rogers SC A M Breitenbach Instructed by: Thyne Hunter Esterhuizen Inc, Johannesburg McIntyre & Van der Post, Bloemfontein
For respondent:	I V Maleka SC Ms S Yacoob Instructed by: Rooth Wessels Motla Conradie Inc, Brooklyn Naudes Inc, Bloemfontein