THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20612/2014

In the matter between:

SASOL LIMITED	**FIRST APPELLANT**
SASOL PENSION FUND	**SECOND APPELLANT**
SACWU NATIONAL PROVIDENT FUND	**THIRD APPELLANT**
SASOL NEGOTIATED PROVIDENT FUND	**FOURTH APPELLANT**

and

CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND	**RESPONDENT**

Neutral citation: *Sasol Limited v Chemical Industries National Provident Fund* (20162/2014) [2015] ZASCA 113 (7 September 2015)

Coram: Mpati P, Cachalia and Mhlantla JJA and Gorven and Baartman AJJA

Heard: **16 August 2015**

Delivered: **7 September 2015**

Summary: Pensions – transfer of membership from respondent fund to appellant funds – interpretation and application of rules of respondent fund

relating to transfer ─ partial compliance with rules insufficient ─ no valid transfer.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mayat J sitting as court of first instance): judgment reported *sub nom Chemical Industries National Provident Fund v Sasol Limited & others* (22869/2013) [2014] ZAGPJHC 90, 2014 (4) SA 205 (GJ)

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

JUDGMENT

Gorven AJA (Mpati P, Cachalia and Mhlantla JJA and Baartman AJA concurring):

[1] This matter concerns transfers of members between funds governed by the Pension Funds Act.[1] Prior to 1 December 2011, most employees of the first appellant (Sasol) who were members of the respondent fund (the CINPF) were not entitled to terminate their membership of the CINPF while they remained in service. The rules of the CINPF prohibited it. A number of Sasol employees wished to transfer to other funds. This led to complaints to the Pension Funds Adjudicator (the Adjudicator). An amendment to rules 3.4.1 and 10.2 of the CINPF followed.[2] Sasol says that after this amendment and with effect from 1 March 2013, the fifth to 2448th respondents (the 2444) in the court below have withdrawn from the CINPF and are now members of one of the second to fourth appellants (the new funds). Sasol consequently ceased paying employer and

[1] Pension Funds Act 24 of 1956.

[2]The amendment was adopted by the trustees of CINPF on 20 November 2011 with effect from 1 December 2011 and was approved by the Registrar of Pension Funds by letter dated 12 July 2012.

member contributions to the CINPF from that date. The CINPF says that no such withdrawal has taken place and the 2444 remain members of the CINPF. The contributions should have continued. The parties agree that the outcome of this dispute and, thus, this appeal, turns on the interpretation of the amended rules 3.4.1 and 10.2 of the CINPF and its application to the facts. The dispute arose as follows.

[2] The Registrar of Pension Funds approved the amendment on 12 July 2012. In response to pressure from employees to transfer, Sasol decided to offer them an opportunity to do so during a 'window period'. Consequently, on 31 August 2012, Sasol wrote to the CINPF. It recorded that many employees wished to transfer and that a window period would open from 1 October 2012 to 30 November 2012 during which employees would be permitted to transfer. An objection period would run from 1 to 31 December 2012. In order to inform employees of the benefits offered by the different funds, they would be given an opportunity to attend information sessions during the window period at which presentations would be made by all the relevant funds. On 13 September 2012, Sasol instructed all of its plants to display a notice informing employees of the window period and the forthcoming information sessions. In the notice, Sasol set 1 January 2013 as the transfer date.

[3] On 18 September 2012, Sasol sent an email to the CINPF and the new funds, informing them of the venues and scheduled dates for the proposed information sessions, beginning on 26 September 2012. The email requested each fund to send representatives to the information sessions to present information about their fund. The CINPF replied to this email on the same day. It advised Sasol that the CINPF would respond to the request after the board met in November 2012.

[4] On 19 September 2012, Sasol wrote expressing concern that the CINPF would not participate in the information sessions. These nevertheless commenced as scheduled. On 2 October 2012, the CINPF wrote to Sasol advising that its unilateral decision to grant its employees a window period to transfer from the CINPF was 'disturbingly inappropriate'. It requested a list of those members wishing to be transferred. It recorded that there had been 'malicious and misleading' information conveyed to employees with housing loans that, if they transferred to one of the new funds, their housing loans would be settled. The CINPF also asserted that its trustees alone could take a decision to transfer members. Sasol could do no more than request the trustees to open a window period.

[5] Sasol responded on 11 October 2012 contending that it had complied with the rules of the CINPF and that members of the CINPF were now permitted to transfer to another fund. Sasol undertook to furnish a list of those employees wishing to transfer from the CINPF once the window period was over. On 12 October 2012, the CINPF advised Sasol that, following a special board meeting, representatives would make presentations at the remainder of the scheduled information sessions.

[6] More than 90 information sessions were conducted countrywide. After 15 October 2012, the CINPF was represented at 53 of them. Employees who intended to transfer were given a document drafted by Sasol which set out a comparison of the funds in tabular form. This document had been supplied to the CINPF prior to the commencement of the information sessions. Despite an invitation to correct or supplement the document, no response was received from the CINPF. After each session, employees were asked to sign declaration forms in which they indicated whether they elected to transfer and, if so, to which of the new funds.

[7] On 7 December 2012, the CINPF and its legal representatives met with representatives of Sasol. It was agreed that they would co-operate with each other by sharing all necessary information so as to facilitate transfers in terms of the rules of the CINPF. On 13 December 2012, the attorneys of the CINPF requested a list of members wishing to transfer from the CINPF. The request for a list was repeated in an email of 7 January 2013. On 10 January 2013, Sasol informed them that it was not in a position to provide the requested information. It explained that 14 January 2013 had been set as the final date for submission of declaration forms. Numerous errors in existing forms had been identified and it had therefore become necessary for each application to be validated. Finally, Sasol informed the CINPF that, due to these factors, the transfer date had been put back to 1 March 2013. On 1 February 2013, Sasol provided the requested list. On 4 February 2013, Sasol made copies of the signed forms available.

[8] On 21 February 2013, the CINPF requested copies of the presentations made to the employees during the information sessions. In addition, it asked Sasol whether the new funds had a home loan facility and how it intended dealing with members who had outstanding loans. Sasol responded on the same day. It said that it had been made clear to employees that, if they wished to transfer to one of the new funds and had a home loan with the CINPF, the loan would have to be settled. The balance of that member's fund credit would be transferred to the new fund once the process under s 14 of the Act[3] had been

[3]Section 14(1) reads as follows:
(1) Subject to subsection (8), 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 within a prescribed period of the effective date of the transaction;
(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;

approved. On 23 February 2013, the CINPF noted that the majority of the declaration forms did not indicate which investment portfolio the member had chosen. It further highlighted differences in the home loan policies and core benefits of the different funds. The CINPF concluded that the trustees 'would not be carrying out their fiduciary duties . . . should they approve these transfers without seeking clarity and/or explanations why members would agree to transfer to funds where they are prejudiced'. Sasol was requested to address those concerns so that the trustees could consider the application. Sasol responded on 28 February 2013 in terse and somewhat dismissive terms.

[9] In an eight page letter dated 27 March 2013, the CINPF motivated in detail the concerns mentioned on 23 February 2013. No response was received. The CINPF again called for a response to the queries and expressed its disquiet that Sasol had ceased to pay contributions to the CINPF despite the 'objections and concerns' raised by the CINPF. After further correspondence failed to resolve the matter, the CINPF approached the court below.

[10] It claimed the following relief against Sasol and the new funds:

'1. Declaring that the 5th to 2448th respondents were not validly transferred from the CINPF with effect from 1 March 2013 and remain members of the CINPF.

2. Declaring that since 1 March 2013 and while the 5th to 2448th respondents retain their status as members of the CINPF, Sasol has been and remains obliged to pay member contributions

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(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.

and its corresponding employer contributions to the CINPF in respect of each of the 5th to 2448th respondents.

3. Ordering the first respondent (Sasol) to pay the costs of this application and ordering any of the other respondents who oppose this application to pay the costs of the application jointly and severally with the first respondent.'

[11] In addition to opposing the relief sought, Sasol and the new funds brought a counter-application for the following relief:[4]

'2. It is declared that the employees of SASOL Limited who are members of the Applicant and who with effect from 1 March 2013 elected to become members of the Second to Fourth Respondents have lawfully exercised that election and are now members of the Second to Fourth Respondents:

3. It is declared that SASOL Limited is entitled to pay to the Second to Fourth Respondents the contributions in respect of the members or the Applicant who have elected to become members of the Second to Fourth Respondents;

4. The Applicant be directed to take all necessary steps contemplated in section 14 of the Pension Funds Act, Act 24 of 1956, read with directive 6 of the directives issued by the Registrar of Pension Funds, to ensure that the assets and liabilities attributable to those members who have elected to become members of the First to Fourth Respondents with effect from 1 March 2013 are transferred to the First to Fourth Respondents.'

The 2444 took no part in the application or counter-application.

[12] Mayat J, in the Gauteng Local Division of the High Court, Johannesburg, granted the relief sought by the CINPF, including an order that Sasol and the new funds pay the costs of two counsel. The parties correctly agree that, even though no order was made on the counter application, the effect of the judgment was also to dismiss the counter-application with costs, including the costs of two counsel. The court below granted Sasol and the new funds leave to appeal against the orders granted in the main application and the dismissal of the counter-application. It is this appeal which is before us.

[4] A prayer for dismissal of the main application formed paragraph 1 of the order.

[13] The legal principles that apply to pension and provident funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund.[5] Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law.[6] The rules of a fund form its constitution[7] and must be interpreted in the same way as all documents. The approach to be taken to the interpretation of documents was recently summarised by this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[8] as follows:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[9]

[14] As so often happens with amendments to documents, those made to the rules of the CINPF in this instance caused the rules to 'grow like Topsy', resulting in an unsightly and unwieldy edifice. Far from clarifying matters, the

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[5]Section 13 of the Act which provides that 'the rules of a registered fund shall be binding on the fund and the members . . .'.
[6]*Tek Corporation Provident Fund & others v Lorentz* 1999 (4) SA 884 (SCA) at 894B; (490/97) [1999] ZASCA 54.
[7]*ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund (under Curatorship)* 2012 (3) SA 585 (SCA) para 26; (679/10) [2011] ZASCA 150.
[8]*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; (920/2010) [2012] ZASCA 13.
[9]References omitted.

amendments gave rise to considerable opacity, if not a number of anomalies. Not all of these arise or can be resolved in this judgment. It remains to construe the relevant rules.

[15] The amended rule 3.4.1 reads as follows:

‘3.4.1. Subject to the provisions of Rule 9.2.4, a Member shall not be permitted to withdraw from membership of the Fund while he remains in Service, except in the circumstances referred to in Rule 10.2.1.’

Rule 9.2.4 has no application in the present matter. Therefore, the only issue is what is meant by ‘the circumstances referred to in Rule 10.2.1’. Rule 10.2 provides:

‘10.2 Transfers out of the Fund

10.2.1 Notwithstanding any contrary provision in these Rules, particularly Rule 3.4.1, existing Members who wish to transfer out of the Fund while still in Service, must make a representation to the Trustees, through their Local Advisory Committee, in writing. Representation is to be made to the Trustees within such a reasonable period as the Trustees shall consider appropriate.

10.2.2 The Trustees must ensure that the representation is investigated and confirmed prior to the submission of an application to the Registrar by conducting a clear and comprehensive communication exercise with the Members concerned in terms of Rule 13.1.8, and by obtaining the explicit approval of all the transferring Members.

10.2.3 The Fund must be satisfied that a transfer is reasonable and equitable and that it accords full recognition to the rights and reasonable expectations of the Members.

10.2.4 Subject to the provisions of Rules 10.2.1, 10.2.2 and 10.2.3, if the transferred Member becomes a member of an Approved Provident Fund or an Approved Pension Fund established for the benefit of employees of the organization to which he is transferred, the Trustees shall transfer the Member's Fund Credit as at the Disinvestment Date plus any interest which may have become due to the Member by the fund, and thereafter, the Member shall have no claim on the Fund.’

[16] It will immediately be noted that the wording used in the two amended rules is not consistent. Rule 3.4.1 refers to withdrawing from membership while

rule 10.2 refers to a transfer. It is accepted by the parties that the application to the Registrar mentioned in rule 10.2.2 is one made in terms of s 14 of the Act. As has been pointed out by Rosemary Hunter et al,[10] s 14 does not regulate the transfer of members but the transfer of assets and liabilities of members. Members do not, strictly speaking, transfer between funds. They withdraw from one and join another.

[17] So the question that then arises is: does rule 10.2 deal with withdrawal of members, the transfer of their assets and liabilities or both? The short answer is that it deals with both. According to rule 3.4.1, one must look to rule 10.2.1 to establish the circumstances under which a member may withdraw. Rule 10.2.1 refers to members who wish to transfer, rule 10.2.2 to 'transferring members' and rule 10.2.4 to a transferred member. These clearly relate to members. Rule 10.2.4 then goes on to refer to a transfer of a member's fund credit. This relates to the s 14 transfer of assets and liabilities. The language in rule 10.2, insofar as it refers to a transfer of members, is therefore not congruent with that of the Act or, indeed, of rule 3.4.1. This imprecise use of language has undoubtedly contributed significantly to the dispute between the parties.

[18] In their heads of argument, the main argument advanced by the appellants was that, since rule 3.4.1 is made subject only to rule 10.2.1, 'termination of membership of the CINPF is not dependent upon compliance with Rules 10.2.2 and 10.2.3 and is a step distinct from the remainder of the Rule, which deals with the transfer of members' fund credits under Section 14' of the Act. This submission was not pressed in argument. It is premised on rules 10.2.2 to 10.2.4 dealing only with a transfer of assets and liabilities under s 14. The appellants agreed before us that the withdrawal of a member from the CINPF could not take place without the provisions of the other sub-rules being complied with.

[10]Rosemary Hunter et al *The Pension Funds Act, 1956: A Commentary on the Act and Selected Notices, Directives and Circulars* (2010) at 284.

[19] In my view, this is correct. Although rule 3.4.1 mentions only rule 10.2.1, the latter rule triggers a process that requires compliance with rules 10.2.2 to 10.2.4. As mentioned, these deal with both the termination of membership and the transfer of members' assets and liabilities. This is clear from at least two factors. First, the requirement in rule 10.2.2 is that the trustees ensure that the representation (which I take to mean request or notice) to transfer out of the fund is confirmed before submitting an application to the Registrar. It makes no sense to contend that a member has already withdrawn before confirming a member's desire to do so. If a member does not confirm the representation, it can hardly be contended that the member in question has in fact withdrawn. Secondly, the requirement in rule 10.2.2 is that the trustees must obtain the 'explicit approval of the member'. This will almost certainly require the members concerned to be made aware of the financial consequences of a transfer to another fund. This is why a communication exercise must take place before the explicit approval is obtained. After the communication exercise it may well be that a member decides not to give approval. The approval must surely be obtained before it can be said that the member has transferred or withdrawn. A withdrawal from the CINPF thus requires the completion of the rule 10.2.2 process.

[20] Under rule 10.2.3, the trustees must be satisfied in two respects. First, that the proposed transfer is 'reasonable and equitable' and, secondly, that the proposed transfer 'accords full recognition to the rights and reasonable expectations of the Members'. It was accepted by the parties that this requires a conscious decision to be taken by the trustees to the effect that they are so satisfied. It was also accepted by the parties that this must take place before an application under s 14 of the Act is submitted by the trustees to the Registrar.

[21] Having conceded in argument that rule 10.2.1 does not alone govern a withdrawal, the alternative submission of the appellants was that the provisions of rules 10.2.1 to 10.2.3 had been satisfied on the facts of the matter. This submission was vigorously contested by the CINPF.

[22] The CINPF submitted that the entire process was fatally flawed. Sasol, it said, had unilaterally initiated and conducted the transfer process, including the communication exercise enjoined by rule 10.2.2. In doing so, Sasol had inappropriately usurped the fiduciary role of the trustees. In addition, the CINPF challenged the accuracy of attendance registers and the like.

[23] It must be said that the strict letter of rule 10.2 was not followed. A simple example arises from the way in which the process was initiated. Rule 10.2.1 requires a 'representation' to be made by a member through the Local Advisory Committee to the trustees of the CINPF. This was clearly not done. Instead, Sasol notified the CINPF that a large number of its members wished to transfer. However, the purpose of the rule is to identify those members wishing to transfer so that the trustees can confirm this and obtain their explicit consent after a communication exercise has been conducted. At the time, the CINPF simply requested from Sasol the relevant particulars of those members. This information would clearly suffice for it to take the steps required by rule 10.2.2 to 10.2.4. It did allege non-compliance with this rule in its letter of 29 April 2013 but has not relied on this in the appeal. In my view, there was sufficient compliance with rule 10.2.1 and the approach of the CINPF in the appeal was refreshingly pragmatic in this regard.

[24] The contention of the CINPF that the process undertaken pursuant to rule 10.2.2 was fatally flawed cannot find traction. First, although the rule clearly envisages that the trustees oversee the process, all that is required in substance

is that the trustees ensure that the representations are ‘investigated and confirmed’ and that the ‘explicit approval of all the transferring Members’ is obtained. This after a communication exercise has taken place. If this was done, and I will deal with this aspect later, to argue that the process is a nullity because the trustees did not ‘conduct’ the communication exercise is to unduly elevate form over substance.

[25] In the second place, the particular circumstances of this matter are highly unusual. Transfers had hitherto not been allowed but members had, for some time, expressed a desire to transfer. This desire had been thwarted by the rules. The right to transfer only arose after the amendment was approved in July 2012. As a result, instead of a situation obtaining where transfers were taking place on an ongoing basis from time to time, a large number of members wished to transfer at the same time. In these circumstances, the involvement of Sasol as employer was imperative. A ‘window period’ and a series of nationwide information sessions at Sasol plants was an appropriate way to address the numbers involved. In addition, there were a number of funds to which employees might transfer. It thus made practical sense for Sasol to schedule the information sessions and invite all the relevant funds, including the CINPF, to participate in them. This situation will not be likely to repeat itself and other employers will be hard pressed to justify adopting a similar approach in the future.

[26] Thirdly, the CINPF, after initial misgivings, participated in the process and gave presentations at 53 of the sessions. It can hardly be heard to complain that the sessions were fatally flawed or that they did not contribute meaningfully to the rule 10.2.2 process. The CINPF’s attorneys conceded as much in their letter of 20 November 2012, after over a month of involvement and with only ten days of the window period remaining, where they said:

'We do not wish to debate with Sasol the merits or otherwise of the validity of the Window Period, but rather to constructively discuss the proposed transfers and process post the information sessions and closing of the Window Period, for the benefit of all the Members of the CINPF'.

This was a salutary approach. Even the letter of 23 February 2013, to which I will return in due course, did not raise complaints about the process.

[27] In addition, the tabulated comparison of the funds was disseminated without correction from the CINPF. Even in the papers the CINPF at no stage challenged the accuracy of the information in this document. This also contributed to the communication exercise. In summary, whilst Sasol may have been over zealous and should have secured CINPF's consent from the outset, the process went a long way to cover the communication exercise required by rule 10.2.2. While there is room for the trustees of the CINPF to complete the process, should they consider it necessary, by ensuring that at least certain of those wishing to transfer are aware of the full implications and give their explicit consent the process should certainly not start anew. This much was conceded in argument before us. A relatively limited process may be necessary, if at all. It would be most unfortunate if further undue delay took place when members have been wishing to transfer since prior to August 2012.

[28] What is clear on any version, however, is that the CINPF did not make an express decision that it was satisfied on the aspects referred to in rule 10.2.3. This much was conceded by the appellants in argument. They accepted that the trustees of the CINPF had to make a decision before a transfer can take place, but sought to address the lack of an express decision in two ways.

[29] First, they submitted that the trustees had made a tacit decision. Using the test accepted by this court for tacit contracts, this requires a finding that, on a balance of probabilities, 'an implication necessarily arises'[11] by virtue of the

[11] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H-533A.

conduct of the CINPF that it had made such a decision. But the evidence does not support this contention. In its letter of 23 February 2013, the CINPF spoke of still needing to be satisfied on a number of matters and recorded a belief that it was of the view that the transfers would be prejudicial to at least some of the members in question. This can hardly be construed as conduct consistent with being satisfied that the transfers are reasonable and equitable and that they give expression to the rights and reasonable expectations of the members concerned, as the rule requires. No tacit decision was taken.

[30] The second attempt to overcome the lack of an express decision, was to submit that, because the test for being satisfied is an objective one, the court should itself have taken the decision. For this submission, the appellants relied on the determination of the Financial Services Board of Appeal in *AH Roy v Registrar of Pension Funds & another*.[12] In that matter, however, a decision to approve a scheme pursuant to s 14(1) of the Act had been taken. The aggrieved party sought to have this decision set aside and the decision of the Appeal Board substituted. In the present matter, I have found that no decision was taken, whether express or tacit. It is not appropriate to make a decision when the trustees have not made one. The authority relied on by the appellants does not apply in this case.

[31] In any event, it is clear that the CINPF consistently raised concerns about the housing loan issue. This is no trifling matter. The CINPF points out that it offers loans of up to 80 percent of the members' fund credits. The new funds offer loans equal to only 25 percent. Some 21 percent of the 2444 have home loans with the CINPF. Sasol's response to the concern expressed in the letter of 23 February 2013 on this issue was simply to the effect that transferring members would have to settle their home loans. In its founding affidavit, the

[12]Dated 18 July 2013 at para 8.

CINPF gave examples of how this would affect the fund credit of certain members. The only response given by Sasol in its answering affidavit was that this ignores the fact that, once a loan is settled, a member will no longer have to service that loan leaving more of the salary available for additional contributions to the fund.

[32] One example given by the CINPF in its founding affidavit is of a 58 year-old employee with a fund credit of R81 640.17. Of this amount R55 905.33 is outstanding on his home loan. The tax liability on withdrawal of the latter amount from his fund credit so as to settle his outstanding home loan is R6 012.96. The fund credit which would be transferred would therefore be R19 721.88. He has only seven years before retirement and it is inconceivable that the fund credit would be reinstated by then. In these circumstances, it is understandable that, in attempting to discharge their fiduciary duties, the trustees would want to ensure that such a member fully understands these implications. In these circumstances, it would most certainly not be appropriate for a court to make a decision in their stead.

[33] I have mentioned that the rule 10.2.2 process may require completion and that no decision was taken by the trustees to the effect that they were satisfied on the two aspects dealt with in rule 10.2.3. It cannot be said that the provisions of rules 10.2.1 to 10.2.3 have been complied with. The appellants accepted that effect has not been given to rule 10.2.4. As such, transfers of the 2444 affected members have not taken place. The court below was accordingly correct to grant prayer 1 of the relief sought by the CINPF.

[34] Finally, although this was not argued before us or dealt with by the court below, it should be mentioned that prayer 2 was also correctly granted by Mayat J. Rule 3.5 provides as follows:

‘If a Member transfers to another Approved Provident Fund or Approved Pension Fund in any of the circumstances envisaged in these Rules and such transfer is subject to the provisions of Section 14 of the Act, then it is specifically provided that with effect from the effective date of transfer as specified in the Section 14 documentation, contributions in terms of Rule 4 shall cease and in the event of his death or disablement, prior to transfer of his benefit in terms of these Rules from the Fund to such other Fund, the death and disability benefits referred to in Rule 6.1 (b) and Rule 7.2 respectively shall not be payable.’

This makes it abundantly clear that, because the transfers are subject to the provisions of s 14 of the Act, Sasol’s contributions to the CINPF cease only from the ‘effective date of transfer as specified in the Section 14 documentation’. The trustees have not submitted an application in terms of s 14. Until this is done and the trustees specify an effective date in it, Sasol's contributions to the CINPF must continue.

[35] The following order is made:

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

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T R Gorven
Acting Judge of Appeal

Appearances

For the Appellants:	AE Franklin SC (with him S Khumalo)
	Instructed by: Bowman Gilfillan, Sandton
	McIntyre & Van der Post, Bloemfontein
For the Respondent:	CE Watt-Pringle SC (with him JJ Meiring)
	Instructed by: Mervyn Taback Inc, Johannesburg
	Webbers, Bloemfontein