



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 664/2015

In the matter between:

THE REGISTRAR OF PENSION FUNDS

APPELLANT

and

BRITISH AMERICAN TOBACCO PENSION FUND

FIRST RESPONDENT

C T HOWIE NO

SECOND RESPONDENT

J D PEMA NO

THIRD RESPONDENT

J M DAMONS NO

FOURTH RESPONDENT

Neutral citation: *The Registrar of Pension Funds v British American Tobacco Pension Fund* (664/2015) [2016] ZASCA 130 (28 September 2016)

Coram: Cachalia, Shongwe, Petse and Dambuza JJA and Dlodlo AJA

Heard: 13 September 2016

Delivered: 28 September 2016

Summary: Pension Funds Act 24 of 1956: interpretation : whether s 15H(1) overrides s 15D(2) read with ss 15A(2) and 15A(4).

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J sitting as court of first instance), judgment reported sub nom as *British American Tobacco Pension Fund v Howie NO & others* 2016 (1) SA 398 (GP):

- 1 The appeal is upheld with costs;
- 2 The order of the court a quo is set aside and the following order is substituted therefor:

‘The application is dismissed with costs.’

JUDGMENT

Cachalia JA (Shongwe, Petse and Dambuza JJA and Dlodlo AJA concurring)

[1] This appeal concerns the interpretation of various provisions of the Pension Funds Act 24 of 1956 (the Act). The judgment appealed against emanates from Potterill J, sitting in the Gauteng Division of the High Court of South Africa (Pretoria). She upheld an application by the first respondent (‘the Fund’) to review and set aside a decision of the Financial Services Board’s Appeal Board. The Appeal Board had dismissed the Fund’s appeal against the registrar’s decision to reject a statutory actuarial valuation of the Fund as at 30 September 2007 on the ground that it did not correctly reflect the financial condition of the Fund. The court a quo accepted the Fund’s submissions and held that the Appeal Board had erred in dismissing the appeal. The registrar, who is the appellant in the present proceedings, maintains that

the court a quo was wrong to have set aside the Appeal Board's decision, and seeks to reinstate it.

[2] In a nutshell this is how the dispute arose. Section 15B of the Act provides for a pension fund to submit a scheme to the registrar for the proposed apportionment of an actuarial surplus in the fund between various classes of stakeholders whom the Fund has selected to participate in the apportionment. On 1 February 2006 the Fund submitted a scheme, referred to as the surplus apportionment scheme, to the registrar for allocation of a surplus in the Fund to members, former members, pensioners and deferred pensioners. The date when the scheme would take effect was 31 March 2002, which is referred in the papers as the surplus apportionment date.

[3] The registrar approved the scheme on 28 November 2006, but it had not yet been implemented when the Fund's actuarial valuation as at 31 March 2005, submitted to the registrar on 6 September 2007, revealed a deficit. A further valuation prepared for the Board, in September 2007, also revealed a deficit as at 31 October 2006. The actuarial reports of those valuations explained that the Fund was in deficit if one disregarded the surplus allocation.

[4] The Fund thus prepared a report as at 30 September 2007 showing no deficit, and submitted it to the registrar. The report revealed that the Fund had used a portion of the allocation approved by the registrar to reduce the deficit. The Fund contends before us, as it did in the court a quo, that it was entitled to reduce the deficit in this way by resorting to s 15H(1), which permits any credit-balance in a member or employer surplus account to be reduced so as to reduce a deficit following an actuarial evaluation. However, the registrar contends that s 15H(1) does not apply once the surplus apportionment scheme is approved. He maintains that s 15D(2), read with ss 15A(2) and (4), required the Fund to use the surplus only in the manner specified in the surplus apportionment scheme after he had approved it in terms of s 15B(9). And so, acting in terms of s 15(3) read with s 16(9) of the Act he

was obliged to reject the 30 September 2007 report because, by using the deficit to reduce the approved allocation in this manner, the report did not reflect the Fund's correct financial condition. These conflicting contentions lie at the heart of this appeal.

[5] It is evident from what I have said that the provisions of the Act germane to the resolution of this dispute are ss 15A, 15B, 15D and 15H. Their relevant parts are set out later in this judgment. I think it is appropriate to first set out the background facts, which are fairly detailed in the registrar's heads of argument. In this regard, special note must be taken of the dates mentioned in the chronology that follows because it is important to understand the process by which the actuarial surplus was apportioned and its impact on the rights of beneficiaries, once the registrar approved the surplus apportionment scheme.

[6] The Fund is a closed defined benefit fund established with effect from 1 February 1951. It was previously known as the Rembrandt Pensioenfonds, the Rembrandt Groep Pensioenfonds and the R & R Pension Fund.

[7] The date of the Fund's first statutory actuarial valuation following the commencement of the Pension Funds Second Amendment Act 39 of 2001, and hence its surplus apportionment date for purposes of s 15B, was 31 March 2002.

[8] On 1 February 2006 the Fund submitted a scheme for the apportionment of an actuarial surplus in the Fund as at 31 March 2002 to the registrar for approval in terms of s 15B(9)(h) and (i). In this regard the following facts are relevant:

(i) A statement by the principal officer setting out the scheme is dated 23 December 2005.

(ii) A letter from the Fund's consultants and actuaries, Alexander Forbes Financial Services ('Alexander Forbes'), under cover of which that statement and the other scheme documents were submitted, is dated 26 January 2006.

(iii) The scheme stated that the Fund had an actuarial surplus on 1 April 2002 of R236 635 000 to which R1 624 000 should be added in terms of s 15B(5)(a) and (6), giving a total surplus available for apportionment of R238 259 000.

(iv) The scheme entailed non-discretionary (first-tier) apportionments in terms of s 15B(5)(b) to pensioners of R1 475 000 and former members of R39 911 000; and discretionary (second-tier) apportionments in terms of s 15B(5)(c) to three classes of former members totalling R62 006 000, to existing members of R3 354 000, to pensioners of R12 925 000, to deferred pensioners of R463 000 and to the participating employer of R118 124 000.

(v) The scheme stated that the amounts apportioned to former members, existing members, pensioners and deferred pensioners would be credited to the member surplus account.

(vi) The general communication to stakeholders by the Fund's board of trustees dated 15 July 2005, which was submitted to the registrar in terms of s 15B(9)(d), added that: the apportionments to former members would be paid to them in cash; the apportionments to active members would be kept in the Fund for them to purchase additional retirement benefits; the apportionments to pensioners would be available either as lump sum payments or to increase their monthly pensions; and the apportionment to the employer would be transferred to a reserve account in the Fund for the employer's use on behalf of employees.

(vii) The statements in general communication to stakeholders as to the manner in which the apportionments to former members, existing members and pensioners would be used, were borne out by the examples of letters dated 30 June 2005 sent to former members, existing members and pensioners, which were also submitted to the registrar in terms of s 15B(9)(d).

[9] On 16 March 2006 Alexander Forbes submitted the report on its actuarial valuation of the Fund as at 31 March 2002, ie the actuarial valuation report to which the scheme related, to the registrar in terms of s 15B(9)(a). Conformably with the scheme it stated the actuarial surplus of the Fund on that date, before any addition in terms of s 15B(5)(a) and (6), was R236 635 000.

[10] On 20 April 2006 the registrar queried some aspects of the actuarial valuation and the scheme with Alexander Forbes. He asked Alexander Forbes to attend to these matters and to re-submit an application in terms of s 15B. On 31 October 2006 Alexander Forbes submitted a revised scheme for the apportionment of the actuarial surplus in the Fund as at 31 March 2002. Of relevance here is the following:

- (i) The statement by the principal officer setting out the revised scheme is dated 24 October 2006.
- (ii) The letter from Alexander Forbes under cover of which that statement and the other documents were submitted, is dated 31 October 2006.
- (iii) The parts of the original scheme described in sub-paragraphs (iii) to (v) in paragraph eight above, remained the same in the revised scheme.
- (iv) The documents submitted did not include further copies of the general communication to stakeholders and examples of letters to stakeholders described in paragraphs (vi) and (vii) in paragraph eight above, presumably because the registrar already had them.
- (v) The main change from the scheme submitted in February 2006 entailed the submission of a revised actuarial valuation report of the Fund as at 31 March 2002, dated October 2006, which adjusted the actuarial values of the Fund's liabilities and contingency reserves, but not the value of the actuarial surplus.

[11] On 28 November 2006 the registrar approved the revised scheme in terms of s 15B(9)(h) and furnished Alexander Forbes with a certificate in terms of s 15B(9)(i). On 6 September 2007 Alexander Forbes submitted the report on its actuarial

valuation of the Fund as at 31 March 2005 to the registrar. This was the Fund's statutory actuarial valuation date following the previous one on 31 March 2002. The following emerges from the report:

- (i) It states that if the value of the assets relating to the 31 March 2002 surplus apportionment exercise is left out of account (a total of R279 534 000), the Fund now had an actuarial deficit of R37 181 000.
- (ii) It says that after the actuarial valuation of the Fund as at 31 March 2002 had been finalised, further information became available, which increased the surplus available for apportionment on that date by R5 167 000 from R236 635 000 to R241 802 000.

[12] During September 2007 Alexander Forbes prepared a report on an interim actuarial valuation of the fund as at 31 October 2006 for consideration by the Fund's board of trustees (but not the registrar).

- (i) It states: '[t]he valuation was specifically performed to determine whether the Fund was in deficit immediately prior to the Registrar's approval of the Fund's surplus apportionment scheme in November 2006 and, should that be the case, to determine the level of the reduction in the Member and Employer Surplus Accounts in terms of s 15H of the Pension Funds Act prior to the implementation of the surplus apportionment scheme.'
- (ii) And further that if the value of the assets relating to the 31 March 2002 surplus apportionment exercise is left out of account (a total of R300 005 000), the Fund had an actuarial deficit on 31 October 2006 of R53 659 000.
- (iii) It continues: 'Following discussions with the Employer after the valuation date, the Employer agreed that the deficit as at 31 October 2006 should be reduced by an amount that equals the value of the Employer contributions since 1 April 2002 [the Employer not having made any contributions since that date], . . . before the remainder of the deficit is funded from the Member and Employer Surplus Accounts.'

The Employer contributions in respect of the period from the statutory actuarial evaluation as at 31 March 2002 to the current valuation date, amounting to

R15 353m [million] as at 31 October 2006, is to be funded from the Employer Surplus Account.

After taking the above Employer contributions into account, an amount of R38.306m [million] remains to be funded proportionately from the Member and Employer Surplus Accounts, thereby reducing the value of the 2002 surplus interest that is payable to stakeholders. . .’

[13] On 19 June 2009 Alexander Forbes submitted the report on its actuarial valuation of the Fund as at 30 September 2007, which, though not the next statutory actuarial valuation date following 31 March 2005, was required by s 14(1)(a). This was because 30 September 2007 was the date immediately prior to a merger of the Fund with the British American Tobacco South Africa Pension Fund. Of relevance here is the following:

(i) The report stated (incorrectly) that because the previous ‘statutory’ actuarial valuation was performed as at 31 October 2006 – as stated above, that was an interim valuation prepared for the Fund’s board of trustees, not the registrar – the period under review is the 11 months from 1 November 2006 to 30 September 2007.

(ii) The report is dated April 2009.

(iii) The section of the report headed ‘Reserve Accounts’ explained the implementation of the board of trustees’ decision as to the funding of the R53 659 000 deficit revealed by the interim actuarial valuation as at 31 October 2006, and more specifically for present purposes, the proportional funding of R38 306 000 of the deficit from the member surplus account (MSA), as follows:

‘For ease of reference the Member Surplus Account was notionally split between . . . the in-service Members, Pensioners and former Members. The change in the various components of the Member Surplus Accounts over the valuation period is provided below:

	R
Initial surplus allocation to in-service members	12 796 345
Proportional funding of the deficit by in-service members	(1 694 016)
Revised surplus allocation as at 31 October 2006	11 102 329
Net investment return	877 084
Surplus allocation awarded to in-service members	(11 979 413)
Value as at 30 September 2007	0

The residual surplus allocations of the in-service members were loaded onto their records and will be paid as part of any future exit benefits. All unpaid benefits are included under “Benefits Payable” in the financial statements.

	R
Initial surplus allocation to former members	83 341 464
Proportional funding of the deficit by former members	(11 032 975)
Revised surplus allocation as at 31 October 2006	72 308 489
Data corrections	567 560
Net investment return	5 712 370
Surplus allocation awarded to former members	(78 588 419)
Value as at 30 September 2007	0

After the approval of the surplus apportionment scheme, a number of former members supplied improved information on which to base a more accurate calculation of their surplus allocations. The increased benefits payable to these stakeholders as a result of the data corrections were funded from the Data Reserve.

The minimum benefit and residual surplus allocations of the former Members were awarded to the appropriate stakeholders and the process of paying the benefits is ongoing. All unpaid benefits are included under ‘Benefits Payable’ in the financial statements.

	R
Initial surplus allocation to Pensioners	44 815 686
Proportional funding of deficit by Pensioners	(5 932 825)
Revised surplus allocation as at 31 October 2006	38 882 861
Net investment return	3 065 420
Surplus allocation awarded to Pensioners	(41 948 281)
Value as at 30 September 2007	0

The minimum benefit and residual surplus allocations of the Pensioners were awarded to the appropriate stakeholders during the valuation period. All unpaid benefits are included under “Benefits Payable” in the financial statements.’

[14] On 11 December 2009 Alexander Forbes submitted a letter by the Fund’s valuator, Mr Knoetze, to the registrar. Amongst other things, he explained that the surplus apportionment scheme submitted to and subsequently approved by the registrar on 26 November 2006 incorrectly contained duplicate records for 2 273 former members ‘[which] was rectified after approval of the scheme was obtained, but before the scheme was implemented’. This ‘rectification’ included a ‘significant reduction’ in the residual surplus that was allocated to one class of former members and ‘a corresponding sizeable increase in the residual surplus of the other stakeholders, in particular the active members, pensioners and deferred pensioners’.

[15] The registrar’s response to this new information, which was communicated to Alexander Forbes on 18 January 2010, was to pend consideration of the reports on the actuarial valuations of the Fund as at 31 March 2005 and 30 September 2007 and to request the Fund ‘to submit an addendum to the surplus apportionment scheme reflecting the changes to the scheme in accordance with what the valuator reported in his letter dated 11 December 2009’.

[16] On 15 April 2010 Alexander Forbes submitted the requested addendum to the surplus apportionment scheme to the registrar. It contained the following information:

(i) The Fund had an actuarial surplus on 1 April 2002 of R241 802 000 (up by R5 167 000), to which R1 624 000 was added in terms of s 15B(5)(a) and (6), giving a total surplus available for apportionment of R243 426 000.

(ii) The scheme entailed non-discretionary (first tier) apportionments in terms of s 15B(5)(b) to pensioners of R1 475 000 and former members of R34 844 000 (down from R39 911 000); and discretionary (second tier) apportionments in terms of s 15B(5)(c) to three classes of former members totalling R36 166 000 (down from R62 006 000), to existing members of R10 665 000 (up from R3 354 000), to pensioners of R34 830 000 (up from R12 926 000), to deferred pensioners of

R1 181 000 (up from R463 000) and to the participating employer of R124 284 000 (up from R188 124 000).

(iii) As to the use of those apportionments, it said:

‘The amounts apportioned will be applied as follows:

Class of stakeholder	Manner in which the actuarial surplus will be applied for their benefit
Former members	Cash payment
Active members	Enhancement to fund benefit
Pensioners	Cash payment or pension increase
Deferred pensioners	Enhancement to Fund benefit
Employer	Allocation to Employer Surplus Account’

(iv) Regarding the surplus apportioned to former members who could not be traced, it said this would constitute unclaimed benefits.

[17] The registrar accepted the addendum on 1 September 2010. On 3 September 2010 he wrote to Alexander Forbes requesting a reconciliation of the Fund’s employer surplus account and the MSA incorporating the addendum to the surplus apportionment scheme approved on 1 September 2010, and explaining any releases from the balances in those accounts. With reference to para 8 of the report of the actuarial valuation of the Fund as at 30 September 2007 (ie the section headed ‘Reserve Accounts’ dealt with in para (iii) above), the registrar added that the Fund could not use s 15H to manage the deficit as at 31 October 2006 because s 15D(2) required the credit balance in the MSA, after apportionment of the actuarial surplus, to be used as specified in the surplus apportionment scheme in accordance with s 15B.

[18] On 29 September 2010 Alexander Forbes replied explaining that R18 660 000 of the money in the MSA had been used to fund the deficit as at 31 October 2006 and asserted that in doing so the Fund had in fact used the credit balance in that account in accordance with s15H.

[19] On 30 November 2010 the registrar responded, saying that the Fund could not invoke the provisions of s 15H, but instead had to give effect to s 15D(2) by apportioning the actuarial surplus in accordance with the scheme approved on 26 November 2006 and the revised Form A dated 15 April 2010. On 22 March 2012 the Fund submitted a legal opinion to the registrar supporting its invocation of s 15H. After considering the opinion, the registrar wrote to Alexander Forbes informing it that he had rejected its actuarial valuation of the Fund as at 30 September 2007 because the report did not correctly reflect the financial condition of the Fund. What followed thereafter were the decisions of the Appeal Board and the court a quo.

Relevant Provisions of the Act

[20] The relevant provisions of the Act, before its amendment by the Financial Services Laws General Amendment Act 45 of 2013, are the following.

Section 15, in its relevant parts, provides:

‘Accounts

- (1) Subject to the provisions of subsection (4), every registered fund shall, within six months as from the expiration of every financial year, furnish to the registrar such statements in regard to its revenue, expenditure and financial position as may be prescribed, duly audited and reported on by the auditor of the fund.

...
- (3) If the registrar is of the opinion that any document furnished by a registered fund in terms of subsection (1) does not correctly reflect the revenue and expenditure or the financial position (as the case may be) of the fund, he may reject the said document, and in that event-
 - (a) he shall notify the fund concerned of the reasons for such rejection; and
 - (b) the fund shall be deemed not to have furnished the said document to the registrar’

Section 15A, in its relevant parts, provides:

'Rights to use of actuarial surplus'

- (1) All actuarial surplus in the fund belongs to the fund.
- (2) Once actuarial surplus is apportioned to either the member surplus account or the employer surplus account in terms of sections 15B and 15C, or directly for the benefit of members and former members subject to the uses specified in section 15D(1), members, former members and the employer acquire rights to such actuarial surplus as provided for in this section.
- ...
- (4) Any credit balance in the member surplus account must be used for the benefit of members as provided for in section 15D.'

Section 15B, in its relevant parts, provides:

'Rights to use of actuarial surplus'

- (1)(a) Subject to paragraph (b), the board of every fund that commenced prior to 7 March 2002 shall submit to the registrar a scheme for the proposed apportionment of any actuarial surplus (in this section referred to as the scheme) plus the details regarding any surplus utilised improperly by the employer as defined in subsection (6) as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date [ie 7 December 2001, being the date of commencement of the Pension Funds Second Amendment Act 39 of 2001].
- ...
- (2) A scheme-
 - ...
 - (b) may involve-
 - (i) the improvement of benefits to existing members;
 - (ii) increases to benefits or transfer values in respect of former members;
 - (iii) the crediting of an amount to the member surplus account;
 - (iv) the crediting of an amount to the employer surplus account; or

- (v) any two or more of the matters contemplated in subparagraphs (i) to (iv).

...

- (3) The board shall appoint a person to represent the interests of former members in the development of the scheme and such person shall-

- (a) assist the board in-

- (i) identifying former members;
- (ii) communicating proposals to former members and to the funds to which former members transferred;
- (iii) conveying proposals from members, and the funds to which they transferred, to the board; and
- (iv) collating any objections to the scheme from former members and the funds to which they transferred;

...

- (5) The board shall apportion the actuarial surplus between the various classes of stakeholders whom the board has determined shall participate in the apportionment in terms of subsection (4), following which such portion as is due to the employer shall be credited to the employer surplus account:

Provided that-

- (a) the actuarial surplus to be apportioned shall be increased by the amount of actuarial surplus utilised improperly by the employer prior to the surplus apportionment date as determined in terms of subsection (6);
- (b) former members shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of section 14B(2) or 14B(6) as at the date when they left the fund, with such increase adjusted to the surplus apportionment date with fund return of the fund over the corresponding period, and pensioners and deferred pensioners shall have their pensions increased to

the minimum pension as determined in terms of section 14B(4), as a prior charge on the actuarial surplus to be apportioned . . .

- (c) after deducting the cost of the increases to former members, pensioners and deferred pensioners in terms of paragraph (b) the balance of the actuarial surplus shall be equitably split between existing members, former members and the employer in such proportions as the board shall determine after taking account of the financial history of the fund . . .

. . .

- (e) the board shall determine how, in the case of existing members and former members, the allocated portion of actuarial surplus shall be applied for their benefit, including the crediting of any portion to the members' surplus accounts or to the members' individual accounts, as the case may be . . .
- (f) the surplus due to any stakeholder as a result of a surplus apportionment scheme approved by the registrar, shall be increased or decreased with fund return from the date determined in line with section 15B (1) until the date the surplus is awarded, paid or allocated.

. . .

- (9) An appointment in terms of this section shall be of no force or effect unless-

. . .

- (a) the scheme, the statutory actuarial valuation as at the surplus apportionment date of the fund, as well as a copy of any other actuarial or other statement taken into account for purposes of the scheme and the report by the person appointed in terms of subsection (3), has been submitted to the registrar

. . .

- (d) the fund demonstrates that reasonable measures have been taken to inform employers, members and former members, together with any fund to which former members transferred, of the scheme in a manner which is clear and understandable to the members and former members and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the amounts of any actuarial surplus which it is

intended to credit to the member surplus account and to the employer surplus account, respectively, and the costs of any benefit improvements for members and former members . . .

- (e) the employer, members, former members, and any fund to which former members have transferred have had 12 weeks after despatch of the communication in which to complain, in writing, to the board;
- (f) the board has considered any objection contemplated in paragraph (e) before submitting the scheme to the registrar;
- (g) the principal officer of the fund has furnished the registrar with details of all objections lodged with the board and the actions taken to address such objections;
- (h) the registrar is satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date; and
- (i) the registrar has forwarded a certificate to the fund to the effect that the scheme is approved and the requirements of this subsection have been fulfilled.

. . . .’

Section 15C provides:

‘Apportionment of future surplus

- (1) The rules may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account or directly for the benefit of members and former members subject to the uses specified in section 15D (1).
- (2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment between the member surplus account, the employer surplus account or directly for the benefit of members and former members, subject to the uses specified in section 15D (1), shall be determined by the board taking into account the interests of all the stakeholders in

the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment.

Section 15D provides:

'Utilisation of surplus for benefit of members

- (1) Notwithstanding anything to the contrary in the rules of a fund but subject to subsection (2), any credit balance in the member surplus account may only be used by the board to-
 - (a) improve benefits for members;
 - (b) where reasonable and equitable, improve benefits paid to, or the amounts transferred in respect of, former members who exited the fund subsequent to the surplus appointment date;
 - (c) reduce current contributions due from members; or
 - (d) meet, in full or in part, expenses which would otherwise reduce the proportion of the members' contributions that are invested for retirement:

Provided that the employer appointed members of the board shall not have a vote in any deliberation over the use of any credit balance in the member surplus account unless the proposal before the board will increase the contribution rate payable by the employer.

- (2) The credit balance contemplated in subsection (1) after the apportionment of actuarial surplus as at the surplus apportionment date must be used as specified in the scheme submitted in terms of section 15B (1) if the scheme makes provision for the use of such credit balance.'

Section 15H provides:

'Use of contents of any surplus accounts to fund deficits

- (1) If a fund has credit balances in the member surplus account or the employer surplus account and the fund is found to have a deficit following an actuarial valuation, including a valuation carried out for the purpose of distributing assets on liquidation of the fund, such credit balances shall be reduced in the same proportion by the amount

of the deficit: Provided that no credit balance may be reduced by more than the amount to which the account was in credit.

- (2) If the deficit exceeds the credit balances in the member surplus account and the employer surplus account, these credit balances shall be applied in full to reduce the deficit and shall be reduced to zero.'

Section 16 provides, in its relevant parts, as follows:

'Investigations by a valuator

- (1) A registered fund shall, once at least in every three years, cause its financial condition to be investigated and reported upon by a valuator, and shall deposit a copy of such a report with the registrar, and shall send a copy of such report or a summary thereof, prepared by the valuator in a form prescribed and signed by the valuator, to every employer participating in the fund.

...

- (9) The provisions of section 15 (3) in connection with a document relating to the financial position or the revenue or expenditure of a fund referred to therein, shall apply with the necessary changes in respect of a copy of a report deposited with the registrar in terms of subsection (1) of this section and which in the opinion of the registrar –
- (a) other than in respect of a report on the valuation of a fund as at its surplus apportionment date, does not correctly reflect its financial condition referred to in the said subsection (1); or
- (b) in respect of a report on the valuation of a fund as at its surplus apportionment date, does not correctly reflect its financial condition in subsection (1) or does not fairly take into consideration the interests of one or more of the stakeholders that may be entitled to participate in a scheme in terms of section 15B (1) based on the result of such report.'

[21] I turn to consider the competing contentions of the parties. It is apparent from what I have said earlier that the Fund's pivotal contention is that s 15H(1) entitled it

to use a portion of the credit balance in the MSA following the surplus apportionment exercise to fund the deficit that appeared in the Fund as at 31 March 2005 and 31 October 2006. The registrar's riposte is that s 15H(1) cannot be invoked in circumstances such as these. This is so, he contends, because once the surplus had been apportioned to members, former members, pensioners and deferred pensioners under the surplus apportionment scheme with effect from 31 March 2002, they acquired rights to use the surplus for their benefit by virtue of s 15A(2) and 15A(4). And, read with s 15D(2), which specifies that any credit balance in the MSA as at that date must be used in the manner for which the scheme has provided, these sections precluded the Fund's use of the credit balance for another purpose ie, to fund the deficit that had subsequently arisen.

[22] I shall return to the Fund's reliance on s 15H, but it is convenient first to consider the registrar's submissions regarding the operation of ss 15A(2), 15A(4) and 15(D)2. It is contended on his behalf that once the surplus allocations were credited to the MSA, it had to be debited immediately with the cash paid or to be paid to the former members and pensioners, who elected cash payments; the amounts required to increase the pension payments of the pensioners, who elected pension increases instead of cash payments; and the amounts needed to enhance the fund benefits of the active members and deferred pensioners. This means that there would be a nil balance in the MSA.

[23] In addition to having to debit the MSA immediately, the Fund had to do the following:

- (i) make the payments to the former members and the pensioners who elected cash payments instead of pension increases;
- (ii) where a cash payment could not be made immediately, reflect the amount as a liability to the former member or pensioner concerned (ie open a creditor's account for that person);

(iii) where the amount of the cash payments to certain former members or pensioners could not immediately be quantified, reflect the balance of the amount owing to former members and pensioners after the subtraction of the cash payments which could be quantified as a liability to the group of former members and pensioners (ie open a creditors' account for that group); and

(iv) where the whereabouts of former members to whom cash payments had to be made were unknown, put the amounts concerned into the contingency reserve account required by reg 35(4) of the Regulations made under the Act (GN R98 in GG 162 of 26 January 1962, as amended) ('Regulation 35(4)').

[24] The consequence of debiting the MSA immediately after it was credited with the surplus allocations is that there was no credit balance available to the Fund when it invoked s 15H(1) to reduce the deficit.

[25] The Fund, however, contends that as a matter of fact there was a credit balance in the MSA when it applied s 15H(1), as appears from the 30 September 2007 valuation report. And further, that if the registrar is correct that pension funds must immediately debit the MSA, thus leaving a nil balance, they would never have credit balances for the purposes of applying the provisions of s15G, s 15H and 15I. These provisions, so it is contended, would be rendered superfluous as a consequence.

[26] The Fund's first contention, that there was in fact a credit balance in the MSA when the deficit occurred on 31 October 2006 and that this was sufficient reason to invoke S15H(1), does not hold water. It falters on both the facts and on the law.

[27] The facts are these. On 28 November 2006 the registrar approved the revised scheme in terms of s 15B(9)(h) and issued a certificate to Alexander Forbes in terms

of s 15B(9)(i). The scheme acquired the force of law on this date, but it took effect retrospectively from 31 March 2002, which is the surplus apportionment date. In 2010, the Fund purported to apply s15H(1) to reduce the deficit as at 31 October 2006. But it could not do so because on 31 October 2006, which was a few weeks before the registrar approved the scheme, there was no approved surplus apportionment scheme, and therefore no credit balance available to reduce the deficit as envisaged in s 15H(1).

[28] But even if we accept the fact of the credit balance in the MSA, it does not necessarily follow that it could lawfully have been used to reduce the deficit. For, this would mean ignoring or overriding the rights of the beneficiaries to the actuarial surplus that had accrued as at the surplus apportionment date, which was 31 March 2002. Once the right had accrued and the MSA was credited with the surplus amount, the beneficiaries immediately became entitled to it, and a liability in the Fund thus arose simultaneously. The MSA had to be debited to reflect this liability, which follows as a matter of law.¹ The fact that the scheme had not been implemented, and that the MSA therefore had what in reality was a notional credit balance at a later date when the Fund invoked s15H(1), has no bearing on the legal question whether the Fund was permitted to do so; the effect of using s15H(1) to reduce the deficit in this manner would eviscerate the rights of beneficiaries to the use of the surplus allocation and defeat the purpose for which the surplus was allocated.

[29] It is important to distinguish, as the registrar does in his answering affidavit, between a situation where a scheme apportions a surplus to members but does not specify how it is to be used from the present case, where the use of the surplus is specified in the scheme and becomes immediately payable to a class of beneficiaries. In the former case the credit balance in the MSA would remain so credited after the surplus apportionment date and therefore could be used to reduce

¹ Cf *Registrar of Medical Schemes & another v Genesis Medical scheme* (238/2015) [2016] ZASCA 75 (27 May 2016), paras 27, 47 and 60.

a deficit in terms of s 15H(1) because no beneficiary would have had any accrued right to the surplus. But in the case of the latter, where the use of the surplus was specified and therefore immediately became payable to the classes of beneficiaries so identified, the MSA had to be debited immediately as at the surplus apportionment date.

[30] The Fund's second contention, that this interpretation would render the ss15G, 15H and 15I superfluous was persuasively answered by the Appeal Board. It reasoned that ss 15D(2) and 15H(1) apply to different points in the life of a pension fund. The former, it said, is concerned with the implementation of a surplus apportionment scheme as at the surplus apportionment date, which entails crediting the MSA with the actuarial surplus and specifies the uses to which the credited surplus must be put. The latter, s 15H(1), deals with a deficit that arises after the scheme is implemented. The Appeal board thus read ss 15(2) and 15H(1) harmoniously by giving effect to the language and purpose of each without rendering either redundant.

[31] I should add, however, that as I have mentioned above, s 15H(1) would also apply in circumstances where the scheme has apportioned a surplus to members but not specified how it is to be used, which does not detract from the Appeal Board's reasoning.

[32] Furthermore, the Appeal Board correctly recognised that s 15B(5)(f) of the Act contemplates that there may be a hiatus or delay between the Fund's having decided to award the benefit and the beneficiary's being able to receive it. The provision therefore says that the surplus due to any stakeholder shall be increased or decreased depending on how the Fund's investments have fared between the surplus apportionment date and the award or payment, as the case may. But it is beyond dispute that every beneficiary's accrued right to the surplus as at the surplus apportionment date remains extant.

[33] For the reasons given the court a quo was incorrect to adopt the Fund's submissions and to set aside the Appeal Board's decision. Consequently the following order is made.

- 1 The appeal is upheld with costs;
- 2 The order of the court a quo is set aside and the following order is substituted therefor:

'The application is dismissed with costs.'

A Cachalia
Judge of Appeal

APPEARANCES

For Appellants: A M Breitenbach SC

Instructed by:

Rooth & Wessels Attorneys, Pretoria

Phatshoane Henney Attorneys, Bloemfontein

For Respondent: M A Chohan SC (and S Khumalo)

Instructed by:

Cliffe Dekker Hofmeyr Inc c/o Jacobson & Levy Inc, Pretoria

Lovius Block, Bloemfontein