THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 518/17

In the matter between:

BRUCE ST CLAIR MOOR	**FIRST APPELLANT**
WILLEM JAN HAZEWINDUS	**SECOND APPELLANT**

and

THE TONGAAT-HULETT PENSION FUND	**FIRST RESPONDENT**
THE TONGAAT-HULETT DEFINED BENEFIT PENSION FUND	**SECOND REPSONDENT**
TONGAAT HULETT LIMITED	**THIRD RESPONDENT**
THE REGISTRAR OF PENSION FUNDS	**FOURTH RESPONDENT**

Neutral citation: *Moor v Tongaat-Hulett Pension Fund* (518/17) [2018] ZASCA 83 (31 May 2018)

Coram Lewis, Majiedt, Mbha and Dambuza JJA and Schippers AJA

Heard: 17 May 2018

Delivered: 31 May 2018

Summary: Pension Funds Act – allocation and distribution of actuarial surplus – proper interpretation of section 15C – amended rules of pension fund to effect decision to allocate surplus not contrary to section 15C(1) – no proof of alleged bias on part of board of pension fund – *Biowatch* principle not applicable in respect of costs in cases of private interest litigation.

ORDER

On appeal from: Kwazulu-Natal Local Division of the High Court (Durban), Koen J sitting as court of first instance:

1. The application to lead further evidence is dismissed with costs, including the costs of two counsel.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Majiedt JA (Lewis, Mbha and Dambuza JJA and Schippers AJA concurring):

[1] The central issue in this appeal is whether the second respondent, the Tongaat-Hulett Defined Benefit Pension Fund (the Fund), contravened the provisions of s 15C of the Pension Funds Act 24 of 1956 (the PFA) when it allocated R363.2 million to the employer surplus account (the ESA) in 2012. The Kwazulu-Natal Local Division of the High Court (Durban), dismissed the challenge to the allocation, brought by the appellants, Messrs Bruce St Clair Moor and Willem Jan Hazewindus, holding that it was lawful. The appeal is before us with the leave of the high court.

Background

[2] The appellants are former members of the Fund and former trustees of the Fund's predecessor, the first respondent, the Tongaat-Hulett Pension Fund. The Fund was established with effect from 1 November 2010 after the unbundling of Tongaat-Hulett Limited (the third respondent) and Hulamin Limited. The third respondent is the sponsoring employer of the Fund. Pursuant to a conversion and restructuring exercise (the scheme) in terms of s 14 of the PFA, the Fund's obligations to the appellants and its other pensioner members were outsourced to Old Mutual with effect from 1 April 2013. As a result, the

appellants' membership of the Fund was terminated. The scheme followed upon a resolution of the Fund's Board of Trustees (the Board) of 14 May 2012 and it was approved by the regulator, the Registrar of Pension Funds (the Registrar), on 15 August 2013. In his approval, the Registrar certified that the requirements of s 14(1)(*a*) – (*d*) had been met, thus signifying that the Registrar was satisfied that the scheme is reasonable and equitable and accords full recognition to the rights and reasonable benefit expectations of the members and pensioners of the Fund. The Registrar also approved the amendment of the Fund's rules. The scheme was effected in terms of Rule 11.5, a registered rule of the Fund specifically made to implement the scheme. Rule 11.5 was part of rule amendment no 3 and it was submitted to the Registrar on 13 June 2012, who approved it on 13 December 2012. It is important to record that the appellants' challenge in the high court did not include an attack on the Registrar's regulatory approval and the s 14 transfer necessary to effect the scheme. As will appear later, this has a material impact on the main issue before us.

[3] For present purposes the main features of the scheme were as follows:
(a) members, pensioners and deferred pensioners had their benefits enhanced through the enhancement to the members' and pensioners' actuarial reserve values; and
(b) the Fund allocated a portion of its assets for the benefit of the employer, Tongaat-Hulett Limited, and credited those assets to the ESA. The amount transferred to the ESA was R363.2 million (the 2012 surplus apportionment). This 2012 surplus apportionment was preceded by apportionments of actuarial surpluses by the Boards of the first respondent and of the Fund in 2001, 2007 and 2009. It is this second feature in (b) above which formed the subject matter of the challenge in the high court and which is on appeal before us.

[4] The appellants lodged complaints with the Pension Funds Adjudicator (the Adjudicator) in terms of s 30A of the PFA in respect of the 2007, 2009 and 2012 distribution of surpluses. The Adjudicator dismissed the complaints in respect of the 2007 and 2009 distribution of surpluses. In respect of the 2012 surplus apportionment, the Adjudicator found that when the future surplus was

allocated exclusively to the ESA, the interests of all stakeholders were taken into account in accordance with s 15C of the PFA. The appellants then launched their application in the high court. They sought the following relief:

'1. Condoning the Applicants' failure to institute this application within the period stipulated in terms of section 30P(1) of the Pension Funds Act 24 of 1956;

2. Setting aside the determination of the Pension Funds Adjudicator under reference number PFA/GP/00003054/2013/TKM, issued on 19 December 2013;

3. Setting aside the decision of the board of trustees of the second respondent ("the board'') to allocate excess assets ("the surplus'') in the second respondent as at 30 June 2012, alternatively as at 1 April 2013, to the employer surplus account in the sum of R363.2 million, alternatively in such amount as was in fact allowed to the employer surplus account, in terms of the second respondent's rule 11.5.4.1(b);

4. Directing the Board of the Second Respondent to determine the actuarial surplus as at 30 June 2012 and to apportion the surplus in accordance with the terms of section 15C(2) of the PFA;

5. Directing the Board of the Second Respondent, in giving effect to the order in prayer 4 above, to take into account:

> 5.1 the interests of all the stakeholders as at 30 June 2012 in the manner contemplated by section 15C(2) of the PFA;
>
> 5.2 prior allocations of actuarial surplus to the employer in 2007 and 2009, respectively;
>
> 5.3 any allocation of the actuarial surplus in existence as at 30 June 2012 that may already have been allocated to members of the Second Respondent if any, upon their transfer out of the Second Respondent in 2012.

6. Ordering the second respondent to pay the costs of their application; alternatively and in the event of opposition from any other respondent, that such respondent and the second respondent are to pay the costs of the application, jointly and severally.'

[5] As can be gleaned from the Notice of Motion, the appellants did not pursue any relief in respect of the 2007 and 2009 surplus apportionments, but sought relief only in respect of the 2012 surplus apportionment. It was contended that the Adjudicator failed to deal with the appellants' complaint in respect of the 2012 surplus apportionment. In argument before us, it was submitted on behalf of the appellants that the 2007 and 2009 apportionments are nonetheless of some relevance, as they entailed substantial amounts then

having been allocated to the ESA for the benefit of the third respondent as the employer.

[6] The scheme entailed the allocation of what is referred to in the rules of the Fund as 'excess assets', which amounted to a total of about R1.816 billion. The allocation of the 'excess assets' was 80% to the member group (comprising former and current members of the Fund and pensioners) and 20% to the ESA. The resolution of the Board which brought about the scheme and rule amendment 3 was passed on the basis of a proposal contained in the report prepared for the Board by the task team led by the Fund's actuary, Mr Howard Buck. The report contained, amongst others, a proposal on how the Fund's assets should be dealt with. The Board unanimously approved the proposal and appointed a working group to guide it in respect of the implementation of the proposed scheme. The working group's mandate included the drafting of the necessary rule amendments, drawing up information material to be communicated to the Fund's members and applying for a s 14 transfer approval from the Registrar. Following the approval of the rule amendments and the scheme by the Registrar, all the Fund's in-service members and more than 90% of pensioners approved the proposals and the scheme was accordingly implemented.

The appellants' challenge to the 2012 surplus apportionment

[7] The appellants' challenge was made in terms of s 30 P(1) of the PFA, which reads:

'Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction for relief and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.'

The main thrust of the challenge in the high court, as is the case in this court, was that the 2012 surplus apportionment was overstated in contravention of s 15C of the Act and that, consequently, the fund failed to discharge its obligations to members, including the appellants as pension members, before allocating the surplus to the ESA. Their case is that future actuarial surplus can only be distributed in terms of s 15C of the Act. The Fund did not make the 2012 surplus apportionment in accordance with s 15C, but instead purported to distribute actuarial surplus under the guise of 'excess assets'. Rule 11.5, in terms of which the allocation was purportedly made, is a rule for the allocation of 'excess assets', not actuarial surplus, and therefore does not comply with s 15C. It does not provide a lawful basis for the allocation of surplus to the ESA. Insofar as Rule 11.5 required 20% of 'excess assets' to be paid into the ESA, it is ultra vires the provisions of s 15C and, to the extent that the Fund sought to effect the transfer of 20% of the 'excess assets' to the ESA, it was unlawful and falls to be set aside.

[8] The allocation to the ESA was made in terms of Rule 11.5.4.1 which provides as follows:

'The enhancement to MEMBER, DEFERRED PENSIONER and PENSIONER transfer values in RULE 11.5.1.2(a), RULE 11.5.2.3 and RULE 11.5.3.5, shall be calculated as follows:

(a) The ACTUARY shall determine, as at the TRANSFER CALCULATION DATE, the excess of the market value of the assets of the FUND over the defined benefit and defined contribution liabilities of the FUND and the value of the *Employer Surplus Account.*

(b) The value of the excess assets determined in RULE 11.5.4.1(a) shall be notionally split 80% to MEMBER, DEFERRED PENSIONER AND PENSIONER enhancements and 20% transferred to the *Employer Surplus Account*.' (Emphasis added.)

[9] The appellants' case rests upon their interpretation of Rule 11.5.4.1 and s 15C of the Act. The rules of a registered pension fund, made in terms of s 11 of the Act, are, subject to the provisions of the Act, binding on pension funds and their members, shareholders and its officers and on any person who claims under the rules or whose claim is derived from a person so claiming (s 13). In having regard to the applicable legislative provisions it is necessary to commence with the definition of an ESA, which is at the heart of the dispute. That definition is to be found in s 1 of the Act and reads as follows:

'**''employer surplus account''**, in relation to a fund, means an account of the fund to which shall be credited-

(a) amounts allocated by the board in terms of sections 15B, 15C and 15F or transferred into the fund for the credit of the account in terms of section 15E(1)(*e*);

(b) such contributions as are specified in the rules to be credited to this account; and

(c) fund return on the balance in the account from time to time: Provided that the board may elect to smooth the fund return,

and to which shall be debited-

(d) any actuarial surplus utilised by the employer; and

(e) any actuarial surplus transferred to any other account in the fund at the request of the employer or transferred to another fund in terms of section 15E(1)(*e*)'

It is common cause that, having regard to the above definition, the relevant section which requires closer scrutiny in this instance is s 15C, which reads:

'**15C 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.

(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment 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 appointment.'

[10] The crux of the dispute is to be found in the nomenclature 'excess assets' in Rule 11.5.4.1, as opposed to 'actuarial surplus' in s 15C, read with the definition of 'employer surplus account'. The definition of an ESA contains certain categories of lawful allocations to the ESA. Section 15C deals with the 'apportionment of future surplus' and an apportionment of a future actuarial surplus as envisaged in that section to the ESA will clearly be lawful. The question to be answered is therefore whether the allocation of 20% of the excess assets is an apportionment of an actuarial surplus for the purpose of s 15C. In answering this question three issues arise:

(a) first, was the sum of R363.2 million on the facts actuarial surplus?

(b) second, is rule 11.5 a rule contemplated in s 15C(1) – that is a legal question; and

(c) third, if the answer to (b) above is in the negative – has s 15C(2) been complied with?

Before considering these three questions, it is helpful to understand how s 15C and related provisions (together commonly known as 'the surplus legislation') came to be enacted and what the objects of s 15C are.

Section 15C in historical context

[11] From its inception in 1958, the PFA made no provision for future surpluses in pension funds. Over time surpluses did in fact build up as actuarial forecasts proved to be conservative and some pension funds became over-funded. Differences arose regarding who owned the surplus and what to do with it. Understandably, members and pensioners on the one hand and employers on the other, had contrasting views as to who should benefit from a surplus. Some disputes ended up in court. The solution plainly lay in legislative reform, as was recognized by this court in *Tek Corporation Provident Fund and others v Lorentz* 1999 (4) SA 884 (SCA). Subsequently, the PFA was amended to address this problem. Section 15C, amongst others, is a result of that reform which came in the form of the Pension Funds Second Amendment Act 39 of 2001. The accompanying memorandum to the Pension Funds Second Amendment Bill reads as follows:

'The use of the minimum benefit approach thereafter (ie once the Bill is passed into law) will ensure that members get a fair deal. Section 15C therefore enables any surplus that arises after the surplus apportionment to be dealt with by the rules or by the trustees in the carrying out of their fiduciary duties'.

[12] Section 15C plainly leaves the apportionment of future surplus to the applicable rules of a particular fund and, absent any rules on the subject, to the board of that fund. In the latter event, the only proviso is that in making a determination, a board must take into account the interests of all the fund's stakeholders (compare: *ICS Pension Fund v Sithole and others NNO* 2010 (3) SA 419 (T) para 15; *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and others* [2015] ZASCA 202 [2016] 1 All SA 704 (SCA) para 10). A

board therefore has the power to decide on the apportioning of surpluses and on how to effect it. Apportionment can be effected either by way of a rule or ad hoc in the discretion of a board.

[13] Another important related provision in this respect is Directive PF3, issued by the Registrar during 2009 in terms of s 33A[1] of the PFA, which reads as follows regarding 'future surplus' (paras 46-47):

'**DISTRIBUTION OF AMOUNTS RELEASED FROM CONTINGENCY RESERVE ACCOUNTS AFTER SAD OR EFFECTIVE DATE OF NIL RETURN**

Where the board determines, following approval by the Registrar of a surplus apportionment scheme or after the noting of a nil return, that an amount set up as at SAD [surplus apportionment date] or the effective date can be released from a contingency reserve account, such amount released creates future surplus and this surplus may be apportioned in terms of section 15C of the Act'.

Was the amount of R363.2 million actuarial surplus?

[14] In order to meet the high court challenge by the appellants, it was incumbent upon the Fund to establish that the sum of R363.2 million was actuarial surplus. As stated, this is a factual enquiry. Two important legal principles bear emphasis in respect of this factual enquiry:

(a) First, the appeal to a high court against a determination of the Adjudicator is an appeal in the wide sense (*Meyer v Iscor Pension Fund* [2002] ZASCA 148; [2003] 1 All SA 40 (SCA) para 8). The court can therefore on appeal consider the matter afresh and make any order it deems fit.

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[1] Section 33A provides as follows:

'33A Directives

(1) The registrar may, in order to ensure compliance with or to prevent a contravention of this Act, issue a directive to a pension fund, an administrator or any other person in which practices or actions that are required or prohibited are set out.

(2) A directive issued in terms of in subsection (1) may –
  (a) Apply to pension funds generally; or
  (b) Be limited in its application to a particular pension fund or kind of pension fund, which may among other things be defined either in relation to a type or budgetary size of a pension fund.

(3) A directive issued in terms of subsection (1) takes effect on the date determined by the registrar in the directive.'

Directives are issued in terms of the PFA and are legally binding.

(b) Second, genuine disputes of fact on the papers must be resolved in accordance with the well-established approach in *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A) at 634E – 635D.

[15] Before turning to the facts, regard must be had to certain definitions in the PFA which have a bearing on the facts. In relevant part, 'actuarial surplus' is defined as follows:

'**actuarial surplus'**, in relation to a fund which is –

(a) subject to actuarial valuation, means the difference between—

(i) the value that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date together with the value of the amounts standing to the credit of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator'.

It is common cause that the Fund is subject to actuarial valuation and that it is therefore subject to the above definition. A 'reserve account', is defined as follows:

'**reserve account'**, in relation to a fund, means a contingency or investment reserve account, as the case may be'.

A contingency reserve account is defined as follows:

'**contingency reserve account**', in relation to a fund, means an account of the fund, which has been amended in accordance with the requirements of the registrar, or which has not been disallowed by the registrar, and to which shall be credited or debited such amounts as the board shall determine, on the advice of the valuator where the fund is not exempt from actuarial valuations, in order to provide for explicit contingencies'.

The concept 'excess assets' is not defined in the PFA. Reserve accounts serve to ensure the continued solvency of pension funds.

[16] The essence of the dispute is whether the 2012 surplus apportionment (R363.2 million) properly constituted actuarial surplus. This was the original challenge by the appellants. When the Fund explained in its answer that the

allocation to the ESA was 20% of the excess assets in the Fund as determined by Rule 11.5.4.1, the appellants changed their attack in their replying affidavit by questioning whether the allocation of excess assets to the ESA was not in contravention of the PFA (more particularly of s 15C). The Fund's case in a further answer to this, advanced by its principal officer, Ms Samantha Davidson, was that the amount allocated to the ESA was not only 20% of the excess assets, but also actuarial surplus as defined in the PFA. In explaining this, Ms Davidson relied on the supporting affidavit of the Fund's actuary, Mr Buck.

[17] Mr Buck confirmed under oath that the 2012 surplus apportionment was actuarial surplus as contemplated in the PFA. He explained that 'before the release of the reserve accounts, the ″actuarial surplus″ in the Fund was approximately R500 million'. He said that the 2012 surplus apportionment was therefore 'less than the ″actuarial surplus″ prior to the release of the solvency and other reserves in the Fund'. Mr Buck performed interim actuarial valuations of the Fund as at 1 January 2012, 1 April 2012 and 1 July 2012 in order to assess the affordability of the contemplated conversion and outsourcing under rule amendment no 3. This affordability assessment required a determination of the excess of the Fund's assets over its liabilities (if any) in respect of its defined benefit and defined best estimate liabilities and the amounts standing to the credit of the ESA. A schedule, prepared by Mr Buck, was attached to his affidavit. The schedule confirms his explanation.

[18] In a supplementary affidavit on behalf of the appellant, Mr St Clair Moor accepted in response to Ms Davidson that 'it is possible that the 20% of ″excess assets″ as defined in Rule 11.5.4(a) may also constitute ″actuarial surplus″, properly calculated'. However, he persisted in his denial that the allocation thereof to the ESA was lawful. Mr Jeremy Andrew, the appellants' actuary, also deposed to a supplementary affidavit to respond to Mr Buck. Mr Andrew accepted that, since the interests of stakeholders in the Fund were determined as if the Fund would terminate on 1 July 2012, Mr Buck was in effect performing a valuation as at the termination date. He also agreed with Mr Buck that there was likely to be an actuarial surplus of about R500 million at the effective date

of the conversion if contingency reserve accounts had been set up to contain the solvency reserve.

[19] The position is thus that on the facts the appellants have not placed in issue that the sum of R363.2 million was actuarial surplus. What remained in dispute was whether Rule 11.5.4.1 was a rule contemplated in s 15C(1) in terms whereof an apportionment of actuarial surplus could lawfully be made. That is a legal question to which I shall turn presently. It is necessary first to deal with two related factual aspects.

[20] The first is the appellants' allegation that no proper actuarial valuation had been done by the Fund's actuary and presented to the Board for its informed consideration before giving the go-ahead for the scheme. That contention is devoid of substance. As stated by Mr Buck under oath, he performed ongoing valuations on 1 January 2012, 1 April 2012 and 1 July 2012. These were interim valuations. His averments in this regard are borne out by the schedule attached to his supporting affidavit.

[21] An interim valuation must be distinguished from the statutory triennial valuation, required in s 16 of the PFA. A statutory valuation entails a full investigation by a valuator (the actuary of a pension fund) into the financial condition of a registered pension fund. The valuator must draw up a report on the investigation and lodge it with the Registrar. Interim valuations are common in the actuarial profession and comprise high level calculation of the relevant assets and liabilities of a fund. In the present instance, interim valuations were self-evidently required to assist the Board in its deliberations and decision on the proposed scheme. These interim valuations formed part of the task team's detailed report and recommendations to the Board, which were discussed at its meeting of 5 August 2011. The minutes of that meeting reflect that the sole purpose was to discuss the proposed scheme, based on the task team's report. Reference was made in the minutes to a 'residual surplus' which was recommended to be allocated to the ESA. That residual surplus can only refer to an actuarial surplus, as will become clear presently. At the Board meeting a working group was appointed to make further recommendations on

implementing the proposed scheme. It is therefore clear on the unchallenged evidence that interim valuations had been performed and were placed before the Board prior to its decision.

[22] The second aspect is that the evidence reflects that a clear distinction was drawn between 'reserves' and 'actuarial (or residual) surpluses'. What 'excess assets' are is set out in Rule 11.5.4.1(a) – 'the excess of the market value of the assets of the Fund over the defined benefit and defined contribution liabilities of the Fund and the value of the employer surplus account'. The PFA itself does not define 'excess assets'. As is made clear in the supplementary affidavit of Ms Davidson, 'excess assets' refers to actuarial surplus and reserves. It was also conveyed as such by the Fund in its information communiques to its members.

[23] In its report to the Board, the task team referred to 'the total surplus and reserves', which amounted to about R1.5 billion as at 31 December 2010 (it grew to some R1.8 billion at the termination date of 1 July 2012). As stated, Directive PF 3 expressly permits pension funds to release reserves and to treat them as actuarial surplus. All the evidence made clear what 'excess assets' are and it drew a distinction between surplus and reserves. On the facts therefore, the Fund had established that the sum of R363.2 million was actuarial surplus.

[24] The appellants made much of the fact that allocations of the surplus had also been made to the ESA in 2007 and 2009. Those apportionments do not form part of the appeal. The employer carried the risk to ensure that the scheme was affordable in the face of the enhancements in benefits promised to members and pensioners. In order to ensure the continuing solvency of the Fund, the employer had to carry the balance of cost. Generous allocations to in-service members, deferred pensioners and pensioners were proposed in the scheme. The decision to make a surplus apportionment to the ESA seems reasonable. What we are concerned with here is only whether that apportionment was lawfully made in terms of the PFA.

Is Rule 11.5 a rule as contemplated in s 15C?

[25] The appellants contended that s 15C requires a single dedicated rule, dealing only with future surplus and which provides for an allocation to both the member surplus account and the ESA. It was also submitted that all stakeholders must be consulted in the formulation of a rule or when the Board is acting in terms of s 15C(1) and (2). In the present instance, so the appellants contended, this did not occur. These contentions are fallacious. They are not supported by a proper interpretation of the section.

[26] Section 15C imposes strict prescripts for the disbursement of actuarial surpluses. Its ambit and objectives must be understood in the light of the historical disputes around surpluses in pension funds, outlined above. There are only two ways in which a surplus apportionment can be made, namely through pension fund rules (s 15C(1)) and, absent any rules, by the determination of a board, provided that it takes into account the interests of all stakeholders (s 15C(2)). In this instance, on the recommendation of the task team, the Fund took a conscious decision to enact rule amendment 3, which included Rule 11.5.4.1, to effect an apportionment of the surplus. In its report the task team outlined the provisions of s 15C. It recommended, with a comprehensive accompanying motivation, that the 'residual surplus' be allocated to the ESA in either the Fund or in the defined contribution fund. The Board decided to allocate the surplus to the ESA of the Fund, through a rule specifically enacted for that purpose. Rule 11.5.4.1 was therefore intended to be a rule envisaged in s 15C(1).

[27] The high-water mark of the appellants' case is that the impugned rule does not in terms refer to 'actuarial surplus', but instead to 'excess assets'. I have already found that, on the facts, the surplus apportioned (R363.2 million) was actuarial surplus. The strictly technical, narrow interpretation advanced by the appellants would completely undermine the purpose of the legislation and would make no business sense (*Dex Group (Pty) Ltd v Trustco Group International (Pty) Ltd [*2013] ZASCA 120 2013 (6) SA 520 (SCA) para 16). Neither a proper interpretation of the section nor the facts preclude the apportionment of actuarial surplus which is part of an apportionment of excess

assets. Furthermore, Directive PF 3 supports the Fund's interpretation of the section. And the Registrar approved rule 11.5.4.1, thus signifying his satisfaction that it would achieve its purpose. The approval of the rule was part of the approval of the entire scheme, with one of its chief elements the apportionment of actuarial surplus.

[28] There is nothing in s 15C(1) which requires that a rule such as Rule 11.5.4.1 must provide for an allocation to both the members surplus account and the ESA. *Hunter et al, Commentary on the Pension Funds Act*, at 434 express the view that 'there is. . . nothing in this section [15C(1)] that suggests that, if the rules are to fall within the scope of rules contemplated in subsection (1), they must provide for the allocation of actuarial surplus to both a fund's member surplus account and its employer surplus account. The rules could, as some do, provide that all 'future surplus' will automatically be allocated to the employer surplus account. Such a rule would not be inappropriate if the fund were a defined benefit, balance of cost, fund'.

[29] To uphold the appellants' contentions regarding rule 11.5.4.1 simply on the basis that it refers to 'excess assets' and not to 'actuarial surplus', would be to impermissibly elevate form above substance. As stated, the rule passes muster on the facts and on the law. It is plain that what has been allocated to the ESA was in fact actuarial surplus. The findings regarding Rule 11.5.4.1 renders it unnecessary to consider the further submissions regarding the alleged non-compliance with s 15C(2).

A composite scheme

[30] There is a further compelling consideration against the appellants' contentions. Rule amendment 3 formed part of a composite conversion and outsourcing scheme in terms of s 14 of the PFA. Section 14 governs an important aspect of the regulation of pension funds and the Registrar's approval of a scheme is an essential prerequisite (*Pepcor Retirement Fund and another v Financial Services Board and another* [2003] ZASCA 56; [2003] 3 All SA 21 (SCA) para 13). In this instance the Registrar was satisfied that the scheme is reasonable and equitable and accorded full recognition to the rights and

reasonable benefit expectations of the Fund's members and pensioners, and issued a certificate of approval in terms of s 14(1)(*e*). The scheme was a composite offer to the Fund's stakeholders with various components and it was conveyed to them as such. As stated, all the Fund's in-service members and more than 90% of its pensioners approved the scheme on this basis, resulting in the implementation of the scheme.

[31] It was emphasized in the task team's report and so understood by the Board, that 'the proposed outsourcing and conversion is based on all pensioners being outsourced and all in-service members having their benefits converted to defined contribution, as opposed to allowing individuals the option to outsource or convert their benefits'. This was to ensure that the Fund retained its economies of scale and the sustainable cross-subsidization of defined benefits. Clearly, by its very nature as a composite package, the scheme could not and did not permit cherry-picking parts of it. This is precisely what the appellants seek to do by challenging only one component of the scheme (the allocation of the ESA), whilst leaving the rest of the scheme as it is.

[32] The scheme has been implemented as a composite whole with the statutory approval of the Registrar and with the consent of stakeholders. Should the appellants succeed in their challenge, the entire scheme, including the transfer of members and pensioners would have to be revisited and changed. As the high court colloquially put it – 'the egg cannot be unscrambled'. The following principle enunciated in *Tellumat* at para 43, albeit in a different factual setting, applies here as well:

'With the utmost respect to the Appeal Board in the present case it seems to me that it failed to give sufficient consideration to the fact that the s 14 application was part of a broader scheme of distribution agreed upon by the trustees in 2007 when they were dealing with the apportionment of the surplus. Instead it dealt with the two issues of the guaranteed 3% annual pension increase and the impact of the possible dissolution of the fund as if they were discrete issues divorced from the entire distribution scheme. Nowhere in the Appeal Board's decision is there any consideration of the fact that the transfer under consideration was part of a larger arrangement having its origins in the decision of the trustees in regard to the apportionment of the surplus. Nor is there any consideration of the fact that the impact of its decision would necessarily be that the entire apportionment exercise, held by the arbitrator to have been valid and lawful in proceedings by Mr Roy against the Fund, would be thrown into disarray and have to be revisited.'

The discrete challenge to one component of the composite scheme must therefore fail also for this reason.

Conflict of interest

[33] The appellants contended, without much vigour it must be said, that the Board had a conflict of interest when it formulated and approved the rule for the purpose of effecting the surplus apportionment. It was submitted that the conflict emanated from the Board's composition, which was weighted in favour of the employer and it resulted in a reasonable apprehension that the Board was biased in favour of the employer. These contentions are devoid of merit. The appellants accepted, correctly so, that the Board was properly constituted in accordance with the prescripts set out in s 7A of the PFA and Rule 5 of the Fund's rules. There were an equal number of employer and member representatives. All trustees are invariably members of the Fund. That is the case in the boards of all pension funds. To that extent there will always be an unavoidable structural conflict of interests inherent in all funds. Ironically, the appellants were themselves trustees of the Fund's predecessor and they had no complaints regarding the composition of that board before this litigation.

[34] None of the authorities cited by the appellants[2] support their case. They do not support the contention advanced by the appellants that a lawfully constituted board which performs its statutory functions can have its decisions set aside on the basis that:

(a) some of its members may have been conflicted because they were part of the executive of the Fund's sponsoring employer, or

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[2] *S v Roberts* 1999 (4) SA 915 (SCA); *PPAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU)* [2007] ZAGPHC 146 2008 (2) SA 351 (W); *Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape* 2001 (4) SA 120 (Ck)*; Council of Review, South African Defence Force and others v Mönnig and others* 1992 (3) SA 482 (A).

(b) that they had a vested financial interest 'in ensuring that the maximum amount is paid into the ESA to improve the profitability of the company and therefore receive greater personal bonuses'.[3]

I know of no authority, nor has any been cited, which supports such a proposition in respect of the boards of pension funds. The allegations of bias must therefore be dismissed. What remains is the application to adduce further evidence and costs.

The application to lead further evidence

[35] A full set of affidavits was filed in respect of the appellants' application to lead further evidence regarding costs. The application was purportedly brought to place additional facts before this court in support of the appellants' contention that this litigation is public interest litigation. It was contended that the principle in *Biowatch Trust v Registrar, Genetic Resources and others* [2009] ZACC 14 2009 (6) SA 232 (CC) in respect of costs should apply here. The Fund opposed the application.

[36] The test for the admissibility of further evidence on appeal is well-established (*S v de Jager* 1965 (2) SA 612 (A) at 613C – D). An applicant must meet the following requirements:

(a) there must be a reasonably sufficient explanation, based on allegations which may be true, why the new evidence was not led in the court a quo;

(b) there should be a prima facie likelihood of the truth of the new evidence; and

(c) the evidence should be materially relevant to the outcome of the case.

Further evidence is allowed only in exceptional cases (*De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67 2011 (1) SA 16 (SCA) para 11).

[37] The application fails at the first hurdle. It was conceded before us that the new evidence adds very little to what was before the high court. It concerns the appellants' attempts to demonstrate that they were acting in this litigation not only for themselves but also on behalf of other pensioners of the Fund. That

[3] The extract is from the appellant's heads of argument in this court.

evidence is not only wholly inadequate and controverted by other evidence, but it will also not materially affect the outcome. (Compare: *All Pay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42 2014 (1) SA 604 (CC) para 94.) In the premises, the application must be dismissed.

Costs

[38] The appellants contended that they were compelled to approach the high court, since the Adjudicator failed to adjudicate their complaint regarding the 2012 surplus apportionment. That submission is fallacious. The Adjudicator decided that complaint as follows:

'(T)he acceptance of the conversion process by the affected stakeholders is not the question with which this Tribunal is seized. The conversion and outsourcing of pensions is permitted by Rule 3 of the rules of [the Fund]. . . . In the circumstances, this Tribunal is persuaded that, when allocating the future surplus exclusively to the employer surplus account the interests of all the stakeholders were taken into account pursuant to section 15C of the Act. Therefore, no grounds exist for the board of the [Fund's] decision to be set aside'.

[39] The second argument in respect of costs was that this is public interest litigation and that *Biowatch* applies. When the litigation commenced, the appellants made no mention at all that they were acting for anyone but themselves. Although the joinder of some 60 other pensioners was foreshadowed in a letter by the appellants' attorneys which preceded the application, they were never joined. Their attempt to adduce further evidence on appeal in this regard has failed. This case concerns a dispute between a pension fund and its members. It emanates from a private relationship between the parties, regulated by a contract (the Fund's rules). It has no public interest implications. The Board does not exercise any public powers – it is a private entity established for the employees of Hulett-Tongaat Limited. The Board derives its powers from the PFA and from the Fund's rules. Those powers are carefully circumscribed and do not extend beyond members and pensioners of the Fund. Participation in the Fund and its benefits is open only to Hulett-Tongaat employees.

[40] Lastly, as far as costs is concerned, we were urged to extend the *Biowatch* principle to this case. While one is not unsympathetic to the pensioners' complaints, this is not a case where that principle can be applied. It was reaffirmed recently in *Hotz and others v University of Cape Town* [2017] ZACC 10 2018 (1) SA 369 (CC) para 22 that the rule applies only in constitutional litigation and public interest cases. There is no basis to find that the appellants act for anyone but themselves. The high-water mark of the appellants' case is that they have informal support from a small percentage of the Fund's members. If we were to extend the *Biowatch* principle to this case it would open the floodgates. It would result in the general membership of pension funds having to in effect fund litigation costs whenever members challenge decisions of their boards of trustees. That would be to the members' detriment inasmuch as those costs would be funded from money that could otherwise have funded members' benefits.

[41] Costs are a matter within the strict discretion of a trial court and an appellate court has very limited grounds on which it can interfere with a trial court's decision on costs. That trite principle was recently restated in *Dobsa Services CC v Dlamini Advisory Services (Pty) Ltd* [2016] ZASCA 131 and in *Ferguson and others v Rhodes University* [2017] ZACC 39; 2018 (1) BCLR 1 (CC).

Conclusion

[41] The appeal and the application for leave to lead further evidence cannot succeed. Costs must follow the outcome.

The following order issues:

1. The application to lead further evidence is dismissed with costs, including the costs of two counsel.
2. The appeal is dismissed with costs, including the costs of two counsel.

S A Majiedt

Judge of Appeal

APPEARANCES:

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