THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 215/2019

In the matter between:

SOUTHERN SUN GROUP RETIREMENT FUND	**APPELLANT**

and

THE REGISTRAR OF PENSION FUNDS	**FIRST RESPONDENT**
THE CHIEF MASTER OF THE HIGH COURT	**SECOND RESPONDENT**
THE MINISTER OF FINANCE	**THIRD RESPONDENT**
LF SMITH NO	**FOURTH RESPONDENT**
In his capacity as former member representative	

Neutral citation: *Southern Sun Group Retirement Fund v The Registrar of Pension Funds and Others* (Case no 215/2019) [2020] ZASCA 142 (2 November 2020)

Coram: Navsa, Zondi, Van der Merwe and Nicholls JJA and Unterhalter AJA

Heard: 21 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 2 November 2020.

Summary: Whether regulation promulgated by Minister, in terms of which a board of a pension fund is obliged to place calculable enhancements due to former members who cannot be traced in a contingency reserve fund from which it cannot be released, except as payment to such members or as a result of crediting the Guardian's Fund or some other fund, is beyond the Minister's power and not in accordance with the Pension Funds Act 24 of 1956 – Minister arrogating power at odds with the Act – against the principle of legality.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Siwendu J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and substituted as follows:

'Regulation 35(4) of the Pension Fund regulations is declared invalid and unenforceable in that it exceeds the Minister's powers under the provisions of the Pension Funds Act 24 of 1956.'

JUDGMENT

Navsa JA (Zondi, Van der Merwe and Nicholls JJA and Unterhalter AJA concurring):

[1] This is one of three related appeals that were heard on the same day.[1] This appeal, like the other two, is directed against a decision of the Gauteng Division of the High Court,[2] in terms of which an application by a pension fund, registered in terms of s 4 of the Pension Funds Act 24 of 1956 (the PFA), to have regulation 35(4) of the Regulations, promulgated by the First Respondent,[3] the Minister of Finance (the Minister) declared invalid on the basis that it exceeded the Minister's powers under the PFA, was dismissed. In all three cases the high court had made no order as to costs.

[2] The principal issue in all three appeals, as it was in the high court, is whether the regulation in question is *ultra vires* the powers assigned to the Minister in terms of the PFA. Put differently, the question is whether the Minister has, by way of the regulation in issue, arrogated power at odds with the PFA, thereby offending against

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[1] The other two being *Vrystaatse Munisipale Pensioenfonds v The Minister of Finance and Another* (Case no 1161/18) and *Hortors Pension Fund v Financial Sector Conduct Authority and Another* (Case no 054/2020). The unreported judgment of the court below in the first is cited as *Free State Municipal Pension Fund v The Minister of Finance and Others* GP 06-06-2018 case no 67954/2015; the judgment of the court below in the second matter is reported as *Hortors Pension Fund v Financial Sector Conduct Authority and Another* [2019] ZAGPPHC 614.

[2] This particular appeal is against a decision of the Gauteng Division of the High Court, Johannesburg (Siwendu J, sitting as court of first instance). The other two – *Vrystaatse Munisipale Pensioenfonds* (ibid) and *Hortors Pension Fund* (ibid) – are appeals against decisions also of the Gauteng Division of the High Court, though both from the Provincial Division (Pretoria)(Wepener J, and Kollapen J, respectively sitting as the courts of first instance).

[3] See GN R98 in *GG* 162 of 26-01-1962. Regulation 35(4) was inserted in an amendment to the Regulations: see GN R558 in *GG* 24780 of 22-04-2003.

the principle of legality. The three appeals require consideration of the person/functionary in whom, in terms of the PFA, the power to apportion an actuarial surplus in a pension fund and to create contingency reserve accounts vests. The impugned regulation has to be viewed against the relevant provisions of the PFA. Neither the second respondent, the Chief Master of the High Court, who is in control of the Guardian's Fund, nor the fourth respondent, who is the former member representative of former members of the appellant, the Southern Sun Group Retirement Fund (the Fund), participated in the proceedings in the court below or before us.

[3] The historical path leading up to the commencement of litigation, and the manner in which the issues were framed by the respective appellants in the three appeals, are not identical. There is also the accusation before us, on behalf of the Minister, that in at least two, if not all three appeals, the respective funds have departed from their initial challenge to the regulation and are now advancing submissions beyond those raised in their founding affidavits and before the high court. Whether that complaint is justified and whether the appellant and the other funds ought to have been granted the relief sought requires scrutiny of the pleadings in each case, hence the necessity for three, separate judgments. There will, of course, in each judgment be references, where relevant, to the other two appeals. The analysis of the law and the conclusions reached will essentially be the same. All three appeals are before us with the leave of the court below.

[4] The Financial Sector Conduct Authority (the FSCA) is a juristic person established under s 56 of the Financial Sector Regulation Act 9 of 2017 (the FSRA),

and came into existence on 1 April 2018,[4] replacing the Financial Services Board (the FSB), which owed its existence to the Financial Services Board Act 97 of 1990 (the FSBA).[5] The main objectives of the FSCA include, enhancing and supporting the efficiency and integrity of financial markets, protecting financial customers through promoting fair treatment by financial institutions and assisting in maintaining financial stability.[6]

[5] It is necessary at the outset to have brief regard to the meaning of an actuarial surplus, since that concept is at the centre of this appeal. Simply stated, a surplus arises in a pension fund when an actuary determines that its assets exceed its liabilities. Prior to 2001, how a pension fund dealt with a surplus was determined by its rules. The Pension Funds Second Amendment Act 39 of 2001 came into effect on 7 December 2001. It was enacted to regulate the distribution of a surplus by pension funds. It became known as the surplus legislation. The surplus legislation inserted definitions relating to pension funds surpluses and also introduced ss 14A and B, and ss 15A to 15K into the PFA.[7] This appeal turns on the interpretation and application of relevant provisions of the surplus legislation, located within the PFA. I shall, in due course, deal with the historical factors that gave rise to the surplus legislation.

[6] The background culminating in the present appeal is set out hereafter. The Fund, registered as a pension fund in terms of the PFA, was established as a defined benefit fund with effect from 1 March 1994. It later converted to a defined contribution

[4] See GN 169 in *GG* 41549 of 29-03-2018; and the Regulations published in GN R405 in *GG* 41550 of 29-03-2018.
[5] Established in terms of s 2 of the FSBA.
[6] See s 57 of the FSRA.
[7] Some of these provisions were either amended or substituted in subsequent legislation.

fund but retained certain guaranteed benefits. It was therefore classified as a defined benefit fund at the time that surplus apportionment legislation, which constituted amendments to the PFA, came into operation. The first respondent, the Registrar of Pension Funds (the Registrar), holds office in terms of s 3 of the PFA and was the executive officer defined in s 1 of the FSBA.

[7] In a letter dated 9 January 2015 the Registrar rejected the Fund's 2010 actuarial valuation report,[8] in terms whereof the Fund sought to release a portion of the funds it held in respect of unclaimed surplus benefits. The Fund asserted that it was entitled to release funds held, in terms of s 15B(5)*(b)* of the PFA, on the basis that the beneficiaries are unlikely to ever claim them. It also sought to release funds, so it said, held in terms of s 15B(4)*(b)*, in respect of members whose benefits could not be calculated on an individual basis, having regard to poor data. The Fund contended that there was nothing in law that prevented the release of those funds. The FSCA did not agree.

[8] The following part of the letter from the Registrar, referred to in the preceding paragraph, sets out the basis for the rejection:

'In terms of s 5 of the 2010 valuation report, the fund purported to take a decision, as recommended by the valuator, to release a portion of the unclaimed surplus benefits held in terms of s 15B(5)*(b)* of the PFA and thus to hold a lesser liability for these s 15B surplus benefits… The release of s 15B surplus is, at least in part, a contravention of regulation 35(4)… The PFA and the Regulations do not give the Fund discretion to hold a lesser liability even if the Fund is of the opinion that it would be unlikely that untraced members would ever claim

[8] In terms of s 16 of the PFA triennial reports are required to be lodged with the Registrar.

their s 15B(5)*(b)* benefits. The valuator's assumptions and recommendations in this regard are therefore contrary to law and [on] this basis the valuation report must be rejected in terms of s 16(9), read with s 15(3) of the PFA, as it does not correctly reflect the financial condition of the Fund.' (Emphasis added.)

As can be seen, regulation 35(4) of the Regulations was central to the Registrar's view. The provisions of regulation 35(4), within the full text of regulation 35, will be dealt with in due course.

[9] As in the other two related cases, the Fund lodged an appeal against the Registrar's decision in terms of s 26 of the PFA. The appeal included a challenge to the validity of regulation 35 (4). Because the FSB appeal board was not empowered to deal with the validity of the regulation, the Registrar's office was amenable to the suggestion by the Fund, that the appeal be held in abeyance, pending the finalisation of a court application by the Fund, in terms of which it would seek a review and setting aside of the regulation in question.

[10] The Fund launched its application in the Gauteng Division of the High Court, Johannesburg, during June 2015. In its founding affidavit the Fund explained why, in its view, regulation 35(4) was *ultra vires* the Minister's power and why it was inconsistent with the provisions of the PFA. The following are the relevant paragraphs:

'101. The regulation is … inconsistent with the PFA and therefore *ultra vires* because it requires a fund, such as the Fund in the present case, to establish a separate contingency reserve account and credit that account with specific amounts, when it is clear, from the definition of the term 'contingency reserve account' in the definitions s of the PFA, that:

101.1 The establishment of the contingency reserve accounts falls within the sole discretion of the board of trustees of a fund; and

101.2 The determination of any amounts to be credited to (or be debited from) that account is a matter for the board of a fund to decide after consulting the fund's valuator.

102. Any regulation which purports to fetter the discretion explicitly granted to the board of trustees of a fund (such as the discretion granted to the board of trustees by the very definition of what constitutes a "contingency reserve account") is inconsistent with the purposes of the PFA and accordingly *ultra vires* the powers of the Minister, who, in terms of s 36, may only make regulations consistent with the PFA.'

For reasons that will become apparent it is not necessary to deal with the Fund's challenge to the impugned regulation on the basis that it is irrational.

[11] The Fund also set out the details of the history of its prior valuations in terms of s 16 of the PFA. The first was submitted in 2005, then again in 2007, and revised in 2008. In the revised apportionment scheme approved by the Registrar, the Fund recorded the following:

'58.1 [T]here were 9 157 former members for whom the calculations could be performed, this constituting 95% of all former members;

58.2 there were 529 former members in respect of whom insufficient information was available to perform the calculations (this being the 'poor data' category of former members … referred to above), this constituting 5% of all former members; and

58.3 of the former members, 1 251 had been traced and validated, this constituting 13% of all former members.'

[12] In respect of former members the Fund noted that there were 529 in respect of whom there was insufficient information to perform a calculation. The board of the

Fund considered itself to be acting within the terms of s 15B(4)*(b)* when it included those former members in the surplus apportionment scheme, rather than excluding them.

[13] Then there were other former members of the Fund, for whom benefits could be calculated but who could not be traced. Like the other funds in the related appeals, the Fund had expended much effort in attempts to trace former members. Brochures and letters were despatched, and advertisements were placed in national newspapers.

[14] In 2010 the Fund became aware of a legal opinion provided to another pension fund to the effect that the impugned regulation was *ultra vires* the powers of the Minister. The Fund, in turn, obtained a legal opinion from senior counsel. The opinion was to the effect that the regulation in question was *ultra vires*.

[15] In its 2010 valuation the Fund sought to release a certain portion of monies previously held in relation to those former members who could not be traced for distribution to those who had been traced. The Fund was at pains to stress that this did not mean that liability to those who could not be traced, but who someday might appear and put in a claim, was extinguished. It did however adopt the attitude that given that the balance owing to those who could not be traced was actuarially unlikely to be drawn upon, it would be irrational not to distribute it to those who had been traced.

[16] It was stressed by the Fund that the duty of the valuator of a pension fund is to determine from time to time what amount should prudently be reserved against a

future risk. That view was the view expressed in the legal opinion that had been obtained by the Fund.

[17] The board of the Fund, on the valuator's recommendation, had determined the amount to be set aside in a 'contingency reserve' in respect of former members for whom calculations could not be done. The amount set aside in relation thereto was also reduced. The Fund was adamant that there was nothing in the PFA or the regulations that prohibited this.

[18] The following are the relevant parts of the valuation report submitted by the Fund:

'At the valuation date the unpaid surplus due to former members totalled R65 373 000 and is reflected in the benefits payable in the financial statements at the valuation date.

For a number of members the data available to perform calculations was not considered adequate to determine a final value for payment at the time the surplus apportionment scheme was approved in February 2009. As a result, no allocation was done on a member individual level for those members and an aggregate reserve was established instead. For any members that came forward additional information was obtained and a final value for payment was determined. To date only a few members have come forward.'

[19] The valuation report was accompanied by a report on the steps that had been taken to trace former members, including efforts made to obtain data from the Department of Home Affairs. The deaths of a number of former members could also, according to the Fund, not be ruled out.

[20] The 2010 valuation report also pointed out that only 51% of former member surplus funds had been paid out. The Fund proposed:

'79.1 …releasing an amount of approximately R6.5 million in respect of those members for whom the calculation could not be done (ie the "poor data" category);

79.2 …releasing an amount of approximately R 16.3 million from the reserves held in respect of members for whom the calculation could be done but who could not be traced (the untraceable category); and

79.3 …releasing an amount of approximately R3.4 million from the contingency reserve in respect of former members who were statistically likely to have died before [the Surplus Apportionment Date].'

[21] The Fund, in its founding affidavit, referred to a draft circular issued by the Registrar, which had been in draft form at the time that the Fund submitted its valuation report. The circular envisaged that a valuator of a pension fund was permitted to place a value of less than 100 % of the full associated liability to former members who could not be traced, by using reasonable assumptions. The circular was never issued. Subsequent to the submission of the valuation report there were a number of exchanges between the Fund and the Registrar's office. This ultimately resulted in the rejection of the valuation report by the Registrar on 9 January 2015.

[22] The Fund accepted that the Minister, in enacting the regulation in question, was concerned to ensure that boards of Pension Funds would not be quick to decide that former members could not be traced and thereafter apply surplus funds towards unauthorised purposes. The Fund contended, however, that the impugned regulation had the effect of sterilizing a portion of a fund's assets, in circumstances where that sterilization is likely to endure indefinitely. There is also no warrant, so the Fund

contended, for the unclaimed monies to be transferred to the Guardian's Fund, where it might ultimately be lost to all the former members.

[23] The Fund asserted that the challenge to the impugned regulation was brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and sought condonation, in the event that the court found that it was necessary, because of the delay in launching the application.

[24] The Registrar, in opposing the application, did not take issue with the condonation sought, stating that it was for the Fund to satisfy the court that condonation was justified. The Minister, on the other hand contested the application for condonation, but more about that later.

[25] In opposing the application, the Registrar, at the outset, pointed out that the purpose of the impugned regulation was to ensure that pension funds have sufficient funds to meet the claims of every former member for whom the board has been able to determine an enhancement in terms of ss 15B(5)*(b)* or *(c)* of the PFA and that this was a legitimate government purpose. That purpose had to be viewed against the rationale for the surplus apportionment amendments, which was to undo the wrongs of the past and to ensure a fair surplus distribution. The Registrar referred to the Fund's acceptance that a former member's entitlement to be paid endured and that it could not extinguish its liability in that regard. The Registrar insisted that the Fund's assertion that the regulation resulted in a sterilization of funds was fallacious.

[26] The Registrar was adamant that to permit the Fund's contemplated release of funds would be to incentivise pension funds not to employ their best efforts to trace and assist former members so as to enable them to pursue their claims.

[27] It was contended that there was no conflict between the impugned regulation and the provisions of s 15B(5)*(e)*. The regulation, so the Registrar asserted, dealt with former members for whom enhancements could be calculated but who could not be traced, whereas the aforesaid subsection deals with former members for whom enhancements could not be calculated, irrespective of whether they could be traced.

[28] In relation to that part of the regulation that provided for the possible release to such funds as the Guardian's Fund, the Registrar contended that it was up to the board of the Fund to decide whether it should transfer the funds.

[29] In relation to the Fund's contention that the regulation was prescriptive in relation to placing funds in a contingency reserve account, contrary to the provisions of the PFA, which afforded the board a discretion in that regard, the Registrar submitted that a purposive interpretation of the regulation does not result in inconsistency with the PFA .

[30] The Registrar insisted that 'contingency reserve account' in the regulation ought to be read not as having to deal with a contingent liability but with actual liability. In respect of International accounting standards the Registrar adopted the position that, whereas in terms thereof, 'contingent liability' is defined as encompassing both a possible obligation depending on whether some uncertain future event occurs and a

present obligation that arises from a past event, the amount of which cannot be measured reliably or in respect of which the obligation is not recognised, because 'it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation', the regulation recognises the liability towards former members as established upon the approval of a pension fund's surplus apportionment scheme.

[31] The Minister, in opposing the application, at the outset, raised the question of unreasonable delay in the bringing of the application. In this regard s 7 of the PAJA was referred to. The Minister pointed out that twelve years had passed since the promulgation of the regulation. The Minister noted that on the Fund's own version of events it had become aware of the legal opinion regarding the validity of the regulation as far back as December 2010 but only launched its application in July 2015. It submitted that condonation should be refused.

[32] In dealing with the merits of the application, the Minister referred to s 36 of the PFA, which grants wide powers to make regulations. Regulations, so the Minister asserted, should promote the objects of the Act under which it was promulgated. According to the Minister, the definition of 'contingency reserve account' was inserted by the surplus apportionment amendments so as to hold what would otherwise have been surplus assets available for distribution. These amounts, so the Minister said, would then be used for contingencies for which they had been earmarked and would be excluded from the surplus that had to be distributed in terms of ss 15B and 15C of the PFA.

[33] It was submitted on behalf of the Minister that other than amounts determined by a board of a pension fund to be placed in a contingency reserve fund, there is nothing in the Act that says that the Minister cannot prescribe other amounts to be placed in a contingency reserve account There was therefore no inconsistency between the regulation and the provisions of the PFA.

[34] The High Court, Gauteng Local Division, Johannesburg (Siwendu J), adjudicated the dispute. The Court recorded that after the decision of this court in *Mostert NO v Registrar of Pension Funds and Others*,[9] the Fund changed its position and now asserted that it was no longer basing its challenge on the PAJA, but that the application should be viewed as a legality review.

[35] The court below, after referring to case law, held that the making of regulation 35(4) was administrative action in terms of the PAJA. In relation to the delay in bringing the application Siwendu J took into account that on the Fund's own version of events it became aware of the challenge to the validity of the regulation 5 years before it launched the application. The court went on to consider whether it should extend the period in terms of s 9 of the PAJA. The court, in favour of the Fund, took into account that it launched the application within 180 days of the Registrar's rejection of its valuation report. The court considered the importance of the issue and of a decision in relation thereto. The court held that it was in the interest of justice that the time be extended. Thus, condonation was granted.

[9] *Mostert NO v Registrar of Pension Funds and Others* [2017] ZASCA 108; 2018 (2) SA 53 (SCA).

[36] In respect of the merits the court had regard to s 15B(4)*(a)* of the PFA and the board's discretion in terms thereof. It dealt with the contention on behalf of the Fund that the Minister could not direct a contingency reserve account other than in terms of the PFA. The court accepted the submission on behalf of the Minister that there was nothing in the PFA that restricted the meaning of 'contingency reserve account' and the Minister's power to promulgate the regulation and directing, in terms thereof, the creation of a specific contingency reserve account. The court went on to hold as follows:

'Where a former member cannot be traced but the calculation and allocation has been apportioned to that member or former member, a legal obligation to meet the allocation will have been created. The peremptory provision of the regulation pertains to instances where the board in its discretion has determined the allocation of the enhancement. Its discretion to determine the apportionment and allocate the amount due remains intact. In my view, the regulation does no more than entrench a legal position germinating from an antecedent decision by the board. The board decides the participation in the apportionment. I find that the board's powers are not usurped as complained.'

[37] As stated above, the application was dismissed without any order being made as to costs. It is against the dismissal of the application and the conclusions on which it was based that the present appeal is directed.

[38] Before us, counsel for the respective pension funds in each of the three appeals aligned with each other and made common cause in their quest to have the regulation set aside or declared *ultra vires* the powers of the Minister. Counsel for the FSCA and the Minister, likewise, supported each other in resisting the application brought by each of the three pension funds. During oral argument before us it was pointed out to

counsel representing the FSCA and the Minister that, in this case, the high court, in considering whether to overlook the delay, took into account, inter alia, the importance of the issue, including the nature and consequence of the impugned regulation, and had concluded that it was in the interests of justice to condone the delay; and there was no cross-appeal in relation thereto, by either of them. It was pointed out that it would be most peculiar to decide the merits in one case and not in the other two, because condonation was not warranted, despite the fact that a finding in the one case would determine the legal position in relation to all three.

[39] After conferring, counsel on behalf of the FSCA and the Minister informed this court that delay should no longer be considered an issue between the disputants and that the matter should be decided on the merits in all three matters. It will be recalled that the FSA had always adopted a neutral stance on the question of delay.

[40] In my view the concession was rightly made. The court below took into account all the relevant factors when it exercised its discretion in favour of the pension fund.[10] I turn, now, to address the merits.

[41] As a starting point, it must be recognised that the surplus legislation was a milestone in pension law. Before it came into operation, as pointed out by the FSCA, the subject that exercised the mind of many pension lawyers and administrators was the following: Who owned the surplus in a pension fund at any given time? The debate

[10] Those factors would have been relevant whether the regulation making in the present case constituted administrative action or not. Of course, in relation to s 9(1)*(b)* of the PAJA the period to be taken into account for as a baseline, in the assessment of whether the delay should be excused, is 180 days. See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 para 19.

around this question endured for a long time before the decision of this court in *Tek Corporation Provident Fund and Others v Lorentz*.[11] A core conclusion in that case was the following:

'Once a surplus arises it is ipso facto an integral component of the fund.'[12]

This court in *Tek* acknowledged that the legislature was best placed to deal with the manner in which surpluses should be apportioned.[13] At that stage there had already been a consultation process concerning pension fund surpluses, involving Government, Business and Labour. That process culminated in the surplus legislation.

[42] The surplus legislation is remedial in nature in that it was designed to redress past abuses of surpluses by a number of employers, but its other purpose was also to ensure fairness in the distribution of a fund's surplus on an ongoing basis. The surplus legislation put paid to any notion that the employer owned a surplus in a fund. The relevant parts of the PFA against which the impugned regulation has to be viewed are set out hereafter.

[43] In s 1 of the PFA, as it stood at the time that the regulation in question came into being, 'actuarial surplus' was 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

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[11] *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA).
[12] Ibid at 895D-E.
[13] Ibid at 895E-H.

(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 those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator*…' (Emphasis added).

[44] Presently, the definition of 'actuarial surplus' reads as follows:

'"Actuarial surplus", in relation to a fund which is—

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

(i) the value, calculated in accordance with the prescribed basis, if any, 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 *plus 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, calculated in accordance with the prescribed basis, if any.'* (Emphasis added).

[45] The definition of contingency reserve account at the time of the promulgation of the regulation in question read as follows:

'"Contingency reserve account", in relation to a fund, means an account of the fund 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…'

Section 1 of the Pension Funds Amendment Act 11 of 2007 amended the definition of 'contingency reserve account' by adding words after '… an account of the fund' as it appears in the definition immediately above. The following are the words that were added:

'… which has been amended in accordance with the requirements of the Registrar, or which has not been disallowed by the Registrar…'

That amendment was part of a list of definitions and provisions that were deemed to have come into operation on 7 December 2001, in terms of s 40B, which caters for retrospectivity. It appears to relate to those funds that were yet to obtain approval for their surplus apportionment schemes. It does not apply to the Fund. The Financial Services Laws General Amendment Act 45 of 2013 brought about a further change. Presently, the definition of 'contingency reserve account' in s 1 of the PFA reads as follows:

'"contingency reserve account", in relation to a fund, means an account provided for in the rules 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 valuation exempt, in order to provide for a specific category of contingency.' (Emphasis added).

[46] Because there are references to 'valuators' and 'valuations' and actuaries in the definitions referred to above and in the applicable provisions of the PFA, it is necessary, first, to have regard to the definition of 'valuator' in s 1 of the PFA. Presently 'valuator' means an 'actuary who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act'.[14] Second, I deal with the definition of 'actuary'. Presently, 'actuary' is defined as 'a natural person admitted as a fellow member of the Actuarial Society of South Africa or

[14] Prior to amendment by Act 45 of 2013, 'valuator' was defined as follows: ' valuator means an actuary or any other person who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act.'

any other institution approved by the Registrar...'[15] Third, it is necessary to appreciate that actuaries are experts in statistics and are used to assess risks and calculate insurance premiums, and are routinely employed in the field of pensions, as the repeated references to actuarial valuations and actuarial surplus in the PFA demonstrate.[16] Lastly, 'surplus apportionment date', as defined in s 1 of the PFA, 'means the first statutory actuarial valuation date following the commencement date'.

[47] As can be seen from the definitions set out above, a pension fund board features prominently in relation to an actuarial surplus and a contingency reserve account. The status and responsibility of a board in relation to a pension fund can be gleaned from the object of a board set out in s 7C(1) of the PFA:

'The object of a board shall be to direct, control and oversee the operations of a fund in accordance with applicable laws and the rules of the fund'.

In pursuing that object it is required to act in the best interests of members and to act with 'due care, diligence and in good faith'.[17]

[48] As explained earlier, the surplus legislation included ss 15A to 15K. In most of those ss of the PFA the board of a pension fund itself features prominently. Section 15A(1), in line with the dictum from *Tek* cited above, reads as follows:

'All actuarial surplus in the fund belong to the fund.'

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[15] Prior to amendment by the Financial Services Laws General Amendment Act 22 of 2008: '"actuary" means any Fellow of the Institute of Actuaries of England or of the Faculty of Actuaries in Scotland or of the Society of Actuaries of America or of any other institute, faculty, society or chapter of actuaries approved by the Minister…' And prior to amendment by the Financial Services Laws General amendment act 45 of 2013: '"actuary" means a person admitted as a fellow member of the Actuarial Society of South Africa or any other institution approved by the Minister.'

[16] See also the definition of 'actuary' in the Oxford English Dictionary (OED 3 ed, 2010):
'A person who compiles and analyses statistics of mortality, accidents, etc., and uses them to calculate insurance risks and premiums.'

[17] Section 7C(2) of the PFA.

[49] Section 15B(1) deals with the apportionment of an existing surplus and provides that the board of every fund that commenced prior to March 2002, must submit to the Registrar a proposed apportionment of an actuarial surplus. This provision was fundamental to the new pension surplus regime introduced by the surplus legislation. In proposing the scheme, a board had to provide details of any surplus historically improperly utilised by an employer who participated in the fund at the time of the improper utilisation.

[50] 'Statutory actuarial valuation', in relation to a pension fund, means 'an investigation by a valuator contemplated in s 16'. That section provides for an investigation by a fund, once at least every three years, into its financial condition and for a report in relation thereto by a valuator at the instance of its board. The report is to be lodged with the Registrar.

[51] Section 15B also sets the rules of general application for *all* apportionments, in favour of members, former members and employers. Section 15B(2) provides that a scheme may the involve improvement of benefits to existing members, increases to benefits or transfer values in respect of former members, the crediting of an amount to a member's surplus account, the crediting of an amount to an employer's surplus account or any two of the aforesaid. In terms of s 15B(3) a board must appoint someone to represent the interests of former members and such person must then be of assistance to the board in identifying former members, communicating proposals to them and to the funds to which they might have transferred, communicating proposals from former members to the board and collating any objections by former members to

the scheme. The person appointed to represent former members is also required to report in writing to the board, inter alia, on the adequacy of the steps taken to involve former members.

[52] Section 15B(4), which, for present purposes, has to be read with the material parts of s 15B(5), provides:

'*The board shall determine* who may participate in the apportionment of actuarial surplus, and shall include in such apportionment existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date: Provided that—

(a) the board may exclude from participation former members in respect of whom the board satisfies the Registrar that insufficient records are available to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps—

(i) to obtain such records from the administrator;

(ii) to construct such records from the records of the—

(aa) employer;

(bb) any fund to which former members transferred; or

(cc) a trade union or staff association active in the workplace during this period; or

(iii) if the steps in subparagraph (i) and (ii) do not yield sufficient information, to obtain such records from potential claimants themselves following an advertisement—

(aa) on a national basis and in the area where the former members used to work; or

(bb) on a more limited basis as approved by the Registrar if representations by the fund satisfy the Registrar that limited advertisement will be adequate,

inviting the former members to come forward with evidence to substantiate their claim, after which advertisement the board should wait at least six months but no longer than nine months before excluding any former members because of a lack of sufficient information to enable the calculations to be performed;

(b) rather than excluding former members whose individual benefits cannot be determined, *the board may set aside a portion* of the actuarial surplus in a contingency reserve account explicitly established to satisfy claims of former members in terms of subsection (5)*(e)*.' (Emphasis added).

As can be seen, this subsection makes *a board* the determinant of which categories of persons shall participate in the surplus apportionment. The board is obliged to include for participation, those who departed the fund in the period 1 January 1980 up to the surplus apportionment date, including untraced members. It may exclude unquantifiable members. Section 15B(4)*(b)* does, however, provide the option of establishing a contingency reserve account in order to satisfy the potential claims of unquantifiable members in terms of the proviso in s 15B(5*)(e)*.

[53] Sections 15B(5)*(a)* and *(b)* read as follows:

'(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 an 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 s 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 over the corresponding period…'

(Emphasis added).

The remainder of this subsection deals with an adjustment for pensioners and for a

proportionate downwards revision in the event that the actuarial surplus to be apportioned is insufficient to permit such increases.

[54] Section 15B(5)*(e),* which is crucial in the determination of the appeal, reads thus:

'(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—

…

(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: Provided further that the board may allocate a portion of the actuarial surplus to be used for former members to a contingency reserve account which will be used to satisfy the claims of former members—

(i) who have been identified in subsection 4*(a)* but who cannot be traced; or

(ii) who did not substantiate their claim during the nine-month period following the advertisement in subsection (4)*(a)*(iii) but who do so after the end of the period...'

(Emphasis added)

[55] The statutory provisions referred to in the preceding paragraphs, including the definitions referred to earlier, show that a board is *the* protagonist in directing and controlling the operations of a pension fund. Of course, that is subject to such measures as the regulator, the FSCA, might employ in terms of the PFA. It is a board's prerogative to determine how to apply a surplus apportionment for the benefit of former

members, including those who have not yet been traced. Section 15B(5)*(e)* has to be read with the rest of the provisions of s15B. There is a cross reference to s 15B(4). These sections, read and understood contextually, make it clear that a board determines how a surplus is to be allocated and then decides how it is to be applied for the benefit of various categories of beneficiaries, including the establishment of contingency reserve accounts. Its discretion is not limited by s 15B(5)*(e)* to the establishment of such an account only in relation to unquantifiable members. The submissions to the contrary advanced by the FSCA and the Minister, and the finding by the court below that that a board is so limited, are erroneous.[18]

[56] It was correctly submitted before us on behalf of all the funds in the three related appeals that an actuarial surplus in a fund is an actuarial calculation of a fund's assets over its liabilities and need not be represented by an actual cash fund in the calculated amount. When a surplus is apportioned the fund assumes liabilities to its members. It vests in members a claim against the fund. That is how s 15A should be understood, where it speaks of rights acquired by members, former members and employers when a surplus is apportioned.

[57] At this stage it is necessary to turn to consider, alongside the statutory provisions referred to above, the provisions of regulation 35(4). Before considering the scheme of regulation 35, regard should be had to the source of Minister's power in terms of the PFA to make regulations. It is located in s 36, the relevant parts of which read as follows:

'(1) The Minister may make regulations, not inconsistent with the Provisions of this Act—

[18] See, further, para 60 (infra).

(a) in regard to all matters which by this Act are required or permitted to be prescribed by regulation…'

The introductory part of that subsection is typical and is meant to keep the regulation making within the parameters of the authorising Act. Put differently, the regulation is meant to be consonant with the provisions of the authorising Act, the PFA

[58] More than seventeen years ago, on 22 April 2003, the Minister, purporting to act in terms of s 36(1) of the PFA, promulgated regulation 35(4), which is at the centre of this appeal. The full text of regulation 35 appears hereafter. Regulation 35, as proclaimed in the heading, purports to deal with 'contingency reserve funds'. It reads as follows:

'35 Establishment of Contingency Reserve Accounts—

(1) By virtue of the fact that—

(a) the Act vests powers in boards of funds to establish contingency reserve accounts; and

(b) the establishment of contingency reserve accounts reduces the actuarial surplus available for apportionment and increases the possibility that actuarial surplus may be insufficient to enhance benefits previously paid to former members to the level prescribed in terms of s 15B(5)*(b)* of the Act,

no fund may, with effect from the date of commencement of this regulation, establish any contingency reserve account under circumstances where a reasonable inference may be made that the establishment of the account is contrary to the duties of the relevant board under s 7C(2)*(b)* of the Act and motivated by bad faith.

(2) The establishment and magnitude of any contingency reserve account by a fund—

(a) must be motivated by the valuator in the relevant report on the statutory actuarial valuation; and

(b) may, where the Registrar is not satisfied with any such motivation, be rejected by the Registrar.

(3) A fund must, on any such rejection of the establishment or magnitude of the relevant contingency reserve account, take such steps in connection therewith as the Registrar determines and sets out in writing to the relevant fund.

(4) Where a board is able to determine the enhancement due in respect of a particular former member in terms of s 15B(5)*(b)* or *(c)* of the Act, but is unable to trace that former member in order to make payment, *the board shall* put the corresponding enhancement into a contingency reserve account specific for the purpose. Notwithstanding anything in the rules of the fund, moneys may not be released from such contingency reserve accounts except as a result of payment to such former members or as a result of crediting the Guardian's Fund or some other fund established by law to include such amounts.' (Emphasis added).

[59] Regulation 35 commences with the recognition that the power to create contingency funds vests in a board. Yet, contradictorily, it goes to on dictate that the board 'shall' put funds into a contingency reserve account.in order to meet claims from as yet untraced members; and that the funds may not be released except to pay such claims or crediting the Guardian's Fund or some other fund'. How can crediting the Guardian's Fund or 'some other fund' be consonant with the provisions of the PFA? Counsel for the Minister and the PFA were rightly constrained not to seek to justify the envisaged potential transfer, as it were, to the Guardian's Fund. In the Guardian's Fund or some other fund the monies that were destined for former untraced members would be lost to them and to the Fund. If it were to remain in the Fund and remained unclaimed in perpetuity that will have the effect of sterilizing the monies from which past or present members could never benefit. It will be recalled that in terms of s 15A all actuarial surpluses belong to a fund.

[60] The Minister arrogated the power to deal with a surplus and to establish contingency reserve funds, to the exclusion of the board. As demonstrated above those aspects are within a board's prerogative. In promulgating regulation 35(4) the Minister acted beyond the regulation making powers set by the PFA. The court below erred in its interpretation of the relevant provisions of the PFA, especially in relation to s 15B(5)(*e)*. That subsection is not time bound nor does it only relate to unquantifiable former members, namely those for whom benefits cannot be calculated. It references s 15B(4) and together they set out the powers of a board in general terms. When a board exercises a discretion in allocating a surplus for the benefit of former members, thereby creating a liability, it must concomitantly decide how to cater for claims that eventuate. The board's decisions can be interrogated by the regulator against the provisions of the PFA, but those decisions are within the remit of the board. Regulation35(4) intrudes upon the board's wide discretion by compelling the board to place the entire allocation in a contingency reserve account and freezing it in perpetuity.

[61] The Minister and the FSCA's submissions in relation to the meaning of 'contingency reserve account' in regulation 35(4) are without substance. The impugned regulation itself speaks of a 'contingency reserve fund' but the Minister and the FSCA then sought to disown the concept and the description. In the three related appeals the contingency relates to the likelihood of the claims materialising. It is in respect thereto that valuators make assumptions. It is a regular occurrence in the field of pensions and in the insurance industry. The court below erred in its interpretation of the relevant provisions of the PFA and of the field of operation of regulation 35(4) and the Minister's regulation making power.

[62] During oral argument the court directed the parties to provide post-hearing, written submissions on the possible effect of setting aside the impugned regulation. We received those submissions. In essence the Minister and the FSCA submitted, with reference to *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd and Others*[19] that setting aside the regulation, without suspending the order of invalidity, to provide the Minister with an opportunity to correct it, would result in chaos and encourage maladministration. It was submitted that pension funds would be incentivised to be lax in tracing former members and that boards would be free to do as they please and build up unmanageable deficits.

[63] A pension fund in which no contingency reserve account has been established, but where other arrangements have been made to accommodate potential claims, will occasion no loss of regulatory oversight. In terms of the definition of 'contingency reserve account', which appears above, credits or debits can only be entered in relation thereto on the advice of a valuator. The board will reflect on the advice it receives from a valuator. In the periodic reports submitted to the FSCA the advice and the provision made for claims that might eventuate. or lack of it, can be interrogated and either approved, or rejected. Furthermore, funds are obliged, unless exempted, to deposit annual financial statements with the FSCA. The FSCA can utilise s 15K to refer matters to a tribunal to make certain determinations. When concerns about the financial soundness of a fund arise, s 18 of the PFA is at its disposal. There are a

[19] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 81-84.

number of tools at the disposal of the FSCA to ensure compliance with the provisions of the PFA and to secure the financial soundness of a fund.

[64] The point made on behalf of the Minister and the FSCA that the setting aside of the regulation will lead to laxity on the part of boards in that they will be incentivised to expend very little or no effort to trace former members, is without substance. The FSCA can always question the adequacy of steps taken and issue directions in relation thereto. In addition, the provisions of s 15B(3), referred to above, come into play. It will be recalled that in terms thereof the person appointed to represent former members is required to report to the board about the adequacy of steps taken to trace former members.

[65] From exchanges between the Fund and the board and from parts of the affidavits referred to above, the complaint that the Fund's challenge to the validity of the regulation has changed and gone beyond the issues raised in the pleadings is without merit.

[66] Counsel on behalf of the funds in the three related appeals after conferring, agreed that in the event of the appeal and the cross appeal being decided in their favour there should not be any order as to costs.

[67] For all the reasons set out above it follows that the appeal must be upheld. The following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and substituted as follows:

‘Regulation 35(4) of the Pension Fund regulations is declared invalid and unenforceable in that it exceeds the Minister’s powers under the provisions of the Pension Funds Act 24 of 1956.’

_____
M S NAVSA
JUDGE OF APPEAL

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