IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 2118/2014

In the matter between:

BRUCE ST CLAIR MOOR	First Applicant
WILLEM JAN HAZEWINDUS	Second Applicant
and	
THE TONGAAT-HULETT PENSION FUND	First Respondent
THE TONGAAT HULETT DEFINED BENEFIT PENSION FUND	Second Respondent
TONGAAT HULETT LIMITED	Third Respondent

Coram: Koen J

Heard: 21 October 2016

Delivered: 22 December 2016

O R D E R

The application is dismissed with costs, such costs to include the costs of two counsel where employed.

J U D G M E N T

KOEN J

INTRODUCTION

[1] The Applicants, two former members of the Tongaat-Hulett Defined Benefit Pension Fund[1] ('the Second Respondent'), seek the following relief:[2]

> '1. Condoning the Applicants' failure to institute this application within the period stipulated in terms of section 30P(1)[3] of the Pension Funds Act 24 of 1956;[4]
>
> 2. Setting aside the determination of the pension Funds Adjudicator under reference number PFA/GP/00003054/2013/TKM, issued on 19 December 2013;
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> 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);
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> 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;
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> 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.

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[1] The Applicants were members and former trustees of the Tongaat-Hulett Pension Fund (the First Respondent) which catered for employees of the Tongaat-Hulett group. In July 2007 the group split into two separate public companies, namely Tongaat-Hulett Ltd (the Third Respondent) and Hulamin Ltd. New Pension Funds were created for each and the assets of the First Respondent were divided pro rata according to the total members' liability in each fund. The employees of the Third Respondent were transferred to the Second Respondent with the Third Respondent being the participating employee.

[2] This relief is as set out in the Applicants' amended Notice of Motion.

[3] Section 30P allows any party who is aggrieved by a determination of the Adjudicator made in terms of section 30M of the Act to apply to the High Court with jurisdiction for relief. The proper construction of section 30P has been dealt with several times by the Supreme Court of Appeal and other divisions of the High Court, and the principles applicable to section 30P applications are well established – see *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 8; *Cape Town Municipality v South African Local Authorities Pension Fund and another* 2014 (2) SA 365 (SCA) para 28.

[4] Condonation was granted by Lopes J on 1 April 2016.

6. Ordering the second respondent to pay the costs of this 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 this application, jointly and severally.'

<u>BACKGROUND:</u>

[2] The Second Respondent's obligations to the Applicants and its other pensioner members were outsourced[5] to Old Mutual with effect from 1 April 2013.[6] This was achieved pursuant to a conversion and re-structuring exercise (hereinafter referred to as 'the Scheme') in terms of section 14 of the Pension Funds Act 24 of 1956 ('the Act') pursuant to a resolution passed on 14 May 2012. The Scheme was approved by the Registrar of Pension Funds ('the Registrar') who on 15 August 2013 issued a certificate of approval.[7] The Scheme, which entailed a transfer of assets and liabilities, was effected in accordance with the terms of rule 11,[8] a registered rule of the Second Respondent specifically made[9] for that purpose.

[3] Rule 11.5.4.1 provides that:

'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 <u>Employer Surplus Account.</u>

(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

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[5] The effect thereof was that the Applicants' membership of the Second Respondent was terminated as a result.

[6] From 2011 the Second Respondent was closed to new members. The in-service members were transferred to a new defined contribution fund and the pensioner members outsourced to Old Mutual.

[7] Thus signifying that he was satisfied that the Old Mutual transfer was reasonable and equitable and accorded full recognition to the rights and reasonable benefit expectations of the members of the Fund.

[8] Rule Amendment 3 introduced the terms of rule 11 in terms of which the scheme was implemented. Rule Amendment 3 was submitted to the Registrar of Pension Funds on 13 June 2012 and approved on 13 December 2012.

[9] Rules of a registered pension fund are made in terms of section 12 of the Act. Subject to the provisions of the Act the rules are binding on the Fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming in terms of section 13 of the Act.

enhancements and 20% transferred to the Employer Surplus Account.'

(my underlining).

[4] The amount thus transferred to the Employer Surplus Account ('ESA') amounted to R363,2 million[10]. It shall hereinafter be referred to as 'the 2012 apportionment' or simply as 'the apportionment'.

[5] The 2012 apportionment to the ESA was preceded by three previous apportionments[11] of Actuarial surpluses by the Board of the First and Second Respondents in 2001,[12] 2007[13] and 2009.[14]

[6] Acting in terms of section 30A[15] of the Act, the Applicants challenged the decisions taken by the boards of the First and Second Respondents regarding the distribution of surpluses in the First and Second Respondents in 2007 and 2009[16] before the Pension Funds' Adjudicator ('the Adjudicator'). The Adjudicator dismissed the

[10] The member group was allocated 80% of the excess assets.

[11] The Act commenced on 1 January 1958. It did not initially deal with surpluses built up in retirement funds registered under the Act. It was noted inter alia in *Tek Corporation Provident Fund and others v Lorentz* 1999 (4) SA 884 (SCA), that disputes arise from time to time between stakeholders in pension funds regarding the ownership, use and distribution of surpluses arising in pension funds, but it was found that the broad policy issues which are raised by surplus disputes are best resolved by legislation. This gave rise to inter alia the introduction of sections 14A to 15K contained in Chapter VA of the Act, to deal with these issues - see *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T). Sections 14A and 14B required that all pension funds were prohibited from penalising members who left employment and exited the pension fund before their normal retirement date, pension funds were required to pay exiting members at least what is known as a "minimum benefit"; and pension funds were required to have a pension increase policy, whose aim had to ensure that pensioners who are in receipt of a monthly pension receive a minimum pension increase at certain intervals. Section 15B of the Act required all pension funds that had actuarial surplus as at their surplus apportionment date as defined in the Act to distribute that surplus by preparing a surplus apportionment scheme which complied with the provisions of the Act and to submit it to the Registrar for approval. Section 15C provided for the apportionment of future actuarial surpluses.

[12] The Applicants have raised no objection to the 2001 apportionment which was on the basis of a three way split. Nothing more need be said about that apportionment in this judgment.

[13] On 10 December 2008 an amount of R660 million, constituting what is referred to as 'the statutory actuarial surplus' was approved as a loan to be allocated to the employer's surplus account and pro-rated between the Third Respondent and Hulamin Ltd. No allocation was made to members and the remaining surplus remained in the fund. In May 2009 the board of the First Respondent converted that loan into an unconditional allocation of surplus to the employer's surplus account.

[14] At a meeting of the First Respondent on 31 August 2010, an interim actuarial valuation compiled in December 2009 was allocated to the employer's surplus account in the sum of R132.2 million, seemingly in terms of section 15C of the Act. No allocation was made to the members' surplus.

[15] Section 30A(3) of the Act allows a member who wishes to challenge decisions taken by the board in terms of the rules of a pension fund to lodge a complaint with the Adjudicator, who may then make a determination under section 30M.

[16] At the time the complaint was lodged, the 2012 outsourcing exercise was still underway and had not been finalised.

Applicants' complaint on 19 December 2013[17] and concluded:

> '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 first respondent's decision to be set aside.'[18]

[7] Aggrieved by this determination of the Adjudicator, the Applicants on 21 February 2014 launched this application. The Applicants are no longer pursuing any relief in respect of the 2007 and 2009 apportionments,[19] but only seek relief in respect of the 2012 apportionment, which they contend the Adjudicator failed to deal with.[20] Nor do they attack the fact of a conversion introduced by the Scheme. They simply seek to have the decision of the board of the Second Respondent allocating the amount allocated to the ESA in 2012 as part of the conversion and outsourcing exercise,[21] set aside.[22]

<u>SECTION 30P OF THE ACT:</u>

[8] Section 30P(1) of the Act provides:

> '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.'

[9] It is an appeal in the wide sense. In *Meyer v Iscor Pension Fund*[23] the SCA held that questions regarding onus and disputes of fact in section 30P proceedings should be approached in accordance with the guidelines formulated in *Plascon-Evans Paints*

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[17] Actual complaint is at pages 126 to 158 of the record and was launched on 15 May 2013. Adjudicator's determination appears at pages 407 – 432 of the record.
[18] This followed after the Adjudicator had earlier determined that: 'The issue for determination is whether or not the board of the first respondent acted in accordance with its obligations in terms of section 15C of the Act in allocating the actuarial surplus in the first respondent as at 31 December 2009 (the valuation date) to the employer surplus account to the exclusion of the member surplus account on 31 August 2010.'
[19] The Applicants do however contend that the previous apportionments are not irrelevant, as they entailed substantial amounts previously having been allocated to the ESA for the benefit of the employer, Tongaat-Hulett Limited, the Third Respondent.
[20] The Second Respondent dealt with the matter on that basis and did not dispute this contention by the Applicants.
[21] The Applicants do not seek to set aside the Registrar's approvals of Rule 11 and the transfer under section 14.
[22] The Applicants are content with the conversion introduced by the Scheme but dissatisfied with the allocations implemented.
[23] 2003 (2) SA 715 (SCA).

Ltd v Van Riebeeck Paints (Pty) Ltd,[24] that the complainant should be regarded as the 'applicant' throughout, and that in the event of a 'genuine dispute of fact' on the papers, the matter must be decided on the version presented by the other side (in *casu* the Second Respondent) unless its version can be described as so far-fetched and clearly untenable that the court is justified in rejecting it merely on the papers.

[10] From the time the application was launched, the matter, like Topsy, has just grown with a proliferation of affidavits, some interlocutory applications, and an amendment to the relief claimed in the Notice of Motion. The Applicants have complained that the multiple affidavits resulted from the Second Respondent being 'obfuscatory in explaining its conduct' and 'drip-[feeding] information to the Applicants and to this Court', whilst the Second Respondent has complained that the Applicants have changed the basis of their claim as they realized that the answers proffered in response to their contentions, left them without a remedy. I do not intend to enter into that debate and shall in this judgment simply seek to decide the substance of the arguments raised as I understand them, to resolve the true issues between the parties.

<u>THE APPLICANTS' CONTENTIONS:</u>

[11] The substance of the Applicants' complaint is that the Second Respondent failed to discharge its obligations to its members, specifically the Applicants in the category of pension members, before allocating the surplus to the ESA, and that the amount apportioned in 2012 to the ESA was overstated. Initially this was said to be in contravention of sections 14 and 15G of the Act as well as the rules of the Second Respondent. That was addressed in its answering affidavit, concluding with a submission that the case was misconceived. Subsequently, the contention has remained that the 2012 apportionment to the ESA was overstated, but now on the basis that the Second Respondent's actions contravened section 15C of the Act. As that is the basis of the claim persisted with, it will be the argument I consider in this judgment.

[12] The Applicants' case is based simply on an interpretation of rule 11.5.4.1(b) and various provisions of the Act, particularly section 15C. They point out that rule 11.5.4.1(b) required the 20% allocation of the excess assets to be transferred to the

[24] 1984 (3) SA 623 (A) at 634E - 635D.

ESA. However, as the rules of the Second Respondent apply 'subject to the provisions of this Act',[25] regard must accordingly be had to the definition of 'employer surplus account' in the Act.

[13] They refer to section 1 of the Act which provides the following definition of an ESA:

> '"**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 of the fund 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 return; …'[26]

[14] Accordingly they argue that any allocation of excess assets pursuant to rule 11.5.4.1, is not an allocation in terms of section 15B, or section 15F, or a transfer into the fund in terms of section 15E(1)(e), nor a contribution as specified in the rules to be credited to the ESA, nor a fund return on the balance in the account from time to time.

[15] Section 15C of the Act read as follows in 2012:

> '**15C Apportionment of future surplus**
>
> (1) The rules of a fund 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 of a fund are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board of the fund taking into account the interests of all the stakeholders in the fund: Provided that, notwithstanding anything to the contrary in the rules of the fund, neither the employer nor the members may veto such apportionment.'

[16] Specifically with regard to section 15C, the Applicants contend, briefly stated,

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[25] Section 13 of the Act.

[26] A member surplus account is defined as follows: 'member surplus account', in relation to a fund, means an account provided for in the rules of the fund to which shall be- (a) credited- (i) amounts allocated by the board in terms of sections 15B and 15C to be used for the benefit of members; (ii) fund return on the balance in the account from time to time: Provided that the board may elect to smooth the fund return; and (iii) amounts reallocated from the employer surplus account to the account in terms of section 15E; and …'

that section 15C(1) requires that the rules may determine any apportionment of an actuarial surplus after the surplus apportionment date. The contention however was that rule 11.5.4.1 (or the whole of rule 11) could not be such a rule, as it sought to deal with a transfer of excess assets, which is not an 'actuarial surplus' as contemplated in section 15C.

[17] Further, since the board of the Second Respondent only implemented rule 11.5, the Applicants maintain that the board by necessary implication failed to act in terms of s 15C(2) of the Act.

[18] They therefore contend that any apportionment of 'excess assets'[27] provided in terms of rule 11.5.4.1, because it does not fall within any of the component parts of the definition of 'employer surplus account', cannot be transferred into an ESA, and to the extent that the rule requires that 20% (or for that matter any other percentage) of the excess assets be paid into the ESA, it would be *ultra vires* the provisions of the Act, or simply, in view of the provisions of section 13 of the Act providing that the rules are to be read subject to the provisions of the Act, not permitted and unlawful. The argument accordingly is that rule 11.5.4.1 could not lawfully achieve the transfer of 20% of the excess assets to the ESA and insofar as the Second Respondent sought to do so with reliance on that rule, it acted unlawfully and the apportionment falls to be set aside.

<u>ANALYSIS:</u>

[19] For an allocation to the ESA to be lawful, it needs to fall into one of the categories contained in the definition of 'employer surplus account'. Plainly an apportionment of a future actuarial surplus as provided for in section 15C will qualify. On the facts applicable in this application, the issue accordingly becomes one whether the 20% allocation of the excess assets to the ESA could qualify as an apportionment of an actuarial surplus for the purpose of section 15C.

[20] Plainly, the words employed to describe what was to be allocated, namely the 'excess assets' (as opposed to an 'actuarial surplus) *prima facie* suggests that it was something different to an actuarial surplus that was being determined and apportioned;

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[27] As opposed to, for example, an actuarial surplus referred to in section 15C(1) of the Act.

'excess assets' and actuarial surplus not being synonomous.

[21] Clause 11.5.4.1(a) required that:

> '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.'

[22] The relevant portion of the definition of 'actuarial surplus' in section 1 of the Act reads:

> '"**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;'

[23] The Applicants' case relies upon a too narrow and, with respect artificial interpretation of section 15C, which if followed would have consequences which could not have been intended by the legislature. Section 15C must be interpreted having regard to the language used in the provision, the background thereto and the legislative purpose that informed it.[28]

[24] As regards the background and legislative purpose of section 15C, the Memorandum on the Objects of the Pension Funds Second Amendment Bill, which accompanied the Pension Funds Second Amendment Bill which was adopted by Parliament read:

> 'The use of the minimum benefit approach thereafter 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.'

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[28] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 at (SCA) para 16; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10–12.

[25] In *ICS Pension Fund v Sithole and others NNO*[29] Rabie J remarked:

> '[15] Surplus arising in the books of a fund subsequent to the surplus legislation and subsequent to the scheme implemented in terms of s 15B may, according to s 15C, be apportioned <u>in terms of the rules of the particular fund</u>.'

(My underlining).

[26] Directive PF 3,[30] issued in terms of section 33A of the Act in 2009 also provides[31] as follows regarding future surplus:

> 'DISTRIBUTION OF AMOUNTS RELEASED FROM CONTINGENCY RESERVE ACCOUNTS AFTER SAD OR EFFECTIVE DATE OF NIL RETURN
>
> 46. 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 or the effective date <u>can be released from a contingency reserve account, such amount released creates future surplus</u> and <u>this surplus may be apportioned in terms of section 15C of the Act</u>.
>
> 47. Section 15C determines how "future surplus" may be distributed between the member surplus account and the employer surplus accounts, and will be dealt with in terms of the rules, or where the rules are silent, by a decision of the board taking into account the interests of all stakeholders in the fund.'

(My underlining)

[27] Having regard to the wording of section 15C (specifically the use of the plural form 'rules', as opposed to the singular), its purpose as set out in the Memorandum, and the interpretation of section 15C adopted by the Courts and applied by the Registrar in approving rule 11.5.4.1, it seems clear that all the Act requires in section 15C(1) in relation to any future surplus is that the rules may determine the apportionment. It does not specify what type of rule. It also does not provide that what amounts to an actuarial surplus cannot be apportioned as part of an apportionment of excess assets.

[28] Rules are made by the board of a pension fund.[32] The Act leaves it to the board to formulate any rules regulating future surplus, subject to the Registrar's approval of

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[29] 2010 (3) SA 419 (T).

[30] Unlike PF Circulars, directives are issued in terms of the Act and are legally binding. Section 33A reads 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.'

[31] At paragraphs 46 – 47 of the Directive.

the proposed rules (as opposed to there being no such indirect Registrar's oversight where there are no rules dealing with an actuarial surplus, and an apportionment is determined by the board, free of any veto by the employer or members, as contemplated in section 15C(2)). The reason for this probably is, as the Memorandum states, that once the minimum benefit regime was introduced and past surpluses had been dealt with under section 15B, pension funds would thereafter start with a clean slate.[33]

[29] Since the definition of employer surplus account contemplates the allocation to such an ESA, it would follow that any rule that provides for the allocation to that account, as Rule 5.1.4 does, necessarily requires that amounts allocated to the ESA must in fact constitute part of actuarial surplus as defined.

[30] The interpretation of section 15C(1) contended for by the Applicants is at odds with the language, background and purpose of the section and also at odds with the Registrar's interpretation of section 15C. Section 15C does not:

(a) require that there must be a single rule dealing with future actuarial surpluses; there could be a number of rules;

(b) require that a rule must deal exclusively or only with future actuarial surpluses;

(c) prescribe what the rule dealing with future actuarial surpluses must provide how it should be structured;

(d) require that the rules must provide for the allocation to both the member surplus account and the ESA;[34]

(e) require that stakeholders be consulted in the formulation of the rules, or when the trustees are acting in terms of section 15C(1) and (2).

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[32] Sections 12 and 13 of the Act. Section 12 of the Act empowers the trustees to amend existing rules of a fund.

[33] See, *British American Tobacco Pension Fund v Howie NO and others* 2016 (1) SA 398 (GP) para 7, where Potterill J said 'The legislature thus foresaw and enacted that within three years of the commencement of the surplus legislation on 7 December 2001 all surpluses would be cleaned up and all funds would start with a clean slate. This was to be achieved with compliance with s 15B'.

[34] The authors of the *Commentary on the Pension Funds Act*, Hunter *et al*, state at p. 434 that 'there is nothing in this section that suggests that, if the rules are to fall within the scope of rules as contemplated in subsec (1), they must provide for the allocation of actuarial surplus to 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. 'Contrast also the present wording of section15C(1).

(f) require that it must expressly refer to actuarial surplus. What matters is that monies that are apportioned do in fact qualify as actuarial surplus;

(g) require that it must expressly say that the amount to be allocated to the member surplus account and the employer surplus account must constitute actuarial surplus (It follows from the definition of employer surplus account that only actuarial surplus and amounts referred to in that definition can be allocated to that account);

(h) require that it must deal exclusively with actuarial surplus to the exclusion of other assets, such as contingency reserve accounts and other reserve accounts. In the context of winding up a fund, there could legitimately be a single, all-encompassing rule that deals with all the assets of the fund. That rule could provide, for example, that all assets not required to fund liabilities will be split between the member surplus account and the employer surplus account.[35]

Section 15C(1) is permissive, not prescriptive, and leaves it to the board of trustees to determine how the rules are to be worded and structured to deal with any future actuarial surplus.

[31] The Registrar registered rule 11.5.4 knowing that it deals with the distribution of the assets of the Second Respondent in excess of its defined benefit and defined contribution liabilities. He would have known that this includes actuarial surplus as defined. The Registrar was satisfied that the rule complied with the provisions of the Act and duly registered it. He also approved the distribution of excess assets effected in terms of the rule and confirmed that in his opinion the distribution was reasonable and equitable.

[32] The 'excess assets' determined in implementing the scheme amounted to some R1 816 million. This amount comprised reserves and surplus. The excess was distributed during 2012 in accordance with the provisions of the rule amendment[36] between the two distinct classes: the former and current members and pensioners ('the member group') on the one hand, and the employer through payment to the ESA, on

[35] Per Directive 3.

[36] Rule amendment no 3 which amended the provisions of Rule 11.5 attached to the FA as "FA2" at pages 60 to 71.

the other hand.

[33] The Scheme was adopted following an extensive communication exercise and was approved by all the in-service members and the overwhelming majority of the pensioners. The communication preceding this was thorough. No basis has been advanced that the communications relating to the implementation of the Scheme were unclear or misleading.

[34] Directive 3, which says that moneys released from contingency reserve accounts must be dealt with in terms of section 15C, also puts paid to the Applicants' contention that a rule contemplated in section 15C cannot deal with surplus and reserves but must only deal with surplus.

[35] The question more correctly then becomes one of whether the percentage that was allocated pursuant to the 'rules', specifically rule 11.4.5.1,[37] although being a percentage of what is labelled 'excess assets', constitutes part of an 'actuarial surplus' (as defined and contemplated by section 15C).[38]

[36] The facts, as contained in the supplementary answering affidavit filed by the Second Respondent show that the R363.2 million allocated to the ESA comprised 20% of the excess assets calculated in accordance with the rules of the Fund. This did not however mean that the amount credited to the ESA did not also qualify as 'actuarial surplus' as defined. The Second Respondent's actuary confirmed that the R363,2 million indeed was part of an actuarial surplus which he determined as part of the exercise he carried out under the rule. Based on interim valuations he had undertaken it was determined that the total actuarial surplus available amounted to around R500 million. This is in excess of the amount allocated to the ESA. It therefore complied with

[37] The Second Respondent also highlighted that the allocation of excess assets was performed in accordance with an approved rule, which the Applicants have not sought to challenge or have set aside, which accordingly was decisive. In view of the introductory words to section 13 of the Act, the absence of any formal challenge to the rule is not of significance.

[38] In their founding affidavit, the Applicants in fact equated the term 'excess assets' to 'actuarial surplus' as defined, but asserted that the actuarial surplus or excess assets comprised R363.2 million which ought to have been proportioned 80/20 in terms of rule 11.5.4.1(b). It was only when it was pointed out in answer that the R363.2 million that was allocated to the ESA did not constitute actuarial surplus but was 20% of the total value of the excess assets, that the argument was raised in reply by the Applicants that the allocation fell afoul of the provisions of the definition of 'employer surplus account' and section15C because it was not an 'actuarial surplus'.

the provisions of the Act as a lawful allocation.

[37] In this regard the Applicants have however complained that it had been misrepresented to the Registrar of Pension Funds that interim valuations had been carried out when, it was alleged, that in fact no such valuations had been made. In his affidavit Mr Howard Buck, the actuary and valuator of the Second Respondent explained that interim valuations were performed. He disputed that the Second Respondent misrepresented this fact to the Registrar. He confirmed that an actuarial determination of the surplus was made. The minutes of the meeting of the board of 28 September 2012 record that:

> 'the updated position of the valuation of the Fund at 30 June 2012 that had been circulated to the trustees by round robin had been ratified'.

The suggestion by the Applicants that because the updated financial position of the Second Respondent was presented to the trustees after 14 May 2012 (the date when rule amendment 3 (Rule 15.4.1) was adopted), the trustees would not have known the financial position of the Second Respondent when they approved the rule, overlooks the fact that what was provided to the trustees was an updated position. The earlier position was provided to the trustees at the meeting of 5 August 2011 when the proposal was adopted.

[38] Nothing emerging from the further affidavits filed by the Applicants,[39] including that of the consulting actuary, Mr Andrew, alters my aforesaid conclusions. In any event to the extent that there may be any genuine material dispute of fact, the version of the Second Respondent must be preferred over that of the Applicants. The version advanced by the Second Respondent certainly cannot be described as so untenable

[39] During May 2015, just short of six months after receiving the Second Respondent's supplementary affidavit, the Applicants filed a series of further documents, namely a notice of motion seeking leave to file a supplementary answering affidavit and seeking an amendment to the relief sought in the initial notice of motion, an affidavit filed in support of the relief sought in the notice of motion and in reply to the Second Respondent's supplementary answering affidavit; and an extensive further supplementary affidavit deposed to by Mr Jeremy Andrew, a consulting actuary in his capacity as an expert. In terms of the amended notice of motion, the Applicants no longer sought under prayer 4, an order declaring that the surplus in the Fund amounted to R363.2 million or such other amount allocated to the ESA, or under prayer 5 an order directing the board to allocate the amount allocated to the ESA on an 80/20 basis as between the members and the ESA, but now orders directing the board to determine and apportion the actuarial surplus in the Fund as at 30 June 2012 in accordance with section 15C(2) of the Act and in making this determination, a further order directing the Board, in giving effect thereto, to take into account the interests of stakeholders, prior allocations of surplus and any allocation of surplus in existence as at 30 June 2012 that may have already been allocated to the members.

that this Court would be justified in rejecting it merely on the papers. Specifically in regard to the actuaries, the version given by Mr Buck ought to be preferred,[40] not that it would really be of much consequence, as there are no material disputes between the factual views expressed by the actuaries, and Mr Andrew in broad terms confirmed Mr Buck's calculation of the actuarial surplus, which was adequate to allow the apportionment.

SECTION 15C(2) OF THE ACT:

[39] But even if I was wrong in concluding that the allocation of the R362,2 million was of an actuarial surplus in accordance with a rule of the Second Respondent as contemplated in section 15C(1), the application nevertheless must still fail. If there was no valid rule as contemplated by section 15C(1) then the position would then be one as contemplated by section 15C(2), that is where the 'rules are silent on the apportionment of actuarial surplus'.

[40] I do not agree with the contention that reliance on section 15C(2) is not permitted in the alternative to section 15C(1). The two subsections are mutually exclusive, but if as a matter of law there is no rule as contemplated in section 15C(1), then the position might be regulated in terms of section 15C(2), if the requirements of that section are satisfied. The two subsections of section15C clearly aim to cater for different situations, the one where there are rules, and the other where there are no rules, which clearly presupposes valid rules, dealing with the apportionment of an actuarial surplus. If a particular new 'rule' on which reliance is sought to be placed, was made to give effect to a determination by the board (as it happened in this case after consultation with the stakeholders, for the implementation of a scheme which inevitably allocated a true actuarial surplus), then the same apportionment result was intended, whether the rule was the *fons et origo* for the apportionment, or simply an instrument to give effect to the determination of the board. Absent the rule having validity, the question still remains whether the board of the Second Respondent in its decisions, achieved a result which

[40] *Associated Institutions Pension Fund v Van Zyl and others* 2005 (2) SA 302 (SCA) para 35, where the SCA said: "[35] I do not find it necessary to get involved in this debate between the two actuaries. First, to the extent that it resulted in a dispute of fact, we must prefer the version of De Wit (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G - 635D). Second, insofar as Lowther's contentions in reply constitute a new case, we are precluded from taking it into account (see eg *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H - 636F)."

nevertheless satisfies the requirements of section 15C(2).

[41] Section 15C(2) has two requirements which the Second Respondent had to comply with, namely the apportionment (in whatever form) had to be determined by the board, and the board had to take into account the interests of all the stakeholders in the Fund when making this apportionment. A decision on apportionment was made, either in terms of rule 11.5.4.1(b), or if it is invalid, then pursuant to section 15C(2), to which effect was given in accordance with the terms of rule.

[42] The monies allocated to the ESA as a matter of fact fell within an actuarial surplus. Accordingly, the first requirement was met. As regards the second requirement, the board had to consider the interests of all stakeholders, being their hopes or expectations to share in the surplus.

[43] A comprehensive report, dated 30 June 2011, setting out the history of the Second Respondent and its surplus position was presented to the trustees so that they knew what the surplus was, what enhancements were proposed to members' benefits, and what was proposed should be done about the surplus after provision had been made for the enhancements of member's benefits.[41]

[44] A reference to this initial proposal for conversion thereafter appeared in the minutes of the meeting of the board of trustees of the Second Respondent of 5 August 2011. It reflected the estimated amount of residual surplus that would be left after granting enhancements to members, and concluded:

> 'After a detailed discussion, including the need to balance the interests of all the stakeholders of the Fund, the above recommendations were unanimously agreed.'

This direct allegation that such interests were taken into account could not be disputed. The trustees thereafter approved the appointment of a working group to deal with the implementation of the conversion and outsourcing exercise. The decision however remained that of the board. It is the board which took the decision on the apportionment, not this working group. The working group was simply authorised to develop any further recommendations for approval by the board. This was reiterated in the minutes of 14

[41] The report commences at page 1035 of the record and ends at page 1064 of the record.

May 2012. The proposal for the outsourcing and allocation of residual surplus to the ESA was discussed and unanimously agreed to by the board, which included five members elected as trustees. The board did not delegate its decision-making powers. It delegated tasks to a sub-committee and accepted the recommendations of that sub-committee.

[45] The details of the Scheme were communicated to members and pensioners by the Second Respondent in the latter part of 2012 by distributing a series of communications to the different member groups explaining details of how the conversion process was to be implemented, and how its surplus and reserves, integral to the calculation of the excess assets, were to be divided. Specifically, in letters dated 25 July 2012, 14 September 2012 and 18 December 2012, the Second Respondent explained the basis upon which the distribution would be done. Interested parties were afforded an opportunity to comment on the proposals contained in these letters. The distinction between excess assets and actuarial surplus was apparent. The Applicants were informed that the allocation to the ESA was 20% of the excess assets, comprising surplus and reserves. Every single in service member and in excess of 95% of the pensioners, and the Registrar, thereafter approved the Scheme.

[46] It was also contended on behalf of the Applicants that there is no indication that the trustees took into account that the employer received two previous allocations of future surplus to the exclusion of the members. No evidence was advanced in support of this allegation and it is contradicted by direct allegations made by the Second Respondent. But in any event, the Second Respondent was only established on 1 November 2010. There is no allegation in the Applicants' founding papers that from its inception until 2012, the Second Respondent had prior surplus allocations before the surplus allocation in issue in this application. Indeed, the report presented to the trustees on 5 August 2011 showed that there was a credit balance in the ESA which was taken into account by the trustees.

[47] The contentions by the Applicants that the trustees of the Second Respondent did not consider the interests of all stakeholders, that the actuarial exercise to determine the surplus position was not performed, and that the trustees did not know what the surplus position was, therefore remain speculative, are not borne out by the facts, and

are contrary to express allegations made by the Second Respondent which the Applicants could not deny.

[48] The facts are consistent at the level of probability with the trustees having decided to allocate a surplus to the member surplus account and they did so having considered the interests of all the stakeholders in the Second Respondent.

[49] The contention by the Applicants that there was no compliance with section 15C(2) because the trustees were simply giving effect to rule 11.5.4 is therefore without merit.

[50] Unlike section 15B, section 15C does not prescribe that future actuarial surpluses must be distributed, does not prescribe how a future surplus must be distributed, does not prescribe the contents of any rules in terms of which any future surplus is to be distributed, does not require that future surplus be allocated to both the member surplus account and employer surplus account, does not require that future surplus should be dealt with separately from (for instance) the allocation of other excess assets of a fund, does not require that a formal actuarial valuation report similar that required under section 15B and 16 be prepared before a future surplus can be distributed, does not provide that the distribution of future surplus is only lawful if it is done in a certain way, and finally, does not prescribe that a rule contemplated in section 15C(1) must deal exclusively with the distribution of actuarial surplus.

THE SCHEME WAS A COMPOSITE ONE:

[51] However, if wrong in my above conclusions, the grant of the relief claimed presents a further fundamental problem which the Second Respondent had raised *in limine,* and which I consider to be an insurmountable obstacle to the Applicants.

[52] The Scheme, in terms of which members and pensioners transferred their interests, was part of a composite offer made to all stakeholders which is not capable of acceptance in part and being repudiated as to the rest. Granting the relief sought would involve an unscrambling of the 'proverbial egg'. Had the scheme been proposed with

the terms now contended for by the Applicants, it may very well not have been accepted by the Third Respondent employer. Accordingly, the Second Respondent argued that it was not open to the Applicants to upset that part of the conversion exercise which does not suit them[42] and leave the rest intact.[43]

[53] Rule 11.4.5.1 resulting in an allocation to the ESA is part of a much larger restructuring and conversion exercise having various components enduring for the benefit of different parties. One was the allocation of monies to the ESA. But it was inextricably linked also to all of the other components, depended also on them, and was not an independent, discrete and self-contained rule, separate from the conversion and outsourcing exercise. The position, although clearly not identical, is not dissimilar to the position that presented in *Tellumat*[44] to overturn a decision of the Financial Services Appeal Board, where the following was said:

> '[43] 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.'

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[42] It is inter alia in that context that the application has been described as self-serving; the Applicants are content to allow the whole restructuring and conversion exercise to continue but simply seek a higher allocation of surplus for members and pensioners.

[43] To focus only on the ESA allocation ignores that the rights and reasonable benefit expectations of members and pensioners of the Fund were not only met, but exceeded, in the restructuring exercise. Members received all of the reserves held by the Fund that would otherwise have been held as a safety buffer. Consideration also had to be given to the rights of the employer as part of the restructuring scheme. It seems to have been appropriate for the employer to participate in the surplus not only because of the nature of a defined benefit fund but also because the employer had supported an aggressive investment strategy which was integral to the build-up of the future surplus, and further, the ratio of contributions made by the employer / members was approximately 2:1.

[44] *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and others* [2016] 1 BPLR 12 (SCA) (Also reported in [2016] 1 All SA 704 (SCA)).

[54] The *ratio decidendi* extracted from *Tellumat* is that the apportionment of a surplus to an employer must be considered in the context of the fund's restructuring and outsourcing exercise as a whole, and not separately and in isolation. To do otherwise, would run counter to the way in which restructuring exercises are routinely done.

[55] Where the Applicants (and other members of the Second Respondent) have accepted the other benefits bestowed upon them by the Scheme, their separate and discreet attack on only one component of the composite Scheme must for the above reasons also fail.[45]

THE ALLEGED BIAS OF THE BOARD:

[56] Finally, the Applicants submitted, but not with much vigour, that to the extent that effect would be given to any decision of the board in the formulation and approval of rule 11, assuming it to be a rule for the purpose of section 15C(1), or deciding on an apportionment in terms of section 15C(2), that such decision is unlawful because of the composition of the Second Respondent's board when it decided to allocate the portion of excess assets to the employer surplus account. The allegation advanced is that the board was weighted in favour of the employer because the majority of its members are beholden to the employer, that this gave rise to a conflict of interests, and that it leads to the reasonable apprehension that the board was biased in favour of the employer, and

[45] In *Tellumat* (supra) at paragraph 54 the SCA held as follows: 'It could not be assumed by the Appeal Board that the enhancements to pensions, both initially and when the annuities were taken out, would have been the same if the funding had to be taken from the overall surplus. That would have diminished the employer surplus account and the ultimate benefit the employer would receive from that account. Would Tellumat have agreed to that? It seems unlikely in the extreme that it would. The trustees knew what surplus had to be apportioned. They started negotiating from opposite poles. If it had been said that any pension enhancements, beyond the original 8 percent increase, would have to be funded proportionally by both the member and the employer surplus account, it is inconceivable that the trustees would have arrived at the same agreement in regard to the apportionment of the surplus. The reason is the obvious one that it would have involved a significant increase in the benefit to be derived from the surplus by members and a significant decrease in the benefit flowing to Tellumat from that source. In all likelihood the outcome of the negotiations would have been substantially different.' Even if the decision of the board of the Fund is found wanting, this Court retains a residual discretion to refuse to set the decision aside – see *Judicial Service Commission and another v Cape Bar Council and another* 2013 (1) SA 170 (SCA) at para 13. In *Seale v Van Rooyen NO and others; Provincial Government, North West Province v Van Rooyen and* others 2008 (4) SA 43 (SCA) 50 para 13. Factors relevant to the exercise of that discretion include amongst others the lapse of time, the need for finality, the consequences for the public at large, and the extent to which persons may have acted in reliance on the decision which it is sought to set aside. If a part of the scheme (the allocation) is set aside and dealt with on a different basis, the rights of other stakeholders, who have arranged their affairs on the basis that the scheme was approved by all stakeholders as is and approved by the Registrar as such, will be affected.

hence that its decision to allocate 20% of the excess assets to the employer surplus account should be set aside on this basis.

[57] It is the board of the Second Respondent which may amend the rules or make a decision in terms of section 15C of the Act. A 'board' is defined in section 1 of the Act as 'the board of a fund contemplated in section 7A of this Act'. In 2012 section 7A of the Act read as follows:

> '**7A Board of fund**
>
> (1) Notwithstanding the rules of a fund, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect.
>
> (2) Subject to subsection (1), the constitution of a board, the election procedure of the members mentioned in that subsection, the appointment and terms of office of the members, the procedures at meetings, the voting rights of members, the quorum for a meeting, the breaking of deadlocks and the powers of the board shall be set out in the rules of the fund: Provided that if a board consists of four members or less, all the members shall constitute a quorum at a meeting.'

[58] Rule 5 of the rules of the Second Respondent deals with the composition of its board. Rule 5.1 provides that the management of the Fund shall vest in ten (10) trustees, five (5) of whom will be appointed in terms of Rule 5.2 and five (5) of whom will be elected in terms of Rule 5.3. Rule 5.2 provides that the principal employer shall appoint five (5) employer trustees and an alternate employer trustee. Rule 5.3 provides that the members shall have the right to elect five (5) member trustees and an alternate from among their number. Executives are not disqualified from being elected.

[59] The structure of the Act, read with the rules therefore contemplates that some of the members of the board will be appointed by the participating employer and some of them will be elected by the members and be members themselves.

[60] All the trustees are members of the Second Respondent, so there will always be an inherent institutional conflict of interest on the board. This occurs in most boards of pension funds. The board was however lawfully constituted in terms of the provisions of the Act. The Applicants, who were themselves trustees of the predecessor to the Second Respondent, never, at any stage when the board was constituted or when it embarked on the communication exercise, sought to attack the composition of the board.

[61] The Registrar approved the Scheme and the rules which resulted in the transfer of 20% of the excess assets to the ESA. The Registrar also never raised any issue with the composition of the board and never raised a possible contravention of the PF Circulars, which are issued by the Registrar, with the Second Respondent.

[62] I am also not persuaded that there has been any contravention of PF Circular 130 as alleged by the Applicants.

[63] I was not referred to any authority[46] in support of the proposition that a board which is lawfully constituted and performs its functions in terms of the Act can have its decisions set aside on the basis that some of its members may have been conflicted because they were executives employed by the participating employer in a pension fund.

[64] An apportionment of an actuarial surplus can only be for the benefit of either the members or the employer. Potential or actual conflicts of interest are therefore inevitable. This is an *'institutional bias'* which is universal in pension funds, and probably inevitable. Its mere presence is not *per se* a ground for setting aside the decision of the board.

[65] What must be shown is that the board acted improperly. That is what the Applicants failed to prove. It is no doubt so that the Third Respondent might stand to gain significantly from the apportionment made, but that by itself, is not proof of an unlawful bias and determination. In terms of the applicable legal framework surplus may be allocated to the ESA, to the member surplus account, or to both.

COSTS

[66] The Second Respondent has been successful in its opposition to the application. In the ordinary course the costs should follow the result. Both sides employed two counsel. It was not contended that the employment of two counsel was not justified. The

[46] None of the authorities relied upon by the Applicants in their heads of argument support the case made by Applicants on the question of conflict of interests in a pension fund, but deal with a different situation.

matter is an important one to the parties and of sufficient complexity to justify the employment of two counsel.

[67] The factual position and the Second Respondent's approach, were explained in the Second Respondent's response to the Applicants' complaint submitted to the Adjudicator. In that response it was explained that the 'allocation of surplus and reserves' was made 'in accordance with rule amendment 3 to the rules' which was 'specifically formulated and submitted to the Registrar', to regulate the 'split of excess surplus and reserves as to 80% for the benefit of members and pensioners and 20% to the employer surplus account'. The Applicants were aware of those contentions when the application was launched.

[68] Mr Watt Pringle SC, on behalf of the Applicants, with reliance on the so-called *Biowatch* principle,[47] however argued that the Applicants should not be mulcted in costs because the application raised a matter of interest in the general interest of members of the Second Respondent generally.

[69] Mr Franklin SC, on behalf of the Second Respondent countered that the *Biowatch* principle did not find application and that the Applicants could not avoid an adverse costs order as *inter alia*:

(a) No principle arising from the Constitution was involved;

(b) This was not a case where the Applicants were faced with inaction by an organ of state and were compelled to litigate to vindicate their rights;

(c) As much as the judgment would provide greater clarity on the legal positions of the general body of members of the Second Respondent generally, the Applicants were pursuing the matter also in their own particular interest.

[70] The Constitutional Court has also since the matter was argued before me held in regard to the *Biowatch* principle that 'a worthy cause cannot immunise a litigant from a

[47] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).

judicially considered, discretionarily imposed adverse costs order'.[48]

[71] In the exercise of my discretion on costs I am not persuaded that the costs of the application should not follow the result.

ORDER:

[72] In the circumstances, I make the following order:

'The application is dismissed with costs, such costs to include the costs of two counsel where employed.'

[48] *Lawyers for Human Rights v Minister in the Presidency and others* [2016] ZACC 45.

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