



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 2234/14

2849/14

30/01/2014

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

2015-01-30

DATE

SIGNATURE

In the matter between:

TELLUMAT PROPIETEARY LIMITED

APPLICANT

AND

APPEAL BOARD OF FINANCIAL

SERVICES BOARD

CT HOWIE, DL BROOKING, GL MADLANGA NNO

(In their capacities as members of the

Appeal Board of Financial Services Board)

ALAN HUNTER ROY

REGISTRAR OF PENSION FUNDS

TELLUMAT PENSION FUNDS

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

5th RESPONDENT

ET

CASE NUMBER: 2849 / 2014

REGISTRAR OF PENSION FUNDS

APPLICANT

AND

HOWIE C.T NO

1ST RESPONDENT

BROOKING D.L, NO

2ND RESPONDENT

MADLANGA G.O, NO

3RD RESPONDENT

ROY ALAN HUNTER

4TH RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] There are two applications before this court (case number 2234 / 14 and case number 2849 / 2014); both seeking essentially the same relief, namely that this court review and set aside a decision of the Appeal Board of the Financial Services ("The Appeal Board") taken on the 9th May 2012, in which the Appeal Board set aside and substituted a decision by the Registrar to approve an application by the Pension Fund for a transfer of business in terms of s14 of the Pension Fund Act, Act 24 of the 1956 ("the PFA").

[2] For purposes of convenience, I shall refer to the parties in their respective identities. The applicant in the case number 2234/ 14 is the principal employer as

contemplated in the registered rules of the Fund (the fifth respondent in both matters). The applicant under case number 2849/2014 is the Registrar of the Pension Fund (the fourth respondent in case number 2234 /14) henceforth referred to as the Registrar. The Appeal Board of the Financial Services Board (Appeal Board of FSB) comprise of its members in their respective nominee capacities, Messrs CT Howie, D L Brooking, and GL Madlanga (NNO).

[3] The Registrar approved an application by fifth respondent to transfer assets and liabilities belonging to Tellumat Pension Fund (the "Fund") to an insurer (the "transfer scheme"), save for the credit balance in the employer surplus account ("ESA"), in terms of s14 (1) of the Pension Funds Act, 24 of 1956, as amended. Roy (Allan Hunter Roy) representing various pensioner-members of the Fund lodged an appeal to the FSB Appeal Board against the aforesaid decision of the Registrar.

[4] Section 14(1) requires, *inter alia*, that the Register "is satisfied that the scheme ... is reasonable and equitable and accords full recognition—

- (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectation relate to service prior to the date of transfer;
- (ii) to any additional benefits in respect of service prior to the transfer, the payment of which has become established practice; and
- (iii) to the payment of minimum benefits referred to in section 14(a),

And that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in sound financial condition..."

- [5] The FSB Appeal Board through its trustee members, acting in their nominee capacities, upheld the appeal by Roy against the decision of the Registrar and set it aside but did not make a costs order. It is this decision which this court is requested to review and set aside.
- [6] The Tellumat did not participate in the appeal by Roy, however, it clearly had a direct and substantial interest in those proceedings and a direct and substantial interest in the FSB Appeal Board's decision in relation thereto. The impugned Appeal Board's decision effectively requires a sizable amount in the employer's surplus account to be used to fund benefits for members of the Fund, and thus deprives Tellumat of a significant portion of the sum which it would have been entitled to have been paid pursuant to the Registrar's decisions and the implementation of the transfer scheme authorized thereby.¹
- [7] Tellumat, after considering the Appeal Board's decision, had a change of heart and approached this Court under case number 2234/14, seeking an order reviewing and setting aside the decision by the FSB Appeal Board taken on or about 18 July 2013. The Registrar has also resolved to bring a review to have the decision set aside, under case number 2849 /14. The thrust of the grounds upon which review is sought in both matters, is substantially the same and for that reason, I shall therefore not traverse the respective submissions individually, but make a broad reference to the substance of the attack against the impugned decision of the FSB Appeal Board.

THE DECISIONS OF THE APPEAL BOARD

- [8] The Appeal Board set aside the Registrar's decision on the following basis:

¹ *Esorfranki Pipelines v Mopani District Municipality* (40/13) [2014] ZASCA 21 (28 March 2014) AT PARA 16; Vide also *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & Others* 2013 (3) BCLRS 251 (CC) at paras 29.

- 8.1 That the fund will not continue to exist. (although the statement in Form C2 of the application provides that it would do so, and that it will not be unable to meet its requirements, and despite there being 14 suspended pensioners and 1 deferred pensioner who would remain in the Fund;
- 8.2 the decision of tribunals (pertinently, the decision of the PFA and the arbitration) were not relevant or binding on the Board;
- 8.3 that the basis on which annuities were agreed with the insurer failed to include proper provision for the 3% increase, leading to undervaluation(It is noted that there was no actuarial deficit in the Fund);
- 8.4 The 3% should have been paid for from the PSA members' share of the enhancement;
- 8.5 The Registrar ought to have refused his approval on that basis;
- 8.6 There is a distinction between section 14(1) and section 28(4), so that full recognition of members' rights and reasonable benefit expectations is not sufficient for a finding that a scheme is just and equitable;
- 8.7 In section 14 application, there will be no employer surplus account remaining. That account will be transferred as part of the application;
- 8.8 The objective of the transfer is that there will be no members to whom the employer owes obligations. (Despite its own finding that the provision for unclaimed benefits, deferred pensioners and paid up pensioners must still be made);
- 8.9 Because the Fund is imminently to go into liquidation it is fair and reasonable for the scheme to have provided for benefits to be funded also from the Employer's Surplus Account in terms of section 151(a);

- 8.10 The legislature must have contemplated that a fund could be wound up after a transfer in terms of s14, and therefore just and equitable requirement also applies to the post-transfer phase;
- 8.11 Sections 28 would have required that the fund's liabilities be met proportionately from the Members' employer's surplus account if the fund value was insufficient,
- 8.12 The scheme is not reasonable and equitable in depriving the members of the right to have their entitlements paid *pro rata* from the ESA (which would have happened if the outsourcing had been part and parcel of dissolution) and in enabling the employer to be paid the entire proceeds of the substantial surplus in the ESA.
- 8.13 That, it is not unreasonable that the employer should be deprived of a part of its surplus account;
- 8.14 The lawfulness of the acquisition of annuities in the fund's own name was not determined because of the finding in the fourth respondent's favour.

[9] The Appeal Board made the following observations that:

"[3] Firstly, because the members were pensioners, services of all of them will have predated the transfer. Secondly, no additional benefits referred to in paragraph (ii) of the subsection are involved in this case and the provisions of s 14(A) are not in contention. Third, apart from compliance with sundry terminal formalities, the fund will not continue to exist after the proposed transfer had been completed. Apart from transferring members who will become insurance policy holders there will be a small number of suspended pensioners for whom the Fund will buy annuities and then there are unclaimed benefits in respect of which a special pension fund will be created. In other words the transfer will be the inevitable prelude to the Fund's dissolution or /voluntary liquidation (either term being appropriate).

- [10] It is trite that the applicants must satisfy the court that the impugned decision was materially influenced by errors of law and must therefore be reviewed and set aside in terms of S8(1)(C) (II) of Promotion of Administration Justice Act 3 of 2000 (PAJA). The impugned decision of the Appeal Board (FSB Appeal Board) can be reviewed and set aside by the High Court, in terms of PAJA, if found to have been materially influenced by an error of law, or evaluation of the facts, *inter alia*; vide *Edcon v Financial Services Board of Appeal*;² *National Tertiary Retirement v Registrar of Pension Funds*³; *Pepcor Retirement Fund v Financial Board Services Board*⁴; *Registrar of Pension Funds v ICS Pension Fund*⁵.
- [11] It is not in issue that the decision of the Board is administrative and accordingly falls to be challenged in terms of s6 of PAJA. The Supreme Court of Appeal in the matter of *Registrar of Pension Funds v ICS Pension Fund* [2010] 4 ALL SA 63 (SCA) at 67 b-c held that "an appeal against the decision of the registrar is not an appeal in the strict sense. The board of appeal, and hence the court below in this case, is called upon instead to consider the matter afresh, upon all relevant material that is placed before the board of appeal."
- [12] The Fund was originally called the TEK Corporation Pension Fund and thereafter the Plessey Corporation Pension Fund ("the PCP Fund"). The Fund's name was changed to its current designation on 1 January 2001. As of that date, members of the Plessey SA Pension Fund") the PSA Fund" had been transferred to the Fund (joining the members of the PCP Fund), and the assets and liabilities of the PSA Fund had been merged with those of the PCP the Fund.

² 2008 (5) SA 511 (SCA).

³ 2009 (5) SA 366 (SCA) at 375.

⁴ 2003 (6) SA 38 (SCA) at 58 para[47] etc.

⁵ 2010 (4) SA 488 (SCA) at 58.

- [13] The PSA Fund members had an entitlement to a minimum pension increase. The Fund is a closed defined benefit fund, which has had only pensioners, and no active members, since August 2003. Certain pensioners, those who were members of the Plessey SA Pension Fund ("PSA members") on 1 January 2001 were entitled to a minimum 3% annual increase. The Fund did not have any distributable surplus on its surplus apportionment date 31 December 2003 as contemplated in s15B of the PFA. However, on its statutory valuation dated 31 December 2006, the fund had a substantial surplus of R174 218 000, which was apportioned 50/50 between the members surplus account and the employer surplus account. During this period the employer had continued to make contributions to the Fund.
- [14] The surplus apportionment was challenged, but confirmed after arbitration proceedings. Members were paid a once-off payment of 4 times the monthly pension in November 2007 and were granted an 8% increase (in addition to the ordinary increase of 6.5%) on 1 January 2008, as part of the surplus allocation. The 8% was provided for before surplus was divided between the employer and the member Surplus Account, meaning that the Members received the benefit of more than 50% of the surplus.
- [15] The Fund amended its rules to permit outsourcing of its pension liabilities by purchasing annuity policies. Pensioners were requested to select an option for the annuity to be purchased, one of which included a minimum 3% annual increase, without "claw-back", whereas the Fund applied a "claw-back" when obliged to apply the minimum increase. This meant that, in practice, the PSA pensioners and other pensioners had similar levels of increases over a longer period of time.
- [16] The s14 application of the fund to transfer its liabilities to pensioners to various insurers was based on annuities being purchased in the name of each pensioner in March 2010. However, some pensioners, including Roy objected to the application,

resulting in the application being withdrawn in June 2010. However, the fund proceeded to purchase the annuities in accordance with the pensioners' choices, but on the name of the Fund. These annuities, including their substantial enhancements, were funded from all the assets of the Fund excluding creditors and Employer Reserve Account. The Fund did not require approval from the registrar for this application. The transaction was confirmed as lawful by the Pension Adjudicator. On 24 May 2011 the Fund submitted a fresh s14 application, to transfer the annuity policies to individual pensioners. The Registrar eventually approved the application on 9 May 2012, after which Roy noted an appeal with the Board of Appeal.

- [17] The complaint of Roy was, *inter alia*, that the surplus should have been used to secure inflationary increases for pensioners before any of the surplus was allocated to the ESA, and also submitted that the amount awarded to ESA was inappropriate, and neither reasonable nor equitable, because it failed to take due cognisance of interests and "reasonable benefit expectations" of pensioner members. The Fund, in response stated that the trustees had been particularly mindful of the reasonable benefit expectations of pensioners, and had been astute to provide a benefit enhancement which exceeded those expectations. The Fund also stated that it had taken the view that in apportioning the surplus, its first obligation was to act "reasonably", and thus to consider properly the interest of all stakeholders (and in particular, the pensioner members and employer). The Fund did thus not take issue with Roy's contention that the surplus apportionment had to be reasonable and equitable; its position was instead that the apportionment complied with that standard.
- [18] It was submitted on behalf of the registrar of the fund that the Board of Appeal failed to take into account that the decisions regarding distribution of surplus and purchase of the annuities were not before it. The setting aside of the section 14 approval had no effect on those decisions, which remains, in the sense the decisions of other

tribunals regarding those other decisions, if not binding, ought to have been taken into account by the Board; Those decisions were therefore not before the registrar as part of section 14 application, nor were they required to be considered. The rights and reasonable benefit expectations of pensioners had to be determined, if at all, in that context.

- [19] It was further contended on behalf of the registrar that the 3% guaranteed by the annuity in option 2 excluded a "claw-back), so that members were, in fact, better off than they had been before annuities were purchased, since the fund applied a "claw-back". The fund would continue to exist, and would still have some obligations to deferred and suspended pensioners. Section 14 does not require the transfer of all assets and liabilities in a fund. It may include the transfer only of identified assets and or liabilities. It does not require the fund to be terminated. There was no evidence before the registrar of the Board that the fund is imminently to go into liquidation. The Board refused the admission of further actuarial evidence. In the absence of evidence of what will happen to the fund after the transfer, apart from the declaration in the form C2 that it will continue to exist, any consideration of the 'post transfer phase' will always be a speculation.
- [20] It was further contended on behalf of the registrar that there was no basis on which to assume that the pensioners would have received the same enhancements and increases as they have done, had the fund been wound up instead of the business transferred. If the surplus distribution and purchase of annuities are also to be considered, there is also no basis to assume that the same distribution and enhancement would have resulted if a winding-up had been the objective. A fund that is not in deficit or insolvent cannot be forced to wind up, and therefore cannot be forced to apply sections 151 and 28. There was no evidence nor did it request such evidence, regarding whether and to what extent payment from the Employer Surplus Account would have been required had the fund been wound up. The

lawfulness of the purchase of the annuities was neither before the registrar nor the board.

[21] The fund *in casu* is a closed defined benefit fund. In the matter of *Registrar of Pension Funds v ICS Pension Fund*⁶ it was held that in a defined benefit fund its members “become entitled to fixed benefits that are circumscribed by the rules, irrespective of the performance of the investments made by the fund. If the investments of the fund produce insufficient income to meet those obligations then the employer underwrites the shortfall. If the investments that are made by the fund perform better than expected a surplus will accrue to the fund. In a ‘defined contribution fund’ the benefits that are payable to members are directly linked to the performance of the investments that are made by the fund. If the investments perform well then the benefit will accrue to the members directly, and they will likewise bear the brunt of poor performance. Such a fund thus relieves the employer of the risk of poor performance of its investments and likewise promises to members the direct benefit of sound performance.”

[22] In the matter of *Tek Corporation Provident Fund and Others v Lorenz*⁷ the Supreme Court looked at the issue of surplus fund. In my view what emerges from this decision, as a general policy is that: the employer surplus fund is an integral part of the fund; The employer does not have in terms of common law or statutorily any right to lay claim to surplus fund either during the life of the fund or upon its liquidation; It is reasonable for the employee member and pensioner of the fund to expect to participate in the distribution of the surplus in the event of the employer being liquidated; There should at interval of three years an actuarial evaluation of the assets of the fund; 'If the valuation discloses that there is a substantial actuarial surplus or that there is a deficit that requires to be funded, the manner of dealing

⁶ 2010 (4) SA 488 (SCA) at 492 para [14].

⁷ 1999 (4) SA 884 (SCA) at 895E et *Ex Parte Trans –Africa Staff Pension Fund and Others* 1959 (2) SA 23 (W) at 27 G-H

with the surplus or funding the deficit shall be considered by the trustees and recommendations made to the principal employer for a decision. The principal employer's decision shall be made within the limitations imposed by the [Pension Funds] Act and the Registrar's practice and shall be final. "If there is any substantial balance then remaining, must go to members, pensioners and other beneficiaries on an equitable basis recommended by the fund's actuary and approved by the liquidator."

[23] The FSB Appeal Board after making certain observations concluded that the transfer will be a prelude to the dissolution or voluntary liquidation of the Fund. It then proceeded to chronicle the attack against the Registrar's decision in approving the scheme as follows:

- "1. It fails to guarantee the annual 3% pension increase to which PSA members are entitled as of right;
2. The evidence justifies the conclusion that members would have had a reasonable expectation that future annual pension increases would equal the annual inflation rate (expressed as "CPIX") and
- 3 The scheme is not reasonable and equitable because its implementation places the Fund, in effect, in liquidation and it would be reasonable and equitable for the scheme to provide, as does s15l: (a) in the event of liquidation in terms of s28 of the Act, that members' rights and reasonable expectations be secured by drawing upon both the members surplus account ("MSA") and the employer surplus account ("ESA")."

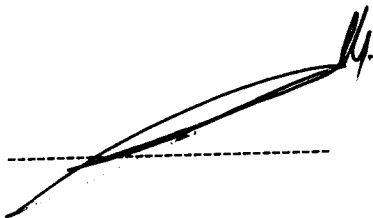
[24] In the matter of *Ex Parte Trans –Africa Staff Pension Fund and Others* 1959 (2) SA 23 (W) at 27 G-H it was held that employer surplus fund it is reasonable for the employee to expect to participate in the distribution thereof. A surplus is an integral component of the fund and the employer has no right thereto. *Vide Tek case supra*. In my view, the employees are entitled to participate in such surplus in the event of

the employer being liquidated, after liquidation expenses have been paid. The registrar must be satisfied that the scheme accords full recognition to the rights and reasonable benefit expectations of the fund members; vide Tek decision supra at 903H.

[25] In view, the fact that pension funds are primarily there to benefit the contributing members, the focus must be whether their interest would be protected, in the event of any transfer of scheme. The approach adopted by the Appeal Board, in my view, was correct. I am unable to agree with the submissions made by the respective applicants attacking the Board of Appeal in the manner it eventually arrived at its decision. Consequently, I am not inclined to set aside the decision of the Appeal Board.

[26] In this matter it is not necessary to deal with the question of costs because there was no opposition.

[27] In the result respective appeal in matters, case number 2849 / 2014 and case number 2234 / 2014 is dismissed and no order as to cost is made.

A handwritten signature in black ink, appearing to read 'N.M. MAVUNDLA', is written over a horizontal dashed line. The signature is fluid and cursive, with a prominent 'M' and 'V'.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 27 MAY 2014

DATE OF JUDGMENT : 30 JANUARY 2015

IN CASE NUMBER 2849 /2014

APPLICANT'S ATT : ROTH & WESSELS ATT

APPLICANT'S ADV : ADV S YACOOB

UNDER CASE NUMBER 2234 /2014

APPLICANT'S ATT : KLAGSBRUN EDELSTEIN BOSMAN DE VRIES INC

APPLICANT'S ADV : ADV P B J FARLAM