IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED. √

27/5/2015

DATE SIGNATURE

27/5/15

Case Number: 9480/2014

In the matter between:

BRITISH AMERICAN TOBACCO PENSION FUND	Applicant

and

C T HOWIE N.O.	First Respondent
J D PEMA N.O.	Second Respondent
J M DAMONS N.O.	Third Respondent
REGISTRAR OF PENSION FUNDS	Fourth Respondent

JUDGMENT

POTTERILL J

Background

[1] The applicant is the British American Tobacco Pension Fund (hereinafter referred to as "the Fund"). The applicant is in terms of section 6(2)(d), (e), (f), (g) and (h) of the Promotion of Administration of Justice Act ("PAJA") Act 3 of 2000 applying that the decision of the panel of the Financial Services Board Appeal Board (hereinafter referred to as "Appeal Board") dated 1 August 2012 be reviewed and set aside. The first, second and third respondents constituted the Appeal Board and are not opposing the review application. The Fund is also applying that the first, second and third respondents' decision be substituted for an order upholding the applicant's appeal against the Appeal Board's decision of 1 August 2012. The parties agreed that if I grant the application this order should follow.

[2] The fourth respondent, the Registrar of Pension Funds (hereinafter referred to as "the Registrar"), is opposing this matter.

[3] The Appeal Board upheld the Registrar's decision to in terms of section 16(9) of the Pension Funds Act 24 of 1956 (hereinafter "the Act") read with section 15(3) of the Act reject the statutory actuarial valuation of the Fund as on 13 September

2007. It did so on the basis that the report did not correctly reflect the financial condition of the Fund.

Common cause facts

[4] The following facts are common cause:

4.1 The Fund is a closed defined benefit fund established with effect from 1 February 1951.

4.2 The Pension Fund Second Amendment Act, 39 of 2001 (hereinafter referred to as "the Act"), amended the Act by inserting *inter alia* sections 15(A) to 15(K). Section 15 is known as the "surplus legislation" and had as its purpose to clean up all the surpluses in pension funds that was historically utilised for improper purposes.

4.3 In terms of section 15(B)(i) of the Act the Board of every pension fund that commenced prior to 7 March 2002 and had an actuarial surplus at its surplus apportionment date must submit to the Registrar a scheme for the apportionment of that actuarial surplus. The applicant's surplus apportionment date was 31 March 2002.

2002 Report

4.4 On 1 February 2006 the Fund submitted to the Registrar a scheme for the apportionment of its actuarial surplus in the Fund as at 31 March 2002. In terms of this scheme the adjusted actuarial surplus to be apportioned was in the amount of R238 259 000.00. First tier apportionments, which in terms of section 15B(5)(b) is non-discretionary, was to pensioners in the amount of R1 475 000.00 and former members R39 911 000.00. The second tear discretionary apportionments in terms of section 15B(5)(c) was allocated to existing members as R3 354 000, to pensioners as R12 926 000.00 and to deferred pensioners as R463 000.00. The participating employer was apportioned an amount of R118 124 000.

4.5 In paragraph 1.6 of the Scheme the following is set out:

"The amounts apportioned to the existing members (including pensioners and deferred pensioners) and former members will be credited to the members' surplus account:

Yes

If the amount in respect of any class of member or former member is not to be credited to the members' surplus account but is to be used in some other way in as set out in section 15D, state the class and how the amount is to be applied:

Not applicable."

4.6 The actuarial surplus apportioned to the employer was credited to the employer's surplus account. The actuarial surplus apportioned to the existing members, pensioners and former members was credited to the members' surplus account.

4.7 In a general communication to stakeholders by the board of the trustees of the Fund dated 15 July 2005 it was set out that the apportionment to former members would be paid to them in cash, the apportionment to active members would be kept in the fund for them to purchase additional retirement funds and the apportionment to pensioners would be available either as lump sum payments or to increase their monthly pension. The apportionment to the employer would be transferred to the reserved account in the Fund for utilisation by the employer on behalf of the employees.

4.8 On 26 November 2006 the Registrar approved a revised scheme pursuant to questions raised by the Registrar to Alexander Forbes. The main change from the scheme submitted in February 2006 reflected adjusted actuarial values of the Fund's liabilities and contingency reserves, but not the actuarial value of its surplus. Alexander Forbes was furnished with a certificate in terms of section 15B(9)(i).

2005 Report

4.11 The Fund's next statutory valuation report was for 31 March 2005. It was submitted to the Registrar on 6 September 2007.

4.12 The Fund undertook an interim non-statutory valuation as at 31 October 2006 and this valuation report revealed that as at 31 October 2006 the fund's liabilities exceeded its assets. This report was undertaken with the specific intent to determine whether the Fund was in deficit immediately prior to the Registrar's approval of the Fund's surplus apportionment scheme in November 2006. This was necessary to determine the level of the reduction in the member and employer surplus accounts in terms of section 15H of the Act prior to the implementation of the surplus apportionment scheme.

4.13 In order to address the deficit the employer agreed that the deficit as at 31 October 2006 should be reduced by an amount that equals the value of the employer's contributions since 1 April 2002, before the remainder of the deficit is funded from the member and employer surplus accounts. The report stated:

> *"After taking the above Employer contributions into account, an amount of R38.306m remains to be funded proportionately from the Member and Employer Surplus Accounts, thereby reducing the value of the 2002 surplus plus interest that is payable to stakeholders" (JAB20 pp.392-393)*

The Fund had utilised the interest on the 2002 surplus in the amount of R26 292 000 in reducing the deficit.

4.14 This scheme was approved by the Registrar on 30 November 2010.

<u>The 2007 Report</u>

4.15 The 2007 statutory actuarial report dated 30 September 2007 was submitted on 19 June 2009. This report was submitted because 30 September 2007 was the date immediately prior to a merger of the Fund with the British American Tobacco South African Pension Fund. In this report it was thus reflected that the Fund had dealt with the deficit reflected in the March 2005 and October 2006 valuation reports by proportionately reducing the credit balances in the member surplus account and the employer surplus account by the amount of the deficit. This was done according to the report furnished by Alexander Forbes wherein it was agreed that the deficit as at 31 October 2006 should be reduced by an amount that equals the value of the employer contributions since 1 April 2002.

4.16 On 11 December 2009 Mr. Knoetze, the valuator of the fund, *inter alia* explained that the surplus apportionment scheme submitted to and subsequently approved by the Registrar on 26 November 2006 incorrectly contained duplicate records for 2 273 former members *"which was rectified after approval of the scheme was obtained, but before the scheme was implemented"*. This rectification resulted in a significant reduction in the residual surplus that was allocated to one class of former members and *"a corresponding sizable increase in the residual surplus of the other stakeholders, in particular the active members, pensioners and deferred pensioners"* (JAB13).

4.17 On 18 January 2010 the Registrar pended considerations of the reports as at 31 March 2005 and 30 September 2007 and requested the fund to submit an addendum to the surplus apportionment scheme reflecting the changes in the scheme. On 1 September 2010 the Registrar accepted the addendum so submitted.

4.18 On 3 September 2010 the Registrar requested from Alexander Forbes a reconciliation of the Fund's employer surplus account and member's surplus account incorporating the abovementioned addendum to the surplus apportionment scheme. The Registrar also informed the Fund that it could not utilise section 15H to manage the deficit as at 31 October 2006 because section 15D(2) required that the credit balance in the members surplus account, after apportionment of the actuarial surplus, had to be used as specified in the section 15B surplus apportionment scheme.

4.19 On 29 September 2010 Alexander Forbes informed the Registrar that R18 660 000 of the money in the members surplus account had to be used to fund the deficit as at 31 October 2005 and thus in fact had used that credit balance as specified in the scheme as submitted in terms of section 15B as required by section 15D(2).

4.20 On 22 March 2012 the Fund submitted to the Registrar a legal opinion which concluded that it was obliged to invoke the provisions of section 15H.

4.21 The Registrar on 10 August 2012 informed Alexander Forbes that it had rejected its actuarial valuation of the Fund as at 30 September 2007 because the report did not correctly reflect the financial condition of the Fund.

4.22 This decision was appealed and is sought to be set aside.

[5] Issues to be decided

[5.1] Factually the crux of the matter is whether the Fund could use the surplus as set out in the 2002 scheme apportioned to members, former members, pensioners and deferred pensioners and approved by the registrar in November 2006 to reduce a deficit revealed through the 2005 statutory actuarial evaluation as well as a non-statutory evaluation.

[5.2] The question in law is thus whether s15H deals only with future deficits. It also raises the issue of the correct interpretation of the interrelationship between sections 15D and 15H of the Act and whether Section 15D is susceptible to s15H. It also begs the question if the Fund was legally compliant; could it take away rights already accrued to the members, former members, pensioners and deferred pensioners in terms of the 2002 surplus scheme?

PRINCIPLES APPLIED IN COMING TO FINDINGS

[6] In **Tek Corporation Provident Fund and Others v Lorentz** 1999 (4) SA 884 SCA in [16] it was found that: *"... Defined benefit pension funds do not exist to generate surpluses but they may arise when reality and actuarial expectation do not coincide ..."*. Despite it not being a defined benefit pension fund's purpose to generate a surplus it was a reality that large surpluses did generate and the legislature had the

intention with the surplus legislation to clean up all surpluses by means of distribution. The legislature thus foresaw and enacted that within 3 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 s15B:

"15B Apportionment of existing surplus

(1)(a) Subject to paragraph (b), the board of every fund that commenced prior to 7 March 2002 shall submit to the registrar a scheme for the proposed apportionment of any actuarial surplus (in this section referred to as the scheme) plus the details regarding any surplus utilised improperly by the employer as defined in subsection (6) as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date.

(b) ...

(2) A scheme –

(a) shall comply with such conditions as may be prescribed; and

(b) may involve –

(i) the improvement of benefits to existing members;

(ii) increases to benefits or transfer of values in respect of former members;

(iii) the crediting of an amount to the member surplus account;

(iv) the crediting of an amount to the employer surplus account; or

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

[7] As remarked so eloquently by Marais JA in the Tek-matter *supra*: *"... In assessing the financial health of a pension fund an actuary is gazing into the proverbial crystal ball to see what the future will hold. The use of the metaphor is not intended to demean the exercise; it is highly sophisticated and requires considerable training and skill, yet it remains, when all is said and done, an exercise in prophecy ... [16]"* With this in mind it is clear that the surplus legislation could not have the intention, pursuant to the first clean slate being achieved, to prevent Funds from generating future surplus, but to utilize it as prescribed in Sections 15C, 15D and 15H:

"15C Apportionment of future surplus

(1) The rules may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account.

(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board taking into account the interests of all the stake-holders in the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment." (Applicant's bundle of authorities p139)

15D Utilisation of surplus for benefit of members -

(1) Notwithstanding anything to the contrary in the rules of a fund but subject to subsection (2), any credit balance in the member surplus account may only be used by the board to –

(a) improve benefits for existing members;

(b) improve the benefits previously paid to former members or the amounts previously transferred in respect of former members;

(c) reduce current contributions due from members; and

(d) meet, in full or in part, expenses which would otherwise reduce the proportion of the members' contributions that are invested for retirement.

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

(2) The credit balance contemplated in subsection (1) after the apportionment of actuarial surplus as at the surplus apportionment date must be used as specified in the scheme submitted in terms of section 15(B)(1) if the scheme makes provision for the use of such credit balance." (Applicant's bundle of authorities p139)

"15H Use of contents of any surplus accounts to fund deficits –

(1) If a fund has credit balances in the member surplus account or the employer surplus account and the fund is found to have a deficit following an actuarial valuation, including a valuation carried out for the purpose of distributing assets on liquidation of the fund, such credit balances shall be reduced in the same proportion by the amount of the deficit: Provided that no credit balance may be reduced by more than the amount to which the account was in credit.

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

[8] It was common cause between the parties that as a general principle a deficit would entail that looking forward the Fund would not be able to meet its obligations. In a

defined benefit Fund this would obviously set up a financially unsound situation; one to be avoided at all costs. Section 18 of the Act requires a Fund to act once a deficit is revealed. Although there are ways and means to address the deficit, without utilising a surplus, it would be financially sound to utilize any surplus to address the deficit. [s15H]. The registrar's only qualification was that s15H only had application to a future surplus and not the initial surplus.

[9] Section 15A provides as follows:

"15A Rights to use of actuarial surplus

(1) All actuarial surplus in the fund belongs to the fund.

(2) Once actuarial surplus is apportioned to either the member surplus account or the employer surplus account in terms of sections 15B and 15C, members and the employer acquire rights to such actuarial surplus as provided for in this section.

(3) ...

(4) Any credit balance in the member surplus account must be used for the benefit of members as provided for in section 15D."

The surplus thus belongs to the Fund and the members and the employer acquire rights to such actuarial surplus once it is apportioned to either the member surplus fund or the employer surplus fund. An apportionment is however of no force or effect unless: [s15B(9)(a)]:*"the scheme, the statutory actuarial valuation as at the surplus apportionment date of the fund, as well as a copy of any other actuarial or other statement taken into account for purposes of the scheme and the report by the person appointed in terms of subsection (3), has been submitted to the registrar and the registrar is satisfied that the statutory actuarial valuation has been prepared on actuarially sound and acceptable principles prescribed:"*

[10] It is thus clear that any rights acquired by members in terms of this section are conditional upon the registrar's approval. This is confirmed in the Board Notice, Notice 22 of 2009, directive PF No. 3: "*Even though the employer, existing members and former members of a fund acquire a right to be considered by the board of that fund for inclusion in the surplus apportionment, provided there is actuarial surplus to be apportioned at the SAD in terms of section 15B of the Act, any amount due to the employer, an existing member, or a former member, in terms of that apportionment scheme, accrues only when the registrar has issued a certificate approving the apportionment scheme in terms of section 15B(()(i).* [49]"

[11] The registrar has a gate-keeping function and grants approval based solely on actuarially sound and prescribed acceptable principles. In **National Tertiary Retirement Fund v Registrar of Pension Funds** 2009 (5) 366 (SCA) it was

confirmed that s12(1)(b) did not confer a broad and equitable discretion on the Registrar. I find this finding also applicable pertaining to the approval of a report and the scheme contained therein; the Registrar is the gate-keeper not the legal compliance officer acting on behalf of the stakeholders.

[12] The Registrar's reasons for the rejection of the 2007 report

The Registrar rejected the 2007 report because the valuation report did not correctly reflect the financial condition of the Fund. The reasons for this were that in terms of the 2002-scheme the members surplus account was to be immediately debited; "*None of the amounts of surplus allocated to the stakeholders should have remained credited to the member surplus account after the surplus apportionment date, let alone used to fund a deficit in the fund on 31 October 2006.*"[Par 3.6 of rejection letter].

[13] In the Registrar's reasons for purpose of the appeal to the Appeal Board the Registrar changed its stance. Whereas it was previously contended that the stakeholders apportionment of the surplus could be credited to the members' surplus account it now concluded that: "*The Registrar is of the view that there was never an apportionment of section 15B surplus to the Member Surplus Account in terms of section 15B(2) of the Act and the Fund never intended that any surplus be placed in*

the member Surplus Account. This is clear from the classes of stakeholders who were allocated the section 15B surplus, the communication exercise to stakeholders and the Fund's addendum to its surplus apportionment scheme. Therefore, the section 15B surplus amounts were improperly placed in the Member Surplus Account. Consequently, the provisions of section 15H cannot be used to justify the reduction in the section 15B surplus amount allocated to members and former members. " In short thus the surplus members' account was only a conduit.

FINDING ON WHETHER A FUND MUST IMMEDIATELY DISTRIBUTE THE SURPLUS CREDITED IN THE MEMBERS' SURPLUS ACCOUNT.

[14] The Appeal Board accepted the proposition that the Fund in terms of the 2002 scheme had to immediately implement and apportion the surplus as set out in the scheme. If this was done there was in effect no surplus to reduce the deficit with. The Appeal Board found:

> *"On the basis that the scheme operated with effect from 31 March 2002, the Registrar's submission that immediate implementation of the scheme by the Fund necessitated an accounting process resulting in a nil balance in the MSA. Why the process was not set in train before the deficits were reported*

> *in 2007 the record does not reveal. The Registrar is right, we think, as regards the accounting result that should have eventuated ..."*

[15] In argument to me it was stressed that a Fund had a duty upon the activation of the surplus apportionment scheme to give effect to that scheme; the Fund must fulfil its duty in terms of the s15B scheme. In plain language you could not leave a credit in the members' surplus account and then later dip into it when a deficit is found. If the Fund had fulfilled its duty there would be no surplus to reduce the deficit. Technically there was no surplus in the account because the amount should have been distributed and there could have been no reduction of the credit in terms of s15(H). The Fund's report thus did not correctly reflect the financial position of the Fund. It was conceded by counsel for the Registrar to be successful in this argument he must convince the Court that once a surplus scheme is activated, the Fund has an obligation to act on it immediately. It was submitted that because the Fund did not act on the scheme immediately the Fund was not legally compliant. The reduction was thus inconsistent with s15(D) and not authorised by s15(H).

[16] It was further submitted that the Fund had to immediately after the crediting of the member's surplus account debit back to back the apportionments in terms of the scheme. The stakeholders, i.e. the members, former members and pensioners were

informed that they were to receive benefits from the surplus fund and that is was the Registrar approved. This cannot be gainsaid for the purpose of a deficit. There were communications to members setting out how the money would be dealt with and then individual letters were sent to each class of stakeholders; this was the outward face of the scheme. The Fund thus specified what the money was to be used for and in not doing so they acted unlawfully. In any event the addendum submitted by the Fund specified the use of the credit balance. The moment the Registrar approved the scheme there was an immediate right to that money by the stakeholders allocated, but with effect from 1 March 2002 the Fund should have credited the member's surplus account and then created these other accounts and debited these accounts. That would have led to a nil credit balance in the member surplus account and the scheme would have been given effect to and there would have been a clean-up as intended.

[17] It was also argued that there is nothing impracticable in achieving back to back accounting because the Fund can open accounts for classes of people until the individual amounts have been determined. Regulation 35 prescribed a contingency reserve account for former members for whom enhancement due could be determined but could not be traced.

[18] On behalf of the Fund it was argued that the Appeal Board in accepting the Registrar's reasoning that the surplus must be debited immediately is flawed in that it is inconsistent with the provisions of the Act and rules; there is no such provision.

[19] Furthermore it is impossible to immediately debit the accounts because individual calculations to determine the exact base amounts and interest due to each member and former member must first be determined. Many former members must first be traced and then their details must be verified. The reliance of the Registrar on regulation 35 is misplaced as it does not prescribe any other accounts that a Fund must maintain except for a contingency reserve account which must be utilized when an enhancement for a former member has been determined, but the former member is untraceable.

[20] It was also argued that if there was the requirement to immediately debit the member surplus account and leave a nil balance there would never be credit balances in the member surplus account for the purposes of sections 15G, 15H and 15I rendering them superfluous.

[21] I cannot agree with the submissions made on behalf of the Registrar. The Registrar was adamant that the Appeal Board was correct in its finding that a Fund had a duty

to upon the activation of the surplus apportionment scheme to give effect to that scheme. It was however conceded by counsel for the Registrar that to persuade this court that once the surplus apportionment scheme is activated effect must be given is reliant upon him persuading me that it must be *"immediate".* On the Registrar's argument the Fund's 2002-surplus scheme required immediate back-to back accounting; i.e. credit the members' surplus account and then immediately debit this account to classes of members, former members and pensioners accounts [if it cannot be achieved individually]. *"Immediate"* was argued as being when the scheme became of force and effect and that was 26 November 2006; this is the date of the certificate issued by the Registrar pursuant to the last two steps as set out in s15(B)9 having been taken. If this is the true legal position why did the Registrar in 2010 approve the 2005 report which gave no indication of immediate back-to back accounting of the 2002 surplus? This period stretched over 4 years; nothing immediate in this timespan! It only became a bone of contention when the 2007 report indicated that the amount in the members' surplus account would be utilised to address the deficit. The Registrar is simply unhappy that the surplus be utilised for the deficit, but can only be unhappy if the report is not actuarially sound and based on prescribed acceptable principles.

[22] There is nothing in the Act or the Rules indicating that back-to back accounting must take place. I accept that on general bookkeeping principles the accounts suggested

by the Registrar could be opened, but they are certainly not prescribed. It was also not argued that they were as a general accepted principle in use by Funds. This is certainly a new principle advocated by the Registrar. The Registrar's reliance on Regulation 35 is misguided because it pertinently prescribes only one account; a contingency reserve account with specific purpose to place the enhancement of an untraceable former member therein. It would have been very easy to prescribe further accounts necessitated by any required back-to back accounting.

[23] I am not persuaded by the argument of the Registrar that the Appeal Board was correct in finding that the activation of the scheme or operation of the scheme was with effect from 31 March 2002. Any surplus, upon approval by the registrar, retrospectively to the date of the apportionment affords right to the stakeholders so approved. As quoted supra "*any amount due to the employer, an existing member, or a former member, in terms of that apportionment scheme,* ***accrues only when the registrar has issued a certificate approving the apportionment scheme in terms of section 15B(()(i).*** [49]" [my emphasis]. Although any Act always takes precedence over rules, regulations and directives, one can only assume that this directive was issued to clear up when the stakeholders' rights in a scheme accrued. I cannot find that this directive is in conflict with s15B, or legal principles as to when rights of stakeholders in such circumstances should accrue.

FINDING ON WHETHER S15H ONLY HAS FUTURE APPLICATION.

[24] It was submitted that the Appeal Board committed a material error of law in finding that: *"The second answer to the Fund's argument is a matter of statutory interpretation. The first thing to observe is that section 15D is not subject to section 15H. Second, although a section 15H is not subject to section 15D, there was no need to insert that qualification. It could not have been contemplated that the two provisions would, or could, conflict. A deficit as at apportionment date would result in no apportionment and no scheme or, at best, a reduced apportionment. There would be no scope for the application of section 15H. The two sections do not legislate for one and the same time. Section 15H was clearly intended to deal with a deficit at a later time when, by necessary implication the purpose of the scheme referred to in section 15D(ii) had already been implemented."*

[25] The Fund argued that not only could it utilize the surplus to reduce the deficit, but the Fund was obliged to do so in terms of s15H(1). It was submitted that the Appeal Board erred in finding that section 15 D and section 15 H would or could not conflict because a deficit as at apportionment date would result in no apportionment scheme and there would be no scope for the application of s15H. The Appeals Board thus incorrectly interpreted section 15H as having only future application, i.e. after a scheme in s15D(2) was implemented.

[26] In fact the purpose of s15H was to ensure that pension funds remain financially sound. The purpose of s15H was to ensure that funds do not allocate surpluses where the fund was in a deficit. The credit balances must then first and foremost be utilized to fund the deficit to ensure financial stability of the fund. Section 15H is peremptory; ..."*such credit balances **shall** be reduced in the same proportion by the amount of the deficit.."[s15(1)] and ... these credit balances **shall** be applied in full to reduce the deficit and shall be reduced to zero."* [my emphasis]

[27] In interpreting s15H I was urged to follow the approach as set out in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 603 [18]. I was also referred to **Dexgroup (Pty) Limited v Trustco Group International (Pty) Limited** 2013 (6) SA 520 (SCA) [16] wherein it was reiterated that *"... Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linquistic uncertainty but are fundamental to the process of interpretation from the outset."* This approach was confirmed in **Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA).

[28] In following this approach it was argued that s15H is couched in clear, unambiguous and peremptory language without being subject to any other section of the Act. There is no reference in the section to a particular date in the future. "*The Court therefor must give effect to what the Act says and not to what it thinks it ought to have said* and ....*the [courts] sole duty is to construe the Act as it stands.*" – **Stafford v Special Investigating Unit** 1999 (2) SA 130 (E) at 140F. The Fund thus had to apply s15H to reduce the deficit.

[29] The Appeal Board had no legal basis to find that the actuarial surplus credited to the member surplus account was not susceptible to s15H due to the provisions of s15D(2). If the legislature intended to shield the actuarial surplus distributed in terms of s15B from the provisions in s15H, it would have been so expressed. Without such express provision the Legislature had no such intention. The Legislature would have been aware that the first credit balances in the surplus accounts in terms of s15B would be vulnerable to the provisions of s15H.

[30] The Appeal Board also was influenced by an error of law when it found that sections 15D(2) and 15H did not legislate for one and the same time, but that s15H was intended to deal with a deficit at a later stage, when by necessary implication, the purpose of the scheme in s15D(2) was already implemented. Sections 15D, 15B

and 15H were inserted into the Act on 7 December 2001.This interpretation by the Appeal Board are at odds with the literal and purposive interpretations of sections 15D and 15H of the Act. Furthermore such interpretation would also render the provisions of s 15H futile because the s15B distribution is the only surplus distribution which is compulsory.

[31] It would be odd for section 15H to apply to only future credit balances, subsequent to a scheme in terms of s 15B, that may never arise. That is specifically so because this future surplus is in terms of section 15C to be apportioned in terms of the rules of the fund; apportionment is not compulsory and left to the discretion of the trustees. It is unlikely that there will be any future surplus pursuant to a scheme because all the circumstances leading to the creation of surpluses before 2001 had largely fallen away due to the minimum benefit requirements in sections 14A and 14B and the movement from defined benefit to defined contribution funds where it is inherent in a defined contribution fund that no surplus can arise.- **Tek Corporation Provident Fund and Others v Lorentz** 1991 (4) SA 884 (SCA) on 891[5].

[32] This interpretation favouring the overall purpose of the legislature is also supported by rule 18.5.2 of the Fund which expressly states that the provisions of s15H shall

apply where there is a deficit in the Fund and the Fund has credit balances in the member surplus account and the employer surplus account.

[33] On behalf of the Registrar it was contended that the legislature enacted this legislation to provide for a historical clean-up of large surpluses rendering. Section 15 C thus, so it was argued, only related to future surpluses, i.e. after the clean-up. This is so in view of the unique nature of s15B to address the past build-up of surpluses in pension funds. Similarly s15H only relates to future clean-ups because section 15(H)(1) does not override s (15)D(2). The Appeal Board was thus correct in finding that Sections 15D(2) and 15(H)(1) deal with different moments in the" life of a Fund.

[34] It was also submitted that s15(D) makes it clear that any credit balance in the member surplus account after apportionment of actuarial surplus as at the apportionment date must be used as specified in the s15(B)(1) scheme if the scheme makes provision for the use of the balance. It was thus argued that it excluded the use of any credit balance for any other purpose, i.e. funding a deficit in terms of s15H (1). It was submitted that the argument of the Fund that the scheme only provided that the money was going to a member surplus account and did not specify in terms of s15(B)(1) the use for such credit balance is to be rejected. The

member surplus account is only a conduit from which the transfers to the stakeholders were to be made.

[35] Section 39(2) of the Constitution requires of a court to interpret any legislation to promote the spirit, purport and objects of Bill of Rights. In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 603 the following was found:

> *"[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike*

results or undermines the apparent purpose of the document ... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[36] The language of s15H is clear and unambiguous; if a Fund has a credit balance in the member surplus account and the Fund is found to have a deficit then that credit balance shall be reduced in the same proportion by the amount of the deficit provided that no credit balance may be reduced by more than the amount to which the account was in credit. If the deficit is more than the credits in the members' and employer surplus accounts then the total of the credit balances are to be applied to the deficit. Considering the language of s15H in the light of the ordinary rules of grammar and syntax there is nothing in the wording of s15H remotely suggesting that it only has future application, i.e. after the first apportionment in terms of s15B.

[37] The purpose of the provision is to extinguish a deficit in a Fund by means of credit balances in surplus accounts. A Fund is left no discretion to regulate otherwise; the surplus must be so utilized. This resonates with the general principle that a deficit in a Fund must be addressed earlier rather than later. It also conforms to the principle that a surplus, as not being the purpose of a defined benefit fund, must be utilised to

keep such a Fund financially sound and used to the benefit of the members. A surplus in a members and employers surplus account must this be utilised to fund a deficit, despite the provisions of s15D. Section 15H thus also confirms that credit balances in surplus accounts need not immediately be debited, as suggested by the Registrar, otherwise there would be no credit balances in surplus accounts available for distribution.

[38] In interpreting section 15H *"... the material known to those responsible for its production ..."* [Natal Joint supra p604 A'] was that s15B was to clear out all surpluses in Funds. This was to be done to the benefit of members. A deficit was however to be funded by a surplus. I cannot find that the legislature must have intended that s15H is only applicable to future surpluses. The legislature invoked these sections, at the same time, with the intent to address surpluses. If it intended that the first surplus in terms of s15B was only intended for the use of members it would have been the simplest thing to say so. The Legislature was alive to the fact that the first credit balances in the surplus accounts in terms of s15B would be vulnerable to the provisions of s15H. The makers were aware of future application of the surpluses because s15C has the heading of: "*Apportionment of **future** surplus.*"[my emphasis]. It would have been very simple to include the word "future" in s15H. In considering the provisions of s15 as a whole I cannot find that the legislature had the intention to make s15H applicable to only future surpluses. The

Appeal Board thus was influenced by an error of law in finding that sections 15(D) and 15H did not legislate for one and the same time; s15H was only to be applied to a deficit after the scheme in s15(D)(2) was apportioned. S15H is not, in the language of the provision, subject to s15D. There is no reason to read in that s15H is subject to s15D. I agree with the Funds submission that if s15H was applicable to only future surpluses the provisions of s15H would be futile because the s15B distribution is the only surplus distribution which is compulsory.

[39] The context in which sections 15B, 15D and 15H are to be read was set out above; Parliament prescribed to Funds to rid surpluses to the benefit of its members. Parliament was however aware that deficits may arise and prescribed that any surplus must fund such deficit. The purpose was that surpluses must be cleaned out; either to the benefit of the members or funding a deficit. The context was thus that a surplus must not be improperly used, but "businesslike" on actuarially sound principles. The stakeholders acquired certain rights upon approval of the scheme, but would be hard-pressed to insist that these benefits were due and payable when a deficit required funding. If the stakeholders were unhappy it would be a matter between the stakeholders and the board of the Fund, not the Fund versus the Registrar. The stakeholders', it would seem, are not persisting with such claims, but the Registrar is on their behalf doing so; this is not the duty of the Registrar unless the Registrar is correct that the funding of the deficit is improper on actuarially sound

and acceptable principles prescribed. This was however not the Registrar's stance in address to me, it was stressed that the reason for rejecting the report was not because the Registrar disagreed actuarially with any of the values placed on the assets or liabilities of the Fund, but that the Fund was not legally compliant by distributing the surplus to the deficit at the time it did so. In interpreting s15H by considering the language and context together I cannot find that the Appeal Board was correct in finding that s15H only had future application.

[40] CAN S15H OVERRIDE SECTION 15D(2)

For ease of reference I repeat s15D(2):

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

> The Appeal Board found as follows: *"The first answer to the Fund's argument is that s15D (2) does not only concern purpose. It pertains to a specific, identifiable and indeed identified amount i.e. the credit balance in the MSA "after the apportionment of actuarial surplus as at the apportionment date." If a scheme provides for the use of such credit balance- as this one*

does- then that amount "must be used as specified". Therefore none of it is susceptible to use in terms of s 15H (1)."

[41] It was submitted on behalf of the Registrar that s15H could be utilised in terms of section 15B if the scheme did not specify how the surplus was to be used, for example the Fund could apportion money only to active members into the member surplus account. It was however immediately conceded that whether the Registrar would approve such scheme is another matter. In *casu* it was argued that the Board had specified and as a matter of law had in the case of existing members and former members determined how the surplus was to be allocated to them. This was a bar to utilising the surplus as set out s15H.

[42] On behalf of the Fund it was argued that the correct interpretation is that s15(D)(1) only sets out the uses to which a credit balance in the member surplus account can be put where the surplus apportionment scheme did not expressly specify how the surplus allocated to members and former members was to be used after the scheme was approved. S15D(2) provides that the credit balance credited to the member surplus account after the apportionment of actuarial surplus as at the surplus apportionment date must be used as specified in the scheme, if the scheme made provision for the use of the credit balance. From par. 1.6 in the Fund's scheme it

was clear that it did not specify what will happen to the credit balance in the member surplus account except that it would be credited to the member surplus account.

[43] The purpose and context of s15(D)(1) is to set out the uses to which actuarial surplus allocated to a member surplus account can be put where the surplus apportionment scheme was not specific as to how the surplus was to be used. Section 15(D)(2) qualifies that if the scheme did specify then the Board cannot rely on the provision of s15D(1), but must then use the credit balance as specified in the surplus apportionment scheme.; i.e. if it specified that it to be credited for the use of former members only the Fund can turn around and credit it to the benefit of existing members.

[44] Once again there is nothing in the application of the ordinary rules of grammar and syntax in section 15(D)(2) expressing that it impacts on s15(H). S15(D)(2) does not refer to for instance sections 15G and s15H which relate to the use of *credit* balances in a Fund; s15(D)(2) accordingly did not apply to those sections, or differently put those sections are not subject to s15(D)(2). Section 15(D)(1) expressly states that it is subject to s15(D)(2), there is no such qualification in s15H.

[45] The Appeal Board thus erred in relying on s15(D)(2) in coming to its finding.

[46] I accordingly make the following order:

46.1 The first, second and third respondents' decision dated 15 August 2013 in which they rejected the applicant's appeal against the fourth respondent's decision of 1 August 2012, is hereby reviewed and set aside.

46.2 The first, second and third respondent's decision is substituted for an order upholding the applicant's appeal against the fourth respondent's decision of 1 August 2012.

46.3 The fourth respondent is ordered to pay the costs, including the costs consequent upon the employment of two counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 9480/2014

HEARD ON: 22 April 2015

FOR THE APPLICANT: ADV. M.A. CHOHAN SC

ADV. S. KHUMALO

INSTRUCTED BY: Hogan Lovells South Africa Inc.

FOR THE 4th RESPONDENT: ADV. A.M. BREITENBACH SC

INSTRUCTED BY: Rooth & Wessels Attorneys

DATE OF JUDGMENT: 27 May 2015