IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 3469/2012

In the matter between:

REGISTRAR OF PENSION FUNDS	FIRST APPLICANT
FINANCIAL SERVICES BOARD	SECOND APPLICANT
and	
KWAZULU NATAL RETIREMENT FUND	FIRST RESPONDENT
MIDLANDS BUJILDING INDUSTRY RETIREMENT FUND	SECOND RESPONDENT

J U D G M E N T
(Delivered on 15 April 2013)

BALTON J

[1] This is an application by the Registrar of Pension Funds (“the Registrar) and the Financial Services Board (“FSB”) in terms of sections 6(2) and 8(1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) to review and set aside two decisions by the Registrar taken during October 2011 to approve and register amendments to the rules of the respondents in terms of section 12(4) of the Pensions Fund Act 24 of 1956 (“the Act”).

[2] The respondents are pension funds registered in terms of the Act with the office of the Registrar and administered by the Kwazulu-Natal Master Builder and Allied Industries Association.

[3] Both the respondents are defined contribution funds as distinct from defined benefit funds.

[4] The respondents' rules in respect of defined contribution benefits do not guarantee any particular benefit and a member on retirement is entitled to the contributions made by him or her and by the employer in respect of the member and any return on the amount in the member's account that has been invested less his or her share of the expenses of the Fund.

[5] The following factual background is common cause or not in dispute:

5.1 Pursuant to the Promulgation of the Pension Funds Second Amendment Act No 39 of 2001 (the Surplus Legislation) on 7 December 2011, the respondents were required to submit to the Registrar's office actuarial valuation reports in terms of section 16(1) and surplus apportionment schemes in terms of section 15B(1) of the Act as at their surplus apportionment dates, being 31 October 2004.

5.2 On 4 January 2007 the respondents submitted to the Registrar's office initial surplus apportionment schemes, as well as initial valuation reports as at 31

October 2004 which were returned to the respondents by the Registrar's office as the respondents had not communicated the details of the schemes to their stakeholders to enable them to lodge objections as contemplated by section 15B(9)(e) of the Act.

5.3 On 3 May 2007 the respondents submitted revised surplus apportionment schemes.

5.4 The initial valuation report and the first revised scheme submitted by both the respondents reflected a contingency reserve for target pensions.

5.5 The respondents were of the view that the establishment of the contingency reserve accounts for the payment of target pensions by the respondents to their members could be viewed as an expectation by the members.

5.6 During August 2007 the Registrar queried both the initial valuation reports and the first revised schemes.

5.7 The Registrar was not satisfied with the establishment of the various contingency reserve accounts in the respondents, including the contingency reserve accounts for target pensions. The Registrar required that the credit balances in the contingency reserve accounts be released for distribution as actuarial surplus in terms of section 15B of the Act.

5.8 During November 2007 both respondents addressed the Registrar's queries, but the respondents' contingency reserve accounts for target pensions remained in issue.

5.9 On 19 February 2008 the Registrar advised the respondents that he had pended the consideration of their initial valuation reports until the issue relating to the contingency reserve accounts for target pensions had been resolved or satisfactorily explained.

5.10 In the letter[1] the Registrar states:

> … It is the Registrar's view that the Rules of the Fund do not create a liability in respect of the pension target. The Rules allow for an augmentation of pension at retirement date in the discretion of the actuary in consultation with the board of the Fund.
>
> The basis of a defined contribution fund is that members are entitled to the contributions allocated towards retirement benefits and fund return thereon. Where additional pension enhancements are given, it can only be funded from surplus.
>
> In essence, the board of the Fund is utilising part of the surplus in the Fund to provide target pensions. By virtue of the surplus legislation surplus must be distributed in accordance with the Act. After the commencement date of the surplus legislation the board of the Fund cannot deal with surplus other than in accordance with the Act.

5.11 Rule 6.2 of the rules of both respondents provided that -

> at the member's normal retirement date, the annual pension payable to the member will be the benefit in terms of Rule 6.1; provided that the pension may be augmented to such an amount and subject to such conditions as may be determined by the actuary in consultation with the trustees.

5.12 The respondents replied to the Registrar's letter and reiterated their view that the target pension was a benefit expectation.

5.13 On 23 June 2008 representatives of the Registrar and the respondents met to discuss the unresolved issues relating to the respondents' first revised schemes and initial valuation reports.

5.14 In a report[2] dated 9 October 2008, Ms Carmen Hollaway, the respondents' attorney, submitted that the provision of target pensions was a benefit entitlement.

---

[1] Page 31 of the indexed papers.

5.15 Ms Hollaway contended *inter alia* that:

(i) Members have been historically, consistently and unequivocally informed that their membership of the respondents entitled them to, at a minimum, a target pension on retirement;

(ii) The trustees of the respondents were historically advised by Fedsure Life (their previous administrator) that the target pension was a benefit entitlement in terms of the rules of the respondents; and

(iii) From a funding perspective, the target pensions have historically been funded from surplus.

5.16 By letter dated 18 December 2009 the Registrar rejected the respondents' initial valuation reports as at 31 October 2004.

5.17 On 19 January 2009 the respondents lodged appeals against the Registrar's decision.

5.18 Pursuant to discussions between the Registrar's office and the respondents' attorney, the respondents agreed to submit revised valuation reports and second revised surplus apportionment schemes and on 19 March 2009 withdrew the appeals.

5.19 On 11 September 2009 the respondents submitted the revised valuation reports and the second revised schemes to the Registrar's office. The reports no longer made provision for contingency reserve accounts for target pensions, but contained a target pension liability for active members.

---

[2] Pages 38 to 48 of the indexed papers.

5.20 In December 2009 the Registrar rejected the revised valuation reports in terms of section 16(9), read with section 15(3) of the Act, as he was of the opinion that the revised valuation reports did not correctly reflect the financial condition of the respondents for the following reasons:

> 3.1 Section 9 of the revised valuation report reflects the benefit resulting from following a target pension approach as a liability, … As this the target level pension liability is not defined in the rules, the valuation has not been performed in line with the rules of the Fund.
>
> At most the rules allow for an augmentation of pension at retirement date, at the discretion of the actuary in consultation with the board of the Fund, and as such, do not create a liability in respect of the pension target.
>
> 3.2 The target level pension for actives is funded from actuarial surplus, hence it constitutes an unauthorized distribution of actuarial surplus.[3]

5.21 The respondents then lodged new appeals with the Appeal Board.[4]

5.22 On 4 October 2011 the first respondent submitted to the Registrar's office amendment No 4 to its rules and the second respondent submitted to the Registrar's office amendment No 2 to its rules.[5]

5.23 The first respondent's amendments were considered and approved on 14 October 2011 and the second respondent's amendments considered and approved on 12 October 2011. They were informed of the approval and registration on 15 and 12 October respectively.[6] The amended rules read, *inter alia*, as follows:[7]

---

[3] Pages 53 to 56 of the indexed papers.
[4] Pages 57 to 82 of the indexed papers.
[5] Pages 83 to 84 of the indexed papers.
[6] Pages 85 to 94 of the indexed papers.
[7] Pages 86 to 88 of the indexed papers.

> TARGET LEVEL OF PENSION means a capitalized value determined at the time of the retirement of a MEMBER based on the ACCRUAL RATE of FINAL SALARY per year of CONTRIBUTORY MEMBERSHIP of the SCHEME, as determined by the TRUSTEES in consultation with the ACTUARY, following each annual financial review of the SCHEME.
>
> …
>
> 6.2 Unless the TARGET LEVEL OF PENSION is less than the MEMBER'S SHARE OF FUND, the Member's SHARE OF FUND shall, on the Member's NORMAL RETIREMENT DATE be credited with such amount as would be sufficient to reach the TARGET LEVEL OF PENSION, provided that such crediting of a Member's SHARE OF FUND is determined by the ACTUARY in consultation with the TRUSTEES as being affordable by the SCHEME.

5.24 On 30 January 2012 the Secretary of the Appeal Board informed Ms Hollaway that the Appeal Board would hear the appeals during February 2012.

5.25 On 1 February 2012 Ms Hollaway requested the Appeal Board to pend the appeals as there were "recent developments" which directly impacted on the merits of the appeals and that the respondents expected to enter into formal discussions with the Registrar regarding such developments during the course of the following week.[8]

5.26 On 9 February 2012 Ms Hollaway advised the Registrar that the target pension provisions has not been implemented in terms of the amended rules since their approval and registration in October 2011. The payment of target pensions had been suspended in May 2010 pending the resolution of the dispute with the Registrar regarding the 2004 valuation and the determination of the financial position of the respondents.[9]

---

[8] Page 97 of the indexed papers.
[9] Pages 99 to 100 of the indexed papers.

<u>Issues</u>

[6] The Registrar seeks to review the decisions in terms of section 6(2)(e)(iii) and 6(2)(i) of PAJA on the grounds that:

6.1 The amendments are inconsistent with the Act, and

6.2 When the applications for the approval and registration of the amendments were made the respondents failed to disclose all relevant material information, namely that:

(i) The issue whether the respondents were liable to pay target pensions to their current active members if and when they retired, was on appeal before the Appeal Board;

(ii) The respondents misstated the nature and effect of the amendments as being 'to clarify the provisions relating to the provision of pension targets' whereas in fact, the rules were silent about the provision of target pensions; and

(iii) The FSB officials who took the impugned decisions on behalf of the registrar made a material mistake of fact, namely, they thought that the rules already contained provisions relating to target pensions when in fact it did not.

[7] Section 6 of PAJA reads *inter alia* as follows:

> 6. Judicial Review of Administrative Action –
>
> (2) A court or tribunal has the power to judicially review an administrative action if –
> (e) the action was taken –
> …

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered.

…

(i) The action is otherwise unconstitutional or unlawful.

[8] The Registrar relies on **PEPCOR RETIREMENT FUND AND ANOTHER v FINANCIAL SERVICES BOARD AND ANOTHER**[10] to have the rule amendments reviewed and set aside. CLOETE JA held that

> [31] I have pointed out that a public functionary may be entitled and even obliged to seek the review by a Court of its own decision; and I have already held that the Registrar and the FSB are entitled to do so. The question which now arises is whether this should be permitted because of a material mistake of fact, even a mistake due to the functionary's own negligence … and even if the mistake was not induced by the person who benefited by the decision.
>
> …
>
> [46] …S 6(2)(*e*)(iii) provides that a Court has the power to review an administrative action, *inter alia*, if 'relevant considerations were not considered'. It is possible for that section to be interpreted as restating the existing common law; it is equally possible for the section to bear the extended meaning that material mistake of fact renders a decision reviewable.
>
> [47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure, Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.

[9] The Registrar submits that:

9.1 It first became aware of the rule amendments on 1 February 2012.

[10] 2003 (6) SA 38 (SCA).

9.2 The functionaries who approved and registered the rule amendments were not aware that the appeals were pending before the Appeal Board and that the respondents' past payment of target pensions and the provision in their valuation reports for future payments of target pensions were in dispute between the Registrar and the respondents.

9.3 Due to an administrative practice in the Registrar's office at the time, the functionaries dealing with the proposed amendments rules did not have any documentation concerning the disputes/appeals in question. This was dealt with by the Legal Department of the FSB.

9.4 The respondents did not disclose the existence of the appeals or the dispute in their applications for approval of the rule amendments. If they had done so, the analysts handling the proposed rule amendments would not have approved and registered the rule amendments and would instead have referred the matters to the FSB's legal personnel involved with the appeals.

9.5 The rule amendments created a liability with effect from 1 January 1992 towards members upon retirement where those members' shares of fund are less than the target level of pension.

9.6 The Registrar requested the respondents to withdraw the rule amendments and abandon their approval and registration and allow the Appeal Board to adjudicate the appeals, failing which the Registrar would bring an application to have the decisions to approve and register the rule amendments in October 2011 reviewed and set aside.

9.7 The respondents were afforded the opportunity to consider these options at special board meetings and advise the Registrar of their decision as soon as possible.

9.8 In a letter to the Registrar dated 21 February 2012, Ms Hollaway responded as follows[11]:

> 28. The Trustees of the Funds have always thought to resolve the issues around the payment of target pensions, amicably with the FSB and in the best interest of members. To this end a number of meetings have been held with FSB representatives since 2008.
>
> 29. The Registrar's primary objection has always been that "the target pension liability is not defined in the rules" of the respective funds.
>
> 30. We have always believed that the members of the Funds have a reasonable benefit expectation of receiving a target pension and that the express inclusion of this liability in defined terms of the rules of the Funds was unnecessary.
>
> 31. However, given the Registrar's position that in order for the target pensions to constitute an accrued actuarial liability, it must be "provided for (and sufficiently described) in the registered rules of the Funds" and "certain".
>
> 32. The relevant rule amendments were drafted to take account of it and provide for the Registrar's view as expressed above.
>
> 33. It is the considered view of both funds that the rule amendments are in the best interests of the members providing as they do for the payment of target pensions as a liability, subject to affordability, consistent with the Funds practice and as consistently communicated to members since 1 January 1992.
>
> 34. Accordingly the Trustees do not believe that they would be complying with their fiduciary duties if they were to agree to submit further rule amendments to restore the rules to their pre-amended forms.
>
> 35. The Trustees are concerned that the longer the disputes continue the greater the prejudice to members, both in respect of the delay of the finalization of the Funds' surplus apportionment scheme, as well as the cessation of the payment of target pension since affordability cannot be established. The Trustees therefore appeal to you to address this issue as a matter of urgency.
>
> 36. It is hoped that the Registrar will now reconsider the Funds respective statutory valuation in light of the amended rules.

[11] Pages 112 to 113 of the indexed papers.

[10] The respondents submit that the amendments were introduced to encapsulate and formalize the respondents' historical practice of paying target pensions to retiring members which created a legitimate expectation for retiring members that they would receive such a target pension as a benefit of right.

[11] The first aspect to be considered is whether the respondents' rule amendments No 2 and 4, which introduced target pensions retrospectively, are inconsistent with the provisions of section 15B of the Act.

[12] Section 15B deals with the apportionment of existing surplus and requires the Board of every fund to register a fund for the proposed apportionment of any actuarial surplus ("the scheme"). The respondents submitted their schemes but the issue of the target pension liability for active members was referred to the Appeal Board to determine:

12.1 Whether or not the historical payment of target pensions to members on their retirement gave rise to a reasonable benefit expectation on the part of such member; and

12.2 Whether, as a result, that practice gave rise to an accrued liability in respect of which provision should be made in the respondent's revised valuation report as at 31 October 2004;

[13] The Registrar is of the view that the use by the respondents before May 2010 of actuarial surplus to fund the target pension was in conflict with the provisions of section 15B of the Act, which require that actuarial surplus in a pension fund be distributed as set out in the section.

[14] In terms of section 12(4) of the Act a rule amendment may be approved and registered if the Registrar is satisfied that the amendment is not inconsistent with the Act and that it is financially sound.

[15] The Registrar submits that the rule amendments retrospectively create liabilities in the respondents towards members in respect of target pension upon retirement. I agree with the Registrar that the rule amendments are silent on the aspect of funding for these liabilities, save to say the payment of target pension will be subject to affordability. This is not in accordance with section 15B of the Act.

[16] In terms of section 6(2)(d) and (i) of PAJA, the Registrar's functionaries made a material mistake of law in that the rule amendments were inconsistent with section 15B of the Act and their registration was therefore inconsistent with section 12(4) of the Act and unlawful.

[17] Both rule amendments provide that their objective was "to clarify the provisions relating to the provision of target pensions under the SCHEME". Prior to

the approval and registration of the rule amendments, the rules of the respondents did not contain any provision relating to target pensions. The rules of the respondents merely provided for the discretionary augmentation of pensions in terms of Rule 6.2

[18] The respondents acknowledge in the appeals that the rules did not create any entitlement to target pension, however, their view is that the historical application of the discretionary enhancement provision in the rules had given rise to a reasonable expectation amongst members of the respondents that upon retirement, in addition to the pension to which they were entitled under the rules, they would receive an enhancement up to the level of the target pension. This Court is of the view that the Appeal Board should adjudicate on this issue.

[19] It was incorrect and misleading for the respondents to state that the objective of the amendments was to clarify provisions in the rules of the respondents relating to target pension when the rules of the respondents did not contain such provisions. On this basis the functionaries of the Registrar who approved the amendments made a material mistake of fact. This is borne out by the respondents' position in the new appeals, namely that the "liability" was in terms of the reasonable benefit expectations of members upon retirement.

[20] The respondents failed to disclose relevant material information being that the subject matter of the new appeals pending before the Appeal Board was the very issue of target level pensions to the Registrar's functionaries when they submitted the rule amendments.

[21] The Registrar submits that by not mentioning the pending new appeals when the rule amendments were submitted for approval and registration, the respondents misled the Registrar, even though it was not deliberate or *mala fide*.

[22] The respondents submit that they cannot be blamed for processing inefficiencies in the Registrar's office. There was no duty on them to inform the Registrar's functionaries of the ongoing dispute. Whilst this Court accepts that the respondents were not under a duty to do so and that it is due to negligence on the part of the Registrar's office in not informing its functionaries of issues in dispute, this Court cannot ignore the fact that the functionaries who approved the rules were not aware of all the circumstances surrounding the dispute. The functionaries made a decision in the public interest and this Court is of the view that the fact that they were not aware of the appeals that their decision ought to be set aside, because if they were aware of the appeals they would not have approved the rule amendments.

[23] The Court was aware in **PEPCOR** of the dangers of recognizing a material mistake of fact as a ground of review.

> [49] Whether a review should succeed in a matter such as the present will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interests of the person in whose favour a decision has been made. Ultimately, a value judgment, balancing all the relevant factors, will be required.

[24] I am accordingly of the view that by failing to mention the pending appeals at the time of submitting the rule amendments for approval and registration and by stating that the rule amendments were aimed at clarifying provisions relating to the provision of target pension when the respondents' rules did not contain such provisions, the Registrar's functionaries did not take into account relevant considerations and the review should succeed in terms of sections 6(2)(e)(iii) and 6(2)(i) of PAJA.

[25] The Registrar requested the respondents to withdraw the amendments pending the outcome of the appeal, which they refused. Had the respondents agreed to the Registrar's proposal it would have obviated the need for the application.

[26] As a result of the ruling which I make, I am of the view that it is not necessary for this Court to deal with the definition of target level pension or the issues which are before the Appeal Board. The matter must be dealt with by the Appeal Board.

[27] The following order is made:

27.1 The first applicant's decision of 14 October 2011 to approve and register amendment No 4 to the rules of the first respondent in terms of section 12(4) of the Act, is hereby set aside.

27.2 The first applicant's decision of 12 October 2011, in terms of section 6(2) and 8(1) of PAJA, to approve and register Amendment No 2 to the rules of the second respondent in terms of section 12(4) of the Act, is hereby set aside.

27.3 The respondents are directed to pay the costs of this application, jointly and severally the one paying the other to be absolved.

COUNSEL FOR THE PLAINTIFFS: A M BREYTENBACH SC
ASSISTED BY J THEYSEN

(Instructed by:
Shepstone & Wylie
24 Richefond Circle
Ridgeside Office Park
UMHLANGA ROCKS.)

COUNSEL FOR THE DEFENDANTS: A E FRANKLIN SC
ASSISTED BY: M A CHOHAN

(Instructed by:

Evershed Attorneys
c/o John Hudson & Company
303 Florida road
Morningside
DURBAN.)

DATE OF ARGUMENT: 28 JANUARY 2013

JUDGMENT DELIVERED ON: 15 APRIL 2013