IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 10983/2001

In the matter between:

THE SAGE SCHACHAT PENSION FUND	First Applicant
THE SAGE GROUP LIMITED STAFF PENSION FUND	Second Applicant
THE SAGE LIMITED STAFF PENSION AND LIFE ASSURANCE SCHEME (now known as **The Sage Group Pension Fund**)	Third Applicant
SAGE LIFE LIMITED	Fourth Applicant

and

THE PENSION FUNDS ADJUDICATOR	First Respondent
NICHOL, ARCHIBALD BARRY	Second Respondent
SMALL, RONALD HENRY CECIL	Third Respondent
THE REGISTRAR OF PENSION FUNDS	Fourth Respondent
THE FINANCIAL SERVICES BOARD	Fifth Respondent

JUDGMENT: 17 OCTOBER 2003

VAN ZYL J:

INTRODUCTION

[1] This is an application for an order: (1) setting aside the first respondent's determination, dated 13 November 2001 and made in terms of the *Pension Funds Act* 24 of 1956 as amended; and (2) declaring that the applicants are not obliged to give effect to such determination. Costs

are sought only against those respondents opposing the application. In this regard the first, fourth and fifth respondents have indicated that they abide the decision of this court. It is hence only the second and third respondents who oppose such application.

[2] The first, second and third applicants are pension funds that have, historically, served the interests of persons employed by companies within the Sage group of companies, known in the commercial world as the "Sage Group". The fourth applicant, Sage Life Limited, is a public company described as "the employer of the employees of the Sage Group". Its joinder in these proceedings has clearly been justified by the obligations placed on it in terms of paragraphs 21.3, 21.5 and 21.6 of the first respondent's aforesaid determination (see par 21 below).

[3] The first respondent is the Pension Funds Adjudicator (hereinafter referred to as "the Adjudicator") appointed in terms of chapter VA of the *Pension Funds Act* 24 of 1956 ("the Act") to consider and adjudicate upon complaints raised in terms thereof. The second respondent, Mr A B Nichol, and the third respondent, Mr R H C Small (hereinafter referred to as "Nichol" and "Small" respectively) are both pensioners who were active, contributing members of the first applicant until their retirement. Although the applicants aver that they are now members of the third applicant, they still regard themselves as members of the first applicant. The fourth respondent is the Registrar of Pension Funds ("the Registrar"), appointed in terms of the Act and having wide-ranging powers and functions in accordance with its provisions. The fifth respondent is the Financial Services Board ("the FSB"), a statutory body established in terms of the *Financial Services Board Act* 97 of 1990. Section 3(a) thereof provides that its function is, primarily, "to supervise the exercise of control, in terms of any law, over the activities of financial institutions and over financial services". This includes the activities of pension funds in terms of the Act, section 3 of which in fact provides that the executive officer of the FSB and his deputy shall, in their respective capacities, also serve as the Registrar and his deputy.

[4] The present application has arisen from a determination made by the Adjudicator in a statement issued by him on 13 November 2001 in response to a complaint lodged by Nichol and Small. The application was launched by Mr Collin Tomsett ("Tomsett") on behalf of the applicants. He was described as the chairman of the third applicant's board and as a director of the fourth applicant. He was duly authorised to act on their behalf and averred that he was likewise authorised to act on behalf of the first and second applicants, whose trustees he had represented on various occasions. The applicants were, initially, all represented in this court by Mr D M Fine SC, assisted by Mr L N Harris. In view of a concession relating to the *locus standi* of the first and second applicants (para 55 below), however, they represented only the third and fourth applicants by the time the matter was argued before me. The second and third respondents (Nichol and Small) were represented throughout by Mr D A Neser SC, assisted by Mr J du Plessis.

BACKGROUND

[5] The Sage Group is engaged, for the most part, in the business of life assurance, property ownership and management, and the provision of various financial services. Its operational activities require complex administrative and human resource skills with a view to running its business and providing the aforesaid services. At the time the application was launched I was given to understand that it employed approximately, or in excess of, one thousand five hundred people in its various branches and divisions.

[6] Since 1997 all the operational activities of the Sage Group have been regrouped within a holding company known as Sage Group Limited, a public company listed on the Johannesburg Stock Exchange. Inasmuch as the group has effectively been operating as a single entity, it appeared logical to the management that there should be only one pension fund to serve the needs of all Sage employees. It was hence resolved, during August 1998, to amalgamate the first, second and third applicant pension funds. This was to be effected by transferring the assets and liabilities of the first and second applicants to the third applicant in accordance with the provisions of section 14 of the Act.

[7] The trustees of the first, second and third applicant pension funds duly approved the proposed amalgamation by resolutions taken during December 1998. At all relevant times, according to Tomsett, they believed that the amalgamation would be fair and reasonable and to the benefit of all the members concerned. In the *bona fide* belief that the required consent would be granted expeditiously, they gave effect to the resolutions prior to their approval and merged the three funds with effect from 1 December 1998. From that date they were known, collectively, as the "Sage Group Pension Fund", being the third applicant in the present matter.

[8] In the meantime, on 14 April and 27 May 1999 respectively, Nichol and Small lodged a complaint with the Adjudicator in terms of section 30A of the Act. The basis of their complaint was that, as members of the first applicant fund, which was small and financially strong, they

had not been consulted on its proposed merger with the larger and less wealthy second and third applicant pension funds. They opposed the merger on the ground that the first applicant had a substantial surplus of accumulated funds as at 1 December 1998. This, they averred, belonged to its pensioners and members and should be distributed among them. If this surplus should be merged as an asset with those of the second and third applicants, the pensioners and members of the first applicant fund would be seriously prejudiced.

[9] In response to the said complaint Tomsett, on behalf of the fourth applicant, averred that it had not been necessary to consult Nichol and Small or, for that matter, any other pensioners, in regard to the merger since there had been no change to their benefits or reasonable benefit expectations. The merger would not materially or substantially affect their future retirement provisions and was, indeed, in their interest. The same applied to a suspension of employer contributions ("contribution holiday") that took effect from 1 April 1996. As for the surplus, this belonged to the fund and not to the members. If the fund should be wound up and the excess assets distributed, pensioners, such as Nichol and Small, whose benefits had been secured and reasonable benefit expectations met, would have no share in such distribution.

[10] Nichol and Small were not satisfied with this response and requested the Adjudicator to determine the issue. While persisting in his averment that the merger had not prejudiced Nichol and Small, Tomsett did not oppose such investigation. He in fact suggested, in a letter dated 17 June 1999 to the Adjudicator, that the complaints of Nichol and Small should, for purposes of convenience and to prevent unnecessary delay, be considered together. There was nevertheless a

fairly substantial delay until October 1999, when the applicants for the first time submitted their application for the proposed merger of their respective pension funds to the FSB for approval by the Registrar.

[11] Then followed another inordinately long delay extending over a period of almost two years. A faint glimmer of light in the protracted chain of events became visible on 15 September 2001, when the Adjudicator, in terms of his wide procedural powers (section 30J of the Act) convened a meeting of the parties, including Nichol and Small, in an apparent attempt to settle the matter amicably. It would appear that there was a further meeting held in Johannesburg on 21 October 2001. The attempt to resolve the issues failed, however, whereupon the applicants appear to have requested the Adjudicator to delay his determination pending the Registrar's imminent approval of the merger.

[12] In a letter dated 22 October 2001, Tomsett subsequently advised Ms K MacKenzie of the Adjudicator's office that the applicants had agreed "to ring fence the surplus in each section of the fund". The distribution of such surplus would be subject to the approval of two thirds of the members, including pensioners, of each section. In addition, as appears from a letter dated 14 November 2001, Tomsett informed Ms MacKenzie that the FSB had indicated its willingness to approve amended rules providing for the protection of the interests of the members and pensioners aforesaid.

[13] On the same day, 14 November 2001, Tomsett directed an e-mail message to the Adjudicator, suggesting that any ruling by his office prior to the FSB having had an opportunity

to approve the amended rules, would be "potentially prejudicial". He therefore requested a short delay in order to give Mr Jeremy Andrew ("Andrew"), the chief actuary in the office of the FSB, sufficient time to deal with the amendment. In this regard he requested Andrew, in a letter dated 16 November 2001, to attempt to persuade the Adjudicator to hold back his determination pending the approval of the amendment by the FSB.

[14] The Adjudicator appears not to have been prevailed upon and proceeded to make his determination on 13 November 2001. Such determination was communicated to the applicants on 16 November 2001 and a copy thereof was sent to the FSB on 18 November 2001.

[15] In a letter dated 29 November 2001 to the Adjudicator, Andrew suggested a way to avoid "unscrambling the omelette" and restoring the respective funds to their pre-merger status as on 1 December 1998. This could be done, he assured the Adjudicator, "without sacrificing the reasonable expectation of members". In order to achieve this, he said, the FSB had decided to approve the rules of the merged funds and the applications to amalgamate their assets and liabilities. Such approval was, however, subject to certain specified conditions aimed at protecting the rights of members of the original funds with regard to the distribution of any surplus after the merger. These conditions, Tomsett averred, had in fact already been approved by the third applicant in a resolution dated 25 October 2001, and had been duly registered by the Registrar.

[16] On 18 December 2001, more than a month after the Adjudicator's determination, the

Registrar advised Tomsett that the revised rules of the third applicant, as amended, and its change of name to "Sage Group Pension Fund", had been approved. On the same day the applicants were informed that the requirements in terms of section 14(1)(a) to (d) of the Act had been complied with regarding the transfer of business from the first and second applicants to the third applicant. The relevant certificates, in terms of section 14(1)(e) of the Act, were attached. These certificates made it clear that the aforesaid approval and the transfer of business would be retrospective to 1 December 1998, when the *de facto* merger came into operation.

THE ADJUDICATOR'S DETERMINATION

[17] In considering the issues before him, the Adjudicator accepted, as common cause, that the first applicant pension fund was "in a far more favourable surplus position" than the other two funds. It was also a smaller fund with fewer members and liabilities. Unless there were "specific rules ring-fencing the present surplus position in the respective funds", the first applicant would "effectively be cross-subsidising the other two funds as a result of the pooling of resources". In view of the circumstances, however, it was not necessary for him to determine whether a scheme of this nature could be sanctioned in terms of section 14 of the Act.

[18] In this regard the Adjudicator held that, since the Registrar had not yet, at the time of his determination, approved the merger of the funds, they effectively remained separate entities. He expressed concern, however, at the fact that the funds had ostensibly been merged since 1 December 1998, without such approval having been obtained. Although this had probably been done in good faith and with the best of intentions, the Adjudicator opined that "the situation

underscores the alarming trend in the pension industry of legal self-help when the regulatory topography becomes too cumbersome".

[19] On the facts of the present case the Adjudicator was of the view that the Registrar had refused to certify the scheme because of his concerns relating to the effect of the scheme on "the reasonable benefit expectations" of the first applicant's members. The complainants (Nichol and Small) were hence, in principle, "entitled to relief in the form of a declarator that the Schachat fund [first applicant] is still an independent legal entity". They were also "entitled to a *mandamus* aimed at restoring the position insofar as the funds may have been administered as an amalgamated entity contrary to the rules of any of the funds, and to a forensic audit reflecting the position of the Schachat fund over the last three years, demonstrating any adjustments that may be required to be made pursuant to the unscrambling of the 'amalgamation'".

[20] With reference to the first applicant's rules, the Adjudicator was furthermore of the view that its management board was not lawfully constituted in terms of section 7A of the Act providing for the right of the members to elect at least 50% of its members. It was "trite law that the provisions of the Act override the rules of a fund in the event of any conflict". Section 7A in fact "empowers a board of management to act in accordance with the provisions detailed in the section, even if their rules do not permit them to do so". The present board should hence be directed "to take all necessary steps to regularize this situation". Although it was desirable that the rules be amended to bring them "into conformity with the Act", it was not "strictly necessary for the appointment of a properly constituted board as the Act takes precedence in any event".

[21] The Adjudicator thereupon issued an order in the following terms:

21.1 It is hereby declared that the first respondent [first applicant in the present matter] still exists as an independent pension fund organization as defined in the Act.

21.2 The board of management of the first respondent is hereby directed to take all necessary steps to convene an election on a date not later than three calendar months after the date of this determination for the purpose of forming a board of management that complies with the provisions of the Pension Funds Act 24 of 1956.

21.3 The fourth respondent [fourth applicant in the present matter] is directed to appoint an actuary to investigate and report on the financial position of the first respondent subsequent to the compilation of the financial statements of the first respondent pertaining to the period ending September 1998.

21.4 The appointment referred to above is to be made in consultation with the newly elected board of management of the first respondent and, if consensus cannot be reached, the dispute must be referred to this forum for decision.

21.5 The fourth respondent is hereby directed to make good any shortfall revealed by the abovementioned report in respect of the financial position of the first respondent that can be attributed to the unlawful merger of the first respondent with the second and third respondents [second and third applicants in the present matter].

21.6 The fourth respondent is to bear the costs of the investigation and report as well as any costs incidental to restoring the financial position of the first respondent.

The order was signed in Cape Town on 13 November 2001 by Mr John Murphy as "Pension Funds Adjudicator".

THE APPLICANTS' RESPONSE TO THE ADJUDICATOR'S DETERMINATION

[22] According to Tomsett the applicants were aggrieved by the Adjudicator's determination in that the rationale for such determination had fallen away by virtue of the Registrar's approval of the merger of the three pension funds on 18 December 2001 (see par 16 above). Inasmuch as the approval was effective from 1 December 1998, the determination was no longer binding.

[23] The applicants accepted that, at the time of the Adjudicator's determination, the three funds had continued to exist independently of one another. The factual position, however, was that the business of the first and second applicant funds had been transferred to the third applicant fund as from 1 December 1998. This meant, according to Tomsett, that the members of the first and second applicant funds had been "lawfully transferred" to, and were now members of, the third applicant fund as from the said date.

[24] In view of this situation it would be very difficult, if not impossible, to give effect to the provisions of paragraph 21.2 of the determination. The first applicant no longer had any members, since they had all been transferred to the third applicant. Furthermore an elected board of management would have no other function than to cancel the registration of the first applicant in terms of section 27(1)(a) of the Act. In any event it was no longer necessary to comply with the said provisions of the determination since the Registrar had given the requisite approval in terms of section 14 of the Act.

[25] As for paragraph 21.3 of the Adjudicator's determination, the appointment of an actuary to investigate and report on the first applicant's financial position subsequent to September 1998 would not achieve any purpose and would involve unnecessary expense. Such a report would cover only the two-month period from 1 October to 1 December 1998. In addition the erstwhile members of the first applicant would be adequately protected by the conditions imposed by the FSB in regard to the merger.

[26] For these reasons, Tomsett added, the provisions of paragraph 21.4, regarding the mode

of appointment of the actuary aforesaid, were incapable of implementation and would serve no useful purpose.

[27] Paragraph 21.5 of the determination, requiring the fourth applicant to make good any shortfall revealed by the said actuarial report, had never, according to Tomsett, been sought or even raised by Nichol or Small in their respective complaints. No such shortfall was suggested in the papers and, in any event, even if it should be demonstrated that a shortfall had occurred, the aforesaid conditions imposed by the FSB, as contained in the amended rules of the third applicant, would reveal it.

[28] Any costs eventuating from an actuarial investigation and report, or emanating from the fourth applicant's making good any shortfall incidental thereto, would, in Tomsett's view, be quite unnecessary and would indeed constitute an unjustified burden on the fourth applicant. The applicants were thus justifiably aggrieved by the costs order contained in paragraph 21.6 of the determination.

[29] With reference to the Adjudicator's concern that the merger of the first applicant fund with the other two funds would have the effect of "cross-subsidising" the latter two funds, Tomsett emphasised that this concern had been fully addressed in the aforesaid conditions imposed by the FSB. The Registrar had clearly been satisfied with such conditions in that he had approved them in terms of section 14 of the Act. If this court should give effect to the Adjudicator's determination, it would in fact be "undoing" the Registrar's approval. This would

yield no benefit to any erstwhile member of the first applicant who had now been transferred to the third applicant.

REPORT OF REGISTRAR AND FSB

[30] In a report dated 1 February 2002, Mr D P Tshidi ("Tshidi"), in his dual capacity as Deputy Registrar of Pension Funds and Deputy Executor Officer of the FSB, confirmed that the Registrar and FSB abided the decision of this Court. They did, however, wish "to convey the salient facts and information in their possession for consideration in these proceedings". In this regard they agreed in substance with the facts set forth in Tomsett's founding affidavit. They added, however, that there would be advantages to merging the funds, as appears from paragraph 7 of the report:

> 7.1 there are benefits in terms of the management of risk in aggregating funds together as a pool of lives is larger and there will be less fluctuation in the mortality experience of the fund and therefore in the risk premiums charged; indeed the risk premium for the merged fund could be lower than the sum of the premiums for the three funds separately;
>
> 7.2 there would be economies of scale in terms of expenses as there would only be one audit and actuarial valuation, and not three of each, and the one large fund would cost less to administer than three funds separately, two of which were small; and
>
> 7.3 there would be reduced opportunity costs to the participating employer and employees (members of the Fund) as there would only be one board of management meeting each quarter and not three.

[31] The one negative aspect perceived in the merger of the funds was "an adverse impact on the members' reasonable expectation to participate in any future distribution of the actuarial surplus, because the levels of actuarial surplus relative to the value of the accrued liabilities were materially different in the three funds". This problem was remedied, Tshidi stated, by an

amendment to the third applicant's revised rules, which made provision for the separate identification of the actuarial surplus of each of the three funds at the date of transfer. The respective surpluses would then be held in three separate accounts subject to certain further conditions.

[32] The first applicant's management board had supported the merger on the basis that it was in the best interests of its members. After taking legal advice and holding discussions with various officials of the FSB, the boards of all three funds believed that the merger would be approved.

[33] The Registrar was, according to Tshidi, satisfied with the third applicant's revised rules and the amendment thereto, as not being inconsistent with the Act or financially unsound. He was also satisfied that the rights and reasonable expectations of members would not be prejudiced by the transfer of assets and liabilities from the first and second applicants to the third applicant. The existing benefits of members were guaranteed and they were effectively given the right to participate in transferred or accumulated surplus emanating from their respective funds. The Registrar therefore approved the revised rules and the applications to merge the three applicant pension funds in terms of section 14 of the Act.

[34] For the rest the Registrar had considered the complaints of Nichol and Small and was satisfied that, in terms of the third applicant's revised rules as amended, they were guaranteed the same benefits as they had enjoyed under their previous fund. This included a right to participate in the surplus from their previous fund similar to that which they would have enjoyed had the

funds remained separate.

[35] Finally, Tshidi stated, the Registrar had the power to approve the merger of the funds and the section 14 applications retrospectively to late 1998. Once this power had been exercised the applicant funds could not comply with the Adjudicator's determination. The first and second applicants no longer existed and the third applicant had a properly constituted management board. The Registrar and FSB hence considered the application to set aside the Adjudicator's determination as being well founded.

NICHOL'S ANSWERING AFFIDAVIT

[36] At the outset Nichol questioned Tomsett's *locus standi* to act on behalf of the first applicant in terms of a resolution of its management board dated 21 January 2002, more than three years after the board's term of office had expired without a new board being elected. He also averred that the application was out of time in terms of the provisions of section 30P of the Act and that this court does not have jurisdiction to hear the matter in terms of section 30M of the Act. In addition he raised the point that all members of the first applicant pension fund should have been cited as respondents in that they all had, and still have, a substantial interest in the outcome of the application. In any event the determination of the Adjudicator had the force of an order of court in terms of section 30O of the Act, in which event the matter was *res iudicata*.

[37] Nichol then sketched the background to his involvement in the present matter, pointing

out that he had commenced employment with the Schachat Management Group on 1 July 1972 as a property advisor and manager of township development. He retired on 30 September 1994 and has since then been a pensioner-member of the first applicant. He elected to take part of his retirement benefit in the form of a cash lump sum and the balance by way of monthly pension payments.

[38] As soon as he became aware of the possibility of a merger of the three applicant pension funds during 1996, he made it known that he and other pensioners should be given the opportunity to comment on any such proposal. His main bone of contention was that the first applicant fund was in a stronger financial position than the other two funds and it would serve no purpose if it should be amalgamated with them. Then follows what appears to have been a frustrating flow of communication over a period of more than two years in the course of which Nichol sought information and assurances that no merger would take place without pensioners being afforded an opportunity to state their case. The response from the relevant officials was, generally speaking, uncooperative and misleading in that assurances were, ostensibly, given but not adhered to. By the time the truth was conveyed to Nichol, the merger on 1 December 1998, and the dissolution of the first applicant's management board, was a *fait accompli*. All that remained was for him to lodge a complaint with the Adjudicator.

[39] Nichol's answer to Tomsett's founding affidavit may be dealt with briefly. He persisted throughout in his view that the first applicant fund was still in existence and that he had remained a member thereof. He denied ever having become a member of the third applicant fund. The

purported merger of the three funds, and the simultaneous dissolution of their respective management boards, was an irregularity in that it had never been approved in terms of the Act. The subsequent attempt by the Registrar, after the Adjudicator had already made his determination, to grant approval of the merger subject to certain conditions and with retrospective effect was, in Nichol's view, equally irregular and essentially in conflict with an order of court. This had prompted him to lodge a review application in the Transvaal Provincial Division on 3 October 2002 under case number 3804/2002 ("the Transvaal application"). Therein he sought to have the decision or decisions referred to in Andrew's letter dated 29 November 2001, and the certification in terms of section 14(1)(e) of the Act reviewed and set aside.

[40] Of some interest in this regard is that the applicants appear to have been advised from time to time that there should be consultation with the pensioners and other interested parties before finalising the merger. This must be seen against the background of the minutes of a meeting of the second applicant's management board held on 9 December 1998, in which the following appears under the heading "Report dated 12 November 1998":

> Mr Tomsett advised that the Company had decided to merge the three funds on the existing basis as specified in the Rules of the individual funds. This decision has resulted from the drop in the markets and the decline in the underlying assets. The following points were discussed:
>
> a) Merging of the surpluses: After discussion it was agreed that, in the context of the current merger proposals, the surplus was not relevant (being at the disposal of the employer), but in practice it had been relevant to the Sage managers as any increase in Company contributions would be absorbed by the managers' salaries.
> b) The trustees must act in good faith to protect the interests of the members of their fund.
> c) It appeared that Sage Life employees would benefit from the merger of the surpluses, while Sage Group and Sage Schachat employees would be prejudiced. However, in the context of the current proposals, this was not a pension fund matter.

[41] It would appear that the matter did not stop here and that there was indeed subsequent debate on the need to consult with pensioners and members of the funds. This emerges from a memorandum, dated 28 June 2001, written by Andrew (par 13 above) and addressed to Tomsett. It indicates that, as at 31 March 1998, there was a surplus of R114 million resulting from the merger of the three pension funds. This was to be divided as follows: (a) R38 million or one third would be placed in an employer reserve account to be used to support a "contribution holiday" in favour of the employer; (b) R38 million would be used to improve benefits for members, including pensioners; and (c) the balance of R38 million would be used to provide increased pensions. No benefits or increased pensions would be received, however, if members did not agree to convert to "defined contribution" and pensioners did not agree to be "outsourced" through the purchase of an annuity policy. Should they not be prepared to do so, Andrew surmised, "it would then be the employer who gets the benefit of this allocation because it is the employer's costs that get subsidised". He then stated:

> I can see no sign that members or pensioners have been consulted. The minutes of the meetings of the trustees of the respective trusts to which this proposal was put are so brief that I have difficulty in concluding that there was meaningful discussion. There is a sound opinion by Adv. Kuper, which is then followed up by a letter which says that he is satisfied by the scheme. I do not know what happened in the meantime to make him change his mind concerning the need for independent advice and consultation.

…

I am not satisfied that the communication material revealed the apportionment of surplus in an open and comprehensive manner.

I am left feeling very uncomfortable with the action taken by the trustees to merge the funds without the approval of the Registrar, and with a less than open and comprehensive communication to members and trustees.

[42] While appreciating the difficulties involved in "unravelling" the merged funds, Andrew suggested that there were only two alternatives that would enable them "to regularise the current ultra vires situation". The first alternative was to apportion the surplus as though the funds had not been merged, and the second was to put the proposal for a revised scheme to the vote after an open and comprehensive communication exercise.

[43] In a subsequent internal memorandum dated 29 June 2001, Andrew pointed out that the merger of the three funds had been put into effect without the approval of the FSB or Registrar and that Nichol and Small had duly lodged their complaints with the Adjudicator. He had not been surprised at their complaint that the allocation of the surplus, was inequitable. The first applicant fund was the "best funded" of the three and they (Nichol and Small) had the "most to gain" by requiring that the surplus be allocated "on a fund by fund basis". In this regard Andrew referred to a handwritten note in the file reflecting a request by the Adjudicator that the merger not be approved before the completion of his determination. For this reason the FSB and Registrar had held back their approval. Tomsett, however, subsequently requested Andrew to consider approval of the merger retrospectively, "thereby sanctioning what they had already done". Nichol and Small objected strongly thereto. This led Andrew to state the following:

> I find myself now in a quandary.
> I have reviewed the material provided by Colin Tomsett and, far from being satisfied that the interests of members have been preserved and that there was adequate disclosure/ consultation / etc, I feel that the interests off the members of the smaller funds are adversely impacted and the trustees and the members, if they have been consulted at all, have been given a very selective employer-orientated view of the situation. They did not

really receive independent advice.

I therefore wish to reject the merger of the funds as proposed by Colin Tomsett unless either Sage can satisfy us that a substantial majority of the active members and the pensioners of each fund separately have approved the merger on the terms proposed or they merge the funds but separate the surplus brought into the merged fund in such a way that only the stakeholders of each of the old funds will determine what happens to that portion of the surplus.

[44] Despite these misgivings, it was Andrew who, in his aforesaid letter of 29 November 2001 (par 15 above), apprised the Adjudicator of the decision of the Registrar and the FSB to approve the merger subject to certain conditions relating to the "ring fencing" of the surpluses and related matters. Nichol saw this as *mala fide* and *ultra vires* conduct, and as a wrongful attempt to override the Adjudicator's decision, well knowing of its effect as a high court order.

[45] Nichol was particularly critical of Tomsett's conduct both before and after the issuing of the Adjudicator's determination. The steps taken by him to delay the determination (par 13 above) constituted, in Nichol's view, an offence in terms of section 30V of the Act in that it anticipated the determination of the Adjudicator in a manner calculated to influence his determination. Tomsett's conduct was also calculated to circumvent his complaint.

[46] The attempt to remedy or ameliorate the situation by "ring fencing" the respective surpluses and making their distribution subject to the approval of two thirds of the members (including pensioners) of each fund (par 12 above) was not, according to Nichol, acceptable. No

provision was made for an actuarial audit to consider, *inter alia*, the financial consequences of the *de facto* merger that had been operating since 1 December 1998. The merger had clearly affected the "reasonable benefit expectations" of the first applicant fund members, who were entitled to be represented by a management board consisting of trustees duly elected by them. Merging the members of the second and third applicant pension funds with those of the first applicant pension fund with a view to electing a "merged" board of trustees was, Nichol averred, in conflict with the relevant provisions of the Act.

[47] Nichol's response to Tshidi's report on behalf of the Registrar and the FSB was that it smacked of superficiality and consisted mainly of hearsay conveyed to Tshidi by Andrew. The purported approval of the merger after the Adjudicator's determination had been made was *ultra vires* and amounted to contempt of a court order.

SMALL'S ANSWERING AFFIDAVIT

[48] In his affidavit opposing the relief sought by the applicants, Small associated himself generally with the response appearing from Nichol's answering affidavit. He added that he had been in the employ of Schachat Bros (Pty) Ltd since April 1962 as a quantity surveyor. He had retired on disability pension on 1 January 1992 and on full pension with cash commutation on 12 November 1994. Throughout his employment with the Schachat Group he had been a contributing member of the first applicant pension fund.

[49] On retirement Small established that there was a healthy surplus of accumulated funds in

the said pension fund. When he became aware of the rumours that the first applicant fund was to merge with those of the second and third applicants, his reaction was that it would prove disastrous to pensioners like himself if the said surplus should be part of the merger. He thereupon directed a letter dated 22 February 1999 to the Sage Life Employee Benefits Division expressing his chagrin at what had been happening behind his back. He rejected the merger as clandestine and lacking in transparency in that it had been effected without giving him "an opportunity to assess or comment on the advantages or otherwise of such a move".

[50] In response Small received, on 23 March 1999, a letter dated 18 December 1998 addressed to "[a]ll pensioners of the Sage Group Pension Fund, Sage Schachat Pension Fund and Sage Life Pension Scheme". In this letter pensioners were informed that the boards of trustees of the three pension funds had approved the merger of such funds with effect from 1 December 1998. The benefits of pensioners would, however, remain unchanged.

[51] In further correspondence Small made it quite clear that he regarded the merger as illegal and that he would certainly place his grievances before the Adjudicator, as he subsequently did. After experiencing much frustration and deflection of the issues, Small was comforted somewhat by an e-mail letter from Tshidi dated 13 July 2001. It read:

> As stated in my previous letter to you, the Chief Actuary did revisit the matter, particularly because the fund administrator, which happens to be Sage, approached the Registrar to approve the merger of the three Sage Funds. We have declined to approve the merger because we do not believe that members have been treated fairly with regard to the pooling of surplus assets existing in the three funds.

A letter has been written to the administrator instructing him to either put the members of the old funds back into the position with regard to surplus apportionment that they would have been had the funds not merged or put the employer proposal for a revised scheme to the vote, after an open and comprehensive communication exercise.

[52] It is common cause that the instruction contained in this letter was not executed. On the contrary, as mentioned before (par 16 above), the Registrar and the FSB appear to have been prevailed upon to approve the merger subject to certain conditions, in the face of the unequivocal determination made by the Adjudicator.

THIRD AND FOURTH APPLICANTS' REPLYING AFFIDAVIT

Condonation

[53] Shortly before this matter was due to be heard, the third and fourth applicants presented their replying affidavit for filing out of time, and hence irregularly. They sought that the irregularity be condoned. Nichol strenuously opposed the application for condonation on various grounds. One of them was that the board of directors of the fourth applicant had changed "dramatically" since the launch of the present application and there was "serious doubt" whether the present board would wish to continue with the application. Another ground raised was that the applicants did not have reasonable prospects of success on the merits of this matter. During argument Mr Neser, for Nichol and Small, expanded on these grounds with copious reference to relevant authorities. It is not necessary to review these authorities, most of which are well known and regularly applied in our courts in considering applications for condonation.

[54] After consideration of this argument, and taking into account all the relevant facts and circumstances, I was, and still am, of the view that it would be in the interests of justice to allow the late filing of the reply. I was not persuaded that Nichol and Small would be prejudiced thereby in that it should not delay the finalisation of this matter in any material way. There was, in my view, no indication of bad faith or other reprehensible conduct on the side of the applicants or their legal representatives. Condonation was hence granted.

Locus Standi

[55] The reason why the first and second applicants have not been associated with the replying affidavit is that they have conceded that they do not have *locus standi* in the present matter. Tomsett hence deposed to such affidavit only on behalf of the third and fourth applicants. The management board of the third applicant has been duly appointed in terms of section 7A of the Act, thereby bestowing on it the necessary *locus standi*, while that of the fourth applicant has never been questioned. For purposes of clarity, when I henceforth speak of "the applicants" I refer only to the third and fourth applicants.

Application to Postpone

[56] In the replying affidavit on behalf of the applicants Tomsett persisted in his view that compliance with the Adjudicator's determination would serve no purpose and would merely result in unnecessary costs being incurred. In any event, the present application should, he submitted, be postponed pending the finalisation of the Transvaal application (par 39 above). This was justified, he suggested, by the fact that the main issue in the Transvaal matter is in fact the same issue as falls to be determined in the present matter. Mr Fine, for the applicants, pressed

this argument further, with reference to *Williams v Shub* 1976 (4) SA 567 (C), on the basis that the Transvaal court is in a much better position than this court to determine such issue, having all the relevant material before it. Needless to say Mr Neser, for Nichol and Small, opposed the application.

[57] After considering the various arguments, I was not prepared to grant a postponement as requested and was not persuaded that the present matter should be held in abeyance pending the finalisation of the Transvaal proceedings. In this regard Mr Fine appeared to have lost from sight the fact that the complete file in the Transvaal matter, including "all relevant material", as he described it, had been placed before this court for its consideration. In any event the case of *Williams v Shub* (*supra*) is clearly distinguishable from the present in that the *lis pendens* in that matter related to two actions, claiming substantially the same relief, both commenced in this division. The first action had never been set down for hearing and the court quite correctly stayed the second action pending finalisation of the first.

Assumption that Approval and Certificate Valid and Enforceable

[58] Tomsett submitted further that, should this court not be disposed to grant a postponement, the matter should proceed "on the basis that the approval given by the FSB and the certificate issued by the Registrar are valid and were correctly given and are effectual in their terms". If this means that it should be accepted or assumed, for purposes of the present application, that the approval and certificate are valid and enforceable, I find it a startling proposition. It is common cause that the major issue between the parties in the Transvaal application is whether or not the *ex post facto* approval of the merger is valid and enforceable. This issue is inextricably linked

with the major issue in the present case, namely whether or not such *ex post facto* approval justifies setting aside the Adjudicator's determination (see par 72 and 73 below). It cannot, in my view, be avoided in considering the relief sought by the applicants.

[59] If, on the other hand, Tomsett means by this proposition that the decision to approve the merger should be presumed to be valid and enforceable until the contrary is proved, he is simply stating trite law. The decision in *Secretary of State for Trade and Industry v F Hoffmann-La Roche & Co AG and Others* [1973] 3 All ER 945 (CA), to which Mr Fine referred me in this regard, says no more than this. In that case, which was confirmed on appeal in *F Hoffmann-La Roche & Co AG and Others v Secretary of State for Trade and Industry* [1975] AC 295, Lord Denning MR held (at 955*c*-*g*) that a statutory order approved by Parliament appeared, on its face, *intra vires* and valid. As such it remained enforceable until such time as it was held to be invalid.

Compliance with Adjudicator's Determination

[60] With reference to the Adjudicator's determination, Tomsett suggested further that the first applicant had in fact complied therewith by transferring assets and liabilities from the first to the third applicant in accordance with the third applicant's amended rules. His computation of the surplus attributable to the first applicant fund was, however, questioned by Nichol in an affidavit opposing the application to file the replying affidavit out of time. Tomsett responded to this in a supplementary affidavit in which he indicated that he had relied on a report compiled by Mr Corné Heymans and reviewed by Ms Marli Venter. It is not necessary to deal with the various allegations, propositions and counter-propositions made in this regard since it is abundantly clear

that there has not yet been compliance with the determination.

Preliminary Points: Out of Time; Jurisdiction; Non-Joinder

[61] Tomsett thereupon dealt with the various preliminary points raised by Nichol (par 36 above). On the view I take of the facts and circumstances in the present matter, and bearing in mind the concession relating to the first and second applicants' lack of *locus standi* (par 55 above), I shall dispose of three of the preliminary points briefly.

[62] Nichol and Small have clearly not suffered any substantial prejudice because of the applicants' being out of time and failing to comply with the provisions of section 30P of the Act, however irritating and even frustrating it might have been to them. The jurisdiction and non-joinder points bear little weight. I have no difficulty with the application having been lodged in the forum where the Adjudicator's office is situated and where he issued his determination. I likewise do not believe it necessary for the applicants to have joined as respondents a vast array of interested parties who have not objected to the proposed merger.

Preliminary Point: Res Judicata

[63] The *res judicata* point raised *in limine* is interesting but, in my view, not persuasive. It is quite correct that the determination of an Adjudicator is, in terms of section 30O(1) of the Act, "deemed to be a civil judgment of any court of law had the matter in question been heard by such court". This means that it is as enforceable as any civil judgment or order of a competent court would be. In the event that a new, or further, complaint be lodged with the Adjudicator on the

same, or substantially the same, grounds as a complaint already determined, the defence of *res judicata* could doubtless be raised by any interested party against the complainant. The basis of the defence would be that the complaint has already been adjudicated and determined.

[64] When the Registrar is approached for his approval of a merger in terms of section 14(1) of the Act, he is required, on the basis of information placed before him, to consider an application for the merger or amalgamation of two or more businesses. He is not required to adjudicate upon it or make a determination in respect thereof, as if it were a complaint in terms of section 30 of the Act. Whether or not he should have considered the application after becoming aware of the Adjudicator's determination, however, is another matter, to which I shall return later on in this judgment.

Reply on Merits of the Application

[65] Tomsett conceded that the first applicant still existed as a legal entity and that the Adjudicator's determination remained in force until rescinded or set aside by a court in accordance with section 30P of the Act. He persisted, however, in his averment that compliance with the determination would be "meaningless" in that all members of the first applicant had been "lawfully transferred" to the third applicant, making it difficult, if not impossible, to give effect to the provisions of paragraph 21.2 of the determination.

[66] With regard to Nichol's objection to not having been consulted or given an opportunity to comment on the proposed merger, Tomsett pointed out that the Adjudicator had made no

reference, in his determination, to such alleged lack of consultation as a basis for granting relief to Nichol and Small. It was hence not material to the issues in the present application.

[67] As for the resolutions to merge the three funds, Tomsett emphasised the Adjudicator's finding that Sage had not acted in bad faith in creating and prematurely implementing the scheme. He repeated his averment that the applicants had acted in all good faith when implementing such resolutions, in the expectation that the Registrar and FSB would give their approval expeditiously. The ensuing delays could not be attributed to the applicants.

[68] Tomsett denied that he at any stage attempted to interfere with the Adjudicator's determination proceedings by suggesting that it should be settled or held back. He had simply communicated to the Adjudicator that the FSB had advised its intention of approving the merger with retrospective operation to 1 December 1998. He had believed that it was important for the Adjudicator to know this before making his determination.

[69] Tomsett likewise denied that the applicants were in contempt of the Adjudicator's determination. The very purpose of the present application was to avoid being in contempt. The fact that the third applicant might not have complied with the provisions of section 7D of the Act by 15 December 1998 did not render the subsequent election of the Board invalid.

[70] In regard to the election of a new board for the first applicant, Tomsett averred that, pending the Transvaal application to set aside the approval of the merger by the Registrar and the

FSB, such approval remained in force. In the event the first applicant did not have any members since they had been transferred to the third applicant in terms of the said approval. It would hence not be possible to convene an election to appoint a board for the first applicant "notwithstanding that in terms of the law and strictly speaking, it still remains a separate entity". Any attempt to convene an election would be "an exercise in futility".

[71] Tomsett denied being of the view that the Registrar's *ex post facto* approval of the merger could nullify the Adjudicator's determination. On the contrary, he accepted that it remained in force until a court ruled otherwise in terms of section 30P of the Act. The court would be free to rehear the matter on all the available evidence, and to make any order it should deem appropriate, "particularly when changed circumstances affect the substratum of the Adjudicator's determination".

THE ISSUES

[72] The major issue in the present matter is whether or not the approval of the merger by the Registrar and FSB, after the Adjudicator had made his determination, justifies setting aside the determination. Ancillary to this issue is whether or not the Adjudicator should have taken cognisance of the fact that an application in terms of section 14 of the Act was pending and that its approval was (allegedly) imminent. In this regard the gist of the applicants' case was that the determination had been “overtaken by events”, namely the said approval of the merger, making it highly impractical, if not virtually impossible, for the applicants to comply with the Adjudicator's order.

[73] A separate issue, in the context of the present application, is whether the decision of the Registrar and FSB to approve the merger and amended rules was *mala fide* and *ultra vires*, as submitted by Nichol and Small. This is indeed the main issue in the pending Transvaal application that seeks, on review, to set aside the approval. Inasmuch as there is no counter-application, however, for such relief in the present matter, it is clearly not necessary for this court to make any finding in this regard. On the other hand the conduct of the Registrar and FSB, through its duly appointed officers, has been dealt with in some detail in the applicants' papers and has also been thoroughly canvassed in the opposing affidavits of Nichol and Small. This court will of necessity have to make reference thereto in considering the relief sought by the applicants.

THE STATUTORY CONTEXT

[74] At the outset it must be accepted that Nichol and Small both qualify as complainants in accordance with the definition in section 1 of the Act in that they are members, or former members, of the first applicant pension fund and are indeed beneficiaries of such fund. The particular complaints raised by them likewise accord with the relevant definition in that they relate to the administration of the fund. More specifically they relate to the decision to merge the fund with the third applicant fund as from 1 December 1998 without fully consulting with its members or affording them the opportunity to comment on such merger. This, they aver, has caused them potential prejudice in regard to the distribution and apportionment of the surplus of the fund existing at the time of the merger.

[75] It is common cause that the complaints were properly lodged in terms of section 30A during April and May 1999 respectively and referred to the Adjudicator in terms of section 30C of the Act (par 8 above). The Adjudicator duly accepted his appointment to dispose of the complaints "in a procedurally fair, economical and expeditious manner", as required by section 30D of the Act. It is not in issue that the Adjudicator disposed of the complaints within the limits of his jurisdiction, after affording the parties to the complaints the opportunity to comment thereon in terms of section 30E-H of the Act. Somewhat disturbing is the length of time it took for the Adjudicator to convene the meetings of 15 September and 14 October 2001 (par 11 above) and to issue his determination in terms of section 30M of the Act on 13 November 2001 (par 14 above). Once issued, however, his determination was deemed, in terms of section 30O(1) of the Act, to be a "civil judgment of any court of law had the matter in question been heard by such court".

[76] It is not in dispute that, at the time of the *de facto* merger of the three applicant funds on 1 December 1998 (par 7 above), the Registrar had not yet given his approval in terms of section 14 of the Act. It is likewise not disputed that, at the time the Adjudicator issued his determination on 13 November 2001, this approval had still not been given, despite the fact that the applicants had submitted their application for the proposed merger during October 1999 (par 10 above).

[77] This delay in submitting the application almost a year after the *de facto* merger of the funds is a cause for concern and appears to have been exacerbated by the Registrar's apparent

recalcitrance in approving it more than two years later. The underlying reason for these delays was clearly the difficulty of the various parties in addressing the complaints raised by Nichol and Small. The question inevitably arises why Tomsett and the third applicant's management board did not simply accede to their request to convene a meeting of all members and pensioners of the first applicant in order to give them an opportunity to voice their qualms and misgivings about the merger. This would have been consistent with the principle that trustees should always act in good faith to protect the interests of their fund members, as Tomsett fully realised (par 40 above) and as required by law (par 80 below). It would also have accorded with the stance initially adopted by Andrew in his consideration of the *impasse* (par 41-43 above).

[78] The persistent attempts by Tomsett and others to persuade Nichol and Small that their benefits would be secured and reasonable expectations met by the amendment of the third applicant's rules were consistently rejected. There attitude was that no manner of "ring fencing" of any surplus by means of amended rules would be able to account for the growth the first applicant's surplus could have experienced had the *de facto* merger not taken place on 1 December 1998. Full and transparent consultation with the said members and pensioners, during which these matters could have been exhaustively debated, would have been a far less expensive and time-consuming exercise than resorting to litigation has proved to be.

[79] A fundamental consideration in this regard is that the Act is, to a large extent, directed at protecting the interests of pension fund members and pensioners. Smalberger ADCJ underlined this object in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 171F-H (par 13):

> The scheme of the Act is to permit privately administered pension funds subject to stringent regulatory requirements, or underwritten pension funds where an insurer, with its own statutory and internal regulatory mechanisms, takes over the administration and investments of the fund. Because pension moneys are perceived to be vulnerable there is a need to provide protective safeguards. The mischief which the Act seeks to prevent is the abuse or misuse of pension funds by unscrupulous employers and other persons dealing with pension funds.

[80] This is consistent with the principle that trustees owe a fiduciary duty, and the employer a duty of good faith, to the fund and to its members and other beneficiaries. See *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894C-D. In *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 730C-F (par 22), Brand JA drew an analogy with the scrutiny of administrative decisions in line with the principles of natural justice:

> The general proposition that the trustees are under a fiduciary duty to act in the best interest of the members appears to be supported by authority (see, for example, *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 898H-I). I accept that the trustees' fiduciary duty towards its members includes a duty of impartiality, that is an obligation not to discriminate between members unfairly. It seems to me to be inherent in the proper exercise of any discretion that it should be done with impartiality … I am prepared to assume, without deciding, that, as a matter of principle, a court is entitled to scrutinise the decisions taken by the trustees in the exercise of their discretion under rule 12.8 on a basis analogous to the review of administrative decisions, that is in accordance with the principles of natural justice …

[81] Section 14(1)(c) of the Act requires, in unequivocal terms, that the Registrar must be satisfied, before giving his imprimatur to a proposed merger or transfer, that it is fair ("equitable") and reasonable. Cloete JA linked this requirement to the public interest in the case of *Pepkor Retirement Fund and Another v Financial Services Board and Another* [2003] 3 All SA 21 (SCA) at 27*c-f* (par 14):

> The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objects. That is the whole purpose which underlies the Act. Of course only a particular fund and the

> members of that fund may be directly affected by a decision of the Registrar under section 14(1)(c). But that does not derogate from the fact that the function which the Registrar performs, is performed in the public interest generally. In addition, the interests of the very persons affected by the decision require the Registrar to perform his functions properly and to seek judicial review of his own decisions should he not have done so. The prejudice to the Registrar in allowing a certificate improperly given in terms of section 14(1)(e), and transfers pursuant thereto, to stand, consists in his not having had an opportunity to evaluate the true facts in arriving a decisions which he is required to make in the protection of the public interest generally, and the particular interests of those directly affected. His function is compromised.

[82] In his aforesaid letter to Small (par 51 above) Tshidi clearly had these principles in mind when he told him that Andrew had reconsidered the matter and that they (being the FSB and Registrar) had declined to approve the merger. Their reason for doing so was" because we do not believe that members had been treated fairly with regard to the pooling of surplus assets existing in the three funds".

[83] The key provisions in the Act, for present purposes, are to be found in section 30P under the heading “access to court”. It reads:

> 1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.
> 2) The division of the High Court contemplated in subsection (1) shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit.

[84] Mr Neser, for Nichol and Small, submitted that the applicants were not “aggrieved” parties as meant in this provision. There is no merit in this submission. The third applicant, and indirectly also the fourth applicant, has clearly been prejudiced by the determination in that it has had the effect of overturning a *de facto* situation, relating to the financial control of the merged

funds, that had prevailed for close on three years. As such I am satisfied that they have not simply been "annoyed or hurt" by the determination (*Neuhaus v The Master of the High Court and Another* 1932 SWA 30 at 32) but have in fact been adversely or prejudicially affected thereby.

[85] In this regard I prefer the qualification "adversely" or "prejudicially" to "wrongfully", as used in *Ex parte Sidebotham: In re Sidebotham* [1880] 14 ChD 458 (CA) at 465 (*per* James LJ):

> It is said that any person aggrieved by any order of the Court is entitled to appeal. But the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

The word "wrongfully", in my view, imports something akin to a tortious or delictual element, whereas "adversely" or "prejudicially" has a less restrictive meaning. This accords with the approach in *Ex parte Official Receiver: In re Reed, Bowen & Co* [1887] 19 QBD (CA) 174 at 178, where Lord Esher MR held that the meaning attributed by James LJ to the words "person aggrieved" in the *Sidebotham* decision (*supra*) was "not an exhaustive definition, but … an affirmative definition of a person who may appeal". Lord Denning cited this with approval in *Attorney-General of the Gambia v N'jie* [1961] 2 All ER 504 (PC), and added (at 511A-B):

> The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

More recently, in *Francis George Hill Family Trust v South African Reserve Bank and Others*

1992 (3) SA 91 (A) at 101E, Hoexter JA agreed with Lord Denning's view that the definition in the *Sidebotham* case (*supra*) was not exhaustive.

THE NATURE OF THE RELIEF SOUGHT

[86] The relief sought by the applicants, in my view, constitutes an issue on its own. The application has apparently been brought in terms of section 30P of the Act, on the basis of the applicants' grievance against the determination, in which event the court would be empowered "to make any order it deems fit". On the other hand an application for an order setting aside the determination smacks of a review of the determination on common law or constitutional grounds, in which event, if the application should be successful, the determination would fall to be set aside.

[87] Mr Neser submitted that the relief sought by the applicants indicated that the applicants had intended a statutory review of the Adjudicator's determination in terms of rule 53 of the rules of this court. The grounds for review could then either be the common law grounds or those stated in section 6 of the *Promotion of Administrative Justice Act* 3 of 2000 (widely known in abbreviated form as "PAJA").

[88] Mr Fine, in turn, submitted that section 30P of the Act envisions a complete rehearing of and fresh determination on the merits of the matter, with or without additional evidence or information. This appears from the court's "power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit", as set forth in section 30P(2). In

this form it accords with an appeal in the wide sense, as defined in *Tikly & Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G. See also *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 117; *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 at 554; *South African Bank of Athens Ltd v Sfier (also known as Joseph) and Others* 1991 (3) SA 534 (T) at 536F-I.

[89] In *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 725I-726A Brand JA confirmed that the application to the high court should be interpreted as "an appeal in the wide sense":

> From the wording of s 30P(2) it is clear that the appeal [*sic*] to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover it must be substantially the same 'complaint' as the one determined by the adjudicator.

SUBMISSIONS ON BEHALF OF THE PARTIES

[90] Mr Fine, for the third and fourth applicants, submitted strongly that the Adjudicator had erred by not taking into account the fact that, at the time he was about to make his award, an application was pending before the Registrar and the FSB under section 14 of the Act. Inasmuch as the present application constitutes a rehearing of the matter, Mr Fine argued, this court may properly take cognisance of subsequent events, more particularly the approval of the merger by

the Registrar and the FSB.

[91] With reference to the Adjudicator's concern that the FSB and Registrar had not approved and certified the merger, while the first applicant fund would effectively be cross-subsidising the other two funds (par 17 above), Mr Fine suggested that the subsequent approval and certification, with retrospective effect as from 1 December 1998, and the amendment of the third applicant's rules, had addressed this concern. Section 12(4) of the Act provided for retrospective operation of amended rules, as apparently accepted by the court in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 181G-I (par 60).

[92] This had the effect, Mr Fine argued, that the fundamental basis for the determination had fallen away. For the rest he reiterated the arguments raised by the applicants in their response to the determination (par 22-29 above), adding that the conditions imposed by the Registrar in regard to the merger had been incorporated in the said amendment of the third applicant's rules, thereby providing the protection required by the members of the first applicant. Further protection appeared from the fact that the amount transferred from the first applicant to the third applicant had in fact been adjusted retrospectively to 1 December 1998, together with the returns earned on and "strain" attributable to such assets from the said date. There was hence no question of any "shortfall" as envisaged in paragraph 21.5 of the determination (par 21.5 above).

[93] Mr Neser, on behalf of Nichol and Small, argued that the applicants had failed to aver or prove any basis for setting aside the Adjudicator's determination on its merits or reasoning. The

allegation that the determination had been "overtaken by events" could never, he submitted, render it reviewable. No subsequent approval could override a determination with the force of a court order. In any event the alleged failure by the Adjudicator to take account of the "imminent" approval and certification by the FSB and Registrar could not constitute a grievance justifying the setting aside of the determination.

[94] On the merits of the complaints raised by Nichol and Small, Mr Neser submitted that the trustees of the applicant funds had clearly failed to consult with their members and pensioners on the merger issue, despite Nichol having been given the assurance that he would be given an opportunity to comment and that no action would be taken before then. This assurance was short-lived, however, as appears from the fact that Small was informed that the applicants did not believe it necessary to consult with the pensioners before giving effect to the amalgamation. This appears to have been in conflict with legal opinion obtained by them and was certainly inconsistent with Andrew's initial attitude as to the importance of consultation and transparency (par 41-43 above). It likewise flew in the face of Tshidi's e-mail to Small to the effect that the merger had been disapproved because it was unfair to members (par 51 above).

[95] The complaint relating to the amalgamation of surpluses and contribution holidays, Mr Neser submitted, was equally valid. He referred in this regard to the *Tek Corporation* case (*supra* par 80) in which this topic was considered in depth. He submitted that there had been a lack of transparency and an unreasonable failure to furnish information This was to a large extent attributable to Tomsett's management style and a failure of the trustees to fulfil their fiduciary

duties.

CONSIDERATION OF THE ADJUDICATOR'S DETERMINATION

[96] The thrust of the Adjudicator's determination has been dealt with above (par 17 - 21). At the outset he duly identified the complaint lodged by Nichol and Small as "the purported amalgamation" of the three pension funds into a single pension scheme, allegedly at the expense of the first applicant, "whose surplus would effectively be diluted by the cross-subsidisation of the other funds". In considering the complaint he made use of documentary evidence and written submissions to establish what appears to be a *prima facie* view in favour of the complainants. He quite justifiably came to the conclusion that the first applicant fund was "in a far more favourable surplus position" than the other two funds, as appeared with eminent clarity from a table of comparative valuation dated 30 September 1998. At that stage the first applicant had 71 members, of whom 20 were active members and 51 were pensioners. The other two applicants had 768 members and 158 pensioners between them. The first applicant had a surplus of R18 915 000, the second applicant R51 223 000 and the third applicant a debit of R6 080 000. Needless to say, I fully agree with the Adjudicator that the merger would seriously prejudice the first applicant unless the surplus be preserved in some way or another, such as "ring fencing" which, at that stage, had apparently not yet been considered by the applicants.

[97] I am in respectful agreement with the Adjudicator that, at the time he made his determination, the three funds were still separate legal entities. No merger was possible without the certification of the Registrar in terms of section 14 of the Act. Without it, the purported merger as from 1 December 1998 was illegal and invalid, regardless of any guarantee given by

the applicants that members and pensioners would not be prejudiced in that they would receive exactly the same benefits as before the merger.

[98] It is common cause that, as from the date of the merger, all benefits, including pensions and bonuses, have been paid from the amalgamated fund. It is likewise common cause that the third applicant has taken a “contribution holiday” at the expense of such fund and more particularly at the expense of the merged surpluses. There has, until the amendment of the third applicant’s rules, been no attempt to preserve the surpluses for the benefit and in the interest of members and pensioners, be it by "ring fencing" or in any other way. I entirely agree with the Adjudicator that the conduct of Tomsett and the trustees who approved the merger without providing such protection, smacks of "legal self-help", however good and *bona fide* their intentions might have been.

[99] It seems irrefutable, as held by the Adjudicator, that concerns relating to the "reasonable benefit expectations" of the first applicant's members and pensioners lay at the heart of the Registrar's long delay in approving the merger. I therefore find it most unfortunate, if not irregular, that the Registrar and FSB gave their approval to the merger scarcely a month after the adjudicator had made his determination. There is no doubt that they were fully aware of the determination and its legal effect as an order of court. Yet they carried on regardless, ostensibly swayed, if not soothed, by the suggestion that the retrospective amendment of the third respondent's rules would rectify matters and confirm the merger without their having to go back to the drawing board. Quite clearly they had been advised that the *ex post facto* approval with

retrospective operation would have the effect that the "fundamental basis", as Mr Fine put it (par 92 above) for the Adjudicator's determination would "fall away", in which it event it would (hopefully) become academic.

[100] This conduct was totally inconsistent with their previous decision, at the request of the Adjudicator, to hold back their approval of the merger pending completion of the determination (par 43 above). It was likewise inconsistent with the acceptance by Andrew, in his capacity as chief actuary of the FSB, that the premature merger was *ultra vires* and inequitable in that it impacted adversely on the interests of members and pensioners of the smaller funds (par 42 - 43 above). It was, indeed, Andrew who pointed out that, because there had been a complete lack of consultation with the interested parties (par 41 and 43 above), the Registrar and FSB should reject the merger, unless a substantial number of members and pensioners should approve it (par 43 above).

[101] Likewise unfortunate, if not irregular or even offensive in terms of section 30V of the Act, were the apparent attempts to delay the completion of the determination until such time as the application in terms of section 14 of the Act could be approved. (par 11, 13 and 45 above). This conduct might well be regarded, as submitted by Mr Neser, as an attempt to anticipate the determination and perhaps even influence it. Fortunately it is not necessary, for present purposes, to make any finding in this regard.

[102] The letter of 29 November 2001 (par 15 and 44 above) appears to have constituted a *volte face* in that it still excluded consultation or open and comprehensive communication with

the aforesaid role players, as initially envisaged by Andrew (par 41 and 42 above). He now appears to have been satisfied with a "ring fencing" exercise to cater for the "reasonable expectations" of members and pensioners. The object of this letter, it seems to me, was not only to "unscramble the omelette", but also to sidestep, or at least to neutralise, the effect of the determination. Once again, however, it is not necessary for me to make any finding in this regard since it relates to the issue in the Transvaal application (par 39 above) rather than to any issue before this court.

[103] In view of the aforesaid considerations I must reject Mr Fine's contention that the Adjudicator erred by not taking account of the pending application in terms of section 14 of the Act and its purportedly imminent approval. Had he done so, I believe he would have acted irregularly. His function was to consider, adjudicate and dispose of the complaints lodged with him "in a procedurally fair, economical and expeditious manner" in terms of section 30D of the Act. Of course he would have to take cognisance of all relevant facts at his disposal. He would, however, be acting *ultra vires* should he give prophetic consideration to the possibility that a pending application before the Registrar may or may not be successful.

[104] I agree with Mr Neser that no subsequent approval of a section 14 application could override a determination with the force of a court order. The determination stands on its own legs and may be rescinded or set aside only by this court, and then only in terms of section 30P(2) of the Act. The Registrar has no such power. It would be absurd to suggest that, by approving a merger after a determination in respect thereof has already been made, he would be able to

nullify or sidestep it.

[105] As for the argument that it is no longer practical or convenient, or even possible, to comply with the Adjudicator's order, I am singularly unimpressed. There is no reason why the former members of the first applicant cannot convene an election for the purpose of forming a management board that complies with section 7A of the Act. There is likewise no reason why the fourth applicant cannot appoint an actuary to investigate and report on the financial situation of the first applicant. The order to make good any shortfall arising from the report and to bear the incidental costs should not constitute any obstacle to a person or party in the position of any of the applicants.

[106] The Adjudicator was, in my respectful view, quite correct in holding (par 20 above) that the first applicant's management board had not been properly constituted in terms of section 7A of the Act. For present purposes it is not necessary to discuss this point.

[107] Suffice it to say that I am quite satisfied that the Adjudicator's determination was presented in a balanced, logical and rational way. There is no basis on which this court can interfere with it on review or appeal, however wide. In terms of the provisions of section 30P(2) of the Act I must perforce conclude that the Adjudicator has, in his determination, duly and properly dealt with the merits of the complaints raised by Nichol and Small. The relief granted by him was quite appropriate, having the effect of a *restitutio in integrum* in respect of at least the first applicant, and it cannot, in my view, be faulted in any way. It will, I believe, have the

inevitable effect that the relevant members and pensioners, like Nichol and Small, will have the opportunity to consult with the trustees and to comment on any proposed merger of the first applicant pension fund with the other two funds.

[108] On the question of costs Mr Neser submitted that costs on the scale of attorney-and-own-client should be ordered. I do not, however, believe that a case has been made out for any special order as to costs. I am of the view that the applicants were probably acting in terms of senior legal representatives' instructions and advice. What I am prepared to order is that the air travel expenses of counsel and their attorney from Johannesburg to Cape Town and back should be reimbursed. This is justified by the fact that the legal team that appeared on behalf of Nichol and Small in the Transvaal application were the obvious persons to appear in the matter before me.

CONCLUSION

[109] It follows that the applicants have been unable to persuade me that there is any basis on which to interfere with the Adjudicator's determination or to grant any of the relief sought by them. In the event I make the following order:

The application is dismissed with costs, including the costs of two counsel and including the return air travel expenses of counsel and their attorney from Johannesburg to Cape Town.

D H VAN ZYL

Judge of the High Court of South Africa