

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 134011/2024

(1)	REPORTABLE: no
(2)	OF INTEREST TO OTHER JUDGES: no
(3)	REVISED: Yes
8 May 2026	
DATE	SIGNATURE

In the matter between:

TOTAL OIL PRODUCTS PENSION FUND

Plaintiff/Applicant/Appellant

And

TOTAL ENERGIES MARKETING

SOUTH AFRICA (PTY) LTD

First Defendant/First Respondent

PENSION FUNDS ADJUDICATOR Second Defendant/Second Respondent

JUDGMENT

SMIT AJ

[1] This is an appeal in the ‘wide sense’ handed down by the Second Respondent on 10 October 2024. For ease of reference, herein after the parties will be referred to as the plaintiff/applicant/appellant (*“the Fund”*), the first respondent as (*“Total”*) and the second respondent as (*“the Adjudicator”*).

[2] This application was launched by the Fund. The Fund and Total appeared before this Court, the Adjudicator however was not represented or present.

[3] The determination by the Adjudicator lists the complaint before it as:

- “1. This complaint concerns the apportionment of a surplus benefit by the fund in terms of section 15C of the Act.
2. the complaint was received by the Adjudicator on 14 February 2024. On 16 February 2024, the Adjudicator requested the complainant [Total] to provide further information. An acknowledgement of the complaint was sent by complainant on 21 February 2024. On the same date, the complaint was sent to the fund requesting its response by 21 March 2024. A response dated 20 March 2024, was received from the fund on 21 March 2024. On 22 March 2024, the complainant was requested to reply to the fund’s submission by 3 April 2024. On 26 March 2024, the complainant requested an extension of 7 days, which was granted. Further submissions were received from the complainant on 12 April 2024. On 15 April 2024, the fund was requested to comply to the complainants’ further submission by 26 April 2024. Further submissions were received from the fund on 24 April 2024. Further submissions were received from the complainant on 23 May 2024. On 8 July 2024, the Adjudicator requested an actuarial evaluation from Simeka Consultants and Actuaries (Pty) Ltd (*“Simeka”*). A response was received from Simeka on 14 August 2024. On 15 August 2024 the fund and employer were requested to reply to Simeka’s submission by 23 August 2024. Further submissions were received from the complainant on 22 August 2024. Further submissions were also received from the fund on 23 August 2024 and 30 August 2024.
3. Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.”

[4] The Act referred to herein and in the determination of the Adjudicator is the Pension Funds Act, 24 of 1956 (“PFA”).

[5] The Order of the Adjudicator reads as follows:

- “6.1.1 The decision of the board regarding the allocation of the surplus is hereby set aside;
- 6.1.2 The fund is ordered to engage the complainant further and re-exercise its discretion regarding the allocation of the surplus to the member account, within eight weeks of this determination; and
- 6.1.3 The fund is ordered to inform the complainant and the Adjudicator of its decision, within two weeks of re-exercising its discretion in terms of the allocation of the surplus.”

[6] The question before this Court is whether the determination of the Adjudicator dated 10 October 2024 against the Fund should be set aside and costs of this application.

[7] Thus, the underlying question to be answered is whether the Fund acted lawfully in the exercise of its discretion in allocating surplus in terms of section 15C of the PFA. A surplus arises in a pension fund when the assets exceed the liabilities.

[8] Section 15C of the PFA provides:

- “15C. Apportionment of future surplus
- (1) The rules may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account.
- (2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board taking into account the interests of all the stakeholders in the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment.”

[9] The complaint to the Adjudicator stems from the situation where the Fund had a surplus built up during the period 2004 to 2021 and such surplus was distributed as at 31 December 2021.

The Fund's case

[10] It is the fund's case that after having regard to all relevant considerations and in the exercise of their true discretion, the surplus comprising of R 530 million was distributed as follows:

[10.1] 45% comprised of about R 240 million to Total, as participating employer in the Fund, and

[10.2] 55% comprised of about R290 million to the Fund's members, former members and pensioners.

[11] Total was dissatisfied with the R 240 million allocated to it and laid a complaint at the Adjudicator. Initially Total contended that the decision of the Fund to be set aside and replaced with an allocation of 63% to Total and 37% to the members. Total however conceded later that at best Total would be entitled to 50% and the members to 50% of the surplus. This amounted to an additional approximately R 26 million for Total.

[12] The Fund contends that the decision taken by its board in the allocation and the decision, was taken lawfully and after taking into consideration all the stakeholders' interest. Therefor the Adjudicator's determination is to be set aside by this Court.

Total's case

[13] The Adjudicator upheld the complaint that the Fund did not properly and adequately consider the interests of all the stakeholders before making the decision for the allocation of 45%/55%. In this regard the Adjudicator remitted the matter back to the board of the Fund to re-consider its decision.

[14] This appeal before this Court is an appeal in a wide sense but same in this instance is an abuse as nothing prevents the Fund from ventilating its decision by reconsideration on exactly the reasons as set out in their papers in this appeal. This appeal is premature. The approach of re-considering its own decision as determined by the Adjudicator would hasten the process to finality and avoid any unnecessary appeals.

[15] It is prudent for the Fund to re-consider its decision, as the Fund in reaching the decision to allocate 45%/55%, did not consider the interest of all the stakeholders as required under section 15C of the PFA.

[16] The Adjudicator considered all the submissions by the parties and investigated by way of Simeka, who is an independent actuarial organisation, and who provided an independent actuarial assessment to the adjudicator. The report of Simeka was commissioned and obtained as provided in section 30E(1)(a) of the PFA, which mandated the Adjudicator to 'investigate' the complaint put before it.

[17] The Fund's discretion should be exercised lawfully, reasonably, and with due regard to fiduciary obligations.

The matter before this Court

[18] This Court was referred to Meyer v Iscor Pension Fund¹ which states:

“The High Court's jurisdiction to entertain an appeal against a determination by the adjudicator is governed by the provisions of s 30P. The relevant part of this section provides:

'Access to court

(1) Any party who feels aggrieved by a determination of the adjudicator may . . . apply to the Division of the [High] Court which has jurisdiction, for relief,

(2) The Division of the [High] Court contemplated in ss (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.'

As was explained by Trollip J in Tikly and Others v Johannes NO and Others 1963 (2) SA 588 (T) at 590F - 591A, an appeal usually falls into one of the following three categories:

'(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . . ;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly. . . .'

From the wording of s 30P(2) it is clear that the appeal 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. Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 635D, the complainant should be regarded as the 'applicant' throughout, despite the fact that it is the other side who is formally the applicant to set the adjudicator's determination aside. In case of a 'genuine dispute of fact' on the papers as contemplated in Plascon-Evans, the matter must therefore, in essence, be decided on the version presented by the other side unless that version can, in the words of Corbett JA, be described as 'so far-fetched and clearly untenable that the court is justified in rejecting [it] merely on the papers'.

¹ MEYER v ISCOR PENSION FUND 2003 (2) SA 715 (SCA)

[19] The PFA specifically provides in section 15C(2) that all stakeholders' interests must be considered by the board of the Fund in coming to their decision to allocate the surplus. It is the complaint of Total, which is supported by the report of Simeka, that there is some doubt as to whether the Fund adequately considered the interests of all the stakeholders and more specifically the interest of Total. In this respect the Court was referred to *St Clair Moor and Another v Tongaat-Hulett Pension Fund and Others*² where the following was stated:

“Section 15C plainly leaves the apportionment of future surplus to the applicable rules of a particular fund and, absent any rules on the subject, to the board of that fund. In the latter event, the only proviso is that in making a determination, a board must take into account the interests of all the fund's stakeholders (compare ICS Pension Fund v Sithole and Others NNO 2010 (3) SA 419 (T) para 15; Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and Others [2016] 1 All SA 704 (SCA) ([2015] ZASCA 202) para 10). A board therefore has the power to decide on the apportioning of surpluses and on how to effect it. Apportionment can be effected either by way of a rule or ad hoc in the discretion of a board”.

[20] The Adjudicator found that relevant factors were ignored in the decision process of the board of the Fund. It was argued by Counsel for Total that in itself is sufficient ground in a *de novo* proceeding to grant a remittal to the board to re-exercise its discretion.

[21] It was further argued on behalf of Total that the Funds arguments about member/pensioner risk ignore the fact that there was a guarantee through annuities against pension increases and never reduced and both employer's and member's contributions were fixed, yet only the fixed contributions of the employers were held against it. It was argued that this demonstrates an inconsistency which illuminates the one-sided reasoning of the Fund. The Fund maintained that pensioners and members had greater exposure to investment risk because pension increases could be limited, however this overlooks:

[21.1] the presence of significant solvency reserves;

[21.2] purchase of inflation-linked annuities in May 2022, removing material post decision exposure;

[21.3] the ability under Fund Rules to reduce benefits or increase member contributions before resorting to employer top-ups.

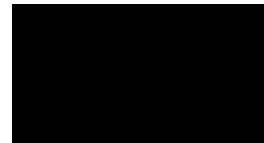
Thus, member risk was cushioned, and pensioner's expectations were exceeded, not undermined.

² ST CLAIR MOOR AND ANOTHER v TONGAAT-HULETT PENSION FUND AND OTHERS 2019 (3) SA 465 (SCA)

[22] I find myself in agreement that the Fund did not consider the relevant risks in a balanced way and in so doing did not consider the interest of the stakeholders adequately.

[23] I therefore make the following Order:

1. The application is dismissed,
2. The applicant/appellant will pay the costs of the application, including the costs of two counsel.



M SMIT

ACTING JUDGE OF HIGH COURT
GAUTENG DIVISION
PRETORIA

Date of hearing: 27 October 2025

Date of judgment: 8 May 2026

For the Plaintiff/Applicant/Appellant	: Adv CE Watt-Pringle SC
	: Adv H Drake
Instructed by	: Shepstone & Wylie Attorneys
For the First respondent	: Adv Nazeer Cassim SC
	: Adv K Naidoo
Instructed by	: Cliffe Dekker Hofmeyer Inc.