**IN THE HIGH COURT OF SOUTH AFRICA**
**(TRANSVAAL PROVINCIAL DIVISION)**

**Case no.: 44886/07**
**DATE: 13/1/2009**

**In the matter between:**

**ICS PENSION FUND** **Applicant**

**and**

**MNS SITHOLE N.O.** **First Respondent**

**HD McLEOD N.O.** **Second Respondent**

**J PEMA N.O.** **Third Respondent**

**REGISTRAR OF PENSION FUNDS** **Fourth Respondent**

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**JUDGMENT**

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**Coram: RABIE J**

**The Application**

[1] In this application the applicant, a registered pension fund, applied for the reviewing and setting aside of the decision dated 13 April 2007 of the Financial Services Board of Appeal ("the board of appeal"), which consisted of the first, second and third respondents. In that decision the board of appeal dismissed an appeal by the applicant against the decision of the Registrar of Pension Funds ("the registrar") whereby the registrar refused the applicant's application made in terms of section 15F of the Pension Funds Act, 24 of 1956 ("the Act"), to transfer some of the credit balance in an existing employer

reserve account of the applicant, to the employer surplus account of the applicant.

[2] The relief claimed by the applicant is based on the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

**Background**

[3] Prior to 1 November 1996 the applicant (to whom I shall also refer as "the fund"), was a defined benefit fund. Generally speaking, a defined benefit fund is a pension fund whose pension benefits are determined in accordance with a formula contained in the rules of the fund and which are underwritten by the participating employer. If the investments made by such a fund perform well, the members do not benefit proportionately. However, if the investments perform poorly, members have the advantage that their pension benefits remain guaranteed by the employer. The employer carries the risk of the investments and the members' pension benefits are secure.

[4] In contradistinction to being a defined benefit fund, a pension fund can be a so-called defined contribution fund. In a defined contribution fund, the benefits are not underwritten by the employer but the members have the advantage that if the fund performs well, it would reflect in their pension benefits. If the fund performs poorly, the members' pension benefits are reduced accordingly. In short, the members carry the risk of the investments, both good and bad, and their benefits are not guaranteed by the employer.

[5] The investments of the applicant, at the time being a defined benefit fund, performed well in the years leading up to 1996. This resulted in the applicant having a large surplus, *i.e.*, a large difference between the actuarial value of the assets of the fund, and the value of the liabilities, including contingent liabilities, of the fund in respect of pensionable service accrued by members. Larger payments into the fund by the employer than was necessary, also contributed to the surplus.

[6] Two things happened during the course of 1996 and 1997 which played an important role in the present litigation between the parties. One was that there developed an interest amongst members of the applicant to belong to a defined contribution fund, as opposed to a defined benefit fund. This seems to have been a trend amongst employees at the time and most pension funds in fact converted to defined contribution funds. By August 1996 the applicant decided to respond to the wishes of its members and to create a defined contribution section in the fund. The establishment of a confined contribution section would also have been to the benefit of the employer who would in such event have a decreased exposure to the investment risk in the fund.

[7] The second event of note was the decision by the applicant to utilise some of the reserve account, *i.e.*, the actuarial surplus, which had built up in the books of the applicant as a result of good investment returns. It was decided, *inter alia*, that an amount would be used to enhance the benefits of those members who decided to transfer to the defined contribution section of

the fund and further that an amount would be allocated for the benefit of other members of the applicant as well as the employer.

[8] Since the applicant decided to utilise some of the surplus in the reserve account for the benefit of members who elected to transfer to the defined contribution section of the fund, as well as other members and the employer, it is necessary to briefly address this issue.

**Existing Surplus in Defined Benefit Funds**

[9] Prior to 7 December 2001, the Act did not determine how an actuarial surplus in the books of a fund should or could be utilised. See Tek Corporation Provident Fund and others v Lorentz 1999(4) SA 884 (SCA) at page 894 – 895, paragraphs 15 – 18.

[10] As was discussed in the Tek matter (*supra*), it was argued by some that since the employer guarantees the benefits accruing to the members, and the members carry no risk in that regard, the employer should be entitled to the benefit from any surplus which might arise as a result of, for example, good investment returns. In the Tek matter the Supreme Court of Appeal decided, however, that any surplus which might arise, *ipso facto*, becomes an integral component of the fund and does not belong to the employer.

[11] Subsequent to the Tek matter, the legislator, *inter alia*, addressed this issue in what is commonly described as the “surplus legislation”. This entailed the introduction into the Act, with effect from 7 December 2001, of

sections 15A to 15K. The main thrust of this legislation can be summarised as follows:

[12] Section 15A provides that all actuarial surplus in the fund belongs to the fund, and that members of the fund and the employer only acquire rights to such surplus once same had been apportioned to the member surplus account and the employer surplus account respectively in terms of sections 15B and 15C of the Act.

[13] Section 15B deals with the apportionment of surplus which, broadly speaking, had accrued in the books of a fund prior to the introduction of the surplus legislation. This section requires the board of trustees of the fund to submit to the registrar a scheme for the proposed apportionment of any actuarial surplus which actuarial surplus shall include the so-called surplus utilised improperly by the employer as defined in subsection (6). The scheme aims at the apportionment of any actuarial surplus as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date. Since the commencement date is 7 December 2001, being the date on which the Pension Funds Amendment Act, 39 of 2001 came into effect, the “surplus apportionment date” would be a date within three years thereof on which date the fund is required to obtain an actuarial valuation in terms of section 16 (1) of the Act.

[14] A scheme envisaged by this section may involve the improvement of benefits to existing members, increases to benefits or transfer values in

respect of former members, the crediting of an amount to the member surplus account, and the crediting of an amount to the employer surplus account. Section 15B envisages an equitable split of the surplus between existing members, former members and the employer in such proportions as the board shall determine after taking account of the financial history of the fund. Although at least 75% of the members of the board duly constituted in terms of section 7A must approve the scheme, the apportionment in terms of a proposed scheme shall be of no force or effect unless the registrar has approved the scheme. In this regard the registrar has to satisfy himself, *inter alia*, that the fund had taken reasonable measures to inform employers and members in a manner which is clear and understandable and which gives details of the allocation of the actuarial surplus for the benefit of the various stakeholders, including the amounts of any actuarial surplus which it is intended to credit to the member surplus account and to the employer surplus account, respectively, and the costs of any benefit improvements for members and former members, and furthermore that all complaints in respect of the apportionment of surplus have been resolved. The registrar must also be satisfied that the scheme is reasonable and equitable. If the board fails to submit a scheme in terms of subsection (1) or if the registrar is not satisfied that the scheme is reasonable and equitable, or if the registrar considers that unresolved complaints require investigation, the registrar shall require the board to refer the scheme to a special *ad hoc* tribunal in terms of section 15K.

**Apportionment of Future Surplus**

[15] Surplus arising in the books of a fund subsequent to the surplus legislation and subsequent to the scheme implemented in terms of section 15B, may, according to section 15C, be apportioned in terms of the rules of the particular fund. If the rules are silent on this issue, the apportionment shall be determined by the board of trustees of the fund taking into account the interests of all the stakeholders in the fund. Neither the members nor the employer may veto such apportionment and neither does it concern the registrar.

[16] In terms of section 15D a credit balance in the member surplus account may be used for the benefit of the members, for example, to improve benefits, to reduce contributions and to meet expenses. Section 14E similarly provides that an employer may make use of surplus allocated to the employer surplus account in order to, for example, fund a contribution holiday, to use for the benefit of members, to meet expenses, to avoid retrenchment of employees, and other such matters.

[17] An employer surplus account arises from surpluses allocated thereto in terms of section 15B, 15C and 15F.

**Existing Employer Reserve Accounts**

[18] Section 15F, with which this application is primarily concerned, makes provision for the transfer to the employer surplus account of all or some of the credit balance which existed in a reserve account of the fund prior to the

introduction of the surplus legislation and which had been ear-marked for the benefit of the employer. This section thus recognizes that in some instances, the employer has already received, or had allocated to it, a proportion of the surplus, prior to the introduction of the surplus legislation. The purpose of section 15F is to allow, in appropriate circumstances, the surplus so allocated to the employer in terms of the rules of the fund, to be excluded from the surplus to be distributed in terms of the other provisions (sections 15B and 15C), of the surplus legislation. In essence, the purpose of section 15F is to facilitate the ratification of an allocation of surplus to the employer prior to the surplus apportionment legislation.

[19] According to section 15F(1) the board may apply to the registrar to transfer all or some of the credit balance in an existing employer reserve account as defined in the rules of the fund, to the employer surplus account. The registrar may approve such transfer if he is satisfied that the earlier allocation of actuarial surplus to the employer reserve account "was negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C". Any remaining portion of the credit balance in an existing reserve account shall be treated as actuarial surplus to be distributed in terms of the surplus apportionment scheme pursuant to section 15B.

[20] It would seem that the thinking behind section 15F, or at least part of the reason for its introduction, was that it would be inequitable to include the employer's earlier share of surplus, in the newly introduced surplus

apportionment scheme when the other stakeholders, who also received their share at the time, are permitted to retain theirs.

[21] Two main principles can at this point be extracted from section 15F. The first is that the legislature recognized that, prior to the introduction of the surplus legislation, it had been the prerogative of the board of a fund to create an employer reserve account for the benefit of the employer. The second is that the registrar only has the authority to establish whether the earlier allocation of surplus to such account had been negotiated between the stake-holders in a manner consistent with the principles underlying sections 15B and 15C. Once so satisfied the registrar is compelled to approve the transfer to the employer surplus account. I shall revert to this issue below.

**The Application to the Registrar**

[22] As mentioned before, the applicant established a defined contribution section in the fund during the end of 1996. The introduction of the defined contribution section afforded the applicant an ideal opportunity to apportion the surplus within the fund to the members of the fund and also to allocate a portion for the benefit of the employer.

[23] At the time of the aforesaid restructuring of the fund, the applicant was at large to do so and no official permission was required. The only requirement was that the rules of the applicant had to allow for the introduction of the defined contribution section and the transfer of members to such section as well as for the apportionment of the surplus for the benefit of the members

and the employer. For this purpose the applicant revised its rules and had same approved by registration on 30 December 1997.

[24] The only change in the authority of a fund in respect of the aforesaid issues resulted from the introduction of sections 15A to 15K of the Act on 7 December 2001 and more particularly in respect of an earlier allocation of surplus to the employer. As pointed out earlier, application had to be made to the registrar in respect of such earlier allocation to the employer in terms of section 15F. No similar authorisation was required in respect of any earlier restructuring of the fund, the transfer of members to any new section in the fund and, more importantly, the allocation of any surplus to the members of the fund.

[25] As a result of the aforesaid amendments to the Act, the applicant applied on 18 January 2005 to the registrar to authorise the transfer of some of the credit balance in the existing reserve account, which had earlier been allocated to the employer, to the employer surplus account. On 25 April 2005 the registrar rejected the application of the applicant. The reason for the rejection was stated to be the fact that the registrar was not satisfied that the allocation of actuarial surplus to the employer reserve account had been "properly negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C of the Act, as embodied in Circular PF 105 paragraphs 14(a) to (h)". The registrar later supplied more comprehensive reasons for his decision.

[26] The applicant noted an appeal against the decision of the registrar to the Financial Services Board of Appeal on 24 May 2005. The Financial Services Board of Appeal (" the board of appeal") dismissed the applicant's appeal on 13 April 2007. As mentioned before the present application is aimed at the review and setting aside of the finding of the board of appeal.

**The Findings of the Board of Appeal**

[27] According to the registrar's written reasons for his refusal of the applicant's section 15F application, the main reasons for the refusal were the following: Firstly, that in the exercise where surplus was shared between the employer and certain members only, no surplus enhancement was allocated to members preferring to remain in the defined benefit option. Secondly, that there was no proof of any negotiations between the fund and members or member representatives. Thirdly, that in the information sent to members, there was no indication of the amount or percentage that would be allocated to the employer. Fourthly, that the enhancement of members who chose to opt for a defined contribution scheme, indirectly also benefited the employer due to the transfer of risk from the employer to the members.

[28] The board of appeal concurred with the reasons supplied by the registrar. In respect of the first main reason mentioned above, the board of appeal found that it is implicit in the provisions of section 15F(2) that the registrar was entitled to consider the issue of fairness, and more particularly whether it had been shown that in allocating an amount to the employer reserve account, all the other stakeholders had been treated fairly in that an

equitable distribution of surplus had been effected. It was further found that there was no evidence which indicated how the portion of 28% allocated to the employers was arrived at and why a mere 1% was allocated to members who elected to remain in the defined benefit section.

[29] The board of appeal further found in this regard that it cannot be said that there was any informed choice made by the members who elected to remain in the defined benefit section since they had not been given sufficient information regarding the making of such a choice and had not been informed that their benefits were underwritten by the employer who had been allocated an amount of R30 million.

[30] In respect of the second main issue, the board of appeal found that in the application placed before the registrar, there was no proof of any negotiations between the applicant and the members or the member representatives.

[31] In respect of the third main issue, the board of appeal found that the information sent to the members did not contain any indication of the amount or percentage that would be allocated to the employer. According to the board of appeal it does not avail the applicant to claim that it was not possible to disclose the benefit to the employer or to suggest that the fact that no objections were lodged, is an indication that the members were fully informed.

[32] In respect of the last main issue, the board of appeal found that the enhancement of benefits of members who chose to join the defined contribution section, indirectly also benefited the employer due to the transfer of risk from the employer to the members. In this regard the board of appeal found that when one group or class of members is discriminated against or is disadvantaged, for whatever reason, such unfair treatment is a factor that impacts upon the registrar's discretion in terms of section 15F(2) of the Act, and that the registrar was entitled to take this ground into account in the interest of fairness and for rejecting the applicant's application.

[33] Before analysing the reasons and findings of the board of appeal, It is necessary to briefly refer to the history of events.

**The Booklet of the Fund of October 1996**

[34] Prior to October 1996 an information booklet was sent to members of the applicant advising them of the board's decision to provide a defined contribution pension fund section with effect from 1 November 1996 and of the option which they had to remain in the defined benefit section or to transfer to the defined contribution section.

[35] This booklet was distributed to all members of the applicant. The booklet commenced by explaining that the applicant was a defined benefit fund and that in response to a need expressed by members, the board had decided to provide an alternative retirement fund with effect from 1 November 1996 in the form of a defined contribution pension fund. The members were

informed that it was required of them to make a choice whether they wished to remain in the defined benefit fund or whether they wished to transfer to the defined contribution fund. The booklet contained approximately 16 pages and set out quite extensively and in detail the relevant information in order to enable members to make this choice.

[36] For example, the options and related benefits available to the members were explained and the members were informed of presentations that would be held during October 1996 and during which further detail would be supplied and members would have an opportunity to put any questions they may have. The differences between the two types of funds as well as the advantages and disadvantages thereof were also fully explained. The issue of risk to the employer and the members respectively, was also explained. Particulars were also supplied of the estimated amount that would be available should a member transfer to the new fund.

[37] Members were, *inter alia*, informed that those who transfer would receive a 30% enhancement to their actuarial reserve value on transfer. This became possible, according to the booklet, as a result of the surplus which had built up due to good past investment returns and the employer contributing more than was necessary. It was stated that it was decided that some of this surplus should be distributed by way of an enhancement to those members who accepted the investment risk and reward in the new defined contribution category, but that members who elect to remain in the defined benefit category would not receive an enhancement benefit as the employer still

retained the investment risk and reward in this category. Members who remained on as members of the defined benefit fund, however, would not experience any change in respect of their contributions and benefits on death, disability, withdrawal or retirement. The employer still guaranteed all the benefits that have accrued and will accrue in future to the members who remained in the defined benefit fund.

[38] The distribution of the booklet to members was followed up by so-called road show presentations during the first three weeks of October 1996. The implications of the defined contribution option were explained to members and they were able to seek clarity on any issue relating to the proposed change.

[39] It was not possible at that stage to indicate to members what percentages or amounts of surplus would be allocated to the various categories of members or to the employer, since these were dependent, *inter alia*, on the number of members who would eventually elect to move. From a reading of the booklet it appears that the decision to transfer to the defined contribution section, or not, would not have depended on any percentage or amount of surplus eventually to be allocated to any of the category of members or to the employer.

[40] The actual establishment of a defined contribution section as well as the allocation of any portion of the surplus to the members and/or the employer, was within the sole prerogative of the fund. The registrar had no authority in regard thereto. Any decision in this regard could, however, only be realised if

and when the rules of the fund had been amended to make provision therefor. The rule amendments allowing for the defined contribution section and the allocation of surplus were approved and registered slightly more than a year later on 30 December 1997.

[41] The members were required to exercise the option by 28 October 1996. Eventually 95% of active members transferred to the defined contribution section. Only approximately 30 members elected to remain on the defined benefit pension fund as opposed to 591 members who transferred to the defined contribution pension fund.

**The Period November 1996 to 30 December 1997**

[42] It is necessary to briefly refer to the period subsequent to the decision to create a defined contribution section in the fund during the latter part of 1996, until the actual amendment of the applicant's rules to allow for the implementation of the establishment of a defined contribution section as well as for the allocation and utilisation of surplus assets by the members and the employer.

[43] Until 25 November 1996 the board of trustees of the applicant did not consist of members appointed by the members themselves. The members of the boards of trustees were appointed by the employer. However, on 25 November 1996 this state of affairs changed when a newly elected board of trustees had its inaugural meeting. The new board consisted of three members elected by the members and three members appointed by the employer. This caused the representation of the board to comply with the

provisions of section 7A of the Act which were introduced into the Act by section 2 of the Pension Funds Amendment Act, 22 of 1996.

[44] At that meeting the following transpired: The market value of the fund's investments as at June 1996 and as at 30 September 1996 was disclosed; it was resolved that with effect from 1 April 1996 and subject to the approval of the registrar, the employer would temporarily stop contributing to the fund as the required level of contribution would be met out of surplus; the rules pertaining to the defined contribution section of the fund were tabled and approved for submission to the registrar for approval; the board minuted its intention to utilise surplus assets at the ratio of 28% for active members, 20% for pensioners,10% for unionised members, 28% in lieu of the employer's obligation to provide post retirement medical aid, and that 14% would be retained as surplus.

[45] According to the applicant reports were made at this meeting concerning the option given to active members to remain members of the defined benefit section or to transfer to the defined contribution section, including the enhancements which they would receive.

[46] It appears from the minutes of this meeting that a memorandum detailing how the surplus assets would be dealt with, was submitted. A document titled "THE NEW ICS DEFINED CONTRIBUTION PENSION FUND - EXECUTIVE SUMMARY" appears to be the memorandum referred to in the minutes. It is not necessary to refer to all the issues referred to in this document.

Regarding the surplus it was stated that the large surplus in the fund should be utilised to the best advantage of all the interested parties, namely, the active members, former members, pensioners and the employer. Further that all the surplus need not be distributed but that it should at least be clearly earmarked in employer controlled reserves.

[47] Under the heading “Proposed Utilisation of the Surplus” a table appears showing in Rand terms “the proposed distribution of the surplus amongst the various interested parties”. According to a footnote the proposed distribution translated, in percentage terms, to the following: Active members – 33%; Pensioners – 19%; Unionised members – 9%; Employer (Medical Aid) – 27%; Surplus – 12%. It would appear, therefore, that the board decided during the meeting of 25 November 1996 to deal with the surplus assets slightly different from what was proposed in the executive summary.

[48] Enhancements for past members who had transferred to provident funds were discussed at a board meeting in March 1997 and further discussed at successive meetings of the management committee of the fund. The management committee included a trustee elected by the members.

[49] Thereafter, in July 1997, the board of trustees distributed a news letter to members. In this newsletter, which was the first of its kind, the members were informed about the workings of the fund, especially with regard to the investment performance of the assets of the fund, and also the benefits provided by the fund. In the preamble to the newsletter, the chairman of the

board of trustees, *inter alia*, informed the members that they should remember that the fund is their fund and that they should take a greater interest in their retirement and other benefits.

[50] It was stated in the newsletter that 95% of the active members elected to transfer to the defined contribution section of the fund with only a handful of members remaining in the defined benefit section.

[51] In a section with the heading "Assets and Liabilities of the Fund", the following was, *inter alia*, stated: That the liabilities in respect of the defined benefit members were significantly less than the market value of the assets of the fund and that apart from negotiating with the employer regarding the introduction of the defined contribution section, it was also negotiated as to how the surplus should be spread amongst the various parties to the fund. It was stated that 29% of the assets of the fund, which had a market value of R370 million as at 1 November 1996, constituted surplus. The utilisation of the surplus was explained by way of a pie-graph which showed the following: defined contribution transfers (including provident funds) – 34%; defined benefit reserves – 1%; pensioners -- 22%; employer controlled reserve -- 28%; and surplus – 15%.

[52] According to another pie-graph, the asset position after the conversion showed the following: defined contribution (including provident funds enhancements) – 34%; defined benefit – 1%; pensioners -- 53%; employer controlled reserve -- 8%; and surplus – 4%.

[53] The newsletter concludes by encouraging the members to contact their member trustee in their region should they wish to raise any matter affecting the affairs of the fund.

[54] As previously mentioned, application was made to the registrar during the latter part of 1997 to change the rules of the fund to, *inter alia*, allow for the intended distribution of surplus. The rule amendment was approved by registration on 30 December 1997.

**The Findings of the of the Board of Appeal**

[55] The main findings of the board of appeal were referred to above. In brief, these reasons amount to the following: Firstly, that it is implicit in the provisions of section 15F(2) that the issue of fairness an equal treatment of members and the employer in respect of the distribution of the surplus, is a relevant consideration. Further that there was no evidence as to how the 20% allocation to the employer was arrived at and that the allocation of 1% to members who elected to remain in the defined benefit section, was unfair.

[56] Secondly, that there was no informed choice made by the members who elected to remain in the defined benefit section since they had not been given sufficient information regarding the making of such a choice and had not been informed that their benefits were underwritten by the employer who had been allocated an amount of R30 million.

[57] Thirdly, that there was no proof of any negotiations between the applicant and the members or the member representatives. In this regard the board of appeal found that the information sent to the members did not contain any indication of the amount or percentage that would be allocated to the employer.

[58] Lastly, that the enhancement of benefits of members who chose to join the defined contribution section, indirectly also benefited the employer due to the transfer of risk from the employer to the members. In this regard the board of appeal found that when one group or class of members is discriminated against or is disadvantaged, for whatever reason, such unfair treatment is a factor that impacts upon the registrar's discretion in terms of section 15F(2) of the Act, and that the registrar was entitled to take this ground into account in the interest of fairness and for rejecting the applicant's application.

**Discussion**

[59] It was common cause that a decision of the board of appeal constitutes administrative action which is reviewable by this court in terms of the provisions of PAJA.

[60] The applicant mainly relied on section 6(2)(d), section 6(2)(e)(i), section 6(2)(e)(iii) and section 6(2)(f)(ii)(cc) of PAJA. Section 6(2)(d) provides for the review of a decision if the decision was materially influenced by an error of law. Section 6(2)(e)(i) relates to a decision taken for a reason not authorised by the empowering provision. Section 6(2)(e)(iii) relates to a decision taken

because irrelevant considerations were taken into account or relevant considerations were not considered. Section 6(2)(f)(ii)(cc) relates to a decision which is not rationally connected to the information before the decision maker.

[61] In my view the decision of the board of appeal was materially influenced by an error of law, more particularly in respect of what section 15F of the Act entails and that this, *inter alia*, resulted in the board of appeal taking into account irrelevant considerations and not considering relevant ones. The findings of the board of appeal are also not, in my view, rationally connected to the information before it. I shall now deal with the main reasons for these views.

[62] Section 15F of the Act deals with the approval by the registrar of a transfer of credit in an existing employer reserve account, in other words, money which had earlier been earmarked for the benefit of the employer. It does not deal, in the context of the present matter, with issues such as an earlier decision by the fund to establish a defined contribution section in the fund and neither does it deal with any earlier allocations of surplus to members of the fund. All that section 15F requires from the registrar is that he should satisfy himself as to whether an earlier allocation of actuarial surplus for the benefit of the employer was at the time of such a location negotiated between the stakeholders in a manner consistent with the principles underlying sections 15B and 15C of the Act. If the registrar is satisfied that such negotiation had taken place, he is obliged to transfer the

money to an existing employer reserve account as defined in the rules of the fund.

[63] The establishment of a defined contribution section in a fund had always been the prerogative of the particular fund and the surplus legislation did not change that fact. Similarly, the surplus legislation does not deal with any prior allocation of surplus to members of the fund but only with earlier allocations to the employer and ancillary matters benefiting the employer. The reason for this distinction probably lies, *inter alia*, in the fact that traditionally, and prior to the introduction of section 7A of the Act by Act 22 of 1996, members of the board of a fund were appointed by the employer and that members had no representation on the board.

[64] Similarly, section 15F specifically refrains from mentioning the fairness or otherwise of such an earlier allocation to the employer. If the legislator intended an investigation into the fairness or otherwise of an earlier allocation to the employer, it could very easily have done so by providing therefor in section 15F in a manner similar to the provisions of section 15B. Section 15B deals with surplus which had not yet been allocated or distributed at the effective date mentioned in that section, and in that regard the legislator specifically required an equitable split of such surplus between the members and the employer and specifically tasked the registrar to satisfy himself that the scheme relating to the distribution of such funds be reasonable and equitable.

[65] In the same vein, the legislator also did not refer in the surplus legislation, and more particularly section 15F, to the fairness or otherwise of allocations of surplus made to members or categories of members of the fund, at the time when an allocation was made to the employer.

[66] *In casu* the board of appeal, *inter alia*, furthermore found as part of its reasons for dismissing the appeal that the members who elected to remain in the defined benefit section, were not supplied with sufficient information to make an informed choice as to whether they should remain in that section or be transferred to the defined contribution section. Firstly, on the facts before the board of appeal, this finding cannot be supported. The newsletter and other evidence referred to above, comprehensively and more than adequately informed the members of all the relevant factors which they required in order to make the decision to migrate or not. But, secondly, whatever the factual position, it is irrelevant for purposes of the applicant's application in terms of section 15F of the Act. The establishment of a defined contribution section by the applicant, the migration of members to that section and the reasons why they may or may not have done so, has nothing to do with what the legislature requires from the registrar in section 15F.

[67] The board of appeal similarly found as part of its reasons for dismissing the appeal that there is no evidence which indicates how a portion of the reserve was arrived at and why a mere 1%, as opposed to the employer's ring-fenced 28%, was allocated for the benefit of those members who elected to remain in the defined benefit section. This was regarded as inherently

unfair and as such impacted negatively on the applicant's application in terms of section 15F. Again, as far as the factual finding is concerned, I am of the view that on the facts before the board of appeal, a finding that it was inequitable to allocate 1% of the surplus to the members who elected to remain in the defined benefit section, could not have been made. Firstly there was no specific evidence in respect of this issue before the board of appeal and the issue was at no stage specifically addressed. Secondly, from the evidence that there was, it would appear that the actuarial valuation of the liabilities relating to the members in the defined benefit section, was R5 million. 1% of the surplus at the time is approximately R1,5 million, and this amount therefore constitutes approximately 30% of the liabilities relating to the members in the defined benefit section, which was allocated for their benefit alone. This percentage is obviously quite high, but does not appear to have been considered by the board of appeal. In any event, an allocation in respect of the members in the defined benefit section would not have had any direct financial benefits for such members and consequently a cold comparison with other allocations made at the time would serve no purpose and it would be wrong to simply regard that it as a relevant aspect for purposes of the applicant's application in terms of section 15F.

[68] However, whatever the factual position is, the fairness or otherwise of an allocation for the benefit of the employer, is an irrelevant consideration for purposes of section15F of the Act. The legislator did not require a consideration of the validity or fairness of any allocation to any section of the

members or to the employer, either on its own or with reference to other allocations made at the same time or at any other time.

[69] Another reason offered by the board of appeal for dismissing the appeal relates to the statement that the employer benefited from the fact that members migrated to the defined contribution section. Again, whether this is factually correct or not with reference to all the evidence, the issue is totally irrelevant for purposes of section 15F and should not have been considered by the board of appeal.

[70] That leaves the issue of whether the allocation of surplus to the employer was negotiated the between stakeholders in a manner consistent with the principles underlying sections 15B and 15C. The board of appeal found that there was no proof of any negotiations between the applicant and its members or member representatives. According to the written reasons of the board of appeal the reason for this finding was the following: "The applicant's own admission that section 15F does not envisage actual negotiation since this is not provided for in sections 15B and 15C; the inadequate "consultation" which was held by means of the distribution of booklets and presentations to appellant's members; the appellant's non-compliance with the provisions of clause 8.6 (b) of PFA 105 and the fact that evidence appears to indicate that there was no full disclosure in the booklets and presentations of the benefit to stakeholders of the benefit which the employer would gain from the surplus distribution."

[71] Despite the above-quoted reasons, it also appears from a reading of the judgment of the board of appeal that it was also found that the allocation to the employer occurred prior to 25 November 1996 and thus at a time prior to the board of trustees also consisting of members elected by the members of the fund. I shall deal with these issues in conjunction.

[72] Firstly, it is necessary to make a few general observations. As indicated before, section 15B provides for the apportionment of existing surplus in terms of the scheme to be devised by the fund and which must be approved by the registrar. The section contains comprehensive provisions regarding, *inter alia*, representation, information and data to be obtained and distributed, the manner in which the surplus must be apportioned, the considerations which shall apply, and ancillary matters. It is provided that at least 75% of the members of the board must approve the scheme.

[73] Section 15C deals with the apportionment of future surplus. This has to be done according to the rules of the fund and if the rules are silent on the apportionment of surplus, the apportionment shall be determined "by the board taking into account the interests of all the stakeholders in the fund".

[74] None of the aforesaid sections were in existence at the time when the allocations envisaged in section 15F would have been made. The legislator was clearly aware of this fact and consequently framed section 15F in the vague terms that it did. To have insisted on strict compliance with a newly devised procedure would obviously have been extremely unfair towards the

employers. Especially since previous allocations of surplus to members did not *per se* come under scrutiny in terms of the surplus legislation, it would seem that the main aim of the legislator was to ensure that previous allocations to the employers, which would have been done by employer appointed boards, had not been done completely unilaterally.

[75] During argument I was referred to two written decisions by the board of appeal in two other matters. Except for one exception, those boards of appeal were constituted differently to of the one in the present matter. The two matters were Coca-Cola Southern Africa Pension Fund v Registrar of Pension Funds and Romatex Pension Fund v The Registrar of Pension Funds. In the Coca-Cola matter the principles underlying sections 15B and 15C which relate to negotiations were summarised as follows:

> "The actuarial surplus must be split reasonably and equitably between the relevant stakeholders in such proportions as the board, constituted broadly as contemplated by section 7A shall, by a substantial majority, determine, taking into account the financial history of the fund and the interests of such stakeholders. Naturally a negotiation envisages an understanding on the part of the negotiators of the relevant facts in order for them to reach an informed conclusion. Accordingly one of the principles underlying sections 15B and 15C is that the members and pensioners must be in possession of sufficient information of what it is proposed to allocate to the employer reserve account to enable them to enter

> into meaningful debate on such an occasion should they hold a view that differs from that of the board."

[76] I respectfully disagree with the first part of the first sentence where it is stated that "the actuarial surplus must be split reasonably and equitably between the relevant stakeholders". In my view the legislator could not have intended to include a requirement of proof that an earlier allocation to the employer had been a reasonable and equitable part of a split. Firstly, the emphasis in section 15F(2) is on the issue that the allocation "was negotiated". The emphasis is therefore on a procedural requirement rather than on the contents or outcome of such a procedure. The last part of subsection (2) refers to the "manner" of such negotiations, which shall be consistent with the principles underlying sections 15B and 15C. By referring to the "manner" of such negotiations, the emphasis is again on exactly this, namely the manner in which the parties negotiated, in other words, the procedure that they followed, rather than on the outcome of such procedure.

[77] Secondly, if the legislator intended a fund to prove to the registrar that a previous allocation to an employer, which may have occurred many years in the past, had been reasonable and fair, and that the registrar had to satisfy himself of such fact prior to approving the transfer, the legislator could have provided therefore in the same clear language as had been done in the other sections.

[78] Thirdly, the above quoted passage in the Coca-Cola matter envisages a split of surplus between stakeholders. It is not inconceivable that a previous allocation to an employer could have been effected without a simultaneous allocation to members or to every section of the membership. In fact, this appears clearly from the wording of the different sections. Both sections 15B and 15C envisages a distribution of a surplus amount between the employer and the members alike. Section 15F does not speak of an earlier distribution of surplus between the employer and the members but speaks of an earlier "allocation" to the employer reserve account. What then would be the position if the application in terms of section 15F relates to an earlier allocation of surplus to the employer alone? Should previous or subsequent allocations to the membership be considered, or perhaps the so-called history of the fund, or, at least, the interests of the other stakeholders? It is clear that the legislator was alive to such considerations as same were specifically referred to in the other sections. In my view the omission to refer to these aspects in section 15F supports the view that the legislator intended to only require that a proper procedure involving the members as well had preceded the prior allocation to the employer and that it had not merely been a unilateral decision by the employer-appointed board alone.

[79] Fourthly, a reference to the provisions of section 15B(9) also, in my view, affords assistance with the interpretation of this issue. Of note in this regard is that despite section 15B(9) requiring the registrar to satisfy himself that the scheme for the apportionment of an existing surplus is reasonable and equitable, the registrar does not have the final say in the matter if he is not so

satisfied . Section 15B(10) provides that in such event the registrar shall require the board to refer the scheme to a special *ad hoc* tribunal in terms of section 15K. Section15K(15) provides that after the *ad hoc* tribunal had made a determination in the matter, the registrar must accept such determination as satisfying the requirements of section 15B (9) unless the registrar is of the opinion that the tribunal failed to exercise its discretion properly and in good faith. In my view it is inconceivable that the legislator would, for purposes of section 15F, have granted the registrar the final say in respect of the reasonableness and equitableness of a previous allocation, but not in respect of a distribution yet to be made. The absence in section 15F of a provision that in the event of the registrar not being satisfied that the allocation had been reasonable and equitable, he or the board should refer the matter to an *ad hoc* tribunal in terms of section 15K, supports the interpretation that section 15F does not allow the registrar to consider whether an earlier allocation or distribution which involved the employer, had been reasonable and equitable.

[80] This is not necessarily the only principle that may be extracted from the provisions of section 15B and 15C. Some of the more important principles would, in my view, be the following: Negotiations need not be with every member of the fund personally. Both the aforesaid sections specifically provide for the board of the fund to negotiate and determine the issue at hand. This is a clear recognition of the principle of collective bargaining. In fact, section15B merely requires that 75% of the members of the board should concur in order to conclude the matter at hand. Furthermore, in terms of section15C an apportionment by the board may not be vetoed by the

employer or any member. The aforesaid all became possible since the introduction of section 7A which requires that 50% of the members of the board of a fund shall be appointed by the members. The aforesaid provisions consequently give full recognition to the fact that the legislator regards the members to be properly represented by their elected board members and that a substantial majority vote would suffice.

[81] The last part of the above extract from the Coca-Cola matter reads as follows: “Naturally a negotiation envisages an understanding on the part of the negotiators of the relevant facts in order for them to reach an informed conclusion. Accordingly one of the principles underlying sections 15B and 15C is that the members and pensioners must be in possession of sufficient information of what it is proposed to allocate to the employer reserve account to enable them to enter into meaningful debate on such allocation should they hold a view that differs from that of the board.” As a general proposition the aforesaid holds true. It goes without saying that in order for negotiations to take place, the negotiators should understand the relevant issues and possess the necessary facts. Furthermore, in a situation of collective bargaining, where representatives negotiate on behalf of a larger membership, the membership should ideally have a full understanding of the issues at stake as well as the relevant facts in order for them to contribute meaningfully in the interaction between themselves and their representatives and to give their representatives a mandate in respect of the relevant issues at stake. In the classical situation of two bargaining entities being represented by representatives, it is the responsibility of each side to ensure

that the aforesaid knowledge and understanding exist in the ranks of its own membership. It is not uncommon, however, that in cases where, or example, facts relating to bargaining issues or to members of the one side, fall peculiarly within the knowledge the other side, such other side has the obligation to make known the relevant information to the first side.

[82] Even if there should be such an obligation in a particular instance, the question as to whether, and to what extent a fund in the position of the applicant is obliged to supply the membership of the fund with facts and information, as opposed to supplying such facts and in formation to the representatives of the membership, does not necessarily have a clear and straightforward answer. However, even if circumstances demand that the fund takes responsibility for supplying such facts and information to the members themselves, it must be accepted that such obligation would only relate to such facts and information which would place the membership reasonably in a position to understand the issues at hand and to meaningfully interact with their representatives. The representatives of the membership also have the duty to inform their members of such relevant facts and information and detail which their members need to know.

[83] In the present matter it is not necessary to make a finding in respect of the aforesaid issues. The thrust of the registrar's case was that no negotiation whatsoever took place as the decision to allocate surplus to the employer was taken by the employer-appointed board prior to 25 November 1996 and thus prior to the board consisting of an equal number of members

appointed by the membership. It is consequently necessary to consider when and how the allocation occurred and whether the members and/or their representatives possessed sufficient knowledge of the relevant facts and circumstances to consider and, if necessary, debate the issues at hand.

[84] It seems clear that the evidence indicates that although the decision to establish a defined contribution section in the fund had been taken by the employer appointed board prior to 25 November 1996, no allocation of any surplus occurred before that date. In fact, as mentioned earlier, it does not appear that any distribution or allocation of surplus played any part in the original decision by members to transfer or not.

[85] However, the utilisation of the surplus by the members and the employer was considered at that point. As indicated earlier, a proposal in this regard was presented to the newly-formed board on 25 November 1996. At that meeting the issue must have been considered and debated because a provisional contribution holiday for the employer was decided on and the intention to utilise different percentages of the surplus in respect of certain categories of members, was also minuted.

[86] The most important aspect, however, is that there could not have been an allocation to an existing employer reserve account at the time for the simple reason that no such account existed at the time and the rules of the fund did not make provision for such allocation. For this to happen, the rules of the fund had to be amended.

[87] Later during1997 the applicant did apply for a rule amendment allowing for the allocation of surplus and the registrar approved the rule amendment on 30 December 1997. It is therefore only as from that date that any allocation to the employer reserve account could legally have been made.

[88] In respect of the interim period namely from the initial intention to utilise some of the surplus in November 1996, until being allowed to do so on 30 December 1997, the evidence shows, *inter alia*, the following: Firstly, the members were duly represented on the board of the applicant from 25 November 1996 onwards. Half of the members of the board were elected by the employer and the other half were elected by the membership. In these circumstances it can be accepted that the members elected by the membership would act in the best interest of the membership in all matters affecting them. In promulgating sections 15B and 15C the legislator obviously accepted this fact as all apportionments are to be made by the board alone; Secondly, relevant issues were discussed at meetings of the board and the management committee; Thirdly, in the newsletter of July 1997 the members were given extensive information on a range of relevant issues such as the assets and liabilities of the fund and also as to how the surplus should be split amongst the various parties to the fund. The split was reflected in an easy to read pie-graph. The asset position of the fund relating to the various parties to the fund was also reflected in a pie-graph; Fourthly, the percentage distribution of the surplus as well as the nature of the distribution differed extensively from what the initial proposed position had been during November

1996; Fifthly, for more than a year prior to the rule amendment which would enable the fund to create an employer reserve account to which surplus could be allocated, the board was a fully representative board and did discuss the different allocations. At least five months prior to the rule amendment, the members were informed both as to the proportions in which the board proposed distributing the surplus and the amount of surplus that was available for distribution as well as to other relevant information. There was no suggestion that the members or their elected board members would have required more information in order to make informed decisions regarding the issue of allocation of surplus to the employer.

[89] The uncontested evidence was furthermore that the members of the board, which includes the members appointed by the membership of the fund, unanimously agreed to the aforesaid distribution of the surplus and furthermore that none of the membership offered any complaint in regard thereto. In any event, if the member-appointed members of the board of the fund at any time had any reservations about the allocation of surplus to the employer or to the extent of such allocation, they could have registered their opposition thereto and they could have opposed the application for the rule amendment. That did not happen.

[90] On behalf of the registrar it was submitted that the decision to allocate surplus to the employer must have been a unilateral decision because there exists no clearly minuted resolution of the board In that regard. This proposition fails to recognize the facts of the matter and the reality of the

situation. The board of the fund was the driving force behind the distribution of surplus. It took more than a year to finalise the process and during all this time the board of the fund was fully representative. Furthermore, for a substantial period prior to the finalisation of the matter, the membership possessed all the necessary information in order to properly consider all relevant aspects thereof. The fact that a formal resolution had not been minuted cannot affect the reality of the situation.

[91] As mentioned before, section 15F requires that such an earlier allocation to the employer should have been “negotiated” between the stakeholders. “Negotiation” in this sense would have its ordinary meaning namely of parties talking to each other in order to settle or compromise a particular matter. In Minister of Economic Affairs and Technology v Chamber of Mines 1991(2) SA 834 (T) the court was called upon to consider the meaning of the word “negotiate” in the context of a regulation which provided that the manager of a mine shall act in the manner indicated ”after negotiation with the individual employees’ organisations as to the needs and preferences of their members”. As to the meaning of the word “negotiate” the honourable Eloff JP held the following at 836G:

> “By using the word 'negotiate' the Minister purported to require something in addition of mine managers than merely to ascertain the wishes of the employees. According to The Oxford English Dictionary vol VII, the word, when used in the transitive sense, means
>
> 'to hold communication or conference (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with the view to some settlement or compromise'.

> The process contemplated by the requirement of negotiation means that, if the employees' organisations concerned express needs and preferences at variance with what the manager considers reasonable or essential, or if various employees' organisations on a mine have different needs and preferences, the manager should endeavour to reach agreement with those organisations. He must enter into debate with them, and, if he thinks it necessary, endeavour to persuade them to change their attitudes. He should give consideration to whether he should not depart from a position already taken for the expediency of achieving compromise. The duty imposed in 'negotiate' means that the interchange should proceed until agreement or deadlock is reached. The complexity of the negotiation process prescribed by the regulations becomes even clearer if regard is had to what the manager has to negotiate about. It has inter alia to be about the preferences of the members of the employees' organisations. It goes without saying that this may well be a matter on which subjective attitudes may be adopted. It may well be a matter of some difficulty to decide whether the negotiation has passed a stage of merely consulting, and when it can be said to have gone as far as the draftsman of the regulations had in mind."

[92] I respectfully agree with the aforesaid statements. The purpose of negotiation is to reach an agreement. Consequently, the extent of the debate and other efforts in order to reach the agreement, would depend on the extent of the disagreement between the contending parties. If the parties, for example, establish during their meeting that they agree in all respects with what the other side proposes, there would obviously be no need for any debate. They would have achieved the purpose of the negotiations, namely the conclusion of an agreement, without any debate. If legislation requires parties to "negotiate" with one another, and they find themselves in the

position of the parties in the aforesaid example, namely, that there are no disagreements between them with the result that they agree on the issues at hand without any debate, the requirement of “negotiation” would have been met.

[93] *In casu* it is common cause that the decision by the board to allocate a percentage of the surplus to the employer was a unilateral decision by the board. That decision was reached by the representative board prior to the amendment of the rules of the fund which allowed for the actual allocation of surplus to the employer.

[94] Consequently, and for the reasons mentioned above, the board of appeal committed several reviewable errors both of law and of fact. As a result it failed to apply its mind to the appropriate enquiry and made a finding which is not rationally connected to the evidence which was placed before it. In the result the decision of the board of appeal should be reviewed and set aside.

[95] It was submitted on behalf of the applicant that in such event this court should substitute the decision of the board of appeal with a decision upholding the appeal and directing the registrar to approve the applicant’s section 15F application. On behalf of the registrar it was submitted that in such event the matter should be referred back to a differently constituted board of appeal for reconsideration.

[96] According to the provisions of section 8(1)(c)(ii)(aa) of PAJA the court has the power on review to substitute administrative action in exceptional cases. In Gauteng Gambling Board v Silverstar Development Ltd and Others 2005 (4) SA 67 (SCA) at p75 para [28] this issue was dealt with as follows:

> "Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002 (6) SA 606 (SCA):
>
> '[14] . . . (T)he remark in Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2) SA 72 (T) at 76D - E that ''the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary'' does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in Livestock and Meat Industries Control Board v Garda 1961 (1) SA 342 (A) at 349G
>
> ''. . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides''.
>
> [See also Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another 1999 (1) SA 104 (SCA) at 109F - G.]
>
> [15] I do not accept a submission for the respondents to the effect that the Court a quo was in as good a position as the Commission to grant or refuse exemption

> and that, for this reason alone, the matter was rightly not remitted. Admittedly Baxter Administrative Law at 682 - 4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:
>
> "The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers . . .; sometimes, however, fairness to the applicant may demand that the Court should take such a view."
>
> This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.'
>
> [29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) D Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at paras [47] - [50], and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] - [49]. That is why remittal is almost always the prudent and proper course."

[97] A consideration of all the facts and circumstances of this case and the submissions made on behalf of the parties convinced me that this is an exceptional case and that this court should substitute the finding of the board of appeal. Most important is the long history of the matter, the fact that the surplus distribution scheme of the applicant cannot be finalised until its

section 15F application has been finalised, and the inordinate delay that will be caused by a remittal to the board of appeal. Nothing is to be gained by a remittal and it would only tend to operate procedurally unfairly and generally prejudicially to both parties and especially to the stakeholders of the fund.

[98] In respect of costs, neither party submitted that costs should not follow the event and that such costs should not include the costs of two counsel. I can find no reason why costs should not follow the event and why costs of two counsel should not be awarded .

[99] In the result the following order is made:

1. The decision of the Financial Services Board of Appeal, which consisted of the first, second and third respondents, handed down on 13 April 2007, including the order of costs, is hereby reviewed and set aside.

2. The aforesaid decision of the Board of Appeal is hereby substituted with a decision in the following terms:

   "Ordering that:

   (a) The appeal is upheld;

   (b) The Registrar it is directed to approve the applicant's section 15F application"

4. The fourth respondent is ordered to pay the costs of the application which costs shall include the costs of two counsel.

CASE NO: 44886/07

FOR THE APPLICANT: ADV WATT-PRINGLE SC
INSTRUCTED BY: THYNE HUNTER ESTERHUIZEB INC
C/O FRIEDLAND HART
REF.: T VAN STRAATEN

FOR THE 4TH RESPONDENT: ADV MALEKA SC
ADV PILLAY
INSTRUCTED BY: ROOTH WESSELS MALULEKE
REF.: F. ASMAL/B24632

DATE OF JUDGEMENT: 13 JANUARY 2009