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

DATE: 06/02/2008

CASE NO: 4150/2007

UNREPORTABLE

In the matter between:

NATIONAL TERTIARY RETIREMENT FUND	Applicant
And	
MSAKAZI NTEKU SOLOMON SITHOLE N.O.	First Respondent
REGISTRAR OF PENSION FUNDS	Second Respondent

JUDGMENT

Rasefate AJ

The parties

[1] The applicant is a pension fund (the Fund) registered in terms of section 4 of the Pension Funds Act, 24 of 1956 (the PF A). The Fund is thus a body corporate capable of suing and of being sued in its corporate name. The Fund was established with effect from 21 December 1994 when members and pensioners from the Associated Institutions Pension Fund (the AIPF) and the Temporary Employees' Pension Fund (the TEPF) transferred to it. It has its registered office at 2nd Floor, Alexander Forbes Building, Brooklyn, Pretoria. The employers participating in the Fund are all higher educational institutions which were previously known as Technicons. There were 209 such

institutions at time of their association from the mentioned previous funds, but some have since merged with others.

[2] The first respondent is a natural person who is a practicing advocate. He is cited in his official capacity as the duly appointed chairperson of the Board of Appeal constituted in terms of section 26 of the Financial Services Board Act, 97 of 1990 (the Appeal Board; the FSB Act). The other members of the Appeal Board are an actuary, and a chartered accountant.

[3] The second respondent is the Registrar of Pension Funds (the Registrar) by virtue of section 3 of the PFA, with his principal place of administration at the offices of the Financial Services Board, Rigel Park, 446 Rigel A venue South, Erasmusrand, Pretoria. He is cited by virtue of the interest he has in this matter, but no relief is sought against him, except for costs in so far as he opposes this application.

[4] For the purpose of this judgment the parties shall, except for First Respondent, be referred to by their abbreviated names above.

The application

[5] The Fund seeks an order reviewing and setting aside the decision of the Appeal Board which was taken on 14 August 2006, dismissing with costs, such costs to include the costs of counsel, an appeal by the Fund against the

refusal of the Registrar to approve and register in terms of section 12 of the PF A an amendment to the Fund's rules (the rule amendment) known as amendment number 31. Secondly, and resulting from the above, the Fund seeks an order substituting for the decision of the Appeal Board, one that upholds with costs, such costs to include the costs of two counsel, the appeal by the Fund and directing the Registrar to register the rule amendment in terms of section 12 of the PFA.

Alternative to the above, the Fund seeks an order referring the said appeal back to the Appeal Board for reconsideration; and an order directing that costs of this application be paid by any of the Respondents opposing it, jointly and severally, the one paying, the other to be absolved.

[6] For the purpose of this application the parties agree that the Appeal Board's decision is an administrative action which is subject to judicial review under the Promotion of Administrative Justice Act, 3 of 2000 (the PAJA).

The deficits

[7] According to specific regulations governing the previous funds, only the funding portion of the actuarial reserve values of the members leaving were transferred to the Fund. This resulted in members who elected to transfer to the Fund bringing only 60,8 cents in the Rand value of their actuarial reserve. The resultant deficit is known in the papers as the 'pure deficit'. This deficit

was eliminated during 2003 by the allocation of a portion from the employer contributions since the Fund's inception. The second deficit is called the 'guaranteed benefit deficit'. It is the result of a provision in the rules of the Fund which guarantees minimum retirement benefits to members when they reach the normal retirement age. Despite the elimination of the pure benefit, this deficit increased because at the effective date of the actuarial evaluation on 31 December 2003 a total of 2 979 members who had transferred from the old funds qualified for the guaranteed benefits, while the investment performance of the Fund was lower than expected, and salaries had increased at rates higher than the rate of inflation. The Fund contends that these were factors over which it had no control. Due to this deficit ever increasing, the Fund held a meeting with a committee of Technicon principals in November 2002, at which it was agreed that every Technicon would take financial responsibility for the portion of the guaranteed benefit deficit attributable to members of the Fund who were its employees when they retired. The Fund contends that the decision was necessary because it had become clear that it would, for the foreseeable future not be in a position to fund the guaranteed benefit. It is this deficit that the rule amendment seeks to address.

When the rule amendment was submitted to the Registrar, all but two of the Technicons had signed the agreement; and by the time the appeal served before the Appeal Board, only one had not signed, who had only one member

who qualified for the guaranteed benefit.

A third deficit is referred to as the 'minimum benefit deficit', which arose in the Fund by the introduction through section 14A of the PFA, of the payment of prescribed minimum benefits to those members who withdrew early from the Fund. The amendment commenced in December 2001. The new minimum benefits became payable since January 2005, which was 12 months after the Fund's surplus apportionment date. The Fund held various discussions with participating employers, from which it became clear that they were not in a financial position to fund the additional benefit deficit.

The rule amendment.

[8] On 3 September 2004 the Fund adopted the rule amendment in question by resolution. In terms of the amendment the 'guaranteed benefit' will remain payable on the retirement of a member only if the employer of such member pays the portion of the guaranteed benefit deficit applicable to that member. The Fund's motivation for the rule amendment is that it is the most beneficial arrangement which is achievable for the affected members of the Fund as a whole since the Fund itself is unable to meet the guaranteed benefits, and it is the result of a contractual commitment from the employers to fund the benefit as and when the affected members retire.

[9] The Fund contends that the only alternative measures would be an

amendment of the rules which deletes any entitlement whatsoever to the guaranteed benefit, or a liquidation of the Fund. The Fund contends that there is nothing else open for it than amend rule 4.6 of the rules of the Fund to provide for the agreement in this regard, which is also the scheme for dealing with the deficit as required by section 18(1A) of the PFA. The Fund submitted the rule amendment to the Registrar on 5 November 2004.

[10] The Registrar's response to the rule amendment.

Following meetings between representatives of the Fund and of the Registrar, the Registrar wrote to the Fund as follows on 14 February 2005:

> 'Amendment number 31 [reduces] the liabilities of the fund should an employer fail to honour the Guaranteed Deficit. This office is therefore unable to determine whether [the] board of the fund has taken all reasonable steps in terms of section 7C(2)(a) of the Act to protect the interests of those members who are entitled to guaranteed benefits in terms of the rules of the fund and the provisions of the Act' .

[11] In response, the Fund's administrators pointed out that the rule amendment formed part of the scheme and the trustees of the Fund had considered all options identified by its advisors before deciding on the rule amendment. The letter stated that the relevant trade unions had approved the scheme, and it added that the guaranteed benefits agreements could be incorporated in the relevant members' conditions of service. The Fund requested the Registrar to reconsider its request for the registration of the rule

amendment.

[12] After a further meeting between them, the Registrar wrote to the Fund on 18 March 2005 notifying it of his refusal to approve the rule amendment giving his reasons as follows:

> '1. Minimum Benefits in terms of the Ac~ came into effect for this Fund on 1 January 2005. If Amendment No 31 is registered, this will usually have the effect of reducing the Minimum Benefits payable to those members who resign from the Fund. The Registrar cannot condone any rule amendment that reduces members' benefits for past service.
>
> 2. If the benefit were taken out of the Fund and the responsibility for the retirement benefit (not the resignation benefits) passed on to the employers, then the members would be at the mercy of their employers. The Registrar is not convinced that members and the Trustees appreciate that if these benefits are not honoured, then the members will no longer have the protection of the Registrar.
>
> 3. It is noted from your communication dated 18 October 2004 that not all participating employers agreed to take on this responsibility. This makes the issue in paragraph 2 above even more concerning, as no disclosure is made of which employers may not have agreed to take on the additional responsibility.

4. Furthermore, this communication did not explain to members the issue discussed in paragraph 1 above and the risks set out in paragraph 2.

5. The Registrar does not believe that the employers appreciate that if the amendment were registered, then there would be a surplus as at the surplus apportionment date. This surplus would then have to be paid to former members and would not be available to the employers.

6. The Registrar does not believe that the employers realize that should the fund be put into liquidation after 1 January 2005, then in terms of section 30(3) of the Act, they would be responsible for paying into the Fund enough money to cover the minimum benefit. Such money would be due and payable forthwith'.

Appeal to the Appeal Board

[13] The Fund, being aggrieved by the Registrar's refusal to register the rule amendment, appealed to the Appeal Board on the following grounds:

1. That the Registrar erred by not complying with the obligations contained in section 12 of the Pension Funds Act (PFA) when he refused to approve the rule amendment;

2. That the Registrar erred by assuming that he has discretionary powers to refuse rule amendment in instances where the rule amendment is consistent with the PF A and does not have the effect that the fund would be financially unsound if the rule amendment is approved.

[14] The Appeal Board considered the appeal by the Fund and, in a comprehensive decision it dealt with the issues raised, and it came to the conclusion and order that –

> 'In the light of the foregoing analysis and findings, the Appeal Board is constrained to arrive at the conclusion firstly, that the nature and ambit of the (Registrar's) powers in respect of the amendment of rules are not restricted to the provisions of section 12(4) of the Act but are to be found in section 12 as a whole; and in particular in section 12(1)(b) which confers a wide, equitable discretion to refuse the registration of rule amendments. This is so, especially if section 12(1)(b) is interpreted extensively with a view to attain the objective of the Act. Secondly, that the rule amendment in question is inconsistent with the Pension Funds Act, and that the (Registrar) was entitled to refuse to approve and register it. In the result the appeal is dismissed with costs, including costs consequent upon the employment of two counsel'.

[15] It is these findings, conclusion and order of the Appeal Board which the

Fund wishes to review before me.

The relevant provisions.

[16] Section 12 of the PFA in so far as this application is concerned provides as follows:

> "***12. Amendment of rules***
>
> *(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid*
>
> *(a) if it purports to effect (sic) any rights of a creditor of the fund, other than a member or shareholder thereof; or*
>
> *(b) unless it has been approved by the registrar and registered as provided in section (4).*
>
> (2) (Relates to transmission of copy of resolution to the registrar)
>
> (3) (Relates to the transmission of a certificate or a statement as to its financial soundness if such amendment may affect the financial condition of the fund)
>
> (4) *If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially*

sound, he shall register the alteration, rescission or addition …

(5) (Relates to consolidation of its rules by the fund and the duties of the principal officer and the registrar in that regard)."

Evaluation.

[17] It is noted that the use of the verb "effect" in the construction of subsection (1)(a) (meaning *'to bring about; to accomplish',* according to the *Oxford Illustrated Dictionary)* is wrong. As it is, the provision would mean that a rule amendment is not valid if it purports to create (i.e. 'bring about, accomplish') any rights of a creditor of the fund, etc. This does not make much sense, and it is clearly not what the legislature wanted to convey. The Afrikaans version of the subsection uses the phrase *'heet aan te tas'* which translates into 'purports to affect', and it seems to be more sensible. The latter meaning is also what both counsel understood the phrase to convey, as they presented their arguments. Therefore, the Court reads in the subsection the verb 'affect', for 'effect'. The user of a statute is entitled to read a word for another as in this situation, where it is obvious that the word used in the statute does not reflect the true intention of the legislature. See the remarks of Ogilvie Thompson JA in *Commissioner of Inland Revenue* v *Witwatersrand Association of Racing Clubs,* 1966(3) *SA* 291 *(A)* at 302A-B.

[18] The intention of the legislature with section 12 is in the first place to

create competencies for both the fund as well as the registrar concerning the amendment of rules of pension funds: To the fund it gives the capacity to effect a rule amendment, while for the registrar is the approval and registration thereof. Secondly, the legislature also sets out conditions under which the Fund as well as the Registrar should exercise those competencies: For the Fund the rule amendment may not affect the rights of a creditor who is not a member or shareholder of the Fund. By implication, therefore, for the creditor who is a member or shareholder of the Fund there is no protection against an adverse consequence resulting from a rule amendment. The Fund argues that with this concession in the provision it has the legal authority not only to reduce a member's benefit, but it may take away the benefit completely without offending the PFA. The Registrar does not deny that the Fund is granted that concession. Thus, the purport and effect of the provision in this regard is a matter of common cause.

[19] However, the validity of a rule amendment is in terms of subsection (1) (b) made subject to approval and registration by the Registrar. Approval and registration of the rule amendment do not constitute two separate processes, but registration follows upon – and it is an expression of - the approval by the Registrar. This means that there are not two separate discretions for the Registrar to exercise, but one: Once the Registrar has exercised a discretion to approve of the rule amendment, he must in terms of subsection (4) register it as an expression or signification of his approval of it. The conditions or

parameters for approval by the Registrar are provided for in subsection (4), and are, firstly if the Registrar finds that the amendment is not inconsistent with the Act, and secondly, if he is satisfied that it is financially sound.

[20] As alluded to in the previous paragraph, it is obvious that the Registrar exercises a discretion when deciding whether or not to approve of a rule amendment. It is so because he has to consider its nature and effect against the whole PFA – not only section 12 – and make a value judgment as to whether it is not inconsistent with the various provisions of it. The Registrar is also enjoined to consider, evaluate and satisfy himself of the financial soundness of the proposed rule amendment.

The Appeal Board has found in this situation that the Registrar's discretion is a broad and equitable one; and it is the main point of dispute in this matter. In my view, it is a matter of description and how one expresses the discretion. The real question should always be how the Registrar has exercised his discretion in a particular issue, ie. whether there is a legal basis for the decision; whether he has acted within the scope of his authority.

[21] It is in the exercise of that discretion that the Registrar decided not to approve of the rule amendment in this matter, on the grounds already stated in paragraph 12.

[22] The Appeal Board found that the Registrar rightly held that the rule amendment is inconsistent with the PFA because if it is approved and registered it would have the effect of reducing the benefits which accrue to members of the Fund who may resign from it, as well as those who retire, who may not receive their full benefits should the employer not pay in accordance with the agreement between the employer and the Fund.

[23] The Fund attacks the finding on two fronts. Firstly it argues that section 12(1) permits the reduction and even the elimination of benefits of its members. The Fund, correctly in my judgment, finds support for this contention in the introductory phrase to section 37 A which states that,

"*Save to the extent permitted by this Act ...*"

Thus, the concession granted to the Fund to be able to reduce benefits of members through a rule amendment is protected through this phrase, and consequently the Registrar's refusal to approve and register the amendment based on the ground that it reduces benefits cannot stand. A decision of the Pensions Adjudicator illustrates the protection to a fund's power to affect the benefit negatively in *Venter* v *Municipal Gratuity Fund and Another [2002] 10 BPLR 4008 (PFA)* at page 4012B-D. Secondly, the Fund argues that the prohibition against reduction of benefits in section 37 A does not relate to one that comes through the rule itself, or which is 'provided in the rules of a

registered fund', but it is directed at a reduction in consequence of external factors such as indebtedness of the member. The Fund is in my judgment correct in this regard. The nature of the reduction in benefits which is intended by the provision must be deduced from the specific words which immediately follow upon it or accompany it, namely 'transfer; cession; pledge or hypothec; execution in terms of a judgment'. This approach which is classical in interpretation of statutes is the *eiusdem generis* rule - See, *ia, GE Devenish, Interpretation of Statutes,* 1st Edition p. 70 et seq.

[24] The Appeal Board held that the rule amendment was also inconsistent with the PFA because it would transfer the liability to pay pension benefits from the Fund to participating employers, which situation would result in the members losing the protection of the Registrar provided to them in terms of the PF A should an employer not be willing or be in no position to pay that portion of the guaranteed benefit which has been undertaken. In that case the Registrar would have no power to compel employers to fulfil their contractual obligation towards the Fund for the benefit of the Fund's members, and it would result in the members having to sue for their benefits. The Registrar develops this argument further that each employer who signed the agreement to pay the benefit is not required to have any assets ear-marked to back that liability, and is not subject to any oversight normally associated with the operation of a pension fund.

[25] The Fund contends that, if a fund can - consistently with the PFA – amend its rules so as to diminish or eliminate benefits, it cannot be inconsistent with the PFA to retain those benefits but make them conditional on funding from the employer. The Fund argues that it is a lesser evil than if it were to eliminate the benefit completely. The Fund argues further that there is nothing in the PF A which entitles the Registrar to insist on 'protecting' potential retirees, and to the extent that he purports to do so he is acting *ultra vires.*

[26] The Fund points out that following the rule amendment, the members would remain entitled to their guaranteed benefits on retirement provided that their employers paid them, and that an employer's failure to pay for such benefits would be a matter which could easily be referred for resolution by the Commission for Conciliation Mediation and Arbitration (the CCMA) in terms of the Labour Relations Act, and the trustees of the Fund did not have any reason to believe that the employers could renege on their undertakings. Thus, it could not be said that they failed to protect the interests of the members in terms of the rules as they stood.

[27] I find it difficult, on consideration of the arguments in this issue, to conceive how a rule amendment which has the effect of removing the responsibility to pay a pension benefit out of the Fund and out of the reaches of the PFA can still remain consistent with the PFA. One would need at least

an indication within the PFA that such an arrangement was permitted. In the absence of any provision, even implied, which authorizes such a scheme or arrangement, it is quite extreme. The Fund has glaringly not been able to present an acceptable argument in this case based on the PFA such as it was able to do with regard to other grounds of the Registrar's refusal. In the premises I think that the Registrar is justified in complaining about this scheme as contained in the rule amendment, and the Appeal Board was justified in upholding the Registrar's refusal to approve and register the rule amendment.

[28] For the same considerations that are stated herein in respect of inconsistency with the PFA, the rule amendment is in my judgment also offensive to the notion of financial soundness. Through shedding of its responsibility towards the members and posting it outside the reaches of the PFA, an artificial surplus is created, but such a surplus then stands to be shared by past members in terms of relevant provisions in the PFA, who have by right no claim on the funds. The expending of already contributed funds in this way through an artificially created surplus, in the face of a deficit situation cannot, in my view, clothe the rule amendment with financial soundness: These are funds which would otherwise have been applied to the deficit. The Registrar correctly refers to the scheme as creating financial soundness at a cost, and it is a situation that does not accord with the dictionary meaning of soundness, which is described *ia* as *"healthy; financially solid or safe; correct,*

logical, well-founded, valid".

[29] On this ground alone it follows that the application for review of the Appeal Board's ultimate decision should fail, and it is ordered that –

[30] The application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

RE RADEFATE
ACTING JUDGE.

Date Heard: 13-09-2007
Date Delivered:
Of interest to other judges: No
Reportable: No