THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1161/2018

In the matter between:

VRYSTAATSE MUNISIPALE PENSIOENFONDS	**APPELLANT**

and

THE MINISTER OF FINANCE	**FIRST RESPONDENT**
FINANCIAL SECTOR CONDUCT AUTHORITY	**SECOND RESPONDENT**
CHIEF MASTER OF THE HIGH COURT	**THIRD RESPONDENT**
CHRISTOPHER HENRY ROSENBERG NO	**FOURTH RESPONDENT**
In his capacity as the former member representative	

Neutral citation: *Vrystaatse Munisipale Pensioenfonds v The Minister of Finance and Another* (Case no 1161/18) [2020] ZASCA 143 (2 November 2020)

Coram: Navsa, Zondi, Van der Merwe and Nicholls JJA and Unterhalter AJA

Heard: 21 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 2 November 2020.

Summary: Whether regulation promulgated by Minister, in terms of which a board of a pension fund is obliged to place calculable enhancements due to former members who cannot be traced in a contingency reserve fund from which it cannot be released,

except as payment to such members or as a result of crediting the Guardian's Fund or some other fund, is beyond the Minister's power and not in accordance with the Pension Funds Act 24 of 1956 – Minister arrogating power at odds with the Act – against the principle of legality.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Wepener J, sitting as court of first instance): judgment reported *sub nom Free State Municipal Pension Fund v The Minister of Finance and Others* [2018] ZAGPPHC 404

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and substituted as follows:

'Regulation 35(4) of the Pension Fund regulations is declared invalid and unenforceable in that it exceeds the Minister's powers under the provisions of the Pension Funds Act 24 of 1956.'

JUDGMENT

Navsa JA (Zondi, Van der Merwe and Nicholls JJA and Unterhalter AJA concurring):

[1] This is one of three related appeals that were heard on the same day.[1] This appeal, like the other two, is directed against a decision of the Gauteng Division of the High Court,[2] in terms of which an application by a pension fund, registered in terms of s 4 of the Pension Fund Act 24 of 1956 (the PFA), to have regulation 35(4) of the regulations, promulgated by the first respondent,[3] the Minister of Finance (the Minister), declared invalid on the basis that it exceeds the Minister's power under the PFA, was dismissed. In all three cases the high court had made no order as to costs.

[2] The principal issue in all three appeals, as it was in the high court, is whether the regulation in question is *ultra vires* the powers assigned to the Minister in terms of the PFA. Put differently, the question is whether the Minister has, by way of the regulation in issue arrogated power at odds with the PFA and offended against the principle of legality. The three appeals require consideration of the person/functionary

[1] The other two being *Hortors Pension Fund v Financial Sector Conduct Authority and Another* (Case no 054/2020) and *Southern Sun Group Retirement Fund v The Registrar of Pension Funds and Others* (Case no 215/2019). The unreported judgments of the courts below in these matters are cited, respectively, as *Hortors Pension Fund v Financial Sector Conduct Authority and Another* GP 28-08-2019 case no 70215/2017 and *Southern Sun Group Retirement Fund v The Registrar of Pension Funds and Others* GJ 18-12-2018 case no 21229/215.

[2] This particular appeal is against a decision of the Gauteng Division of the High Court, Pretoria (Wepener J, sitting as court of first instance). The other two – *Hortors Pension Fund* (ibid) and *Southern Sun Group Retirement Fund* (ibid) – are appeals against decisions also of the Gauteng Division of the High Court, first from the Provincial Division (Pretoria)(Kollapen J, sitting as court of first instance), and second from the Local Division (Johannesburg)(Siwendu J, sitting as court of first instance).

[3] See GN R98 in *GG* 162 of 26-01-1962. Regulation 35(4) was inserted in an amendment to the Regulations: see GN R558 in *GG* 24780 of 22-04-2003.

in whom, in terms of the PFA, the power to apportion an actuarial surplus in a pension fund and to create contingency reserve accounts, vests. The impugned regulation has to be viewed against the relevant provisions of the PFA. Neither the third respondent, the Chief Master of the High Court, who is in control of the Guardian's Fund, nor the fourth respondent, who is the former member representative of former members of the appellant, the Vrystaatse Munisipale Pensioenfonds (the Fund), participated in the proceedings in the court below or before us.

[3] The historical path leading up to the commencement of litigation, and the manner in which the issues were framed by the respective appellants in the three appeals, are not identical. There is also the accusation before us, on behalf of the Minister, that, in at least two, if not all three appeals, the respective pension funds have departed from their initial challenge to the regulation and are now advancing submissions beyond those raised in their founding affidavits and before the high court. Whether that complaint is justified and whether the appellant and the other funds ought to have been granted the relief sought requires scrutiny of the pleadings in each case, hence the necessity for three, separate judgments. There will, of course, in each judgment be references, where relevant, to the other two appeals. The analysis of the law and the conclusions reached will essentially be the same. All three appeals are before us with the leave of the court below.

[4] The Financial Sector Conduct Authority (the FSCA), the first respondent, was established under s 56 of the Financial Sector Regulation Act 9 of 2017 (the FSRA),

and came into existence on 1 April 2018,[4] replacing the Financial Services Board (the FSB), which owed its existence to the Financial Services Board Act 97 of 1990 (the FSBA).[5] The main objectives of the FSCA include, enhancing and supporting the efficiency and integrity of financial markets, protecting financial customers by promoting fair treatment by financial institutions and assisting in maintaining financial stability.

[5] It is necessary at the outset to have brief regard to the meaning of an actuarial surplus, since that concept is at the centre of this appeal. Simply stated, a surplus arises in a pension fund when an actuary determines that its assets exceeds its liabilities. Prior to 2001, how a fund dealt with a surplus was determined by its rules. The Pension Funds Second Amendment Act 39 of 2001 came into effect on 7 December 2001. It was enacted to regulate the distribution of a surplus by pension funds. It became known as the surplus legislation. The surplus legislation inserted definitions relating to pension funds surpluses and also introduced ss 14A and 14B, and ss 15A to 15K into the PFA.[6] This appeal turns on the interpretation and application of relevant provisions of the surplus legislation, located within the PFA. I shall, in due course, deal with the historical factors that gave rise to the surplus legislation.

[6] The background culminating in the present appeal is set out hereafter. The Fund is a closed pension fund, which was established and registered on 31 March

[4] See GN 169 in *GG* 41549 of 29-03-2018; and the Regulations published in GN R405 in *GG* 41550 of 29-03-2018.
[5] Established in terms of s 2 of the FSBA.
[6] Some of these provisions were either amended or substituted in subsequent legislation.

1963, in terms of prevailing legislation. The Fund has three categories of active membership, with class A members accruing benefits on a defined benefit basis, class B members accruing benefits on a defined contribution basis and class C members having certain vested pension benefits, accrued on a defined benefit basis and accruing further benefits on a defined contribution basis.'

[7] The Fund's members, subject to certain minor exceptions, are full-time employees and former employees of Local Authorities in the Free State. The following seven paragraphs explain how the litigation culminating in the present appeal arose.

[8] On 29 November 2013 the Fund deposited a copy of a Statutory Actuarial Valuation Report (12/8/412) reflecting the valuation of the Fund as at 30 June 2011, with the Registrar of Pension Funds, as required by s 16(1) of the PFA. Paragraph 5.55 of the Valuation Report reads as follows:

'In terms of Rule 45(2) the contingency reserve account in respect of surplus allocations to former members of the Fund revert to the fund two years after the approval of the surplus scheme by the Registrar. The two-year period expired in October 2008 and an amount of R86.5 million reverted to the fund.'

The reference to rule 45(2) is a reference to the rules of the Fund which would in the ordinary course have been authorised in terms of the PFA.

[9] On 28 January 2014 the Registrar's office wrote to the Fund, stating that it had 'pended' the Valuation Report until the following issues were resolved or satisfactorily explained:

'Section 5.55 refers. It is stated that in terms of Rule 45(2), the contingency reserve account in respect of surplus allocations to former members of the Fund revert to the Fund two years after the approval of the surplus scheme by the Registrar. The two-year period expired in October 2008 and an amount of R86.5 million reverted to the Fund.

Rule 45(2) states that 'a contingency reserve account will be maintained in the Fund and will be credited with actuarial surplus payable to former members in terms of (*sic*) s 15B(5)*(e)*(i) and (ii) of the Act. Any remaining balance in the contingency reserve account two years after the approval of the surplus apportionment scheme by the Registrar will revert to the Fund.

In its surplus apportionment scheme, approved by the Registrar on 24 October 2006, the Fund did not establish a contingency reserve account for former members in terms of s 15B(5)*(e)* of the Act.

The Registrar is of the opinion that the Fund is acting *ultra vires* its rules. The Fund is expected to amend the report in line with its registered rules.

The Registrar requires the Fund to amend its rules in line with the Act to provide for the adverse experience reserve. The Fund is expected to attend to this forthwith, as the statutory actuarial valuation has not been performed in line with the rules of the Fund...'

[10] The Fund's attorney wrote back, stating that he could not comprehend why the Registrar adopted the view that the Fund was acting *ultra vires* its own rules. He thought it appropriate to bring the following to the Registrar's attention:

'On 11 November 2005 the board of our client approved a Surplus Appointment Scheme under s 15B the PFA for submission to the Registrar. Paragraph 2.3 of the Scheme reflects the allocation of surplus to former members. Included in that allocation was 2114 "Former members for whom the calculations could be performed, but could not be traced. (ie 58.64% of the total number of 3605 former members)."

On 9 December 2005, our client approved at its Annual General Meeting a rule amendment to establish a contingency reserve account to house the benefits allocated to the category of former members quoted above.

On 25 April 2006, the Registrar approved our client's rule amendment number 24, which reads as follows (Rule 45(2)):

"'n Gebeurlikheidsreserwerekenig word in die Fonds in stand gehou wat gekrediteer word met enige aktuariïele surplus betaalbaar aan vorige lede waarna daar in Artikel 15B(5)*(e)*(i) en (ii) van die Wet verwys word. Die kredietsaldo van die gebeurlikheidsreserwerekening word vermeerder of verminder met die beleggingsopbrengs verdien op die bates in hierdie rekening. Die kredietsaldo van die gebeurlikheidsreserwerekening word gebruik om voordele te betaal aan enige vorige lede waarna daar in artikel 15B(5)*(e)*(i) en (ii) van die Wet verwys word wat deur die Uitvoerende Komitee opgespoor word en wat in staat is om hul aanspraak op die betaling van 'n gedeelte van die aktuariële surplus tot die bevrediging van die Uitvoerende komitee te staaf. Indien daar, twee jaar nadat die Registrateur van Pensioenfordse die surplustoedelingskema goedgekeur het, 'n kredietsaldo in die surplustoedelingskema goedgekeur het, 'n kredietsaldo in die gebeurlikheidsreserwerekening is, word sodanige kredietsaldo aan die Fonds verbeur en het enige vorige lid waarna daar in Artikel 15B(5)*(e)*(i) en (ii) van die Wet verwys word, geen verdere eis teen die Fonds nie."

On 24 October 2006, the Registrar approved our client's Surplus apportionment Scheme and the board thereafter allocated the surplus as per the approved Scheme. This allocation included an allocation to the 2114 former members as per para 2.3 of the Scheme to the contingency reserve account in terms of Rule 45(2).

By October 2008, the amount standing to the credit of the contingency reserve account reverted to our client in accordance with Rule 45(2).

As appears from the above:

our client did establish a contingency reserve account for former members in terms of Rule 45(2) as referred to in s 15B(5)*(e)* of the PFA; and

our client has acted in accordance with its rules.

Please convey this information to the Registrar on our client's behalf and establish from the Registrar whether the first issue has been clarified to his satisfaction, or (if not), the basis upon which the Registrar still contends that our client is acting *ultra vires* its rules.'

[11] There were numerous interactions thereafter between the Fund and the Registrar's office. On 18 May 2015 the Registrar's office wrote to the Fund as follows: 'In terms of s 33A(1) the Registrar directs the board of the fund within two months of the date of this letter to—

reverse the decision to revert the R83.357 million of s 15B surplus payable to its former members in terms of the surplus apportionment scheme and calculated as at 31 October 2008 and restore the fund to financial neutrality, ie in the same position it was prior to the reversion of the said amount; and

implement the provisions of Regulation 35(4) made in terms of s 36(1) of the PFA in respect of s 15B surplus mentioned in paragraph 18.1 (sic).'

Section 33A of the PFA empowers the Registrar, in order to ensure compliance with the PFA, to issue a directive to a pensions fund, an administrator or any other person in which practices or actions that are required or prohibited are set out.

[12] The Registrar, it seems, initially objected to the valuation report on the basis that the Fund was precluded from releasing funds in terms of Rule 45(2) because it had not established a contingency reserve account for former members in its surplus apportionment scheme in terms of s 15B(5)*(e)* of the PFA and that it was therefore acting *ultra vires* its own rules. Later, from early 2015, the objection was that contrary to regulation 35(4), the Fund was releasing the surplus allocated to former members. I shall, in due course, deal with the provisions of the sub-regulation within the scheme of regulation 35 as a whole.

[13] On 18 May 2015 the Registrar's office wrote to the Fund as follows:

'The Registrar is concerned that contrary to the PFA and contrary to the Regulations made in terms of the PFA, the fund released R83.357 million of s 15B surplus which is payable to former members in terms of the fund's surplus apportionment scheme … the fund is bound by Regulation 35(4) of the Regulations published by the Minister in terms of s 36(1) of the PFA which says that where a board is able to determine the enhancement value due in respect of a particular former member in terms of s 15B(5)*(b)* or *(c)* of the PFA, but is unable to trace the former member to make the payment, the board must put the enhancement into a contingency reserve account established specifically for that purpose. Regulation 35(4) makes it clear that notwithstanding the rules of a fund, the moneys in this contingency reserve account may not be released except to pay the former member or as a result of crediting the Guardian's fund or another fund established by law to include such amounts. This is what the Fund was supposed to do in terms of the PFA and the Regulations and it was therefore not permitted to "release" the R833.357 million of s 15B surplus payable to its former members for all of whom its surplus scheme indicated that it could calculate their benefits … *The Registrar directs the board of the Fund to within two months of the date of this letter implement the provisions of Regulation 35(4) made in terms of s 36(1) of the PFA in respect of the s 15B surplus mentioned in paragraph 18.1 (sic).'*

It is clear that the Registrar considered herself and the Fund bound by regulation 35(4).

[14] Section 26 of the FSBA permits an appeal against any decision of the Registrar to the FSB appeal board, established in terms of s 26A of the FSBA. The Fund lodged an appeal but because it raised. as a ground of appeal, a challenge to the validity of regulation 35(4) the Fund and the FSB appeal board agreed that the appeal be held in abeyance, pending an application to be brought in the high court by the Fund. That culminated in the application referred to in the first paragraph of this judgment and to the resultant order.

[15] I now turn to deal with the nature of the challenge by the Fund as expressed in its founding affidavit, followed by the Minister and the FSCA's responses and the findings of the court below.

[16] The appellant's case was that regulation 35(4), impermissibly, 'placed a number of fetters' on the wide discretion of the board to decide how an actuarial surplus is to be applied. The following are the relevant parts of the Fund's summary of its challenge to the validity of the regulation as expressed in its founding affidavit:

'Firstly… the discretion of the board to determine how, in the case of former members, the allocated portion of actuarial surplus shall be applied for their benefit is sufficiently wide as to place in the hands of the board, a power to determine the extent, if at all, of a former member's entitlement to actuarial surplus. There is accordingly nothing in the PFA as is stood at the time of the promulgation of the Regulation which states that this enhancement is legally due and payable to the former member.

Secondly, the Regulation prescribes that where the board is unable to trace the former member in order to make payment, "the board shall put the corresponding enhancement into a contingency reserve account specific for the purpose…"

This imperative requirement that the enhancement be placed in a contingency reserve account contradicts the statutory discretion vested in the board to determine how, in the case of… former members, the allocated portion of actuarial surplus shall be applied for their benefit.

Thirdly, notwithstanding that the statute provides that the board shall determine how, in the case of former members, the allocated portion of actuarial surplus shall be applied for their benefit, the Regulation provided that notwithstanding anything in the rules of the fund, moneys may not be released from such contingency reserve accounts except as a result of payment to such former members or as a result of crediting the Guardian's Fund or some other fund established by law to include such amounts.'

In formulating its challenge the Fund relied, inter alia, on the provisions of s 15B(5) *(a)*, *(b)*, *(c)* and *(e).*

[17] For reasons that will become apparent it is unnecessary to deal with the Fund's other grounds of challenge, namely that the regulation in question was arbitrary and irrational.

[18] In presenting its case the Fund described how it applied its surplus apportionment scheme (SAS) and explained how it dealt with former members, for whom a benefit was calculated but were untraced and who had failed to substantiate a claim. On 11 November 2005, the Fund approved a surplus apportionment scheme as contemplated in s 15B of the PFA. The surplus apportionment date was 30 June 2002 and it was the first statutory actuarial valuation date after 7 December 2001, as contemplated by s 15B(1)*(a)*. The Fund resolved in the SAS, as required under s 15 B(4), that former members who had left the Fund in the period from 1 January 1980 to the surplus apportionment date would participate in the SAS.

[19] The fourth respondent, as required by the PFA, was appointed in terms of the Act to represent former members. Steps were taken by the Fund to identify and contact former members and obtain sufficient information to enable the calculation of top-up benefits. The Fund's administrators had remained unchanged since 1980 and retained information of each former member of the fund. In its attempts to trace former members the Fund used newspaper advertisements, radio broadcasts and written communications. The Fund also made enquiries at the Department of Home Affairs, tried telephoning former members and used tracing agents.

[20] An amended SAS reflected the allocation of the surplus to former members. Included in that allocation were 8770 former members, of whom 5165 were excluded, because their exit benefit exceeded the minimum benefit. Of the remaining balance of 3605 former members, payments were made to 1491, for whom calculations could be performed and who could be traced and/or who claimed the benefit. The remainder were a group of 2114 former members for whom the calculations could be performed, but who could not be traced and who did not register for payment. They represented 24.10% of the total number of former members entitled to participate in the SAS and 58,64% of the total number of former members who were included in the apportionment.

[21] On the 11 November 2005 when the Fund approved the SAS it also amended its rules to establish a contingency reserve account to hold the actuarial surplus for former members for whom benefits could be calculated but who could not be traced and for those who were unable to substantiate their claims, but which also provided that if there were no claims after two years the amounts so credited would revert to the fund. The rule does state that thereafter no former member will have any claim against the fund. On 26 April 2006 the Registrar approved the rule amendment.

[22] On 24 October 2006 the Registrar approved the Fund's SAS and the board thereafter allocated the surplus as per the approved Scheme. This allocation included an allocation to the 2114 former members for whom the calculations could be performed but who could not be traced and/or who did not substantiate their claims as per paragraph 2.3 of the scheme, as amended.

[23] In the subsequent years all but 49 of these former members, ie 2065 former members, could still not be traced and/or had not substantiated their claims. Accordingly, the Fund advised the Registrar in a registered letter sent on 12 August 2008 that it intended to implement the Rule and that the amount standing to the credit of the contingency reserve account, in terms of rule 45(2), would revert to the Fund.

[24] On 24 October 2008 the amount standing to the credit of the contingency reserve account reverted to the Fund in accordance with the above Rule 45(2). Following the reversion of this amount the Fund was of the view that in terms of its Rules it was no longer obliged to make provision for these former members. The board of the Fund had nevertheless, in the exercise of its discretion to settle and determine claims made against the Fund (rule 23(1)*(e)* of the rules), made a few *ex gratia* payments to certain former members who after 24 October 2008 came forward and substantiated their claims. The Fund has made no further payments to any former members since 3 March 2010, more than a decade ago.

[25] The Fund's valuator reported in the Valuation Report referred to above (as at 30 June 2011), under the heading 'Contingency Reserve Accounts', and with respect to the former member allocation under the s 15B scheme, that the amount which on 30 June 2008 had been R83 357 million, was now nil

[26] As stated above, the Registrar refused to approve the valuation report and ordered the fund to reverse the R83 357 million and to implement the provisions of rule 35(4). That is what led to the application in the court below.

[27] In opposing the application, the Minister insisted that there was nothing in the provisions of the PFA that prevented the Minister from directing or requiring a pension fund to create contingency reserve accounts. The Minister and the FSCA pointed out that the purpose of the surplus legislation was to ensure that past abuses were remedied and that members who had been unfairly treated in the past, due to improper uses of pension fund surpluses by many employers, were now given their due. The surplus legislation was designed to ensure that former members received enhancements due to them. Regulation 35(4) was directed to that purpose. The regulation required the creation of a contingency reserve fund as envisaged in the PFA and, as far as the Minister was concerned, it was consistent with the legislative scheme.

[28] The FSCA made common cause with the Minister. It denied that the impugned regulation fettered the board's discretion in any way and contended that the Fund misread and misunderstood the relevant provisions of the surplus legislation. The FSCA was adamant that upon the approval of a pension fund's SAS it immediately incurred a liability towards those former members for whom calculations could and were done. It was submitted on behalf of the FSCA that there was no discretion vested in the board to deal with this category of quantifiable claimants. The amounts held in the members' surplus accounts no longer formed part of the surplus. Where such members could not be traced the liability was not extinguished. The impugned regulation was directed at preserving the rights of those members to claim their due from the Fund. The FSCA contended that s15B(5)*(e)* catered only for those for whom calculations could *not* be made and that there was no established liability in relation to the contingency account which a Fund decided to establish in terms of that subsection.

In short, as postulated by the FSCA, the liability by a pension fund to untraced former members is absolute and there could be no talk of a contingency reserve account in the true meaning of that expression. To the extent that the regulation speaks of a 'contingency reserve account' it must be understood that it is to a specific purpose and that it was meant to recognise a fixed liability towards former members. The FSCA reiterated that the regulation in question was entirely consistent with the provisions of the PFA.

[29] The impugned regulation was promulgated by the Minister on 22 April 2003 and the review application was launched on 25 August 2015, more than a decade thereafter. The Fund, belatedly (after all the affidavits were filed), conditionally applied for condonation in terms s 9 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA),[7] submitting that it was in the interests of justice that the matter be heard, despite the considerable delay. Curiously, it commenced by stating that it was advised that the application to have the regulation set aside was one in terms of PAJA, but then went on to state that it was also advised that the making of regulations did not fall under PAJA. It submitted, alternatively, in the court below and before us, that the Fund's challenge to the regulation was a classical collateral challenge as a result of which the need to bring a condonation application in terms of PAJA fell away. The court below dealt with these issues as well as with the merits as set out hereafter.

[30] The court below (Wepener J), dealt with the question of the delay described in the preceding paragraph. The court noted that it was only after all the affidavits had

[7] In terms of s 7 of PAJA an application in terms thereof must be brought without unreasonable delay and not later than 180 days from the date of the action complained of. Section 9 of PAJA authorises a court to extend the period of 180 days 'where the interests of justice so require'.

been filed that the Fund had sought condonation in terms of s 9(2) of PAJA, conditionally, asserting that it was relying on a collateral challenge to the validity of regulation 35(4), for which condonation was not required. Wepener J had regard to the decision of the Constitutional Court in *Merafong City Local Municipality v Anglo Gold Ashanti Limited*[8] in considering the Fund's asserted collateral challenge.

[31] The court below went on to state the following:

'Accepting, as the applicant does, that it knew of the regulations and its impact shortly after it was promulgated, this court must determine whether the applicant has satisfied the provisions of s 9 in order to grant the applicant condonation or whether it is not time barred at all due to the collateral challenge, should it be able to rely thereon despite the manner in which it was introduced into the papers.'

[32] Wepener J proceeded to examine the 'unexplained' lengthy delay and considered that it militated against both the application for condonation and the asserted collateral challenge. The court below weighed the prejudice that might arise because of the delay. It said the following (at para 15):

'In my view, there is severe prejudice for the respondents and well as other Funds, the latter which have adhered to the regulation. The majority of the Funds have complied with the regulation. That, in turn, resulted in surplus funds having been allocated as prescribed over a period of twelve years. There would be manifest prejudice to those employees who were identified and were recipients of allocations over the years. The applicant failed to set out specific facts, even baldly, to show that there is no prejudice to other parties. I am driven to the opposite conclusion. Since the promulgation of reg 35, the vast majority of funds (and

[8] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC) para 69.

there are approximately 500 of them with only three that have not complied with the regulation) have indeed complied with the regulation and allocated funds in accordance with its provisions. Should the regulation be set aside, these Funds will have to reallocate the funds retrospectively and also amend their records since 2003 in order to comply with a new regime since reg 35. Such refunds and reallocation will be made despite the vested rights of former members, an aspect to which I will return. These rights would be annulled despite having accrued to former members and will be to the prejudice of such former members. The prejudice will also be for those Funds who complied with the regulation and they, if the regulation is set aside, will have to reallocate funds and re-do all the allocations since 2003. This, too, will affect the rights of those former members who acquired rights due to the allocation to them pursuant to the provisions of the regulation. These members are entitled to protection rather than action that would deprive them of their rights. The applicant has failed to show that the problem of acquired rights can be accommodated should the regulation be set aside. That it would constitute an onerous task on the Funds who complied with the regulation is apparent if regard is had to the various prescriptive provisions and the manner in which the boards of Funds are required to consider the issues when allocating funds.'

[33] In dealing with time delay in relation to a review application brought in terms of PAJA, as opposed to a collateral challenge, the court below expressed itself thus:

'The position, should s 9 of PAJA not apply, is no different. Delay may not be a bar to a collateral challenge in many cases. But as held by Cameron J in *Merafong*, it is available to a party "who never previously confronted" the legal issue and where the law was possibly unknown to the person it is sought to be enforced against. The applicant falls in neither category. It is common cause that the applicant was confronted with the regulation over twelve years ago but elected to ignore it. It was therefore well aware of the promulgation of the regulation and delay can indeed be a disqualifying consideration. In addition, the applicant is disqualified from attacking the regulation for the same reasons that were set out why an

extension of time would not be in the interests of justice. The applicant's gross failure in so far as its delay is concerned makes its unnecessary to consider the prospects of success.'

[34] The court below concluded as set out hereafter:

'In my view, the applicant failed to make a case that it would be in the interests of justice to allow it to embark on the collateral challenge belatedly introduced after all parties had filed their affidavits dealing with the merits of the review matter. The application falls to be dismissed on this basis alone.'

[35] The court below thought it prudent to consider the merits of the Fund's case in so far as it might impact on whether condonation should be granted. It held:

'As far as the prospects of success are concerned, I find that the Minister had the authority to make the Regulation. Section 36 of the PFA grants the Minister wide powers of regulation. A limitation would have to meet the general principles of legality and rationality that have to be met.'

[36] Furthermore, Wepener J accepted the correctness of the attitude of the Registrar concerning the interpretation and application of ss 15B(4) and 15B(5)*(e)*. In this regard he said the following (at paras 20-21):

'The applicant failed to have regard to the distinction between the various provisions of the PFA and reg 35(4). In my view, it failed to acknowledge the different categories of members dealt with by the PFA and the regulation and the effect and purpose of the regulation but dealt with the different categories generically. A failure to appreciate that distinction led to the challenge based on legality or that it is *ultra vires* the Minister's powers, and a challenge based on rationality. An analysis of the legislative scheme of the PFA leads to an understanding of, which counsel for the second respondent submitted, the distinction between the "calculation

problem" and the "payment problem" that is evident from s 15B(4)*(b)* and s 15B(5)*(e)* on the one hand and reg 35(4) on the other. These provisions provide for two different situations in which actuarial surplus can be placed into a contingency reserve account. The sections confer a discretion on a board whilst the regulation imposes an obligation.

The first situation arises where the benefits that are due to a former member are incapable of calculation because of inadequate records that exist regarding that member. This results in a board of a Fund being unable to apportion an actuarial surplus to such former member because it is unable to determine what period the former member was a member of the Fund. This leads to a difficulty in calculating the amount to apportion to such a member. A second situation arises when the benefits of former members can be calculated but payment cannot be made because the member cannot be traced. In such a case a board is able to apportion actuarial surplus to the members' surplus account and, importantly, the former member acquires a right to such surplus. However, payment cannot be made to the former member because the member's whereabouts are unknown. This leads to a payment problem for the Fund since it involves the payment of a benefit that has been calculated. The right to the allocation vests in the former member "once the actuarial surplus in apportioned…" This is different from other members who have been excluded from apportionment in terms of s 15B(4)*(a)* due to the fact that there are insufficient records available. These members do not acquire rights to actuarial surplus.'

[37] At para 25 of its judgment the court below held as follows:

'The very purpose of reg 35(4) is to cater for the former members for whom a benefit can be calculated but who cannot be traced. In the result, since reg 35(4) does not deal with the same category of former members as s 15B(5)*(e)*, there is no inconsistency between the two provisions and the regulation is therefore not *ultra vires* as it does not fetter the board's discretion when it comes to dealing with the former members as contemplated in s 15B(5)*(e)*.'

[38] In the result, the court below dismissed the application in the terms mentioned at the beginning of this judgment. It is against that order and the conclusions on which it was based that the present appeal is directed.

[39] The anterior question was whether, because of the long delay, the application by the Fund ought to have been entertained at all by the court below and whether this court should consequently entertain the appeal on its merits.

[40] Before us counsel for the respective pension funds in each of the three related appeals aligned with each other and made common cause in their quest to have the regulations set aside or declared *ultra vires* the powers of the Minister. Counsel for the FSCA and the Minister, likewise, supported each other in resisting the application brought by each of the three pension funds. During oral argument before us it was pointed out to counsel representing the FSCA and the Minister that in the *Southern Sun* matter, which is one of the related appeals, the high court, in considering whether to overlook the delay, took into account, inter alia, the importance of the issue, including the nature and consequence of the impugned regulation and had concluded that it was in the interests of justice to condone the delay, and that there was no cross appeal in relation thereto, by the FSCA or the Minister. It was pointed out that it would be most peculiar to decide the merits in one case and not in the other two, because condonation was not warranted, despite the fact that a finding in the one case would determine the legal position in relation to all three.

[41] After conferring, counsel on behalf of the FSCA and the Minister informed this court that the delay should no longer be considered an issue between the disputants

and that the matter should be decided on the merits in all three matters. It will be recalled that the FSCA had always adopted a neutral stance on the question of delay.

[42] In my view the concession was rightly made. The high court in *Southern Sun*, in condoning the delay, took into account all the relevant factors when it exercised its discretion in favour of the pension fund in that case.[9] Similarly, in the present case, considering the manner in which the dispute arose and having regard to the time when matters came to a head, rather than the time of the promulgation of the regulation in question, and the importance of the issues the interests of justice dictate that the delay should be overlooked. Moreover, although courts should scrutinise asserted collateral challenges carefully, to ensure that they qualify as such and should be countenanced, lest that avenue becomes the new 'go-to' basis for justifying extensive delays, it does appear to me that in the three appeals the respective pension funds were exposed to the coercive force of the regulatory body, the FSCA.[10] The delay, in the prevailing circumstances, consequently, ought not to preclude the challenge on the basis that the challenge by the Fund could correctly be construed to be a collateral challenge and should be countenanced.[11] It must also be understood that the coercive force was only brought to bear more recently. Be that as it may, condonation was effectively correctly conceded by the Minister and the FSCA. I turn now to address the merits.

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[9] Those factors would have been relevant whether the regulation making in the present case constituted administrative action or not. Of course, in relation to PAJA the period to be taken into account for as a baseline, in the assessment of whether the delay should be excused, is 180 days. See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 para 19.

[10] That they faced the coercive power of the FSCA is best demonstrated by the directive form the Registrar who disapproved of the fund causing R83.357 million that had stood to the credit of members who could not be traced and whose claims could not be substantiated to revert to the fund. Several years thereafter the Registrar directed the board of that Fund 'within two months of the date of this letter' to reverse the decision to revert the abovementioned amount and 'to restore the fund to financial neutrality, ie in the same position it was prior to the reversion of the said amount.' That was a tall order.

[11] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC) paras 27, 30 and 32.

[43] As a starting point, it must be recognised that the surplus legislation was a milestone in pension law. Before it came into operation, as pointed out by the FSCA, the subject that exercised the mind of many pension lawyers and administrators was the following: Who owned the surplus in a pension fund at any given time? The debate around this question endured for a long time before the decision of this court in *Tek Corporation Provident Fund and Others v Lorentz*.[12] A core conclusion in that case was the following:

'Once a surplus arises it is ipso facto an integral component of the fund.'

This court, in *Tek*, acknowledged that the legislature was best placed to deal with the manner in which surpluses should be apportioned. At that stage, there had already been a consultation process concerning pension fund surpluses, involving Government, Business and Labour. That process culminated in the surplus legislation.

[44] The surplus legislation is clearly remedial in nature in that it was designed to redress past abuses of surpluses by a number of employers, but its other purpose was also to ensure fairness in the distribution of a fund's surplus on an ongoing basis. The surplus legislation put paid to any notion that the employer owned a surplus in a fund. The relevant parts of the PFA against which the impugned regulation has to be viewed are set out hereafter.

[45] In s 1 of the PFA, as it stood at the time that the regulation in question came into being, 'actuarial surplus' was defined as follows:

'"actuarial surplus", in relation to a fund which is—

(a) subject to actuarial valuation, means *the difference between*—

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[12] *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) para 17.

(i) the value that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date *together with the value of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator*…' (Emphasis added).

[46] Presently, the definition of 'actuarial surplus' reads as follows:

'"Actuarial surplus", in relation to a fund which is—

(a) subject to actuarial valuation, means *the difference between*—

(i) the value, calculated in accordance with the prescribed basis, if any, that the valuator has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date *plus the amounts standing to the credit of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator, calculated in accordance with the prescribed basis, if any.'* (Emphasis added).

[47] The definition of contingency reserve account at the time of the promulgation of the regulation in question reads as follows:

'"Contingency reserve account", in relation to a fund, means an account of the fund to which shall be credited or debited such amounts as *the board* shall determine, on the advice of the valuator where the fund is not exempt from actuarial valuations, in order to provide for explicit contingencies.'

Section 1 of the Pension Funds Amendment Act 11 of 2007 amended the definition of 'contingency reserve account' by adding words after '… an account of the fund' as it appears in the definition immediately above. Those words are:

'… which has been amended in accordance with the requirements of the Registrar, or which has not been disallowed by the Registrar…'

That amendment was part of a list of definitions and provisions that were deemed to have come into operation on 7 December 2001, in terms of s 40B, which caters for retrospectivity. It appears to relate to those funds that were yet to obtain approval for their surplus apportionment schemes. It does not apply to the Fund. The Financial Services Laws General Amendment Act 45 of 2013 brought about a further change. Presently, the definition of 'contingency reserve account' in s 1 of the PFA reads as follows:

'"contingency reserve account", in relation to a fund, means an account provided for in the rules of the fund, which has been amended in accordance with the requirements of the Registrar, or which has not been disallowed by the Registrar, and to which shall be credited or debited such amounts as *the board* shall determine, on the advice of the valuator where the fund is not valuation exempt, in order to provide for a specific category of contingency.'

(Emphasis added).

[48] Because there are references to 'valuators' and 'valuations' and actuaries in the definitions referred to above and in the applicable provisions of the PFA, it is necessary, first, to have regard to the definition of 'valuator' in s 1 of the PFA. Presently 'valuator' means an 'actuary who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act'.[13]

[13] Prior to amendment by Act 45 of 2013 'valuator' was defined as follows:

Second, I deal with the definitions of 'actuary'. Presently 'actuary' is defined as 'a natural person admitted as a fellow member of the Actuarial Society of South Africa or any other institution approved by the Registrar...[14]' Third, it is necessary to appreciate that actuaries are experts in statistics and are used to assess risks and calculate insurance premiums, and are routinely employed in the field of pensions, as the repeated references to actuarial valuations and actuarial surplus in the PFA demonstrate.[15] Lastly, 'surplus apportionment date', as defined in s 1 of the PFA, 'means the first statutory actuarial valuation date following the commencement date'.

[49] As can be seen from the definitions set out above, a pension fund board features prominently in relation to an actuarial surplus and a contingency reserve account. The status and responsibility of a board in relation to a pension fund can be gleaned from the object of a board set out in s 7C(1) of the PFA:

'The object of a board shall be to direct, control and oversee the operations of a fund in accordance with applicable laws and the rules of the fund'.

In pursuing that object, it is required that the board act in the best interests of members and with 'due care, diligence and good faith'.[16]

'valuator means an actuary or any other person who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act.'

[14] Prior to amendment by the Financial Services Laws General Amendment Act 22 of 2008: '"actuary" means any Fellow of the Institute of Actuaries of England or of the Faculty of Actuaries in Scotland or of the Society of Actuaries of America or of any other institute, faculty, society or chapter of actuaries approved by the Minister…'

And, prior to amendment by the Financial Services Laws General Amendment Act 45 of 2013: '"actuary" means a person admitted as a fellow member of the Actuarial Society of South Africa or any other institution approved by the Minister…'

[15] See also the definition of 'actuary' in the Oxford English Dictionary (OED 3 ed, 2010):

'A person who compiles and analyses statistics of mortality, accidents, etc., and uses them to calculate insurance risks and premiums.'

[16] Section 7C(2) of the PFA.

[50] As explained earlier, the surplus legislation included ss 15A to 15K. In most of those sections of the PFA the board of a pension fund itself features prominently. Section 15A(1), in line with the dictum from *Tek* cited above, reads as follows:

'All actuarial surplus in the fund belongs to the fund.'

[51] Section 15B(1) deals with the apportionment of an existing surplus and provides that the board of every fund that commenced prior to March 2002 must submit to the Registrar a proposed apportionment of an actuarial surplus. This provision was fundamental to the new pension surplus regime introduced by the surplus legislation. In proposing the scheme, a board had to provide details of any surplus historically improperly utilised by an employer who participated in the fund at the time of the improper utilisation.

[52] 'Statutory actuarial valuation', in relation to a pension fund, means 'an investigation by a valuator contemplated in s 16'. That section provides for an investigation by a fund, once at least every three years, into its financial condition and for a report in relation thereto by a valuator at the instance of its board. The report is to be lodged with the Registrar.

[53] Section 15B also sets the rules of general application for *all* apportionments, in favour of members, former members and employers. Section 15B(2) provides that a scheme 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 a member's surplus account, the crediting of an amount to an employer's surplus account or any two of the aforesaid. In terms of s 15B(3) a board must appoint

someone to represent the interests of former members and such person must then be of assistance to the board in identifying former members, communicating proposals to them and to the funds to which they might have transferred, communicating proposals from former members to the board and collating any objections by former members to the scheme. The person appointed to represent former members is also required to report in writing to the board, inter alia, on the adequacy of the steps taken to involve former members.

[54] Section 15B(4) which, for present purposes, has to be read with the material parts of s 15B(5), provides:

The board shall determine who may participate in the apportionment of actuarial surplus, and shall include in such apportionment existing members and any former members who left the fund in the period from 1 January 1980 to the surplus apportionment date: Provided that—

(a) the board may exclude from participation former members in respect of whom the board satisfies the Registrar that insufficient records are available to enable the additional benefits that may be due to such former members to be calculated, after the board has taken reasonable steps—

(i) to obtain such records from the administrator;

(ii) to construct such records from the records of the—

(aa) employer;

(bb) any fund to which such former members transferred; or

(cc) a trade union or staff association active in the workplace during this period; or

(iii) if the steps in subparagraph (i) and (ii) do not yield sufficient information, to obtain such records from potential claimants themselves following an advertisement—

(aa) on a national basis and in the area where the former members used to work; or

(bb) on a more limited basis as approved by the Registrar if representations by the fund

satisfy the Registrar that limited advertisement will be adequate, inviting the former members to come forward with evidence to substantiate their claim, after which advertisement the board should wait at least six months but no longer than nine months before excluding any former members because of a lack of sufficient information to enable the calculations to be performed;

(b) rather than excluding former members whose individual benefits cannot be determined, *the board may set aside a portion* of the actuarial surplus in a contingency reserve account explicitly established to satisfy claims of former members in terms of subsection (5)*(e)*.' (Emphasis added).

As can be seen, this subsection makes *a board* the determinant of which categories of persons shall participate in the surplus apportionment. The board is obliged to include for participation, those who departed the fund in the period 1 January 1980 up to the surplus apportionment date, including untraced members. It may exclude unquantifiable members. Section 15B(4)*(b)* does, however, provide the option of establishing a contingency reserve account in order to satisfy the potential claims of unquantifiable members in terms of the proviso in s 15B(5)*(e)*.

[55] Sections 15B(5)*(a)* and *(b)* read as follows:

'(5) *The board shall apportion the actuarial surplus* between the various classes of stakeholders whom *the board has determined* shall participate in the apportionment in terms of subsection (4), following which such portion as is due to the employer shall be credited to the employer surplus account: Provided that—

(a) the actuarial surplus to be apportioned shall be increased by an amount of actuarial surplus utilised improperly by the employer prior to the surplus apportionment date as determined in terms of subsection (6);

(b) former members shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of s 14B(2)

or 14B(6) as at the date when they left the fund, with such increase adjusted to the surplus apportionment date with fund return over the corresponding period…'

(Emphasis added).

The remainder of this subsection deals with an adjustment for pensioners and for a proportionate downwards revision in the event that the actuarial surplus to be apportioned is insufficient to permit such increases.

[56] Section 15B(5)*(e)*, which is crucial in the determination of the appeal, reads thus:

'(5) *The board shall apportion the actuarial surplus* between the various classes of stakeholders *whom the board has determined shall participate in the apportionment in terms of subsection (4)*, following which such portion as is due to the employer shall be credited to the employer surplus account: Provided that—

…

(e) the board shall determine how, in the case of existing and former members, the allocated portion of actuarial surplus shall be applied for their benefit, including the crediting of any portion to the members' surplus accounts or to the members' individual accounts, as the case may be: Provided further that the board may allocate a portion of the actuarial surplus to be used for former members to a contingency reserve account which will be used to satisfy the claims of former members—

(i) who have been identified in subsection 4*(a)* but who cannot be traced; or

(ii) who did not substantiate their claim during the nine-month period following the advertisement in subsection (4)*(a)*(iii) but who do so after the end of the period...'

(Emphasis added)

[57] The statutory provisions referred to in the preceding paragraphs, including the definitions referred to earlier, show that a board is *the* protagonist in directing and

controlling the operations of a pension fund. Of course, that is subject to such measures as the regulator, the FSCA, might employ in terms of the PFA. It is a board's prerogative to determine how to apply a surplus apportionment for the benefit of former members, including those who have not yet been traced. Section 15B(5)*(e)* has to be read with the rest of the provisions of s 15B(5). There is a cross reference to s 15B(4). These sections, read and understood contextually, make it clear that a board determines who may participate in the apportionment of an actuarial surplus, and determines how a surplus is to be applied for the benefit of various categories of beneficiaries, including the establishment of contingency reserve accounts. Its discretion is not limited by s 15B(5)*(e)* to the establishment of such an account only in relation to unquantifiable members. The submissions to the contrary advanced by the FSCA and the Minister and the finding by the court below that that a board is so limited are erroneous.[17]

[58] It was correctly submitted before us on behalf of all of the funds in the three appeals that an actuarial surplus in a fund is an actuarial calculation of a fund's assets over its liabilities and need not be represented by an actual cash fund in the calculated amount. When a surplus is apportioned the fund assumes liabilities to its members. It vests in members a claim against the fund. That is how s 15A should be understood, where it speaks of rights acquired by members, former members and employers when a surplus is apportioned.

[59] At this stage it is necessary to turn to consider, alongside the statutory provisions referred to above, the provisions of regulation 35(4). Before considering the

[17] See, further, para 62 (infra).

scheme of regulation 35, regard should be had to the source of Minister's power in terms of the PFA to make regulations. It is located in s 36, the relevant parts of which, read as follows:

'(1) The Minister may make regulations, not inconsistent with the Provisions of this Act-

(a) in respect of all matters which by this Act are required or permitted to be prescribed by regulation…'

The introductory part of that subsection is typical and is meant to keep the regulation making within the parameters of the authorising Act. Put differently, any regulation pursuant to s 36 is meant to be consonant with the provisions of the authorising Act, the PFA.

[60] More than seventeen years ago, on 22 April 2003, the Minister, purporting to act in terms of s 36(1) of the PFA, promulgated regulations, including regulation 35(4), which is at the centre of this appeal. Although referred to in the Registrar's communication set out in para 20 above, for convenience it is restated hereafter, within the full text of regulation 35. As proclaimed in the heading, regulation 35 purports to deal with 'contingency reserve funds'. It reads as follows:

'35 Establishment of Contingency Reserve Accounts—

(1) By virtue of the fact that—

(a) the Act vests powers in boards of funds to establish contingency reserve accounts; and

(b) the establishment of contingency reserve accounts reduces the actuarial surplus available for apportionment and increases the possibility that actuarial surplus may be insufficient to enhance benefits previously paid to former members to the level prescribed in terms of s 15B(5)*(b)* of the Act,

no fund may, with effect from the date of commencement of this regulation, establish any contingency reserve account under circumstances where a reasonable inference may be

made that the establishment of the account is contrary to the duties of the relevant board under s 7C(2)*(b)* of the Act and motivated by bad faith.

(2) The establishment and magnitude of any contingency reserve account by a fund—

(a) must be motivated by the valuator in the relevant report on the statutory actuarial valuation; and

(b) may, where the Registrar is not satisfied with any such motivation, be rejected by the Registrar.

(3) A fund must, on any such rejection of the establishment or magnitude of the relevant contingency reserve account, take such steps in connection therewith as the Registrar determines and sets out in writing to the relevant fund.

(4) Where a board is able to determine the enhancement due in respect of a particular former member in terms of s 15B(5)*(b)* or *(c)* of the Act, but is unable to trace that former member in order to make payment, *the board shall* put the corresponding enhancement into a contingency reserve account specific for the purpose. Notwithstanding anything in the rules of the fund, moneys may not be released from such contingency reserve accounts except as a result of payment to such former members or as a result of crediting the Guardian's Fund or some other fund established by law to include such amounts.' (Emphasis added).

[61] Regulation 35 commences with the recognition that the power to create contingency funds vests in a board. Yet, contradictorily, it goes to on dictate that the board 'shall' put funds into a contingency reserve account.in order to meet claims from as yet untraced members and the funds may not be released except to pay the claims or crediting the Guardian's Fund or some other fund'. How can crediting the Guardian's Fund or 'some other fund' be consonant with the provisions of the PFA? Counsel for the Minister and the PFA were rightly constrained not to seek to justify the envisaged potential transfer, as it were, to the Guardian's Fund. In the Guardian's Fund or in some other fund the monies that were destined for former untraced members would

be lost to them and to the Fund. If it were to remain in the Fund and remained unclaimed in perpetuity that will have the effect of sterilizing the monies from which past or present members who are traceable could never benefit. It will be recalled that in terms of s 15A all actuarial surplus belongs to a fund.

[62] The Minister arrogated the power to deal with a surplus and to establish contingency reserve funds, to the exclusion of the board. As demonstrated above those aspects are within a board's prerogative. In promulgating regulation 35(4) the Minister acted beyond the regulation making powers set by the PFA. The court below erred in its interpretation of the relevant provisions of the PFA, especially in relation to s 15B(5)(*e)*. That subsection is not time bound nor does it relate only to unquantifiable former members, namely, those for whom benefits cannot be calculated. It has to be read within the scheme of s 15B and there is a cross reference to s 15B(4). Together they set out the powers of a board in general terms. When a board exercises a discretion in allocating a surplus for the benefit of former members, thereby creating a liability, it must concomitantly decide how to cater for claims that eventuate. The board's decisions can be interrogated by the regulator against the provisions of the PFA, but those decisions are within the remit of the board. Regulation 35(4) intrudes upon the board's wide discretion by compelling the board to place the entire allocation in a contingency reserve account and freezing it in perpetuity.

[63] The Minister and the FSCA's submissions in relation to the meaning of 'contingency reserve account' in regulation 35(4) are without substance. The impugned regulation itself speaks of a 'contingency reserve fund' but the Minister and the FSCA then sought to disown the concept and the description. In the three related

appeals the contingency relates to the likelihood of the claims materialising. It is in respect thereto that valuators make assumptions. It is a regular occurrence in the field of pensions and in the insurance industry. The court below erred in its interpretation of the relevant provisions of the PFA and of the field of operation of regulation 35(4) and the Minister's regulation making power.

[64] During oral argument this court directed the parties to provide post-hearing, written submissions on the possible effect of setting aside the impugned regulation. We received those submissions. In essence the Minister and the FSCA submitted, with reference to *Bengwenyama Minerals and Other v Genorah Resources (Pty) Ltd and Others*[18] that setting aside the regulation, without suspending the order of invalidity, to enable an opportunity for the Minister to correct it, would result in chaos and encourage maladministration. It was submitted that pension funds would be incentivised to be lax in tracing former members and that boards would be free to do as they please and build up unmanageable deficits.

[65] A pension fund in which no contingency reserve account has been established, but where other arrangements have been made to accommodate potential claims, will occasion no loss of regulatory oversight. In terms of the definition of 'contingency reserve account', which appears above, credits or debits can only be entered in relation thereto on the advice of a valuator. The board will reflect on the advice it receives from a valuator. In the periodic reports submitted to the FSCA the advice and the provision made for claims that might eventuate. or lack of it, can be interrogated

[18] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 81-84.

and either approved, or rejected. Furthermore, funds are obliged, unless exempted, to deposit annual financial statements with the FSCA. The FSCA can utilise s 15K to refer matters to a tribunal to make certain determinations. When concerns about the financial soundness of a fund arise, s 18 of the PFA is at its disposal. There are a number of tools at the disposal of the FSCA to ensure compliance with the provisions of the PFA and to secure the financial soundness of a fund.

[66] The point made on behalf of the Minister and the FSCA that the setting aside of the regulation will lead to laxity on the part of boards and that they will be incentivised to expend very little or no effort to trace former members, is without substance. The FSCA can always question the adequacy of steps taken and issue directions in relation thereto. In addition, the provisions of s 15B(3), referred to above, come into play. It will be recalled that the person appointed to represent former members is required to report to the board about the adequacy of steps taken to trace former members.

[67] The court below, in considering whether the long delay by the Fund in bringing the application should be excused, concluded that there would be prejudice in relation to other funds which have complied with directives by the Registrar and have held funds in a special contingency reserve and that there might have to be reallocations retrospectively, in the event of the impugned regulation being set aside. The court surmised that those to whom allocations had been made pursuant to the provisions of the regulations would be prejudiced as their allocations might have to be revisited.

[68] Those fears are unfounded. The board of a fund can make provision for claims that might materialise, as in *Hortors*. The sufficiency of such measures might be interrogated by the FSCA. Those issues will come to light in a SAS and an accompanying valuation. That is the debate to be had, rather than rigid adherence to the unyielding prescripts of regulation 35(4). All the indications are that strict adherence to the regulation would, for the most part, result in the sterilization of that part of the surplus, well in excess of what would be required to meet future claims. On the other hand, such sterilization would prevent further allocations to benefit former members, frustrating the purpose of the surplus legislation to ensure fairness in the distribution of a surplus.

[69] In the present case the Fund was mistaken as to the claims of former members being extinguished. They continue to adhere. The question is whether actuarial assumptions in valuation reports as to their eventuating are within an acceptable compass. The Fund's rule on reversion and the extinguishing of claims is not the answer. The engagement between the Fund and the regulator in this case should be about whether it is necessary to make provision for claims eventuating and if so, its sufficiency.

[70] From exchanges between the Fund and the board and from parts of the affidavits referred to above, the complaint that the Fund's challenge to the validity of the regulation has changed and gone beyond the issues raised in the pleadings is without merit.

[71] The funds in all three appeals, after conferring, were agreed that in the event that they were successful in the appeal there should be no order as to costs.

[72] For all the reasons set out above it follows that the appeal must be upheld. The following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and substituted as follows:

‘Regulation 35(4) of the Pension Fund regulations is declared invalid and unenforceable in that it exceeds the Minister’s powers under the provisions of the Pension Funds Act 24 of 1956.’

_____

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

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