THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF THREE JUDGMENTS DELIVERED IN THE SUPREME COURT OF APPEAL

Hortors Pension Fund v Financial Sector Conduct Authority and Another
(Case no 054/20) [2020] ZASCA 141;

Southern Sun Group Retirement Fund v The Registrar of Pension Funds and Others
(Case no 215/19) [2020] ZASCA 142;

Vrystaatse Munisipale Pensioenfonds v The Minister of Finance and Another
(Case no 1161/18) [2020] ZASCA 143

From: The Registrar, Supreme Court of Appeal

Date: 02 November 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of these cases and does not form part of the judgments of the Supreme Court of Appeal

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Today the Supreme Court of Appeal (SCA) handed down judgments in three related appeals that were heard on the same day. All three appeals were directed against decisions of the Gauteng Division of the High Court – *Hortors Pension Fund* and *Vrystaatse Munisipale Pensioenfonds* of the Provincial Division (Pretoria) (Kollapen J and Wepener J, respectively sitting as the courts of first instance) and *Southern Sun Group Retirement Fund* of the Local Division (Johannesburg) (Siwendu J, sitting as court of first instance) – concerning the distribution of actuarial surpluses and provisions that may need to be made in order to meet the claims of former members of pension funds. All three of the appeals were upheld, with no order as to costs.

The matters involved the interpretation and application of a regulation promulgated by the Minister of Finance, purportedly under the powers assigned to the Minister in terms of the Pension Funds Act 24 of 1956, governing the manner in which an actuarial surplus, ie the surplus that arises when an actuary of a pension fund determines that its assets exceed its liabilities, is apportioned and applied for the benefit of former members of a pension fund. The appellants in each matter are registered pension funds, to wit: the Hortors Pension Fund, the Southern Sun Group Retirement Fund, and the Vrystaatse Munisipale Pensioenfonds (collectively, the Funds). The Funds had brought respective applications in the high court to have the regulation 35(4) declared invalid.

The regulation obliges a pension fund to place in a contingency reserve account the total amount of enhancements due to quantifiable, but as yet untraced members of that fund, where it is to stay until claimed or transferred to a particular fund identified in the regulation. The principal issue was thus whether the regulation in question was beyond the powers assigned to the Minister under the PFA.

The Minister and the Financial Services Conduct Authority (FSCA) opposed the applications, first, on the basis of delay. In their view there had been an unreasonable and excessive delay, of between twelve and fourteen years, from the date on which the regulation was promulgated by the Minister and the various dates on which the review applications were launched. There was some issue with the classification of the respective reviews, as either reviews under the Promotion of Administrative Justice Act 3 of 2000, which prescribes a maximum period of 180 days in which an application for the review of administrative action is to be brought, or so-called collateral challenges. Nevertheless, on appeal it was pointed out that the high court in *Southern Sun* (Siwendu J) had condoned the delay after considering it in the interests of justice to do so, which finding was not cross-appealed by either the Minister or the FSCA. The Minister and the FSCA accordingly conceded the point. The matters were decided on their merits, on the basis that the SCA found that the point was correctly conceded and that it was in the interests of justice that the delay be overlooked.

The SCA noted that the surplus legislation was remedial in nature, designed to redress past abuses of surpluses by a number of employers but also to ensure fairness in the distribution of a pension fund's surplus on an ongoing basis. Having regard to the relevant definitions and

other provisions in the surplus legislation, and other provisions of the PFA, it found that a pension fund board featured prominently in relation to an actuarial surplus and a contingency reserve account. Indeed, the SCA noted, in the case of an actuarial surplus the board is the determinant of which categories of persons shall participate in the surplus apportionment. The SCA found that the relevant statutory provisions were clear on the fact that a board is the protagonist in directing and controlling the operations of a pension fund. A board determines how a surplus is to be allocated and then decides how it is to be applied for the benefit of various categories of beneficiaries, including the establishment of contingency reserve accounts.

The SCA held that an actuarial surplus in a fund is an actuarial calculation of a fund's assets over its liabilities, and did not have to be represented by an actual cash fund in the calculated amount. By apportioning a surplus a fund assumes liabilities to its members and vests in them a claim against the fund. This was the position found to exist under the PFA.

The SCA thereafter scrutinised the provisions of regulation 35, which purports to deal with contingency reserve accounts. Regulation 35(4) was promulgated by the Minister, who is empowered to make regulations on all matters required or permitted to be prescribed by regulation, provided they are consistent with the provisions of the PFA. The SCA found that while regulation 35 acknowledged that the board has the power to create a contingency reserve account, it went on to provide that a board 'shall' put funds into such an account; and that these funds could not be released except to pay claims or to credit the Guardian's Fund or some other fund established by law to include such amounts. It was held that the Minister, by promulgating regulation 35(4), arrogated powers that vested in the board. In promulgating regulation 35(4) the Minister had acted beyond the regulation-making powers set by the PFA.

The SCA found that when a board exercises a discretion in apportioning a surplus for the benefit of former members, thereby creating a liability, it was to concomitantly decide how to cater for claims that might eventuate. The board's decisions could be interrogated by the FSCA against the provisions of the PFA, but those decisions were within the remit of the board. In compelling a board to place the entire allocation into a contingency reserve account and freezing it in perpetuity, regulation 35(4) was held to be an intrusion upon the board's wide discretion.

Lastly, the SCA had directed the parties to provide post-hearing, written submissions on the possible effect of setting aside the impugned regulation. The Minister and the FSCA submitted that setting aside the regulation, without suspending the order of invalidity, to provide the Minister with an opportunity 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. The SCA found these submissions to be devoid of any substance, for there were various provisions in the PFA which allowed the FSCA to ensure compliance with the provisions of the PFA and to secure the financial soundness of a fund.

In the result, the appeals were upheld with no order as to costs.
