THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

REPORTABLE
Case number: 268/03

In the matter between:

THE ASSOCIATED INSTITUTIONS PENSION FUND	FIRST APPELLANT
THE MINISTER OF FINANCE	SECOND APPELLANT
THE DIRECTOR GENERAL OF FINANCE	THIRD APPELLANT
LEON DE WIT	FOURTH APPELLANT

and

JOHAN VAN ZYL & 1 699 OTHERS	RESPONDENTS

CORAM: HARMS, MTHIYANE, BRAND, CLOETE JJA *et* COMRIE AJA

HEARD: 26 AUGUST 2004

DELIVERED: 17 MAY 2004

Summary: Pension funds – review of actuarial determination of 'funding percentage' in terms of regulations promulgated under Act 41 of 1963 – interpretation of regulations – review of determination on substantive grounds – undue delay in launching review application.

JUDGMENT

BRAND JA/

BRAND JA:

[1] The first appellant ('the AIPF') was established in terms of s 2 of the Associated Institutions Pension Fund Act 41 of 1963 ('the Act') to provide pension funds for associated institutions. The latter were mainly universities, technicons and other institutions of a similar kind. The second and third appellants are the Minister and the Director General of Finance. Their involvement is said to have arisen from the fact that the AIPF was administered by the National Department of Finance. The appeal has its origin in the large scale withdrawal by employees of associated institutions of their pension interest from the AIPF to the newly established own pension funds of the individual institutions during 1994 and 1995.

[2] One of the associated institutions was the University of Pretoria. All the respondents were employed by that university, and until 31 December 1994 they were members of the AIPF. On that date their individual pension interests were transferred to the Universiteit van Pretoria Voorsorgfonds ('the Voorsorgfonds'). These transfers took place pursuant to regulations ('the transfer regulations') that were promulgated in terms of the Act in Government Notice 821 of 22 April 1994. According to the transfer regulations, the transfer value of each member's pension interest

as at the transfer date was to be determined by the actuary of the AIPF. He is the fourth appellant in this matter, Mr Leon de Wit ('De Wit'). Broadly stated, the respondents' case is that the determination by De Wit was not properly made, with a resultant shortfall in the amounts that were transferred to the Voorsorgfonds.

[3] The determination of the transfer values was finalised by August 1995. Nearly four years later, at the end of June 1999, the respondents launched an application in the Pretoria High Court for De Wit's determination to be reviewed and set aside. They also sought an order that the transfer values of their pension interest be recalculated and that the recalculated amounts, together with interest, be paid over to the Voorsorgfonds by the AIPF, alternatively by the Minister. The court *a quo* (Botha J) held, upon the strength of its interpretation of the transfer regulations, that De Wit's determination was not in accordance with these regulations. Consequently the orders sought were granted. The appeal against that judgment is with the leave of the court *a quo.*

[4] On appeal it was contended by the appellants that the court *a quo* misconstrued the transfer regulations. They also contended that, in all the circumstances of the case, the court *a quo* erred in

not dismissing the review application on the ground of respondents' unreasonable delay in bringing the application. The issues arising from these contentions can best be understood against the factual background that follows.

FACTUAL BACKGROUND

[5] The AIPF was governed by the provisions of the Act and the regulations ('the general regulations') that were promulgated by Government Notice 1653 of 10 September 1976. Pursuant to the general regulations, the AIPF was subject to a statutory triennial actuarial valuation. These valuations were done on the basis of audited figures. During the 1980s and the 1990s the triennial actuarial valuations revealed a substantial funding deficit. This gave rise to concern on the part of AIPF members and the associated institutions that were ultimately responsible for funding their pension benefits. As a result, by 1993 many of the associated institutions had for several years been exerting pressure on the government to allow members to transfer their pension benefits out of the AIPF into privately administered pension funds to be established by each of the institutions for that purpose. This pressure increased with the anxiety of the institutions to have the

AIPF removed from government control before any political changeover after the democratic elections in April 1994.

[6] The transfer regulations as eventually promulgated were preceded by several drafts which were prepared under the direction of a workgroup consisting of representatives of the government and the associated institutions. The workgroup included De Wit as well as two professors of actuarial science, Prof Anthony Asher of the University of the Witwatersrand and Prof George Marx of the University of Pretoria. Subsequent to the promulgation of the transfer regulations, the Minister appointed an advisory board of experts to oversee the transfer process. Different members of the board were appointed to protect the interests of the government, the associated institutions and the membership of the AIPF. Professors Asher and Marx were also members of the advisory board.

[7] In terms of the transfer regulations, new pension funds, called 'own established funds', could be established by associated institutions for the benefit of their employees and members could elect between keeping their pension benefits in the AIPF or to transfer them to own established funds.

[8] According to the transfer regulations, the transfer dates were to be agreed upon by the Director General and each associated institution concerned, provided that such date could not be later than 31 March 1995. At the time there were 211 associated institutions. Many of them established their own funds. Various transfer dates were agreed upon over the 13 month period between April 1994 and March 1995. The transfer date for the University of Pretoria was 31 December 1994. Eventually, over 80 per cent of the original 50 000 members of the AIPF decided to join the autonomous funds established by their own institutions. Included in their number were the 1 700 respondents.

[9] In terms of regulation 2(4)(b) of the transfer regulations the AIPF had to make available to a member who elected to terminate his membership, an amount '*equal to the funding percentage multiplied by the actuarial obligation of the [AIPF] in respect of that member as determined by the actuary on the date on which his membership of the fund is terminated, with interest thereon calculated at the bank rate from that date to the date on which the amount is paid …*' The member was then obliged to pay the amount thus made available into the own established fund of his or her institution.

[10] The 'actuary' referred to in regulation 2(4)(b) was De Wit. There is no dispute with regard to his determination of the actuarial obligations of the AIPF in respect of each of the individual respondents on 31 December 1994. It is the other factor in the calculation provided for in regulation 2(4)(b), ie the 'funding percentage' of the AIPF, which forms the subject of the dispute between the parties. 'Funding percentage' is defined in the transfer regulations. This definition, which is pivotal to the appeal, reads as follows:

'"funding percentage", means the market value of the net assets of the [AIPF] on a fixed date [ie 31 December 1994], expressed as a percentage of the calculated aggregate actuarial obligation of the [AIPF] on that date, as determined by the actuary.'

Actuarial obligation' is in turn defined as signifying, 'with regard to a particular member … of [the AIPF], … the actuarial obligation of [the AIPF] with regard to that member … on a fixed date, calculated by the actuary'. The term 'actuary' is defined independently as a reference to the actuary of the AIPF, appointed in terms of the general regulations.

[11] De Wit determined the funding percentage of the AIPF for 31 December 1994 at 60 per cent. This determination was communicated to the University of Pretoria on 6 February 1995

and on 23 August 1995 the individual transfer amounts pertaining to those who elected to move to the Voorsorgfonds were calculated by him on that basis. These totalled some R286,5m which was paid over to the Voorsorgfonds.

[12] In January 1996 the triennial statutory valuation of the AIPF as at 30 September 1994, was completed by De Wit and became generally available. According to this valuation the funding percentage as at the latter date was fixed at 66 per cent. Subsequently De Wit performed a further valuation of the rump of the AIPF as at 31 March 1995 when those members who had elected to leave the AIPF were finally identified. This valuation yielded a funding percentage of 84,3 per cent as at that date. These significant variations in the funding percentage over a relatively short period of time led to discontent among those members whose parting benefits were calculated on substantially lower funding percentages.

[13] First to act were some 2 500 employees and pensioners of the University of South Africa ('Unisa'). Their transfer date was 30 November 1994 and the funding percentage of the AIPF determined by De Wit as at that date was 60,8 per cent. In October 1998 they instituted review proceedings similar to these in the

Pretoria High Court against the AIPF ('the *Unisa* case'). The initial outcome of those proceedings favoured the Unisa employees. In a judgment handed down by Southwood J in February 2000, De Wit's determination of the funding percentage as at 30 November 1994 was set aside and the attendant relief sought was granted. On appeal to this court that decision was, however, overturned. The judgment of this court, which was handed down on 31 May 2001, has subsequently been reported as *Associated Institutions Pension Fund and Another v Le Roux and Others* 2001 (4) SA 262 (SCA).

[14] The applicants in the *Unisa* case contended that the root of De Wit's inaccurate determination of the funding percentage at their transfer date was to be found in his adoption of a 'data loading factor' of 7,5 per cent to the actuarial obligations which appeared from the records of the AIPF in establishing the aggregate actuarial obligations of the fund, thereby increasing these obligations by a notional 7,5 per cent. De Wit's explanation for adopting this loading factor was that it was done in an attempt to compensate for a known understatement of liabilities in the records of the AIPF.

[15] The application in the *Unisa* case was upheld by the Pretoria High Court essentially on the basis that the transfer regulations did not allow for the adoption of a loading factor in calculating the obligations of the AIPF. What these regulations required of De Wit, so the court found, was to calculate the aggregate actuarial obligations of the AIPF on the basis of reliable data. According to this interpretation, De Wit's approach, which was to rely on estimates and assumptions when faced with unreliable membership data, was *ultra vires* the regulations. The reasons why this court upheld the appeal against that judgment appear, in short, from the following *dicta* by Cameron JA (in para 16):

'On a true construction the transfer regulations required the invocation and application of actuarial expertise and that, on the uncontested evidence before the Court as to the professional methodology involved, necessarily entailed that assumptions would be made to allow for contingencies and imponderables. That is the nature of the actuary's job, and it was a job the regulations required De Wit to perform.'

And (in para 19):

Later-acquired wisdom showed that a higher percentage, calculated with perhaps less prudence and less caution, would have matched the facts as subsequently revealed. This does not mean that [De Wit] erred. By the methodology appropriate to what the regulations required of him, De Wit acted properly and lawfully at the time he made his determination. There is no

suggestion that the assumptions he employed were inappropriate or unreasonable. The applicants' case … was that the regulations permitted him to make no assumptions at all; and for the reasons I have given this contention does not withstand scrutiny.'

[16] The respondents in this case did not contend that De Wit was not entitled to apply any data loading at all in calculating the obligations of the fund. In the light of this court's decision in the *Unisa* case, such contention would have had little prospect of success. Instead their first contention was that he should have applied a much lower data loading percentage than 7,5 per cent. In support of this contention they relied on the expert opinion expressed by an actuary, Mr Michael Lowther, in an affidavit filed on their behalf. This contention did not find favour with the court *a quo* and on appeal it was expressly abandoned on behalf of the respondents. It accordingly requires no further consideration.

DETERMINATION OF ASSETS

[17] The only remaining objection by the respondents in this case, which was not raised in the *Unisa* case at all, was that De Wit had failed to determine the market value of the net assets of the AIPF in accordance with the definition of 'funding percentage'.

It was on the basis of this objection that the matter was decided in favour of respondents in the court *a quo*.

[18] This objection goes to the heart of De Wit's whole approach to his brief, as it appears from his answering affidavit. According to De Wit it was known at an early stage that different transfer dates would be chosen by the various institutions involved. One of the crucial decisions De Wit was therefore required to take at the outset was whether the transfer valuations should be done by using the latest available actuarial valuation of the AIPF, ie the valuation at 30 September 1991, with appropriate adjustments to take account of new data, or whether they should rather be held over until fully audited data for each transfer date became available. By September 1993, De Wit, with the approval of the work group, including Professors Asher and Marx, decided to adopt the former approach. This decision was subsequently endorsed by the advisory board. According to De Wit, the decision was motivated by the consideration that the latter approach would have occasioned an initial delay of about 18 months coupled with a further delay of about four months for the determination at each individual transfer date. The prospect of such delays was unacceptable to the associated institutions and their members

because they were, for the reasons already stated, anxious to finalise the transfers as soon as possible. Delays thus caused would also have resulted in numerous practical difficulties for the newly established individual funds and their members. Moreover, the cost of every determination on the basis of fully audited data at each transfer date would run into thousands, if not millions, of rands. Although Lowther suggested that he would have awaited fully audited data for each calculation, it was not contended that De Wit's decision to the contrary was *ultra vires* the transfer regulations or even unreasonable in all the circumstances.

[19] Once the selected approach had been adopted, the methodology applied by De Wit was, broadly stated, to use the September 1991 actuarial valuation, appropriately adjusted to reflect all data available to him, to determine a 'base funding percentage' for September 1993. As is apparent from the definition of 'funding percentage', the concept is essentially comprised of two elements, ie the market value of the net assets of the fund, on the one hand, and the aggregate actuarial obligation of the fund, on the other. In order to establish the base funding percentage as at September 1993, De Wit obtained complete information regarding the assets of the AIPF from the Public Investment Commissioners.

For the corresponding liability figure, he applied the actuarially projected liability figures as at 30 September 1993, which included the data loading of 7,5 per cent. Once that base funding level had been determined for September 1993, it was then adjusted by De Wit on a monthly basis to reflect *ad hoc* changes to the liability profile of the fund and shifts in the market values of the assets of the fund. In this manner a set of adjusted transfer values was obtained for each month after September 1993 until the transfer process was completed.

[20] The assets of the AIPF consisted mainly of government stock. Adjustments to the market value of these assets subsequent to September 1993 were based on a financial model involving a 'basket' of government stock as at the end of each month. The result of this methodology was that the only actual determination of assets that took place was at 30 September 1993. Subsequent adjustments to the assets were done on a notional basis. This of course also happened on the transfer date pertaining to respondents, ie 31 December 1994. It is common cause that as an inevitable consequence of De Wit's methodology, he took the assets of the AIPF on 30 September 1993 and calculated their value as at 31 December 1994. As a result, no account was taken

of any change in the number of AIPF's assets, due, say, to increased contributions made from September 1993 to 31 December 1994.

[21] The court *a quo* found that on a proper construction of the definition of 'funding percentage', De Wit's use of estimates and projections in determining the assets of the AIPF as at the transfer date was *ultra vires* the transfer regulations. Though the regulations permitted the use of actuarial estimates in the determination of **liabilities**, so the court found, it was not allowed in relation to **assets**. Since the court's reasons for this finding were directly linked to the definition of 'funding percentage', I will for convenience quote that definition again. It reads as follows:

'"funding percentage", means the market value of the net assets of the Fund on a fixed date, expressed as a percentage of the calculated aggregate actuarial obligation of the Fund on that date, as determined by the actuary.'

[22] The court *a quo*'s reasoning, with reference to the wording of the definition, appears from the following part of its judgment:

'In my view the expression "**market value**" connotes the actual value and not a notional value established by projections.

The value obtained by [De Wit] from the Public Investment Commissioners at the commencement of his exercise was such a value. The subsequent values that he obtained by making projections cannot be described as market values.

It was argued that the phrase "**as determined by the actuary**" refers to the determination of the market value. I cannot agree.

In my view it refers to the "**calculated aggregate actuarial obligation of the Fund**". It tells one who is to calculate the aggregate actuarial obligation of the fund, namely the actuary appointed in terms of the general regulations. I cannot see any licence in this phrase to the actuary to determine asset values that are not market values.

The phrase "**as determined by the actuary**" was mentioned in the *Unisa* case, but apparently as qualifying "**actuarial obligation**". See the *Unisa* case *supra*, paragraph 9 at 268.

For all these reasons I have come to the conclusion that the approach of [De Wit] to determine the funding level as at the 31st December 1994 not with reference to the market value of the assets, but with reference to a notional value, was *ultra vires* the transfer regulations.'

[23] I agree with counsel for the appellants that purely as a matter of literal construction, the court's reasoning cannot be sustained. Interpreted along ordinary literal lines, the two commas in the definition create a parenthetical clause so that the phrase 'as determined by the actuary' qualifies the words 'market value of the net assets of the fund on a fixed date'. If the phrase 'as determined by the actuary' is to be linked exclusively to the words 'calculated aggregate actuarial obligation of the fund', as suggested by the

court *a quo*, there is no explanation for the second comma in the definition.

[24] Moreover, if the phrase after the second comma is to be understood as applying solely to the calculation of the actuarial obligation of the fund, it will hardly have any independent meaning. After all, 'actuarial obligation' is already defined in the regulations as pertaining to calculations done by 'the actuary'. Added to this, the latter term is independently defined as a reference to the actuary of the AIPF appointed in terms of the general regulations. The suggestion by the court *a quo*, that the phrase 'determined by the actuary' was intended to identify the person who was to calculate the aggregate actuarial obligation of the fund, namely the actuary appointed in the terms of the general regulations' therefore cannot be accepted for this reason as well.

[25] Even more significant than the literal construction, however, is the consideration that the substantive result of the interpretation adopted by the court *a quo* could not, in my view, have been intended. Since this consideration also has a bearing on the new interpretation of the definition contended for by counsel for the respondents in this court, I shall elaborate upon it after considering

the arguments advanced in support of what I shall call 'the new interpretation'.

[26] The new interpretation was advanced for the first time by counsel for the respondents during oral argument in this court. Though it was presented as an alternative to the interpretation adopted by the court *a quo*, it is clear that the two constructions are in fact mutually destructive. According to the new interpretation, the phrase 'as determined by the actuary' does not relate to the words 'aggregate actuarial obligation of the fund' at all. It pertains only to 'the market value of the net assets of the fund on a fixed date'. But, so the argument went, 'determination' is to be understood as requiring an actual, empirical determination as opposed to the actuarial determination. Accordingly, the reference to 'the actuary' in the phrase 'as determination by the actuary' was intended only to identify the functionary and not the function.

[27] The substructure for the new interpretation was exclusively founded on the difference between the terms 'calculate' and 'determine' as used in the transfer regulations. On a proper analysis of the regulations, counsel for the respondents contended, it is apparent that 'calculate' was consistently used with reference to the 'actuarial obligation of the fund'. 'Calculate' must

therefore be understood as a reference to an actuarial function. Since a change in wording must be construed to indicate a different intent, 'determination' must be understood to mean the opposite, ie a non-actuarial function.

[28] I do not consider that the tenuous foundation upon which the argument rests justifies its adoption. In the *Unisa* case Cameron JA referred at para 9 to the repeated use of the words 'actuary', 'actuarial' and 'actuarially' in the transfer regulations as well as 'their insistent allusion to the actuarial function'. The conclusion to be drawn from this is formulated as follows (para 10):

'Given the linguistic accumulation, the phrase 'as determined by the actuary' can hardly have been intended … only to identify the actuary in whom the regulations vest the power to perform the calculations they enjoin. That the instrument attains with economy and clarity by a separate definition of 'actuary'. The repetition, in my view, points not only to functionary, but to function, and it must have been intended to imbue the latter with attributes of professionalism and skill peculiar to the field of expertise it names.'

[29] I respectfully agree with the aforegoing reasoning. Given the emphasis on actuarial function, to which reference was repeatedly made, I find it unlikely that the legislature would have intended a fundamental change in the nature of the function conferred upon the same functionary within the scope of a single definition and

while prescribing what is in essence a single process, namely the determination of a funding percentage. I find it even more unlikely that the legislature would have indicated such a dramatic change in intent through an almost imperceptible change in expression. I say almost imperceptible, because it is obvious that in the present context 'calculation' and 'determination' are linguistically interchangeable. Both terms can legitimately be used with reference to either an actuarial or a non-actuarial function, depending on the functionary entrusted with its performance.

[30] The starting point in determining the meaning of the definition is the decision of this court in the *Unisa* case, as is accepted by the respondents, that the actuarial obligations of the fund were to be determined in accordance with actuarial practice. In *Tek Corporation Provident Fund and others v Lorentz* 1999 (4) SA 884 (SCA) 894G-895B, para 16, Marais JA explained what is normally understood by 'actuarial practice'. It entails, he said, a highly sophisticated process requiring considerable training, expertise and skill. But it remains, he said, an exercise in prophecy involving a host of factors about which assumptions have to be made. In the *Unisa* case it was accepted (at 270F-H, para 16) that a determination in accordance with actuarial practice necessarily

involved the making of assumptions and predictions to allow for contingencies and imponderables. It was not suggested by the respondents that a determination of assets cannot be done actuarially, or even that it involves an exercise which an actuary could or should not perform.

[31] Against this background, I can think of no reason in logic why the legislature would have intended that, in determining the funding percentage of the AIPF, the actuary should apply his training, skills and expertise in establishing the aggregate actuarial liabilities of the fund in accordance with actuarial practice, but that he could not use the same attributes in establishing the net assets of the fund. According to De Wit's testimony, it is a known fact of actuarial practice and experience that assumptions which later prove to be inaccurate often tend to cancel each other out. So, for example, an underestimate of contributions to the fund, which will affect the projected assets, may be matched by a parallel underestimate of pensions, which will affect the actuarial obligations, because increases in contributions usually have to keep up with increases in pensions. If we accept this testimony, as we are bound to by the well established rules pertaining to motion proceedings, acceptance of the interpretation contended for by the

respondents is so divorced from the reality of actuarial practice and experience that it can be justified on the acceptance of only one of two possible assumptions. It must be assumed either that the legislature had no conception of these actuarial realities, or that it chose to ignore them. I have no reason to think that either of these rather starling propositions should be accepted and none was advanced by counsel. It follows that the interpretation of the definition contended for by the respondents cannot be sustained.

[32] On a proper interpretation the transfer regulations, in my view, enjoined the actuary to act, throughout the entire process of determining the funding percentage, in accordance with actuarial practice. On this basis it was accepted in the *Unisa* case (in para 16), with reference to the determination of actuarial liabilities that this necessarily entailed the application of professional actuarial methodology. By the same token, the regulations, in my view, prescribed the selfsame actuarial methodology, involving assumptions and predictions to allow for contingencies and imponderables when it came to the determination of assets. It follows that De Wit's methodology per se was not *ultra vires* the regulations.

[33] The respondents' alternative contention was that, even if De Wit was in principle entitled to act on the basis of assumptions, he erred in relying on assumptions regarding the assets of the AIPF which were known to be invalid when the 31 December 1994 determination was made. In support of this contention it was pointed out by the respondents' actuary, Lowther, that as a result of De Wit's methodology, he did not establish what assets were in fact held by the AIPF as at the transfer date of 31 December 1994. Instead, he took the assets of the AIPF on 30 September 1993 and calculated their value with reference to the prices of those types of assets as at the transfer date. As a result of this methodology, it was stated by Lowther in respondents' founding papers, De Wit intentionally ignored additional assets accumulated by the AIPF through an increase in employer contributions between 30 September 1993 and 31 December 1994, which assets it appeared subsequently, had a value of approximately R160m.

[34] All this was conceded by De Wit in his answering affidavit. He pointed out, however, that he had assumed that this increase in assets would have been cancelled out by an increase in greater pension liabilities. In the event, De Wit stated, his actuarial assumptions were borne out by subsequent events, because the

R160m was 'cancelled out' by an increase in liabilities of about R180m. In reply Lowther denied that the assets of R160m could be regarded as 'cancelled out' by the liabilities of R180m. Moreover, he contended that, on reflection, the value of the assets excluded by De Wit was not R160m but approximately R450m.

[35] I do not find it necessary to get involved in this debate between the two actuaries. First, to the extent that it resulted in a dispute of fact, we must prefer the version of De Wit (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634G-635D). Second, insofar as Lowther's contentions in reply constitute a new case, we are precluded from taking it into account (see eg *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) 635H-636F). The most important consideration, however, is that the debate takes the matter no further. Respondents' case is not that De Wit's exclusion of assets, whatever their value may be, was due to any ignorance or oversight on his part. He knew about the existence of these assets and their exclusion was a deliberate, but inevitable result of his methodology. That much is common cause. Consequently, this is not a case in which a material mistake of fact arose within the meaning of the rule explained in *Pepcor Retirement Fund and another v Financial Services Board and*

another 2003 (6) SA 38 (SCA), para 47. Respondents' criticism is aimed at the methodology adopted by De Wit. Shorn of unnecessary elaboration, Lowther's objection amounts to no more than that he would not have adopted the same methodology as De Wit because, so he said, it led to a result which eventually turned out to be demonstrably unfair and unreasonably prejudicial to the respondents.

[36] Since De Wit's decision was taken before the advent of both the final Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA), it was accepted by counsel on both sides, rightly in my view, that the legal substructure for respondents' case is to be found in s 24(d) of the interim Constitution. This subsection – which was re-enacted as a transitional measure pending the promulgation of PAJA in item 23(2)(b) of schedule 6 to the final Constitution – vested in every person the right to administrative action 'which is justifiable in relation to the reasons given for it'. Although the subsection expanded the ambit of judicial review, it did not abolish the well established distinction between review and appeal (see eg *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) 315C). Nor did it introduce substantive fairness as a criterion for judging the validity of administrative action. That

much is clear from the explanation of the analogous provisions of item 23(b) of schedule 6 in the majority judgment by Chaskalson CJ in *Bel Porto School Governing Body and others v Premier, Western Cape and another* 2002 (3) SA 265 (CC) 291F-292G. These provisions, the Chief Justice said, encapsulate and extend the common law grounds of judicial review – legality, procedural fairness and rationality – as they have been developed over the years in England and South Africa. For good reason, he said, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. The substantive unfairness of a decision in itself, has never been a ground for review. Thereafter, the Chief Justice proceeded to express himself as follows (at paras 88, 89 and 90):

'I do not consider that item 23(2)(b) of Schedule 6 has changed this and introduced substantive fairness into our law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag Courts into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not at a judicial level. This is of particular importance in cases such as the present, in which the issue relates to difficult and complex policies …

I do not understand the *Carephone* case, or any of the cases that have followed it, to hold otherwise. What they require for a decision to be justifiable,

is that it should be a rational decision taken lawfully and directed to a proper purpose.

If that is the case, and if the decision is one which a reasonable authority could reach it would, in my view, meet the requirements of item 23(2)(b) ….'

(Cf also *Minister of Environmental Affairs & Tourism and others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 406 (SCA) paras 46-50 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) 512H-513A.)

[37] In this matter, De Wit gave a full explanation as to why he decided to adopt the methodology that he did. Though he realised, he said, that a determination of the funding percentage based on audited figures at every transfer date would be more accurate and therefore more satisfactory to everybody concerned, that approach was, in his considered view, ruled out by considerations of delay and expense. He therefore had to compromise. Both his reasons for compromising and the compromised methodology itself were thereafter endorsed by the advisory board appointed to oversee the transfer process on behalf of the various interest groups. The members of that board included two professors of actuarial science, Professors Asher and Marx. Amongst the affidavits filed on behalf of respondents, is one deposed to by Prof Asher. In this

affidavit he, *inter alia*, made the following unequivocal and unqualified statements:

'I confirm that, as stated by De Wit, both Prof Marx and I were at all material times aware of, and satisfied with, the professional methodology applied by De Wit to the determinations and described by him in his affidavit.

I confirm also, that at the time, there appeared to be no possibility of De Wit being allowed to defer making his determinations until after all the data for the September 1994 triennial evaluation had been obtained and audited. It appeared that considerable covert pressure was being placed on the Department of Finance to ensure that the transfer process was completed as quickly as possible. We were instructed that the transfer process had to proceed as quickly as possible …

I have read both Lowther's criticisms of De Wit and De Wit's response to Lowther's affidavit. I remain convinced that within the constraints of the difficult process that was imposed upon him, De Wit made his transfer value determinations in a manner that meets the professional standards expected of a reasonable actuary.'

[38] Respondents also filed an affidavit by Mr Peter Milburn-Pyle, an independent actuary of some 40 years experience who specialises in the valuation of pension funds and who was at one stage the chief actuary of the Financial Services Board. He confirmed that after considering De Wit's methodology and Lowther's criticism thereof, he came to the conclusion that De Wit

performed his task in a professional manner and that he followed a reasonable methodology in doing so.

[39] Particularly in the light of the training, skills, experience and intricacies involved in the application of actuarial science, I believe that this is a matter where judicial deference is appropriate. Of course, I do not mean judicial timidity, but judicial deference as explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs supra* para 47. In these circumstances it is almost self-evident, I think, that the respondents have failed to make out a case that De Wit's methodology was not one which an actuary could reasonably have adopted, ie that De Wit had failed to act rationally in the execution of his brief. For these reasons the appeal must, in my view, succeed.

UNREASONABLE DELAY

[40] The remaining issues stem from the challenge of the application on grounds of unreasonable delay. Given my conclusion on the merits, these issues can make no difference to the outcome of the appeal. Nevertheless I consider it necessary to decide them lest it be thought that the court *a quo*'s view on when the defence of unreasonable delay will be upheld, is endorsed by this court. To begin with, I revert to the facts.

[41] In their founding papers, the respondents gave no reasons why their application for the review of De Wit's determination of the funding percentage was launched nearly four years after the implementation of that decision in August 1995. In the answering papers the appellants pertinently raised the defence of unreasonable delay. In support of this defence they pointed out that, apart from the fact that nearly four years had lapsed since the decision had been implemented, the respondents' application was, on their own version, triggered by De Wit's valuations of the AIPF as at 30 September 1994 and 31 March 1995. According to the appellants, both these valuations were freely available at the Department of Finance in July 1996. There was therefore no reason why the application could not have been launched shortly thereafter. Moreover, appellants pointed out, Prof Marx, who held a Chair at the University of Pretoria, was a member of the advisory board that oversaw the transfer process to its completion, while the objections raised by the respondents arose from decisions taken by De Wit with the full knowledge and approval of the advisory board. All this, the applicants stated, was apparent from the minutes of the meetings of the advisory board that were circulated to all the associated institutions, including the University of Pretoria. Furthermore, the appellants contended, the *Unisa* case

was launched in October 1998 and the respondents must have become aware of those proceedings shortly thereafter. Nonetheless, it took them another eight months to launch the present proceedings.

[42] As to the prejudice caused by this alleged unreasonable delay, the appellants pointed out that about 80 per cent of the members of the AIPF withdrew from the fund over the transfer period. Assuming that the present application were to be successful and all the transferring members were to become entitled to a further payment representing the difference between a funding level of 60 per cent and, say, 66 per cent, the total of the capital amount involved would be approximately R500m. To this should be added the interest at bank rate from date of transfer to date of payment prescribed by regulation 2(4)(b) of the transfer regulations. The effect of all this would be, depending on when the matter is finally resolved, that the AIPF may be required to pay out amounts of between one billion and one and a half billion rand, or between approximately 15 per cent to 22 per cent of the total assets of the fund.

[43] The capacity of the AIPF to carry this loss, so the appellants contended, had been substantially affected by the changing

composition of the membership of the fund. The withdrawal of members of the AIPF had left the fund with a substantially reduced proportion of contributing members. Whereas the number of contributing members had dropped by 91,3 per cent, the total number of pensioners had dropped by only 13 per cent. As time passed since 1995, they said, the membership of the fund had aged further, the number of contributing members had shrunk even further and the number of pensioners had increased. If the present application had been brought without delay, the AIPF would have been able to ameliorate the position in a number of ways by, for example, negotiating an increase of contributions from contributing members and/or their employers or by adopting a different asset management strategy with a view to maximise short term returns on investment. Apart from all this, the appellants averred, they were severely hampered in the preparation of their defence so long after the event.

[44] The first respondent was the only applicant who deposed to a replying affidavit. The other respondents did not respond to the appellants' allegations of unreasonable delay at all. The first respondent's answer to these allegations was in essence that, although he had known since about August 1995 that De Wit had

determined the funding percentage of the AIPF at 60 per cent, he had had no reason to question the accuracy of this determination until he became aware of the *Unisa* case which was launched in October 1998. He conceded that the present proceedings were triggered by De Wit's subsequent valuations of the AIPF that were both released in 1996. He denied, however, that these valuations were freely available at the time. In any event, first respondent contended, he had no reason to seek access to these valuations or to the minutes of the advisory board nor, for that matter, to seek the advice of Prof Marx until he realised that there was something amiss with De Wit's determination. That only happened, he said, when he heard of the *Unisa* case. Consequently, the time period which preceded the *Unisa* case should not be counted for the purposes of deciding whether or not there had been an unreasonable delay. With reference to the period that had elapsed between the *Unisa* case and the launch of the present proceedings, first respondent's contention was that in all the circumstances eight months could not be regarded as an unreasonable delay.

[45] The court *a quo* found that the defence based on the lapse of time could not be sustained. Its reasons for this finding were formulated as follows:

'There is no reason to doubt the word of first applicant that he was never aware of the possibility of review until he got wind of the Unisa application. Even if he had sight [of the valuation reports pertaining to 30 September 1994 and 31 March 1995] there would not have been reason for him to obtain elucidation which, in this case, would have entailed obtaining actuarial advice. … The argument that there was a duty on the applicants after the determination had been communicated to them, to go behind the decision and to establish whether it could be taken on review, must be rejected.

That means that I am of the view that the period preceding the Unisa application cannot be counted for the purposes of deciding whether there had been an unreasonable delay. What is left, is a matter of eight months. If one looks at the application, its technical complexity and the number of persons involved, I simply cannot find that a period of eight months was unreasonable to bring the application to fruition. …'

[46] Since PAJA only came into operation on 30 November 2000 the limitation of 180 days in s 7(1) does not apply to these proceedings. The validity of the defence of unreasonable delay must therefore be considered with reference to common law principles. It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings,

to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (see eg *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA) 10b-d, para 27). The *raison d'etre* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 41).

[47] The scope and content of the rule has been the subject of investigation in two decisions of this court. They are the *Wolgroeiers* case and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

(See *Wolgroeiers* 39C-D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg *Setsokosana* 86G). The investigation into the reasonableness of the delay has nothing to do with the court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (See *Setsokosane* 86E-F).

[49] The finding of the court *a quo* was that the applicants' delay was not unreasonable. The court did not decide that there had been an unreasonable delay which it elected to condone. The appeal against the court's finding under consideration is therefore an ordinary appeal against a finding of fact and law. It does not involve an appeal against the exercise of a judicial discretion by a court of first instance.

[50] Pivotal to the approach adopted by the court *a quo* is the proposition that, since there was no duty on the respondents to go behind De Wit's decision and to establish whether it could be taken

on review, any delay which preceded their knowledge of reviewability should be disregarded. I cannot agree with this proposition. It will inevitably lead to the result that however supine and unreasonable the applicants might have been in their failure to investigate the validity of an administrative decision affecting their rights and however long it might have taken before they were independently alerted to some flaw in the decision, the delay caused by their ignorance should be disregarded. Acceptance of the proposition will undermine the two considerations underlying the recognition of undue delay as a substantive defence. There will be no finality in administrative decisions and those affected by the review will have to suffer whatever prejudice comes their way through the applicant's supine attitude.

[51] In my view there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both s 7(1) of PAJA and in the provisions of s 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have taken all reasonable steps available to them in

compliance with this duty, will depend on the facts and circumstances of each case. (Cf *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA).)

[52] Accordingly, it was legally insufficient for the first respondent simply to allege that he was unaware of any potential irregularities in De Wit's determination until the Unisa application was launched several years later. The question remains: did he take all reasonable steps available to investigate the reviewability of that decision after he became aware that it had been taken? In my view he did not. A reasonable person in his position would at least have made enquiries, either from Prof Marx or from De Wit, as to how the determination was made. This trail of enquiry would have led him to the documents already available at his own university and eventually to the facts that formed the basis of his review application. Since the other respondents gave no explanation whatsoever for their delay, which was *prima facie* unreasonable, they cannot be in a better position than the first respondent.

[53] The finding that respondents' delay was unreasonable, leads to the next enquiry, that is, whether that delay should be condoned. This question, I believe, should also be answered against the respondents. Of primary concern is the severe

prejudice that the delay in the setting aside of De Wit's determination would have caused, not only to the appellants, but to a large number of people and institutions who might have arranged their affairs on the basis of its presumed validity. Included among these would obviously be the remaining members of the AIPF and those who have in the meantime taken retirement. The nature of their prejudice appears from the appellants' factual allegations that I have referred to and which, though contradicted in some respects by respondents, must be accepted for purposes of motion proceedings.

[54] For these reasons the appeal is upheld with costs, including the costs of two counsel and the following order is substituted for that of the court *a quo*:

> 'The application is dismissed with costs, including the costs of two counsel.'

…….
F D J BRAND
JUDGE OF APPEAL

Concur:
HARMS JA
MTHIYANE JA
CLOETE JA
COMRIE AJA