THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 221/2015

In the matter between:

TELLUMAT (PTY) LTD	**Appellant**
and	
APPEAL BOARD OF THE FINANCIAL SERVICES BOARD	**First Respondent**
C T HOWIE, D L BROOKING and G O MADLANGA NNO	**Second Respondent**
ALAN HUNTER ROY	**Third Respondent**
REGISTRAR OF PENSION FUNDS	**Fourth Respondent**
TELLUMAT PENSION FUND	**Fifth Respondent**

Neutral citation: *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board* (221/2015) [2015] ZASCA 202 (2 December 2015)

Coram: MPATI P, LEACH, WALLIS and MATHOPO JJA and BAARTMAN AJA

Heard: 24 November 2015

Delivered: 2 December 2015

Summary: Pension fund – apportionment of surplus in terms of s 15C of Pension Funds Act 24 of 1956 – apportionment by trustees undertaken as part of an overall scheme for the outsourcing of pensions and enhancement of pension benefits – implementation of distribution scheme involving transfer in terms of s 14 of the Pension Funds Act – scheme to be viewed as a whole and elements not to be treated as discrete from the whole – scheme approved by the Registrar of Pension Funds – appeal to the Appeal Board for the Financial Services Board – Appeal Board deciding appeal without regard for the scheme as a whole or the impact of its decision on the agreed apportionment of surplus – such a reviewable error in terms of s 6(2)(*e*)(iii) of PAJA – decision of Appeal Board set aside.

ORDER

On appeal from: Gauteng Division, Pretoria (Mavundla J, sitting as court of first instance):

1 The appeal is upheld.

2 The decision by the Gauteng Division, Pretoria is set aside and altered to read as follows:

'(a) The decision by the Appeal Board of the Financial Services Board in the appeal by Mr Roy, the third respondent, against the decision by the Registrar of Pension Funds to approve, in terms of section 14 of the Pensions Act 24 of 1956, the application by Tellumat Pension Fund under reference S14-092-11, is hereby set aside.

(b) The decision by the Appeal Board is replaced by the following:

'The appeal is dismissed.'

JUDGMENT

Wallis JA (Mpati P, Leach and Mathopo JJA and Baartman AJA concurring)

Introduction

[1] The administration of pension funds in South Africa occurs within the framework established by the Pension Funds Act 24 of 1956 (the

Act). The case of *Tek Corporation*[1] exposed a lamentable gap in the legislative framework when it came to dealing with actuarial surpluses in defined benefit pension funds. That gap was filled by the enactment of what is commonly referred to as the 'surplus legislation' by way of the Pension Funds Second Amendment Act 39 of 2001. It incorporated into the Act sections 15A to 15K, which governed and, subject to some subsequent amendment, continue to govern the use to which such surpluses may be put.

[2] The fund in issue here, the Tellumat Pension Fund (the Fund), is, by a curious turn of fate, the self same fund as the fund at the heart of the dispute in *Tek Corporation*, but under a different name and much transformed. Like many other defined benefit funds it was closed to new members some years before the events with which we are concerned. As a result it no longer has any active members, but only pensioners to whom it owed obligations under its rules.[2] Its triennial statutory actuarial valuation as at 31 December 2003 revealed a nil surplus. The following triennial valuation as at 31 December 2006 reflected a dramatically improved position. Not only was there now a solvency reserve of some R68 million, but there was an actuarial surplus of some R174 million. Together this amounted to a surplus of a little more than R242 million. This appeal arises from the steps taken thereafter to deal with that surplus.

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[1] *Tek Corporation Provident Fund &others v Lorenz* [1999] ZASCA 54; 1999 (4) SA 884 (SCA).

[2] References in this judgment to members is therefore to be understood as a reference to those pensioners and references to pensioners encompass the entire body of people interested in receiving benefits from the Fund. There are 14 deferred and suspended pensioners but their involvement does not affect the matter in any way.

[3] It will be necessary to describe more fully in due course the decisions taken in relation to the surplus, but a summary suffices here. First the assets in which the Fund was invested were realised and placed in money market investments in order to 'lock in' the surplus. A debate then ensued among the trustees of the Fund as to how to deal with the surplus. They concluded an agreement to divide the surplus equally between the employer, Tellumat (Pty) Ltd (Tellumat), the appellant, and the members of the Fund, after affording the latter an increase in their pensions. They agreed that the portion of the surplus allocated to the members would be used first to enhance existing pensions. Thereafter it would be used, together with the members' individual actuarial accounts, to purchase annuities for the members from a major insurance company.

[4] The intention was that these annuities would provide the members with pensions equivalent to or better than those they were entitled to under the rules of the Fund. This was referred to as 'outsourcing' the obligations of the Fund. Once this had been done and the annuities were transferred to the pensioners and the liabilities of the Fund to the members had been transferred to the chosen insurer, the only assets remaining in the Fund would be those representing the employer's surplus account. The Fund would then be wound up and those assets transferred to Tellumat. I will refer to these arrangements collectively as the distribution scheme.

[5] Although the board of trustees, representing both employer and employees, agreed upon the distribution scheme, it did not satisfy a group of pensioner members of the Fund who regarded the division of the surplus of the Fund between the employer and the members as unduly favourable to the employer. At every stage of the implementation of the

distribution scheme they have sought to block it. Their purpose was to secure for members a greater proportion of the surplus. Despite their resistance their attempts to block the scheme failed at every stage, until they came before the Board of Appeal (the Appeal Board) established in terms of s 26 of the Financial Services Board Act 97 of 1990 (the FSB Act). The attempts included an arbitration on a complaint lodged with the Pension Funds Adjudicator (the PFA), two adverse determinations by the PFA, and the decision by the Registrar of Pension Funds that gave rise to the appeal before the Appeal Board and the present proceedings.

[6] The Registrar's impugned decision was to authorise, in terms of s 14 of the Act, the transfer to the pensioners of individual annuity policies issued by an insurance company in place of annuity policies in the name of the Fund held with that insurer. The effect of such transfer would be to transfer to the pensioners those assets of the Fund and to the insurer all the liabilities of the Fund towards the members. It would leave the Fund with the assets constituting the employer surplus account and nothing more. The transfer of the annuities in this fashion would complete the process of outsourcing pensions proposed in terms of the distribution scheme. As he was entitled to do in terms of s 26(1) of the FSB Act,[3] Mr Roy, a pensioner and the third respondent in this appeal, appealed against that decision to the Appeal Board. His appeal was successful and the Board set aside the Registrar's decision to approve the transfer.

[7] Tellumat had taken no active part in the proceedings before the Appeal Board, but it then instituted proceedings by way of judicial review

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[3] Financial Services Board Act 97 of 1990.

to challenge the decision of the Appeal Board. The application was dismissed by Mavundla J in the Gauteng Division, Pretoria. This appeal is with his leave.

The legal framework

[8] All actuarial surplus in a fund belongs to the fund.[4] Any such surplus may be apportioned to either a member surplus account or an employer surplus account. Any credit balance in the member surplus account must be used for the benefit of members. The only portion of any surplus that may be used for the benefit of the employer is the surplus in the employer surplus account.[5] The legislation provided for an initial surplus apportionment date, being the date of the first statutory actuarial valuation of a fund after the commencement of the surplus legislation.[6] In the case of the Fund the valuation on that date showed a nil value for surplus so that it was unnecessary for the Fund to undertake an apportionment exercise.

[9] When a surplus arose at the time of the following statutory valuation, it had to be apportioned in terms of s 15C of the Act. That provides:

'(1) The rules may determine any apportionment of actuarial service arising in the fund after the surplus apportionment date between the members surplus account, the employer surplus account or directly for the benefit of the members and former members subject to the uses specified in section 15D(1).

(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment between the members surplus account, the employer surplus account or directly for the benefit of members and

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[4] Section 15A (1) of the Act.
[5] Section 15D of the Act.
[6] Section 15B of the Act.

former members, subject to the uses specified in section 15D(1), shall be determined by the board taking into account the interests of all the stakeholders in the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment.'

[10] The rules of the Fund contained no provision dealing with the apportionment of surplus arising after the initial surplus apportionment date. Accordingly it was for the board of trustees of the Fund to determine how the surplus was to be apportioned. The board was constituted of equal numbers of trustees appointed by the members and the employer, Tellumat. They engaged in debate and eventually arrived at the result reflected in the distribution scheme. It is to the terms of that scheme that I now turn.

The distribution scheme

[11] The identification of the actuarial surplus occurred in June 2007 when the statutory valuation for the three year period ending on 31 December 2006 was signed and submitted by the Fund's actuary. Thereafter a lengthy debate occurred among the trustees. They approached the issue from diametrically opposed standpoints. The trustees representing the members and pensioners demanded that 90% of the surplus be apportioned to the members. It could then be used to enhance their pensions. Not surprisingly the trustees representing Tellumat took precisely the opposite stance. They proposed that Tellumat should receive 90% of the surplus.

[12] At the end of the debate between the two groups of trustees, after making allowance for an immediate enhancement of pensions, they agreed to apportion the remaining surplus equally. In practical terms this

amounted overall to an apportionment of approximately 56% to the members and 44% to Tellumat. As part of this process the trustees also agreed on what would happen to the Fund after apportionment.

[13] The details of the apportionment and what was to be done with the member and employer surplus accounts were set out in a circular letter addressed to pensioners on 12 October 2007. By that date the trustees had resolved to 'lock-in' the surplus by transferring the Fund's assets from the equity portfolio, in which they had been invested and which had generated the surplus, to what were effectively money market funds. Whilst the returns on these funds would be more modest the capital would be preserved.

[14] The letter of 12 October 2007 was written on behalf of the trustees by the chair of the board. It was sent to all the pensioners of the Fund. The letter gave details of the surplus and said that as a result it was possible to make material improvements in their pensions. It explained that accordingly the trustees had decided, with the agreement of Tellumat, to make a number of changes to the structure of the Fund. These were summarised as follows:

'In summary the Trustees and the Employer have agreed to a special increase, a special bonus, outsourcing of the pensions, upliftment, sharing of surpluses and to the winding down of the Fund.'

[15] Under the general heading 'Sharing of surplus' the letter proceeded to explain how these changes were to be effected. There would be a special pension increase of 8% funded from the overall surplus. The balance of surplus remaining would be split equally between a member surplus account and an employer surplus account. R5.3 million would be

allocated from the member surplus account to give additional increases to the lower bands of pensioners. All profits or losses accruing on the Fund after 1 January 2007 would be for the benefit or account of the member surplus account. Any liabilities of the employer towards the Fund would be paid from the employer surplus account.

[16] According to Tellumat the proposal that pensions be outsourced emanated from the member trustees. Apparently they thought that if a large insurer provided the pensions there was a greater likelihood of their being secure. They took this view because of the financial strength of large insurers when compared to that of a single, relatively small, pension fund catering only for pensioners. The letter explained this proposal to pensioners in the following way:

'The Trustees have decided, as part of this agreement, to undertake a pension outsource exercise. This means that your pension currently being paid from the Tellumat Pension Fund will in future be underwritten by an insurer and no longer by the Fund. The main reason for this decision is to provide pensioners with the added security of being part of a substantially larger pool of pensioners underwritten and protected by the financial muscle of a major insurer as opposed to the benefits being underwritten by Tellumat which does not have the same financial resources as a large insurance company. It is envisaged that the entire outsourcing process will be completed by mid-2008, thereafter the Fund will [be] closed.'

[17] The financial implications of the surplus apportionment exercise for pensioners were summarised as follows:

'As a result of the allocation of the surplus, it is envisaged that all pensioners will receive the following:

(i) A cash "bonus" equal to 4 months pension to be paid on 1 December 2007.

(ii) A special increase of 8% to be effected from 1 January 2008.

(iii) The normal annual increase to be effected from 1 January 2008 (percentage still to be decided).

(iv) An additional enhancement on your pension at date of outsourcing of up to 25%, depending on which outsourcing option you decide to take and the final terms offered by the insurers.'

[18] The reference to outsourcing options appeared because it was envisaged that three options would be made available to pensioners. The first would be the purchase of an annuity providing a pension mirroring exactly what they were currently entitled to in terms of the rules of the Fund, including the spouses and children's pensions, and any pension increase guarantee. The second would be the purchase of annuities that would provide the various pensions provided in the rules of the Fund on a stronger valuation basis, but without any guaranteed minimum increases that pensioners might have enjoyed under the rules. Based on past experience it was said that in this way pensioners would be likely to receive increases equal to or exceeding the increases to be expected from the Fund. The third option would be to permit pensioners to uplift their pension and purchase an annuity of their choice.

[19] Following upon the decision by the trustees, the rules of the Fund were amended to provide for the outsourcing of pensioners. This was done by amendment 11 dated 6 December 2007. The Registrar duly registered the amendment on 21 February 2008. It has not been challenged. Rule 7.1 provided that at a date referred to as the 'pension outsource date' the trustees would be entitled to purchase from a registered insurer an annuity approved by the trustees that would cover the pension entitlement of the pensioners. Under rule 7.2 the terms and conditions of the annuities would include options elected by the pensioners. Under rule 7.3 the trustees were appointed as the agent of the pensioners to purchase the annuities.

[20] On 23 January 2008 Mr Roy, on his own behalf and on behalf of 40 other pensioners, lodged a complaint with the PFA against the decision by the trustees in regard to the apportionment of the surplus. His contention was that all surplus should have been allocated to the pensioners and used to secure inflationary increases for them. He said that it was inappropriate for the amount credited to the employer surplus account to accrue to Tellumat on termination of the Fund.

[21] The Fund opposed the complaint. It claimed that the benefit enhancements secured to pensioners through the apportionment exercise exceeded their legitimate expectations. It said that, in arriving at the apportionment, it had been obliged to act reasonably and equitably towards both pensioners and employer and the decision it had reached struck an appropriate balance between the two.

[22] The complaint by the pensioners was, by agreement, referred to arbitration before Mr J F Myburgh SC. In the meantime the Fund was unable to pursue the distribution scheme in case the apportionment of surplus was set aside. On 19 November 2009 the arbitrator handed down his award and dismissed the complaint. He rejected all the grounds of complaint advanced by the pensioners. He held that it was for the trustees, who represented both the pensioners and the employer, to determine how the surplus was to be apportioned and they had done so.

[23] After the arbitration award was handed down the trustees again communicated with the pensioners in a letter addressed to them in March 2010. The letter said that they were pleased to inform them that the arbitration award had decided the disputes in favour of the Fund and that

they intended to proceed with the outsourcing initiative immediately. The letter proceeded to explain the options that faced pensioners. It highlighted the fact that there were two groups of pensioners. The first group had come to the Fund from the Plessey South Africa Pension Fund (the PSA pensioners) and the other group from the Plessey Corporation Pension Fund, as the Fund had previously been known. The PSA pensioners had brought with them to the Fund a guarantee of a minimum 3% annual pension increase. Historically there had been little need for them to rely on this because the Fund's pension increase policy was to increase pensions by at least 75% of inflation and more if that were affordable. A table provided to the Appeal Board showed that there had only been two years in the previous eleven years when the pension increase for ex-Plessey Corporation Pension Fund members had been less than 3%, and that was made up in the following year when they received a 10% increase. Throughout the aim of the trustees had been to ensure as far as possible that the two groups of pensioner were treated equally.

[24] The letter set out the three options being offered to the pensioners pursuant to the outsourcing scheme. The first was a pension with no minimum increase guarantee. The basis would be that the member's interest would be invested on a 'with profits' basis with an insurer. The trustees said that this had, on an historical basis, provided similar pension increases to those that had been enjoyed through membership of the Fund. If a pensioner chose this option they would be given a once off enhancement of their existing pension of 32%. The second option was that the member's interest would be invested on the same basis, but with a guarantee of an annual 3% increase in the pension. In this case the once off enhancement of the pension would be 26%. The differential represented the cost of obtaining the guarantee. The third option was the

purchase of an inflation-linked pension. In this instance the once off enhancement would be substantially less – 10.47% - because the cost of securing the guarantee was considerably higher.

[25] Each letter was accompanied by a form in which the pensioner was required to elect which of these three options they were choosing. They were encouraged to respond quickly and in any event by 11 June 2010. If the form was not returned by that date they would automatically be given the default option and an annuity best approximating their current pension entitlement would be purchased on their behalf. Mr Roy and two other pensioners who feature in this case, Mr Barnes and Mr Myles, elected option 1. Under that option an annuity would be purchased in their names on a with profits basis, but without any guaranteed annual increase. Before purchasing the annuity their existing pension would be enhanced by the 32% uplift.

[26] The further implementation of the distribution scheme and the outsourcing of pensions was checked by Mr Barnes lodging a complaint with the Pension Funds Adjudicator. He said that he had selected option 1 and his pension had been outsourced by the purchase of an annuity from Old Mutual. The annuity had been purchased with his pro rata share of the Fund and a once off enhancement funded from the member surplus account. Mr Barnes complained that he had always received an annual increase in his pension sufficient to keep pace with inflation. He argued that this had become a settled practice and accordingly his reasonable expectation from the Fund was that he would receive an annuity providing a pension that would increase each year by at least the rate of inflation. He also argued that as the eventual result of the outsourcing of pensions would be the dissolution of the Fund it was necessary to have

regard, in the funding of benefits, to the position that would pertain if those benefits were to be funded on the liquidation of the Fund. In other words he sought to rely, as had Mr Roy before the arbitrator, on the provisions of section 15I of the Act.

[27] The general body of pensioners did not share the opposition to the outsourcing scheme and the apportionment of surplus of Mr Roy, Mr Barnes and their supporters. They wanted to receive immediately the enhanced benefits they had been promised. They had already had the initial pension uplift, but now wanted the further pension enhancement flowing from the elections they had made in the period up to 11 June 2010. In order to satisfy this demand, during the period from April to August 2010, the Fund purchased annuities in its own name according to the election of each pensioner. It then used those annuities to afford to each pensioner the pension benefits they had elected to receive, including the uplift.

[28] Mr Barnes' complaint was dismissed by the Pension Funds Adjudicator on 28 September 2011. The Adjudicator held that his reasonable benefit expectations had been satisfied and that he was not entitled to claim the benefit of section 15I of the Act dealing with the dissolution of the Fund as no steps had yet been taken to dissolve it.

[29] While awaiting the outcome of the complaint by Mr Barnes, on 24 May 2011 the Fund submitted an application to the Registrar for the approval in terms of s 14 of the Act of the transfer of business from the Fund to various insurers and the cession of annuity policies owned by the Fund to the pensioners. In other words the assets of the Fund in the form of annuity policies in respect of each pensioner were to be transferred to

the pensioners and the liabilities the Fund owed to those pensioners would henceforth rest on the insurers who issued the annuities. The business of the Fund would be severely attenuated by this as it would be left (apart from the 14 pensioners mentioned above) with no liabilities and the assets constituting the employer surplus account.

[30] The application prompted an objection from Mr Roy, representing himself and nine other pensioners, including Mr Barnes. The basis for the objection was that the section 14 transfer was not reasonable and equitable because it failed to secure members' reasonable benefit expectations and it ignored the fact that the process on which the Fund had embarked would inevitably lead to its dissolution. That being so, Mr Roy contended that the proper approach to the apportionment of the surplus would have been to pursue it in terms of s 15I of the Act. He said that the benefit enhancements that pensioners had enjoyed should have been funded from both the member surplus account and the employer surplus account and not, as had occurred with the major portion of the pension enhancements, from the member surplus account alone.

[31] After the complaint by Mr Barnes had been dismissed by the PFA the Registrar considered the Fund's application in terms of s 14 of the Act and, notwithstanding the objection by Mr Roy, approved it on 9 May 2012.[7] This prompted Mr Roy to appeal to the Appeal Board on 18 May 2012. It is that appeal that was upheld and led to the review proceedings before the High Court.

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[7] On 26 May 2012 another complaint was lodged with the PFA, this time by Mr Myles, but it does not appear to have affected subsequent events. It was dismissed on 20 February 2013.

The Appeal Board's decision

[32] When authorising the transfer of the annuities in terms of s 14(1)(*c*)(i) of the Act the Registrar had to be satisfied that:

'… the scheme … is reasonable and equitable and accords full recognition-

(i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer.'

There are further requirements in ss 14(1)(*c*)(ii) and (iii) but they are not relevant to this case.

[33] The Appeal Board viewed this section as creating two separate and distinct requirements in regard to which the Registrar had to be satisfied. The first was that the scheme under consideration had to give full recognition to the rights and reasonable benefit expectations of the members whose business was the subject of the transfer. The second was that the scheme had to be reasonable and equitable.

[34] I am less than certain that these requirements are in truth distinct. If the scheme gives full recognition to the rights and reasonable benefit expectations of members it will ordinarily be reasonable and equitable. Save in an unusual situation – and this does not strike me as being in any way unusual – it is difficult to see why it will not be reasonable and equitable to implement it. After all the principal purpose of a pension fund is to provide the members of the fund with the benefits embodied in its rules. Section 14(1)(*c*) is designed to ensure that when considering whether to authorise a scheme the members' and pensioners' rights are protected as well as their reasonable benefit expectations.

[35] The notion of reasonable benefit expectations arises in two contexts, namely surplus in the fund and practices and promises of the fund in regard to future benefits. The surplus legislation is designed to allocate surplus fairly and equitably between members and the employer. That is the matter in issue here. In regard to future benefits, where the pension fund has over some years established practices, say in regard to pension increases, those practices will give rise to reasonable expectations that they will be continued in the future. Similarly, where it has given undertakings to members about their future treatment, those undertakings will give rise to a reasonable expectation that the undertaking will be fulfilled. The interests arising from this are encompassed by the expression 'reasonable benefit expectations'. The word 'reasonable' is important. The Registrar is obliged when considering a scheme to assess whether the members and pensioners will receive everything that they could reasonably expect to receive from the Fund. But that is all.

[36] The Appeal Board upheld Mr Roy's appeal on two grounds. Firstly it said that he and the other former PSA pensioners were entitled as of right to an annual 3% pension increase. As two of the three options made available to pensioners did not provide for such a right (including the one elected by Mr Roy and his colleagues) the scheme did not give effect to their rights. The first requirement identified by the Appeal Board was accordingly not satisfied. Secondly, it held that the transfer of business would ultimately lead to the winding-up of the Fund in terms of s 28 of the Act. That being so, it held that in determining whether the scheme was reasonable and equitable s 15I(*a*) of the Act needed to be taken into account. This provided that any enhancement in the benefits of pensioners on liquidation should be funded *pro rata* from the members

surplus account and the employer surplus account. Apart from the initial 8% increase in pensions, which had been funded from the general surplus, thereby reducing the balance available for apportionment, this had not occurred when the annuities were purchased and each member's benefits were enhanced in 2010. All of the enhancement came from the member surplus account. For this reason the Appeal Board held that the scheme was not reasonable and equitable and the second requirement was not satisfied. It accordingly upheld the appeal and set aside the Registrar's decision to approve the s 14 transfer.

The review

[37] Tellumat had not played any role in the proceedings before the Appeal Board even though it had been given the opportunity to intervene and make submissions. Its reasons for adopting this approach were understandable. The Fund was appearing in order to support the application that it had made and that had been approved by the Registrar. In addition the Registrar appeared to explain and support the decision. It was legitimate for Tellumat to take the view that it could add little to the debate in those circumstances and that its own interests were protected.

[38] All that has changed subsequently because, in the light of the Appeal Board's decision, the board of trustees of the Fund has become a house divided against itself. The member trustees understandably wish to support the Appeal Board's conclusion, the effect of which would be that a substantial portion of the employer surplus account will become available to enhance pensioner benefits. The employer trustees, although themselves pensioners, continue to support the original arrangement. This division of views was the subject of an arbitration and the arbitrator concluded that the appropriate course for the trustees to take was to abide

the outcome of any proceedings directed at challenging the Appeal Board's decision. That left Tellumat's interests potentially unprotected. In those circumstances it has a sufficient direct and substantial interest in the validity of that decision to give it the necessary locus standi to bring these proceedings by way of judicial review.[8]

[39] The parties assumed with some justification, as it had also been assumed in several decisions in this court involving reviews of decisions of the Appeal Board,[9] that the review is one in terms of PAJA.[10] However, it was not immediately apparent that a decision of the Appeal Board was a decision of an administrative nature as required by the definition of administrative action in PAJA,[11] so Tellumat was asked to furnish supplementary argument in that regard.

[40] The determination of whether something constitutes administrative action requires a detailed analysis of the nature of the public power or public function in question in order to determine its true character.[12] Tellumat's argument correctly proceeded from the premise that the Registrar's decision in terms of s 14 is administrative action. As the function of the Appeal Board is to 'confirm, set aside, or vary' that

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[8] Section 38*(a)* of the Constitution. See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) paras 41 and 43; *Tulip Diamonds FZE v Minister of Justice and Constitutional Development and Others* [2013] ZACC 19; 2013 (10) BCLR 1180 (CC) para 31. Its situation is similar to that of COSATU in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC) (*Sidumo*) para 52.

[9] *National Tertiary Retirement Fund v Registrar of Pension Funds* [2009] ZASCA 41; 2009 (5) SA 366 (SCA) para 26; *Registrar of Pension Funds v ICS Pension Fund* [2010] ZASCA 63; 2010 (4) SA 488 (SCA) para 10.

[10] The Promotion of Administrative Justice Act 3 of 2000.

[11] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21; *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) (*Motau*) para 33.

[12] *Sokhela & others v MEC for Agricultural and Environmental Affairs (KwaZulu-Natal) and Others* [2009] ZAKZPHC 30; 2010 (5) SA 574 (KZP) para 60 quoted with approval in *Motau* para 34 and *Minister of Home Affairs & others v Scalabrini Centre, Cape Town C*2013 (6) SA 421 (SCA) para 52.

decision and to order that the decision of the Appeal Board be given effect to,[13] the Appeal Board's decision either reaffirms the Registrar's decision or substitutes it with a varied or different decision. But the character of the decision does not change as a result. It remains a decision in terms of s 14 of the Act. The fact that the decision is made in proceedings that, under our former administrative law dispensation, would have been described as quasi-judicial does not affect the matter.[14] In the circumstances I am satisfied that the decision by the Appeal Board constitutes administrative action and is reviewable in terms of PAJA.

[41] The only ground for review to which we need have regard in this case, is that set out in s 6(2)(*e*)(iii) of PAJA. That provides that a court may review administrative action if it was taken because irrelevant considerations were taken into account or relevant considerations were not considered. This encapsulates a principle that was part of our administrative law prior to s 33 of the Constitution or the enactment of PAJA, namely that a functionary who 'took into account irrelevant considerations or ignored relevant ones'[15] was liable to have their decision overturned on review.

[42] In approaching this question a court must be careful not to overturn a decision on review merely because it disagrees with it. It must be alive to the fact that it was primarily for the decision maker to determine which facts are relevant and which not. But, once the court is satisfied that the decision could only properly be taken if certain facts, overlooked by the

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[13] Section 26B(15)*(a)*
[14] *Sidumo* paras 81 to 85 and 125-6.
[15] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* [1988] ZASCA 18; 1988 (3) SA 132 (A) at 152 C-D; [1988] 2 All SA 308 (A).

decision maker, were taken into account, it is entitled to interfere. Similarly once it is satisfied that in taking the decision certain facts that were taken into account should not have been, it may interfere.[16] Even when all relevant facts were considered the court will have to consider the weight attached to the facts. The precise point at which a court is entitled to interfere may not be entirely clear, but as Henning J said many years ago,[17] 'where a factor which is obviously of paramount importance is relegated to one of insignificance, and another factor, though relevant is given weight far in excess of its true value' interference is warranted. I would suggest that it is essential.

[43] With the utmost respect to the Appeal Board in the present case it seems to me that it failed to give sufficient consideration to the fact that the s 14 application was part of a broader scheme of distribution agreed upon by the trustees in 2007 when they were dealing with the apportionment of the surplus. Instead it dealt with the two issues of the guaranteed 3% annual pension increase and the impact of the possible dissolution of the fund as if they were discrete issues divorced from the entire distribution scheme. Nowhere in the Appeal Board's decision is there any consideration of the fact that the transfer under consideration was part of a larger arrangement having its origins in the decision of the trustees in regard to the apportionment of the surplus. Nor is there any consideration of the fact that the impact of its decision would necessarily be that the entire apportionment exercise, held by the arbitrator to have

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[16] *Jacobs en 'n Ander v Waks en Andere* [1991] ZASCA 152; 1992 (1) SA 521 (A) at 550D-H.
[17] *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) at 685C-D.

been valid and lawful in proceedings by Mr Roy against the Fund, would be thrown into disarray and have to be revisited.[18]

[44] After the trustees' decision in regard to apportionment of the surplus in 2007, the pensioners had been given an 8% increase in their pensions. The lowest band of pensioners had received a special increase in 2008 at a cost of some R5.3 million. The rules of the Fund had been amended to permit the outsourcing of pensions by way of the purchase of annuities from an insurer. The members had made their election as to the nature of the annuities they wanted and the Fund had purchased those annuities in its own name, at the same time enhancing the actuarial value attributable to each pensioner. The enhanced pensions payable in terms of the annuities had been paid. The process would have been quicker, but for the challenges by Mr Roy and Mr Barnes. And those challenges had delayed matters for the very reason that the relief that each of them sought was directed at undoing the distribution scheme and, in particular, undoing the decision of the trustees in regard to the apportionment of the surplus. Yet there is no mention of all of this in the Appeal Board's decision.

[45] Why was this important? The answer is that if it had been necessary for the outsourced pensions of all the PSA pensioners to include a guarantee of a 3% annual increase, different annuities would have had to be purchased. They would have generated very different pensions from those that the pensioners, including Mr Roy and Mr Barnes

[18] The Appeal Board held that it was not bound by this decision. I am not sure what it meant by that. Mr Roy and the Fund were certainly bound by it and, apart from the 41 pensioners who were parties to that arbitration, no other pensioners had any complaint about the apportionment. In those circumstances I have grave doubts as to the correctness of this statement by the Appeal Board. If it was wrong that provides a further reason why it was not open to the Appeal Board to make an order having the effect of overturning that award.

and Mr Myles, obtained as a result of their electing option 1. Those who elected options 2 or 3 either received a guarantee of a 3% increase or a guarantee of an inflation linked increase, so they would have had no grounds for complaint. Only the PSA pensioners who elected option 1, giving them a considerably enhanced pension without a guaranteed annual increase, could have advanced this objection. So the people who were complaining were those who by their own election had decided to forego a guaranteed 3% increase. They then sought to obtain what they had foregone, by resisting the transfer to them of the annuities purchased at their instance, the benefits of which they were reaping on a monthly basis. The old saying about wanting to have your cake and eat it springs to mind.

[46] I stress that the amendment of the rules to permit outsourcing of pensions was not challenged and the proposal of outsourcing emanated from the trustees elected to represent pensioners. There was likewise no challenge to the process by which the pensioners made their election and chose the form of annuity that they wanted. In fact Mr Roy made it clear that he and those for whom he spoke had no objection to their pensions being outsourced. But he objected to there being a cost attached to having a guaranteed annual increase to his pension. But inevitably such guarantees would come at a cost. To have provided a guarantee to all the PSA pensioners, would have disadvantaged all pensioners, because the amount by which their pensions could be enhanced would have diminished.

[47] One could more readily understand a complaint by Mr Roy and his colleagues had they elected option 2, in order to preserve their guarantee, and objected to the fact that the cost of the guarantee was funded by them

by receiving a smaller increase in their current pensions. But instead they took option 1 and then demanded the guaranteed increase over and above that.

[48] Unfortunately the Appeal Board did not have regard to any of these matters. Its approach was that the rules of the Fund, as they related to the PSA members, provided for the guaranteed increase and only one of the options offered to the members did so. The Appeal Board held that this meant that the annuities did not give full recognition to the pensioners' rights. The fact that they had been given and had exercised an option was irrelevant. Its view was summed up in a single sentence from its decision: 'The trustees could not foist on members choices that were not in accordance with their liabilities.'

[49] But the three choices offered to members were precisely in accordance with the rules. Under rule 7.1 the trustees were entitled to purchase annuities for members in a form approved by them. Clearly that gave them an option as to the form of the annuities and, as one would expect, they gave the members a choice. If they could only offer members annuities that mirrored their existing pension rights there would have been no point in providing in rule 7.2 for the terms of the annuity to be agreed between the pensioner and the insurer on terms approved by the trustees. And, once an annuity had been purchased in accordance with the member's choice, their rights and reasonable benefit expectations were those embodied in that annuity and not in provisions of the rules that they had elected to forego.

[50] As the Appeal Board did not take account of any of these matters in arriving at its conclusion its decision falls to be reviewed under

s 6(2)(*e*)(iii) of PAJA. Whether the decision should be set aside depends on whether it similarly erred in relation to the other ground for its decision.

[51] Turning to the second ground the Appeal Board's approach was that a dissolution or liquidation of the Fund was inevitable and therefore the question whether the scheme was reasonable and equitable should be measured against the provisions of the Act dealing with the application of surplus accounts on liquidation of a fund. Its view was that it was of primary importance that s 15I(*a*) provided that on liquidation all credit balances in both the member and the employer surplus accounts might be drawn upon proportionately to secure the rights and benefit expectations of the members participating in the distribution. Only after that had been done would the employer be entitled to any benefit from what remained in the employer surplus account.

[52] Unlike its approach to the guaranteed increase the Appeal Board on this issue did look at the distribution scheme, but only at a single aspect of it, namely the Fund's dissolution on completion of the scheme. That was the basis for its view that s 15I needed to be taken account of in determining whether the scheme before it was reasonable and equitable. In my view this entirely overlooked the fact that, assuming there was to be a dissolution, this was only contemplated after the implementation of the specific terms of the distribution scheme as agreed to by the trustees and communicated to the members in 2007. That was not a scheme involving the enhancement of pension benefits funded from the overall surplus. It was one that contemplated the apportionment of the surplus and the provision of enhanced benefits funded largely from the member surplus account.

[53] The approach of the Appeal Board appears to have been that the enhanced benefits would have been provided in any event and that it would not make any difference, save as to the manner in which those benefits would have been funded, to deal with them as benefits arising on liquidation. That ignored the fact that the apportionment of surplus agreed in 2007 was not in any way distinct from the distribution scheme that accompanied it. In fact all the correspondence with the members was based on the scheme as a totality. When it was held up by the initial complaint by Mr Roy forming the subject of the arbitration it was not abandoned. Instead, once the award was handed down in favour of the Fund, the chair informed members that they would proceed immediately with the outsourcing initiative. In communications from the Fund's attorneys in 2010 and 2011 it was made plain that the Fund was still in the process of implementing the original distribution scheme agreed upon by the trustees.

[54] It could not be assumed by the Appeal Board that the enhancements to pensions, both initially and when the annuities were taken out, would have been the same if the funding had to be taken from the overall surplus. That would have diminished the employer surplus account and the ultimate benefit the employer would receive from that account. Would Tellumat have agreed to that? It seems unlikely in the extreme that it would. The trustees knew what surplus had to be apportioned. They started negotiating from opposite poles. If it had been said that any pension enhancements, beyond the original 8% increase, would have to be funded proportionally by both the member and the employer surplus account, it is inconceivable that the trustees would have arrived at the same agreement in regard to the apportionment of the

surplus. The reason is the obvious one that it would have involved a significant increase in the benefit to be derived from the surplus by members and a significant decrease in the benefit flowing to Tellumat from that source. In all likelihood the outcome of the negotiations would have been substantially different.

[55] In this regard as well, in my view, the Appeal Board, by failing to reach and locate its decision squarely within the context of the entire distribution agreement, failed to have regard to the most relevant consideration in the task confronting it. That constituted reviewable error in terms of s 6(2)(*e*)(iii) of PAJA.

[56] That conclusion dictates that we set aside the Appeal Board's decision. The question then is whether we should remit the matter to the Appeal Board, or make a substitution order in terms of s 8(1)(*c*)(ii)(*aa*) of PAJA. Fortunately there has recently been guidance from the Constitutional Court on the correct approach to making such an order.[19] Following the approach explained in that judgment the most relevant factors seem to me to be these. The surplus apportionment was undertaken in 2007, when the distribution scheme was implemented. The validity of that apportionment was upheld by the arbitration award in November 2009. The three subsequent attempts to derail the process have all, directly or indirectly, been directed at the same goal, namely setting aside the apportionment. All of them have failed. In the meantime the Fund has in good faith and at the instance of the majority of pensioners proceeded to implement the scheme. There can be no doubt that this is

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[19] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22.

what the general body of pensioners wishes it to do. Further delay is undesirable and in any event I think that the outcome of a remittal would inevitably be that the appeal by Mr Roy would be dismissed.

[57] For those reasons this is a case where the court should not remit the matter but should substitute the decision of the Appeal Board with the decision that it should have made. Accordingly the following order is made:

1 The appeal is upheld.

2 The decision by the Gauteng Division, Pretoria is set aside and altered to read as follows:

'(a) The decision by the Appeal Board of the Financial Services Board in the appeal by Mr Roy, the third respondent, against the decision by the Registrar of Pension Funds to approve, in terms of section 14 of the Pensions Act 24 of 1956, the application by Tellumat Pension Fund under reference S14-092-11, is hereby set aside.

(b) The decision by the Appeal Board is replaced by the following:

"The appeal is dismissed.'

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: P B J FARLAM SC

Instructed by:

Alastair Morrison Van Huyssteen Attorneys, Bellville

McIntyre & Van der Post , Bloemfontein

For respondent: No appearance.