THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 054/2020

In the matter between:

HORTORS PENSION FUND	**APPELLANT**
and	
FINANCIAL SECTOR CONDUCT AUTHORITY	**FIRST RESPONDENT**
THE MINISTER OF FINANCE	**SECOND RESPONDENT**

Neutral citation: *Hortors Pension Fund v Financial Sector Conduct Authority and Another* (Case no 054/2020) [2020] ZASCA 141 (2 November 2020)

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

Heard: 21 August 2020

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

Summary: Whether regulation promulgated by Minister, in terms of which a board of a pension fund is obliged to place calculable enhancements due to former members who cannot be traced in a contingency reserve fund from which it cannot be released, except as payment to such members or as a result of crediting the Guardian's Fund or some other fund, is beyond the Minister's power and not in accordance with the

Pension Funds Act 24 of 1956 – Minister arrogating power at odds with the Act – against the principle of legality.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J, sitting as court of first instance): judgment reported *sub nom Hortors Pension Fund v Financial Sector Conduct Authority and Another* [2019] ZAGPPHC 614

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

2 The cross-appeal is dismissed with no order as to costs.

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

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

JUDGMENT

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

[1] This is one of three related cases that were heard on the same day.[1] This appeal, like the other two, is directed against a decision of the Gauteng Division of the

[1] The other two being *Vrystaatse Munisipale Pensioenfonds v The Minister of Finance and another* (Case no 1161/18) and *Southern Sun Group Retirement Fund v The Registrar of Pension Funds and Others* (Case no 215/2019). The unreported judgments of the courts below in these matters are cited, respectively, as *Free State Municipal Pension Fund v The Minister of Finance and Others* GP 06-06-

High Court,[2] in terms of which an application by a pension fund registered in terms of s 4 of the Pension Funds Act 24 of 1956 (the PFA), to have regulation 35(4) of the Regulations promulgated by the second respondent,[3] the Minister of Finance (the Minister), declared invalid on the basis that it exceeds the Minister's powers under the PFA , was dismissed. In all three cases the high court made no order as to costs.

[2] The principal issue in all three appeals, as it was in the high court, is whether the regulation in question is *ultra vires* the powers assigned to the Minister in terms of the PFA. Put differently, the question is whether the Minister has, by way of the regulation in issue, arrogated power at odds with the PFA, thereby offending against the principle of legality. The three appeals require consideration of the person/functionary in whom, in terms of the PFA, the power to apportion an actuarial surplus in a pension fund and to create contingency reserve accounts, vests. The impugned regulation has to be viewed against the relevant provisions of the PFA.

[3] The historical path leading up to the commencement of litigation, and the manner in which the issues were framed by the respective appellants in the three appeals, are not identical. There is also the accusation before us, on behalf of the Minister, that, in at least two, if not all three appeals, the respective pension funds have departed from their initial challenge to the regulation and are now advancing

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2018 case no 67954/2015 and *Southern Sun Group Retirement Fund v The Registrar of Pension Funds and Others* GJ 18-12-2018 case no 21229/2015.

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

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

submissions beyond those raised in their founding affidavits and before the high court. Whether that complaint is justified and whether the appellant and the other funds ought to have been granted the relief sought requires scrutiny of the pleadings in each case, hence the necessity for three, separate judgments. There will, of course, in each judgment be references, where relevant, to the other two appeals. The analysis of the law and the conclusions reached will essentially be the same. All three appeals are before us with the leave of the court below.

[4] The Financial Sector Conduct Authority (the FSCA), the first respondent, is a juristic person established under s 56 of the Financial Sector Regulation Act 9 of 2017 (the FSRA). The FSCA came into existence on 1 April 2018,[4] replacing the Financial Services Board (the FSB), which owed its existence to the Financial Services Board Act 97 of 1990 (the FSBA).[5] The main objectives of the FSCA include enhancing and supporting the efficiency and integrity of financial markets, protecting financial customers through promoting fair treatment by financial institutions, and assisting in maintaining financial stability.[6]

[5] It is necessary at the outset to have brief regard to the meaning of an actuarial surplus, since that concept is at the centre of this appeal. Simply stated, a surplus arises in a pension fund when an actuary determines that the pension fund's assets exceed its liabilities. Prior to 2001, how a fund dealt with a surplus was determined by its rules. The Pension Funds Second Amendment Act 39 of 2001 came into effect on 7 December 2001. It was enacted to regulate the distribution of a surplus by pension

[4] See GN 169 in *GG* 41549 of 29-03-2018; and the Regulations published in GN R405 in *GG* 41550 of 29-03-2018.
[5] Established in terms of s 2 of the FSBA.
[6] See s 57 of the FSRA.

funds. It became known as the surplus legislation. The surplus legislation inserted definitions relating to pension funds surpluses and also introduced ss 14A and 14B, and ss 15A to 15K into the PFA.[7] This appeal turns on the interpretation and application of relevant provisions of the surplus legislation, located within the PFA. I shall, in due course, deal with the historical factors that gave rise to the surplus legislation.

[6] The background culminating in this appeal is set out hereafter. The Hortors Staff Pension Fund was established on 1 November 1950. On 1 June 1977, it changed its name to that which the appellant now bears, Hortors Pension Fund (the Fund). In 1994 the Fund was converted from a defined benefit fund to a defined contribution fund. Prior to 1998, the Fund was administered by Old Mutual, but from 1998 the administration was conducted by a subsidiary of the participating employer, Caxton and CTP Publishers and Printers (Pty) Ltd (Caxton). From 1 November 1994, the rules of the Fund provided for bonuses to be credited annually to the members' retirement contribution accounts, based on the Fund's investment performance. The bonuses were to be declared by the Fund's trustees, having regard to the advice of the actuary. Due to the poor state of the Fund's administrative records, the bonuses declared over the period 1994 to 2001 were too conservative and well below actual investment performance.

[7] In 2001 the Fund engaged with the FSB in relation to paying out further bonuses, to make up for the under-declarations for the period 1994 to 2001. In a meeting with the Fund in February 2002, FSB personnel appeared to accept that the

[7] Some of these provisions were either amended or substituted in subsequent legislation.

envisaged further payments were reasonable. At that time, the Fund did not consider the contemplated payments to be part of a surplus distribution in terms of the then recently adopted surplus legislation, in the form of amendments to the PFA.[8]

[8] On 4 June 2002, preceding further engagement with the FSB, the Fund received recommendations from the valuator of the Fund concerning the allocation of the surplus for the period 1 November 1994 to 31 December 2001. On 5 June 2002, the Fund submitted a proposal to the FSB for approval. On 7 June 2002, the FSB expressed the view that the proposal appeared to amount to a distribution of a surplus, rather than an adjustment to past bonuses, and requested that the Fund motivate why the payment of bonuses should not be interpreted as an apportionment of actuarial surplus. The Fund replied on 24 June 2002, setting out the reasons for its interpretation.

[9] The Fund's trustees met on 12 September 2002, by which time the FSB had not yet responded to the last-mentioned communication. On that date, the trustees, relying on the advice of the Fund's actuaries, approved the payment of the full investment return to those who had been historically deprived of it.

[10] In late 2002 and early 2003, the additional bonuses in respect of active members were credited to the member accounts, and cash payments were made to former members (the 2002 distribution). R86.7 million (plus the investment return thereon) was distributed as follows:

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[8] See the Pension Funds Second Amendment Act 39 of 2001, which came into effect on 7 December 2001.

10.1 R25.2 million was paid to past members at the time (going back to 1994);

10.2 R31.5 million was credited to members who had been paid out upon leaving the Fund, or retiring up until 30 September 2007; and

10.3 the remaining R30 million of members' credits were frozen on 30 September 2007.

[11] On 28 January 2004, more than a year later, the FSB expressed the view that the 2002 distribution was unlawful. The Fund took legal advice and conceded that the distribution ought to have been treated as part of a surplus apportionment in terms of s 15B of the PFA, rather than as a bonus distribution.

[12] On 7 February 2007, the FSB appointed a specialist tribunal in terms of s 15K of the PFA.[9] On 24 February 2012, the tribunal found that the 2002 distribution had been incorrect and unlawful. The tribunal noted that:

'The Registrar previously accepted and still accepts that the 2002 distribution was not unlawful to the extent that it grossed up past bonus declarations to bring them in fine with actual investment performance over the years in question. It is the amounts of the distribution in excess of such adjustment that the Registrar regards as unlawful and which the HPF conceded was unlawful.'

[13] After adjusting the low bonuses for the period 1998 to 2001 to the actual investment returns that were achieved during that period, a surplus of R83 million was

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[9] Section 15K provides that the Registrar may appoint a special ad hoc tribunal to make a determination in respect of certain issues, including the situation where a fund fails to submit a scheme for apportionment of an actuarial surplus (s 15K(1)*(a)*); or where the Registrar is not satisfied that a scheme submitted by the board in terms of s15B is reasonable and equitable or that s 15B has not been complied with (s 15K(1)*(b)*(i) and (iii)).

determined by the tribunal. Of the R83 million surplus, R18 million had already been paid out as surplus topping-up benefits to persons who participated in the 2002 distribution. Consequently, an amount of R65 million, plus investment return (about R280 million in 2012), fell to be paid out as topping-up benefits. With respect to the frozen credits referred to in para 11 above, the tribunal found that the low bonuses allocated to these members between 1997 and 2001 also had to be adjusted to take account of the higher investment returns that were achieved during that period. The effect was that those members lost the R30 million in credits but received enhanced bonuses of about R10 million. The tribunal also found that there was a surplus of approximately R390 million in 2012 (calculated by disregarding the 2002 distribution), which ought to have been paid out as topping-up benefits. As a matter of fact, however, the Fund only had a surplus of approximately R140 million as a result of the distribution in 2002, leaving the Fund with a deficit of approximately R230 million and a funding level of 76.17%.

[14] In its founding affidavit the Fund stated the following in relation to the deficit:

'Notwithstanding the Tribunal's determination, the reality is that the deficit is unlikely to materialise at all as it relates to payments due to former members who left the Fund prior to 1994 and who cannot be traced. Moreover, it is a near certainty that, if any claims should arise, they will not be for substantial amounts. This is because the Fund has already taken extensive steps to trace former members, without success, and it is highly unlikely that any further former members will be traced. …

In addition to the Fund being unable to trace these former members, it is unlikely that many of these former members are still alive. This is demonstrated through an examination of former members' dates of exit and dates of birth. Specifically, only 12% of total potential claims are attributable to the former members who left after 1994 and who were younger than age 65 in

October 2014. If any claims materialise, they could be expected to come from this demographic profile. Older former members and members who exited before 1994 are considered extremely unlikely to come forward at any time. This is significant because if the liability towards so-called "unquantified"[10] and untraced former members is reduced to a nil value, then there would be a small surplus of some R12 million in the Fund as at 31 October 2014.'

The Fund's actuaries took the view that there was no realistic prospect that a material number of former members, who were untraced and un-contactable, would come forward to submit claims in the future.

[15] The Fund contended that what is set out in the preceding paragraph provided the context within which its actuaries submitted a valuation as at December 2013, in terms of which 'untraced' and 'unquantified' members were excluded. Those terms will become clearer when the applicable statutory provisions are dealt with later. The Fund contended that if liability towards untraced and unquantifiable members were to be reduced to a nil value, there would be a surplus of R12 million. The Fund's perspective, based, at least in part, on the views expressed by the actuaries, was that the Fund was financially sound and that its assets were sufficient to meet its obligations towards members. I shall deal with the FSCA's response to the Funds assertions in relation to the deficit and the valuation by the Fund's actuaries

[16] On 9 July 2015, the Registrar accepted the Fund's revised valuation as at 31 December 2013. On the same date, the Registrar sent a letter to the Fund stating that because the Fund's funding level was only 76.17%, it was financially unsound, and it

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[10] That is, members in respect of whom insufficient records are available to enable the additional benefits that may be due to such former members to be calculated.

was required to submit a scheme, setting out the arrangements which the Fund had taken or would take to bring itself back into a financially sound condition.

[17] On 23 September 2015, the Fund, taking the view that it was in a position to meet its financial obligations, filed an appeal against the decision of the Registrar. The Registrar filed her reasons for the directive referred to in the preceding paragraph, the relevant parts of which read as follows:

'2.5 When evaluating a report on the statutory actuarial evaluation valuation of a fund to decide whether it properly reflects the fund's financial condition, the Registrar, with the assistance of the chief actuary, considers, amongst other things

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2.5.3 *whether the report reflects a proper accounting of the fund's assets and liabilities in compliance with applicable law, including, in particular, regulation 35(4)* which provides that

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

…

5.1 While, in his report on the statutory actuarial valuation of the fund as at 2013, the valuator has reflected a funding level of 76,17% and a funding shortfall in the amount of approximately R229 million, it appears that the fund does not consider that this shortfall is required to be addressed into a s 18 scheme approved by the Registrar because—

5.1.1 in its opinion, it is highly unlikely that it will be able to trace and pay all those to whom the fund is liable for shares of surplus allocated to them in terms of s 15B of the PFA; and

5.1.2 accordingly, although the fund may have made provision in its report on its statutory actuarial valuations of the fund as at 2013 for 100% of the full face value of those liabilities, it can expect to be allowed to release at least a part of that provision and to use the excess to provide for the fund's other liabilities.

5.2 *However, for so long as regulation 35(4) is in place, this will not be permissible and so the fund will remain financially unsound* unless measures provided for in a s 18 scheme approved by the Registrar are adopted to address its funding shortfall. It is for this reason that the Registrar requested the fund to prepare and submit a proposed s 18 scheme to him for his consideration, as the Registrar was entitled, and in fact required, to do.'

(Emphasis added.)

[18] As can be seen, regulation 35(4) obliges a pension fund to place in a 'contingency reserve account', the total amount (liability) owing, of enhancements due to quantifiable but untraced members, where it is to stay until claimed or transferred to a fund identified in the regulation. It is clear that the Registrar placed reliance for the position she adopted on regulation 35(4) and was emphatic that she and the Fund were bound by its provisions.

[19] It was that perspective that led to a directive by the Registrar that there be compliance with s 18 of the PFA, the relevant parts of which read as follows:

'(1) The Registrar may prescribe criteria for financial soundness, and when any return under this Act indicates that a registered fund is not in a financially sound condition, the Registrar may… direct the fund to submit a scheme setting out the arrangements which have been

made, or which it intends to make, to bring the fund into a financially sound condition within such period, and subject to such conditions, as determined by the Registrar.

(1A) When any return under this Act indicates a deficiency in a registered fund, the fund shall, within three months from the date of such return, submit a scheme to the Registrar setting out the arrangements which have been made or which it is intended to make to eliminate the deficiency, together with a report thereon by a valuator.

(2) If a Registrar finds that a scheme submitted in terms of subsection (1) or (1A) is not inconsistent with the provisions of this Act and is satisfied that the arrangements set out therein should suffice to accomplish the objects of this section, he should approve the scheme.

(3) If the Registrar is not satisfied regarding the matters referred to in subsection (2), he shall request the fund to make such amendments to the scheme, or to submit such new scheme, as will enable him to be satisfied, and the fund shall comply with the request within a period prescribed by the Registrar…'

[20] An appeal by the Fund against the Registrar's decision to the FSB appeal board was dismissed on the basis that it had been filed out of time. On 15 August 2016, the Fund made a submission to the FSB, setting out why, in its view, a scheme in terms of s 18(3), which deals with steps that a Registrar is empowered to take in respect of a Fund that is considered to be in a financially unsound condition, was not called for. The following was part of what appeared in the submission:

'[T]he Fund's actuaries considered the Fund to be financially sound, and that its assets were sufficient to cover the obligations for the traced and paid former members. Moreover, they considered that the probability of former members coming forward in any material numbers as being "small".' This was the oft repeated refrain by the Fund.

[21] On 19 October 2016, the FSB informed the Fund that it did not accept the submission. This prompted the Fund to make yet another submission, accompanied

by a letter from a valuator. On 14 March 2017, the FSB sent the Fund a letter, dated 28 February 2017, in which it recorded its decision to reject the s 18(1) scheme submitted by the Fund, and reiterated its requirement that the Fund submit a new scheme.

[22] The Fund noted an appeal against that decision. Included in the grounds of appeal, was a challenge to the validity of regulation 35(4), it being contended that it was *ultra vires* the PFA. The appeal board was not empowered to deal with such a challenge. Consequently, the Fund launched an application in the high court seeking, inter alia, the following relief:

‘1. Reviewing and setting aside regulation 35(4) of the Pension Funds Regulations, published in GN R98 in *GG* 162 of 26-01-1962…;

2. To the extent necessary, granting the Applicant condonation for the late filing of this application in terms of s 9(1) of the Promotion of Administrative Justice Act 3 of 2000...’

[23] Before dealing with the legal basis for the challenge by the Fund, as asserted in its founding affidavit, it is necessary to set out the details provided by the Fund in relation to former members who were potential claimants for enhanced benefits and the steps it took in relation to them.

[24] The Fund, like the pension funds in the related appeals, set out relevant data in relation to its former members at the time of the 2002 distribution date. The Fund explained that at that time there were 8 792 former members who would have been entitled to enhanced benefits. Of those, 7 022 could not be traced. And of those (who could not be traced), there was insufficient information to calculate the benefits for approximately 922 former members (the unquantifiable members). Benefits could be

calculated for 6 100 former members, but they remained untraced (the untraced former members).

[25] The table hereunder is a summarised form of the Fund's administrative records:

CATEGORY OF MEMBER	NUMBERS
'Unquantified members' for whom there was insufficient information to calculate benefits	922
'Untraced former members' for whom benefits could be calculated	6 100
Traced members for whom there was insufficient information to calculate benefits	197
Traced members for whom benefits have mostly been calculated and paid	1 573
TOTAL	8 792

[26] The Fund explained why it had been difficult to trace so many former members:

'60. [P]rior to 1994, the Fund's record-keeping was poor. Specifically:

60.1 for members who left between 1 January 1980 and 31 December 1981, no data at all was available, except for that which former members could themselves provide;

60.2 for members who left the Fund between 1 January 1982 and 31 October 1994, the employers' records had to be relied on, as well as records of the Principal Officer at the time; and

60.3 from May 1998 (the date on which the Fund transferred to the new administrator), the Fund was able to produce all of the information required to calculate top-up benefits.'

[27] It appears that it is only in respect of persons who were members prior to 1988 for whom the Fund lacked the data to be able to trace them. The Fund set out the steps it took to compile a database of former members and the extensive efforts it expended in tracing former members, including resorting to advertisements in local and national newspapers and employing tracing agents.

[28] On 15 April 2011 the Fund's actuary provided a certificate stating that the steps taken by the board of trustees were comprehensive and reasonable and should be expected to result in a surplus apportionment that complied with the PFA. On 13 January 2012, the Fund's actuary provided a second certificate which contained a more detailed summary of the steps taken by the Fund to complete its database.

[29] The Fund disclosed the measures it had put in place in the event of some former members, for whom benefits could be calculated but who were as yet untraced and who could come forward to make claims. It also considered the position of those for whom benefits could not be calculated who might later be able to make claims. The present actuarial surplus of R10.9 million could be drawn upon. If the surplus were to become exhausted the Fund had, as a back-up, an undertaking by Caxton, given in 2012, to make a special further contribution of R5.7 million. Any further claim, beyond that would be met by a further special contribution to be made by Caxton. The Fund submitted that given all the available information and all the steps taken and taking

into account past experience, it was highly unlikely that there would be any further claims by members, more particularly for the pre-1994 years.

[30] As an example of why it was unlikely, the Fund provided the following example:

'Hence, in the Fund's view, it is unlikely that there will be any further claims by former members, particularly for the pre-1994 years of exit and the older former members. For example, some R153 million of the potential claim values relates to former members who would be at least 65 years old at 31 October 2014, and who left the Fund more than 20 years prior to 2014.'

The Fund was at pains to point out that, in the prevailing circumstances, it was justified in not meeting the FSB's call to make provision to reflect the contingent liability at full value. The Fund contended that in taking the measure referred to and in valuing the Fund in the manner described above it was adhering to international accounting practice and relied on the expert opinion of Professor Harvey Weiner. It was contended that the Registrar's approach, requiring the Fund to cater for the contingent liability in full, is at odds with international accounting practice.

[31] The legal challenge to the validity of the impugned regulation was formulated by the Fund under the heading 'Regulation 35(4) is ultra vires the PFA' in the following terms:

'103. The Fund will argue that regulation 35(4) of the PFA Regulations is *ultra vires* the PFA in the following respects:

103.1 Regulation 35(4) prescribes that the Fund must place the monies owed to the untraced former members into a [contingency reserve account], whereas the PFA gives the board the discretion to do so;

103.2 Section 1(1) of the PFA provides for the creation of a "contingency reserve account" but only for the reservation of "such amounts as the board shall determine". It means that, for purposes of the PFA, a contingency reserve account must be one for the reservation of an amount determined in the board's discretion.

103.3 This interpretation is fortified by s 15B(5)*(e)* which also makes it clear that it is for the board to determine the amount reserved for the benefit of former members.

103.4 The PFA's understanding of a [contingency reserve account] accords with generally accepted accounting practice. The purpose of such an account is to provide for a contingency, that is, an uncertain future event. The determination of the amount reserved for such a contingency is necessarily a matter of judgment. That is why the PFA says in its definition of a "contingency reserve account" that the amount must be determined by the board "on the advice of the valuator". The amount so reserved depends on the likelihood of the contingency occurring and its quantum if it does. It is nonsensical to suggest that the full amount of a contingent liability should be reserved if the likelihood of its occurrence is remote.

103.5 Regulation 35(4) directs that the Fund must place the full value of the amount allocated to the untraced members into the [contingency reserve account], whereas the PFA allows the Fund to place "a portion" thereof into a [contingency reserve account]; and

103.6 It prohibits monies allocated to a [contingency reserve account] from being released to the Fund, whereas the PFA allows the board to debit such monies from a [contingency reserve account] as it deems fit on the advice of an expert valuator.'

[32] The Fund went on to state:

'The PFA accordingly only contemplates and permits contingency reserve accounts for the reservation of discretionary amounts to cater for future contingencies. The Minister thus does not have the power to create a different kind of contingency reserve account which requires

the reservation of the full amount of a contingent liability despite the fact that the likelihood of its occurrence is remote.'

There is thus a clear challenge to the validity of regulation 35(4), on the basis that the Minister in promulgating it acted beyond his powers in terms of the PFA, and that the FSCA and the Minister's view are based on an erroneous interpretation and application of s 15B(5)*(e)*. For reasons that will become apparent it is unnecessary to deal with the Fund's further bases of challenge to the validity of the regulation.

[33] In resisting the application by the Fund the FSCA, in this and the related appeals, adopted a neutral attitude to the long delay by the Fund in launching the application in the high court and whether it should be condoned. Not so the Minister, but more about that later.

[34] In relation to the merits, the FSCA disputed the Fund's interpretation of the regulation and the relevant provisions of the PFA. The following six paragraphs of the FSCA's answering affidavit sets out its perspective:

'56. The applicant's contentions are based on the premise that the liability towards former members for whom calculations can be made (and were made), but who cannot be traced, ie the so-called "untraced former members", is a contingent liability as opposed to a clearly established liability (see, for example, para 105 of the founding affidavit). However, this premise is incorrect. The regulation deals with liabilities of a fund and not contingent liabilities because the existence of the liability for a fund with regard to the discharging of its obligations towards stakeholders upon the approval of its surplus apportionment scheme is not contingent at all. The liability is fixed. What is uncertain Is whether the persons to whom the money is due will be traced and when it will be paid. However, these uncertainties do not translate into a contingent liability for the fund.

57. The situation contemplated by the Regulation is therefore quite different to the situation contemplated by s 15B(4)*(b)* read with the proviso to s 15B(5)*(e)*. Those provisions envisage that a contingency reserve account may be established at the board's discretion to cater for those former members for whom calculations could not be made and who may come forward and establish their claims at a later stage.
58. This is an uncertain future event for which the board may decide to make provision as a contingency that may arise following the happening of such event, i.e. a former member for whom calculations could not be made but who comes forward at some time In the future to claim a surplus payment or who belatedly substantiates a claim to surplus.
59. A fund has no liability towards former members for whom money has been set aside in a contingency reserve account contemplated in s 15B(5)*(e)*. This is because the former members contemplated in that section, more specifically the proviso to the section, are those for whom calculations could not be made and for whom money was set aside on an aggregate and "benevolent" basis in a contingency reserve account. Because this is a contingent liability that may arise in future, the amounts held in such contingency reserve accounts may be released over time in line with the diminishing possibility that the uncertain future event will materialise.
60. In contrast, the Regulation deals with the situation that arises where benefits that were calculated and became due and payable as enhancements to each of the former members are quantifiable. Because the benefits can be (and were in fact) calculated, this translates into a liability for a fund upon the approval of its surplus apportionment scheme. In this case, the obligation to pay their unclaimed benefits is recognised as an obligation of a fund in terms of, inter alia, the peremptory provisions of s 15B(5)*(b)*.'

[35] The FSCA's position was clear, namely, where benefits for former members can and have been calculated and apportioned there is an established liability. As far as the FSCA was concerned s15B(5)*(e)* applied only to unquantifiable members.

Assumptions concerning the likelihood of recovery by former members were irrelevant. As far as the FSCA was concerned, the liability in respect of former untraced but quantifiable members was not contingent, but absolute. The FSCA insisted that there was no inconsistency between the Act and the regulation in question.

[36] The Minister, in opposing the Fund's application in the court below was adamant that there had been an unreasonable and excessive delay of more than 14 years by the Fund in launching the application. In this regard it referred to the period between the promulgation of the regulation and the launching of the application. The Minister took the view that the application by the Fund was one in terms of PAJA and that the delay should not be excused. It was submitted on behalf of the Minister that there was no proper explanation for the delay and that given that the regulation was applied by pension funds over so many years 'untold' prejudice would be suffered by former members.

[37] Like the FSCA, the Minister adopted the position that there was no conflict between the applicable provisions of the Act and the regulations. The Minister made common cause with the FSCA's interpretation of the relevant provisions of the PFA and submitted that the Fund was misinterpreting the provisions of s 15(B) of the PFA. The Minister was emphatic in the assertion that the impugned regulation and s 15B dealt with different periods in the life of a pension fund. Paragraph 80 of the Minister's answering affidavit is instructive:

'Whilst the applicant relies heavily on the diminishing likelihood of the former members being traced, it is apparent that such a "contingency" will be directly linked to the efforts made by the Fund to trace those former members. Accounting practice, approach or terminology cannot

override the legislation and it is fundamentally incorrect to interpret the provisions of the legislation in light of an accounting practice. It must be done the other way round.'

The Minister, too, was adamant that there was no conflict between the regulation and the PFA and that the regulation was not *ultra vires* the Minister's powers in terms of the PFA.

[38] The Fund, in challenging the validity of the regulation on the basis that the making of the promulgation of the regulation in question was 'administrative action' as defined, relied, inter alia, on the following sections of the Promotion of Administrative Justice Act 3 of 2000 (PAJA): s 6(2)*(a)*(i) – in that the Minister was not authorised by the PFA to do so; s 6(2)*(e)*(i) – in that it was enacted for a reason not authorised by the PFA; and s 6(2)*(e)*(vi) – in that the Minister's action was arbitrary. Pre-emptively, the Fund, appreciating that the PAJA requires that an application in terms thereof be brought without unreasonable delay, and not later than 180 days from the date of the action complained of,[11] and that the FSCA and the Minister might resist the application on the basis that the impugned regulation was promulgated many years before the application was launched, contended as follows:

'If the point is raised the Fund will submit that this review is, in substance, a collateral challenge to the Regulations. Our courts have confirmed that the right to bring a collateral challenge can be brought at any time and that the court has no discretion to disallow such a challenge.'

[39] The court below (Kollapen J) dealt with the question of delay in the bringing of the application. He held that the nature of the Fund's challenge to the validity of the regulation was in substance a collateral challenge and that he had no discretion to

[11] See s 7(1) of the PAJA. Section 9 in turn authorises a court to extend the period of 180 days 'where the interests of justice so require'.

disallow such a challenge. The court below dismissed the ultra vires challenge on the basis that the Minister had wide powers to make regulations in terms of the PFA and acted within those powers. It was also dismissive of the Fund's contention that the impugned regulation was inconsistent with the provisions of the PFA. The court below agreed with the submissions on behalf of the FSA and the Minister, that the regulation in question and ss 15A(4)*(a)* and 15(5)*(e)* dealt with different phases and subject matter than the impugned regulation.

[40] It is against those conclusions, and the resultant orders, that the present appeal is directed. The Minister was given leave to cross-appeal the court's finding that the challenge by the Fund to the validity of the regulation was a collateral challenge.

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

[42] Before us, counsel for the respective pension funds in each of the three appeals aligned with each other and made common cause in their quest to have the regulations set aside or declared *ultra vires* the powers of the Minister. Counsel for the FSCA and the Minister, likewise, supported each other in resisting the application brought by each of the three pension funds. During oral argument before us it was pointed out to counsel representing the FSCA and the Minister that, in the *Southern Sun* matter,[12] which is one of the related appeals, the high court, in considering

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[12] *Southern Sun* (above fn 1).

whether to overlook the delay, took into account, inter alia, the importance of the issue, including the nature and consequence of the impugned regulation, and had concluded that it was in the interests of justice to condone the delay; and there was no cross-appeal in relation thereto, by either of them. It was pointed out that it would be most peculiar to decide the merits in one case and not in the other two, because condonation was not warranted, despite the fact that a finding in the one case would determine the legal position in relation to all three.

[43] After conferring, counsel on behalf of the FSCA and the Minister informed this court that delay should no longer be considered an issue between the disputants and that the matter should be decided on the merits in all three matters. It will be recalled that the FSA had always adopted a neutral stance on the question of delay.

[44] In my view the concession was rightly made. The high court in *Southern Sun*, in condoning the delay, took into account all the relevant factors when it exercised its discretion in favour of the pension fund in that case[13]. Similarly, in the present case, considering the manner in which the dispute arose and having regard to the time when matters came to a head, rather than the time of the promulgation of the regulation in question, and the importance of the issues the interests of justice dictate that the delay should be overlooked. Moreover, although courts should scrutinise asserted collateral challenges carefully, to ensure that they qualify as such and should be countenanced, lest that avenue becomes the new 'go-to' basis for justifying extensive delays, it does

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[13] Those factors would have been relevant whether the regulation making in the present case constituted administrative action or not. Of course, in relation to s 9(1)*(b)* of the PAJA, the period to be taken into account as a baseline, in the assessment of whether the delay should be excused, is 180 days. See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) para 19.

appear to me that in the three appeals the respective pension funds were exposed to the coercive force of the regulatory body, the FSCA,[14] and that delay in the prevailing circumstances consequently ought not to preclude the challenge on the basis that the challenge by the Fund could correctly be construed to be a collateral challenge and should be countenanced.[15] Be that as it may, condonation was effectively correctly conceded by the Minister and the FSCA. I turn, now, to address the merits.

[45] As a starting point, it must be recognised that the surplus legislation was a milestone in pension law. Before it came into operation, as pointed out by the FSCA, the subject that exercised the mind of many pension lawyers and administrators was the following: Who owned the surplus in a pension fund at any given time? The debate around this question endured for a long time before the decision of this court in *Tek Corporation Provident Fund*.[16] A core conclusion in that case was the following:

'Once a surplus arises it is *ipso facto* an integral component of the fund.'[17]

This court, in *Tek*, acknowledged that the legislature was best placed to deal with the manner in which surpluses should be apportioned.[18] At that stage, there had already been a consultation process concerning pension fund surpluses, involving Government, Business and Labour. That process culminated in the surplus legislation.

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

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

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

[17] Ibid at 895D-E.

[18] Ibid at 895E-H.

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

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

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

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

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

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

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

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

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

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

(ii) the value that the valuator has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date *plus the amounts*

standing to the credit of those contingency reserve accounts which are established or which the board deems prudent to establish on the advice of the valuator, calculated in accordance with the prescribed basis, if any.' (Emphasis added).

[49] The definition of 'contingency reserve account' at the time of the promulgation of the regulation in question read as follows:

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

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

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

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

'"contingency reserve account", in relation to a fund, means an account provided for in the rules of the fund, which has been amended in accordance with the requirements of the Registrar, or which has not been disallowed by the Registrar, and to which shall be credited

or debited such amounts as *the board* shall determine, on the advice of the valuator where the fund is not valuation exempt, in order to provide for a specific category of contingency.' (Emphasis added).

[50] Because there are references to 'valuators' and 'valuations' and actuaries in the definitions referred to above and in the applicable provisions of the PFA, it is necessary, first, to have regard to the definition of 'valuator' in s 1 of the PFA. Presently 'valuator' means an 'actuary who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act'.[19] Second, I deal with the definitions of 'actuary'. Presently 'actuary' is defined as 'a natural person admitted as a fellow member of the Actuarial Society of South Africa or any other institution approved by the Registrar...'[20] Third, it is necessary to appreciate that actuaries are experts in statistics and are used to assess risks and calculate insurance premiums, and are routinely employed in the field of pensions, as the repeated references to actuarial valuations and actuarial surplus in the PFA demonstrate.[21] Lastly, 'surplus apportionment date', as defined in s 1 of the PFA, 'means the first statutory actuarial valuation date following the commencement date'.

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[19] Prior to amendment by Act 45 of 2013 'valuator' was defined as follows: 'valuator means an actuary or any other person who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act.'
[20] Prior to amendment by the Financial Services Laws General Amendment Act 22 of 2008: '"actuary" means any Fellow of the Institute of Actuaries of England or of the Faculty of Actuaries in Scotland or of the Society of Actuaries of America or of any other institute, faculty, society or chapter of actuaries approved by the Minister…' And prior to amendment by the Financial Services Laws General amendment act 45 of 2013: '"actuary" means a person admitted as a fellow member of the Actuarial Society of South Africa or any other institution approved by the Minister.'
[21] See also the definition of 'actuary' in the Oxford English Dictionary (OED 3 ed, 2010):
'A person who compiles and analyses statistics of mortality, accidents, etc., and uses them to calculate insurance risks and premiums.'

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

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

In pursuing its object, the board is required, inter alia, to act in the best interests of members and to act with ‘due care, diligence and good faith’.[22]

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

‘All actuarial surplus in the fund belongs to the fund.’

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

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[22] See s 7C(2)*(b)* of the PFA.

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

[55] Section 15B also sets the rules of general application for all apportionments, in favour of members, former members and employers. Section 15(2) provides that a scheme may involve the improvement of benefits to existing members, increases to benefits or transfer values in respect of former members, the crediting of an amount to a member's surplus account, the crediting of an amount to an employer's surplus account or any two of the aforesaid. In terms of s 15B(3) a board must appoint someone to represent the interests of former members and such person must then be of assistance to the board in identifying former members, communicating proposals to them and to the funds to which they might have transferred, communicating proposals from former members to the board and collating any objections by former members to the scheme. The person appointed to represent former members is also required to report in writing to the board, inter alia, on the adequacy of the steps taken to involve former members.

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

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

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

(i) to obtain such records from the administrator;

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

(aa) employer;

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

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

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

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

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

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

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

establishing a contingency reserve account in order to satisfy the potential claims of unquantifiable members in terms of the proviso in s 15B(5)(*e)*.

[57] Section 15B(5)*(a)* and *(b)* read as follows:

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

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

(b) former members shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of s 14B(2) or 14B(6) as at the date when they left the fund, with such increase adjusted to the surplus apportionment date with fund return over the corresponding period…'

(Emphasis added).

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

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

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

…

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

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

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

[59] The statutory provisions referred to in the preceding paragraphs, including the definitions referred to earlier, show that a board is *the* protagonist in directing and controlling the operations of a pension fund. Of course, this is subject to such measures as the regulator, the FSCA, might employ in terms of the PFA. It is a board's prerogative to determine how to apply a surplus apportionment for the benefit of former members, including those who have not yet been be traced. Section 15B(5)*(e)* has to be read with the rest of the provisions of s 15B(5). There is a cross reference to s15B(4). These sections, read and understood contextually, make it clear that a board determines how a surplus is to be allocated and then decides how it is to be applied for the benefit of various categories of beneficiaries, including the establishment of contingency reserve accounts. Its discretion is not limited by s 15B(5)(e) to the establishment of such an account only in relation to unquantifiable members. The

submissions to the contrary advanced by the FSCA and the Minister, and the finding by the court below that that a board is so limited, are erroneous.[23]

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

[61] At this stage it is necessary to turn to consider, alongside the statutory provisions referred to above, the provisions of regulation 35(4). Before considering the scheme of regulation 35, regard should be had to the source of Minister's power in terms of the PFA to make regulations. It is located in s 36, the relevant parts of which read as follows:

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

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

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

[23] See, further, para 64 (infra).

[62] More than seventeen years ago, on 22 April 2003, the Minister, purporting to act in terms of s 36(1) of the PFA, promulgated regulation 35 (4), which is at the centre of this appeal. Although regulation 35(4), which is the impugned sub-regulation, is referred to in the Registrar's communication set out in para 17 above, for convenience it is restated hereafter, within the full text of regulation 35. As proclaimed in the heading, regulation 35 purports to deal with 'contingency reserve funds'. It reads as follows:

'35 Establishment of Contingency Reserve Accounts—

(1) By virtue of the fact that—

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

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

no fund may, with effect from the date of commencement of this regulation, establish any contingency reserve account under circumstances where a reasonable inference may be made that the establishment of the account is contrary to the duties of the relevant board under s 7C(2)*(b)* of the Act and motivated by bad faith.

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

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

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

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

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

[63] Regulation 35 commences with the recognition that the power to create contingency funds vests in a board. Yet, contradictorily, it goes to on dictate that the board 'shall' put funds into a contingency reserve account in order to meet claims from as yet untraced members; and that the funds may not be released except to pay such claims or 'crediting the Guardian's Fund or some other fund'. How can crediting the Guardian's Fund or 'some other fund' be consonant with the provisions of the PFA? Counsel for the Minister and the PFA were rightly constrained not to seek to justify the potential transfer, as it were, to the Guardian's Fund. In the Guardian's Fund or in some other fund the monies that were destined for former untraced members would be lost to them and to the Fund. If it were to remain in the Fund and remained unclaimed in perpetuity that will have the effect of sterilising the monies from which past or present members could never benefit. It will be recalled that in terms of s 15A all actuarial surpluses belong to a fund.

[64] The Minister arrogated the power to deal with a surplus and to establish contingency reserve funds, to the exclusion of the board. As demonstrated above those aspects are within a board's prerogative. In promulgating regulation 35(4) the Minister acted beyond the regulation making powers set by the PFA. The court below

erred in its interpretation of the relevant provisions of the PFA, especially in relation to s 15B(5)(*e*). That subsection is not time bound nor does it only relate to unquantifiable former members, namely those for whom benefits cannot be calculated. It references s 15B(4) and together they set out the powers of a board in general terms. When a board exercises a discretion in allocating a surplus for the benefit of former members, thereby creating a liability, it must concomitantly decide how to cater for claims that eventuate. The board's decisions can be interrogated by the regulator against the provisions of the PFA, but those decisions are within the remit of the board. Regulation 35(4) intrudes upon the board's wide discretion by compelling the board to place the entire allocation in a contingency reserve account and freezing it in perpetuity.

[65] The Minister and the FSCA's submissions in relation to the meaning of 'contingency reserve account' in regulation 35(4) are without substance. The impugned regulation itself speaks of a 'contingency reserve fund' but the Minister and the FSCA then sought to disown the concept and the description. In the three related appeals the contingency relates to the likelihood of the claims materialising. It is in respect thereto that valuators make assumptions. It is a regular occurrence in the field of pensions and in the insurance industry. The court below erred in its interpretation of the relevant provisions of the PFA and of the field of operation of regulation 35(4) and the Minister's regulation making power.

[66] During oral argument the court directed the parties to provide post-hearing, written submission on the possible effect of setting aside the impugned regulation. We received those submissions. In essence the Minister and the FSCA submitted, with

reference to *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,[24] that setting aside the regulation, without suspending the order of invalidity, to provide the Minister with an opportunity to correct it, would result in chaos and encourage maladministration. It was submitted that pension funds would be incentivised to be lax in tracing former members and that boards would be free to do as they please and build up unmanageable deficits.

[67] A pension fund in which no contingency reserve account has been established, but where other arrangements have been made to accommodate potential claims, will occasion no loss of regulatory oversight. In terms of the definition of 'contingency reserve account', which appears in para 47 above, credits or debits can only be entered in relation thereto on the advice of a valuator. The board will reflect on the advice it receives from a valuator. In the periodic reports submitted to the FSCA the advice and the provision made for claims that might eventuate. or lack of it, can be interrogated and either approved, or rejected. Furthermore, funds are obliged, unless exempted, to deposit annual financial statements with the FSCA. The FSCA can utilise s 15K to refer matters to a tribunal to make certain determinations. When concerns about the financial soundness of a fund arise, s 18 of the PFA is at its disposal. There are a number of tools at the disposal of the FSCA to ensure compliance with the provisions of the PFA and to secure the financial soundness of a fund.

[68] The point made on behalf of the Minister and the FSCA that the setting aside of the regulation will lead to laxity on the part of boards in that they will be incentivised

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

to expend very little or no effort to trace former members, is without substance. The FSCA can always question the adequacy of steps taken and issue directions in relation thereto. In addition, the provisions of s 15B(3), referred to above, come into play. It will be recalled that the person appointed to represent former members is required to report to the board about the adequacy of steps taken to trace former members.

[69] In the present case the board took extensive steps to trace former members. It paid the former members it could trace. It has not, nor could it, extinguish the claims of those that remained untraced. Its actuaries, in the conventional manner of actuaries, calculated what it might cost the fund to pay the claims of those untraced members that might come forward in the future. In doing so, it took into account the probability of the claims materialising. It set out in its founding affidavit the measures that were put in place to meet the claims, if they eventuate, including drawing on the existing surplus and then, as a further back-up, it procured an undertaking from the employer. If those measures were considered wanting, and if the Fund's actuaries are shown to have worked on the wrong assumptions, then that is what the FSCA, through the measures available to it under the PFA, can take up with the Fund. Instead, the FSCA took the view that it was bound by the impugned regulation and that it could thus direct the creation of a special reserve as dictated by the regulation. The Registrar based her directive, referred to earlier in this judgment, on the provisions of the impugned regulation.

[70] From exchanges between the Fund and the board and from parts of the affidavits referred to above, the complaint that the Fund's challenge to the validity of the regulation has changed and gone beyond the issues raised in the pleadings is

without merit. In so far as the cross appeal is concerned the concession on delay referred to earlier must mean that it serves no purpose and it cannot be sustained.

[71] Counsel on behalf of the funds in the three related appeals after conferring, agreed that in the event of the appeal and the cross appeal being decided in their favour there should not be any order as to costs.

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

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

2 The cross-appeal is dismissed with no order as to costs.

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

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

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	W Trengove SC, with A Franklin SC, K McLean, and N Luthuli
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