IN THE BOARD OF APPEAL CONSTITUTED IN TERMS OF

SECTION 26 OF ACT 97 OF 1990

In the appeal between

B K B GROUP RETIREMENT FUND **Appellant**

and

REGISTRAR OF PENSION FUNDS **Respondent**

DECISION

<u>The Issue</u>

1. This appeal relates to a decision by the respondent (the Registrar of Pension funds, hereinafter referred to as the Registrar), to refuse to register an amendment to the Rules of the BKB Group Retirement Fund (the appellant). The amendment

which forms the subject of this appeal is aimed at rectifying a Rule Amendment that was previously registered.

The nature of the appeal

2. The Registrar's decision is not one arrived at in judicial proceedings; nor is he required to keep a record of evidence. In terms of section 26(7) of the Financial Services Board Act, No. 97 of 1990 (the FSB Act) the Board is entitled to receive the evidence of witness. This is therefore an appeal in the wide sense, i.e. one involving a complete rehearing and fresh determination on the merits with or without additional evidence or information. Cf Tickley and others v Johannes NO and others 1963 (2) SA 588 (T) at 590. The Board is consequently required to determine *de novo* whether the Rule Amendment sought must be granted or not.

The background

3. A pension fund known as the Saamwerk Group Pension Fund was established in 1953. In 1976 the business of the Saamwerk Group Pension Fund was merged with other funds

to form the BKB Group Pension Fund (the pension fund). The pension fund was a defined benefit fund and was administered by Alexander Forbes Financial Services (Alexander Forbes). With effect from 1 July 1994, the pension fund became a closed fund and all the existing members were given the option to transfer to a newly established defined contribution fund called the BKB Group Provident Fund (the provident fund). The pension fund was left with 76 in- service members and 390 pensioners. A statutory valuation of the pension fund in June 1996 revealed an actuarial surplus of R50 226 000.00. Mainly as a result of the large number of members of the pension fund having elected to transfer to the provident fund, the pension fund was substantially over-funded. Discussions followed between the boards of the pension and provident funds with a view to amalgamating the two funds. In view of the divergent views as to how the surplus in the pension fund should be treated upon amalgamation, the issue was submitted to the chief actuary of the Financial Services Board for advice. The chief actuary proposed a division of the surplus between the employer (BKB Limited), the in-service members of the pension fund and those who had transferred to the provident fund.

4. Following on the advice received from the chief actuary, the parties were able to reach agreement on the allocation of the pension fund's surplus. With effect from 1 January 1998 the pension fund and the provident fund were merged by way of a transfer of the pension fund's business to the provident fund in terms of a scheme approved by the Registrar in terms of section 14 of the Pension Funds Act, No 24 of 1956 (the Act). The provident fund was renamed the BKB Group Retirement Fund (the present appellant).

5. The amount of the pension fund's surplus earmarked by agreement for the employer was, upon amalgamation, to be credited to an account in the appellant styled Reserve Account No 2. The amount so credited was R51 082 812.00.

6. Rule 4.2.1 of the appellant's rules provides that the employer shall make contributions towards the retirement benefit of each member in its service at the rate of 7.5% of the member's fund salary. In terms of Rule 4.3.2.3 the amount standing to the credit of Reserve Account No. 2 shall be used to meet all or part of

the contributions required in terms of Rule 4.2.1 until the amount standing to the credit of this account is exhausted.

7. All BKB's employees, with the exception of female employees whose husbands were members of another medical aid scheme, were obliged to join the SAKAV Medical Aid Fund (the MAF). BKB also funded the MAF contributions of retired employees, although this benefit was not extended to employees who joined BKB's service after 1 September 1998.

8. As a result of the collapse of the economies in the Far East in 1998 and the consequential negative impact on the wool industry in South Africa, BKB inevitably faced severe financial loss in its 1998 and 1999 financial years. In order to mitigate these losses and maintain its financial viability, BKB sought to eliminate its liability for the payment of post-retirement medical aid (PRMA) subsidies. This it aimed to achieve by allowing the credit in Reserve Account No. 2 to be applied to fund benefit enhancements for members of the MAF who were prepared to waive their entitlement to PRMA subsidies.

9. Alexander Forbes were requested by BKB to prepare an actuarial assessment of the employer's liability in respect of in-service employees arising as a result of the employer's subsidy of their PRMA contributions. As appears from Alexander Forbes' report dated November 1998, the purpose of the valuation was to determine the amounts that were needed to be offered to each employee in return for his or her forgoing the right to the employer's subsidy of the PRMA contributions. This would enable BKB to reduce the liability which it would need to reflect in its financial statements in respect of these subsidies.

10. In the report Alexander Forbes calculated that the amounts required to fund the employer's contributions at retirement were R14.84m in respect of accrued service and R25.80m in respect of future service.

11. Following receipt of Alexander Forbes' report, the appellant's board resolved on 19 March 1999 that the amounts stated by Alexander Forbes be appropriated for the purpose of meeting BKB's PRMA liabilities and that Alexander Forbes be

instructed to draft an appropriate amendment to the Rules in order to give effect thereto.

12. On 28 June 1999, in purported compliance with the board's request, Alexander Forbes forwarded to the appellant its draft of an amendment (Amendment No. 4) "to cater for the additional benefit to be paid to members as a result of the waiving of the medical aid post-retirement subsidy".

13. The relevant portion of Rule Amendment No. 4 reads as follows :

> "B With effect from 1 March 1999 the Rules of the BKB Group Retirement fund shall be amended by adding Appendix II to the Rules :
>
> **APPENDIX II**
>
> **SPECIAL PROVISIONS APPLICABLE TO MEMBERS ON 1 MARCH 1999 :**
>
> The following provisions shall apply to each member in service on 1 March 1999 :

(a) such Member shall become entitled to an Additional Benefit which is equitable in relation to his interest in the Fund;

(b) the Administrators shall keep a record of the amount referred to in (a) and such amount shall be increased or decreased at such a rate that the Trustees in their reasonable discretion, after consulting the Actuary, shall from time to time determine, having regard to the Investment Return on the fund's assets. Hereinafter this amount shall be referred to as the 'Additional Benefit',

(c) if a Category A member [i.e. a transferee from the Pension fund who, upon amalgamation, was entitled to retain his/her defined benefits and whose position was regulated by Appendix I to appellant's Rules]; retires in terms of Rule 5 of Appendix I, he shall become entitled to an additional Pension equal to the value of the Additional Benefit as at the date of his retirement;

(d) if a Member, who is not a Category A member retires in terms of Rule 5, then a lump sum equal to the value of the Additional Benefit as at the date of his retirement shall be added to the value of his Fund Credit at that date;

(e) on the death of the Member while in Service, a lump sum equal to the Additional Benefit at the date of his death shall become payable in terms of Rule 6.3;

(f) if a Member is not a Category A member transfers out of the Fund in terms of Rule 9.2 or Rule 9.3 of the main body of the Rules, then the Additional Benefit at the date of transfer shall be added to such member's Fund Credit;

(g) if a Category A member transfers out of the Fund in terms of Rule 9.2 of Appendix I then the Additional Benefit at the date of transfer

shall be added to his actuarial reserve as determined by the Actuary at that date;

(h) if the Member

(i) who is not a Category A member is not retiring in terms of Rule 5 but leaves Service of his own free will or is dismissed by his Employer for reasons other than those provided for elsewhere in these Rules; or

(ii) who is a Category A member leaves Service for any reason;

then the following percentage of the Additional Benefit shall become payable at the date of leaving SService:

Years of Continuous service	Percentage
1	10
2	20
3	30

4	40
5	50
6	60
7	70
8	80
9	90
10 or more	100

For the purpose of the above table

(i) 'Years of Continuous Service' means, for each member, an uninterrupted period of Service with his Employer;

(ii) where the Years of Continuous Service are fractional they shall be calculated accordingly and any period of less than one complete month shall be disregarded;

provided that if a Member who is not a Category A Member leaves Service in terms of Rule 7.2, then the full Additional Benefit at the date of leaving Service shall be payable as a lump sum benefit".

14. The resolution passed by the appellant's board of trustees on 19 March 1999 does not state that the additional payments in respect of BKB's PRMA liability to employees who waived their entitlement to the PRMA subsidy, are to be funded from Reserve Account No. 2. However, as Mr Vosloo, the chairman of the appellant's board, stated in an affidavit furnished in the dispute before the Pension Funds Adjudicator (dealt with below), the board's decision contemplated that the amounts to be credited to the MAF members entitled thereto would emanate from Reserve Account No. 2. This statement stands un-contradicted. Moreover, there was never more than a nominal amount standing to the credit of Reserve Account No. 1; Reserve Account No.2 was accordingly the only source from which these additional amounts could be paid.

15. Presumably in anticipation of an appropriate amendment to the Rules, BKB on 19 April 1999 addressed a circular to employees who were members of the MAF.

Under the heading **"NA-AFTREDE MEDIESE FONDSVERPLIGTINGE"**, the circular stated :

> "Met die goedkeuring van the Uitvoerende Kommittee as ook the Trustees van die BKB Groep aftreefonds word aan indiens personeel wat lid was van SAKAV Mediese Hulpfonds op 1 Maart 1999 nou 'n aktuarieel berekende bedrag uit the surplus van die aftreefonds aan elke sodanige personeellid toegeken wat aangewend sal word om die personeellid se na-aftrede mediese voordele mee te befonds. Hierdie toekenning is nie van toepassing op personeel wat na 1 September 1998 aangestel is nie".

16. On 15 July 1999 the appellant's board, in the belief that the amendment as drafted by Alexander Forbes authorised what BKB and the appellant's board had decided upon, adopted Rule Amendment no. 4 as drafted by Alexander Forbes and it was in due course registered by the Registrar on 17 December 1999.

17. Following on the registration of Rule Amendment No. 4, an amount of R46 534 240.00 was, with effect from 1 March 1999, debited to Reserve Account

No. 2 and credited to the affected members. In respect of the period 1 March 1999 to 31 March 2002, R16 519 643.94 was paid to the 167 affected members who withdrew from the appellant during that time.

18. Because the enhancement vested on a sliding scale, the full amount was not paid out in each case to the withdrawing members. Where the full amount was not paid, the balance was re-credited to Reserve Account No. 2. In respect of the period 1 March 1999 to 31 March 2002 an amount of R4 747 116.64 was returned to Reserve Account No. 2. According to Mr Vosloo's affidavit there is currently a credit in Reserve Account No. 2 estimated at R19.65m as at 31 March 2004. This constitutes actuarial surplus.

The dispute before the Pension Fund's Adjudicator

19. On 20 September 1999 Mrs Benita Brown, an employee of BKB and a member of the appellant, lodged a complaint with the Pension Funds Adjudicator in terms of Chapter VA of the Act. This followed a number of earlier complaints that other

employees had addressed to BKB. The complaint of Mrs Brown and the other complainants was that as married females they were being discriminated against since they did not qualify to participate in that portion of the surplus that was applied to other employees in lieu of PRMA subsidies.

20. It appears that Mrs Brown's complaint to the Pension Funds Adjudicator alerted the appellant to what was clearly a deficiency in its Rules. In the response to the complaint filed by the legal representatives of the appellant and BKB dated 28 February 2001, it was stated that Rule 4.2.3 restricted the application of monies in Reserve Account No. 2 to the payment of employer contributions. The response went on to state :

> "28.1.11 The Respondents submit that no member of the First Respondent (the appellant) was prejudiced by the failure of the First Respondent to effect a rule amendment prior to the distribution of the additional amount to those of its members who were also members of the medical aid scheme, as the second respondent

was entitled to apply the amount in Reserve Account No. 2 for the purposes of a 'contribution holiday' until such time as Reserve Account No. 2 has been exhausted".

In paragraph 28.1.12, it was stated that the appellant was in the process of revising its Rules and that "a retrospective enabling amendment is being incorporated in the revised rules". A set of revised rules was adopted by the appellant on 2 November 2002, effective from 1 September 1999. These Rules (the revised rules) were registered by the Registrar on 17 October 2002.

21. In what he termed an Interim Ruling issued on 4 July 2002, the Pension Funds Adjudicator found that the use of the surplus in Reserve Account No. 2 to fund the payment of amounts in lieu of BKB's PRMA liability was not authorised by the Rules. The Pension Funds Adjudicator ordered the appellants to disclose the amount of the portion of the surplus that was deposited into Reserve Account No. 2, the amount transferred out of that account for the payment of additional benefits in lieu of PRMA liabilities and how much had already been paid to affected

members who have since withdrawn from BKB's service. A rule nisi was issued calling on the appellant to show cause why the payments already made should not be set aside and why the appellant should not be ordered to recover same and refund these to Reserve Account No. 2. The proceedings before the Pension Funds Adjudicator are now awaiting the outcome of the present appeal.

22. On 29 October 2002 the appellants board passed a resolution entitled "Rectification of Rule Amendment No. 2". In terms of the resolution Appendix II is to be replaced by a new Appendix II bearing the heading "Special Provisions applicable to Members on 1 March 1999". The new Appendix II makes it clear that the additional benefits to members in service on 1 March 1999 are in respect of PRMA subsidies waived in favour of the employer. Rule 4.3.2.3 is, in terms of the resolution, to be replaced by a Rule reading –

> "4.3.2.3 The amount standing to the credit of Reserve Account No. 2 shall be used to meet the additional benefit referred to in Appendix II and all or part

of the contribution required in terms of rule 4.2.1 until the amount standing to the credit of this Reserve Account is exhausted".

23. On 30 October 2002 application was made to the Registrar by the appellant's legal representatives on behalf of the appellant for the registration of the rectified rule. The letter of application from the appellant's legal representatives sketched the background as outlined above and attached a copy of Mr Vosloo's affidavit dated 10 October 2002. In this affidavit, Mr Vosloo stated :

"6.1 At the time when the payments were made, the board *bona fide* but mistakenly thought that the payments were authorised by the fund's rules. That was because the board had earlier resolved to amend the fund's rules to facilitate the payments and had been informed by the fund's administrator, Alexander Forbes ("AF") which had been requested to draft the amendment, that what all concerned thought to be an appropriate amendment had been registered; whereas in fact the amendment drafted by AF, approved by me, by a trustee and by the

principal officer and thereafter registered by the Registrar of Pension funds (the Registrar) at AF's instance did not give effect to the board's resolution...".

24. On 7 March 2003 the Registrar refused to register the rectification amendment. Following on the appellant's notice of appeal against that decision dated 16 March 2003, the Registrar, in terms of regulation 4 of the regulations promulgated in terms of section 26(2) of the FSB Act, furnished further reasons for his decision, which he summarised as follows :

"2.1 The Act does not provide for the rectification of a registered rule amendment by the Registrar;

2.2 Even if rectification were possible, there was no common error between the board of management and the Registrar;

2.3 If it were found that there was a common error (and this is denied), rectification must take place within a reasonable time. A lapse of three years before asking for rectification is not a reasonable time;

2.4 The existing rules have been superseded by the registration of a set of revised rules. Registration of a 'rectified' Rule Amendment No. 4, even if possible, would therefore be an exercise in futility;

2.5 If rectification is allowed, this would nullify a provisional determination by the Pension Funds Adjudicator. The error (if any) or deficiency was only discovered in the middle of proceedings before the Adjudicator. This an indication that 'rectification' would probably affect vested rights of third parties.

2.6 The proposed amendment is inconsistent with the Act and can therefore not be registered."

25. The first three reasons advanced by the Registrar can be disposed of shortly. The Registrar is correct that the Act does not provide for the rectification of a registered rule amendment by the Registrar. As he pointed out in paragraph 4 of his amplified reasons, the correct approach is to apply for the replacement of the registered Rule Amendment with a further amendment. That is in effect what the appellant sought and the application for the replacement of Rule Amendment No. 4

must consequently be considered as such. The fact that the appellant chose to refer to the amendment as a "rectification" is not a ground for refusing to register it. The law relating to rectification in the contractual setting is not applicable to an application such as this. As the Registrar correctly pointed out, the so-called rectification rule is nothing more than an application for a modification and therefore an amendment to an existing rule. The fact that three years has elapsed between the date on which Rule Amendment No. 4 was registered and the date on which the application for the rectification or amendment is made, is likewise not a ground for refusing registration; there is no time bar to an application of this kind.

26. It is correct that the rules (including Rule Amendment No. 4) have been superceded by a revised set of rules. The revised rules took effect on 1 September 1999. The original rules (which included Rule Amendment No. 4) continued to govern the appellant's affairs in respect of the period prior to 1 September 1999. The debit of R46 534 240.00 to Reserve Account No. 2 and the corresponding credits to the qualifying members were made with effect from 1 March 1999 (the date on which Rule Amendment No. 4 came into operation). If

the rectifying amendment were granted, it would not amount to an exercise in futility as suggested by the Registrar : it would rectify what occurred from 1 March 1999 to 1 September 1999.

27. Rectification would not nullify a provisional determination by the Pension Funds Adjudicator. His orders that he be furnished with details of the amounts in question have been complied with. Determination of the rule nisi is, with his concurrence, standing over pending the outcome of this appeal. Moreover, for the reasons dealt with below, no third parties have any vested rights that could be affected by the registration of the remedial rule.

28. The final reason advanced by the Registrar requires consideration for if the proposed amendment is indeed inconsistent with the Act, it cannot be registered. On the other hand, if the proposed amendment is not inconsistent with the Act, the Registrar was obliged to register it and this Board would likewise be so bound.

Before dealing with the question of the consistency or inconsistency with the Act it is necessary to consider whether the remaining requirements for registration have been complied with. The Registrar's power to register or refuse to register a Rule Amendment is derived from section 12 of the Act. The relevant portions of that section read as follows :

> "**12. Amendment of rules.**(1) A registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or additional shall be valid -
>
> (a) if it purports to effect any right of a creditor of the fund, other than as a member or shareholder thereof; or
>
> (b) unless it has been approved by the registrar and registered as provided in sub-section (4)
>
> (2) Within 60 days from the date of the passing or a resolution for the alteration or rescission of any rule or for the adoption of any additional rule, a copy of such resolution shall be transmitted by the principal

officer to the registrar, together with the particulars prescribed by regulation.

(3) If any such alteration, rescission or addition may affect the financial condition of the fund, the principal officer shall also transmit to the registrar a certificate by the valuator or, if no valuator has been employed, a statement by the fund, as to its financial soundness, having regard to the rates of contributions by the employers and, if the fund is not in a sound financial condition, what arrangements will be made to bring the fund in a sound financial condition.

(4) If the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration."

The proposed amendment was made in accordance with appellant's rules. The first requirement of section 12(1)(a) has therefore been complied with.

The proposed amendment does not affect the rights of any creditor of the type referred to in section 12(1)(a).

The proposed amendment was submitted to the Registrar within 60 days of the passing of the relevant resolution. Section 12(2) has therefore been complied with.

The proposed amendment cannot be said to affect the financial condition of the appellant. Section 12(3) is accordingly not a bar to registration.

It remains to consider section 12(4). In terms of that section the Registrar is obliged to register an amendment if he finds that it is not inconsistent with the Act and is satisfied that it is financially sound. There is no suggestion that the

proposed amendment is not financially sound. The sole remaining question is whether it is inconsistent with the Act.

Consistency with the Act

29. In refusing to register the amendment, the Registrar stated that although the proposed amendment may not have been inconsistent with the Act as it read before the amendment thereof by the Pension Funds Second Amendment Act, No. 39 of 2001 (the Second Amendment Act) which came into operation on 7 December 2001, the proposed amendment is now inconsistent with the Act, as amended.

30. This immediately raises the question whether consistency or otherwise with the Act must be determined with reference to the Act as amended or to the Act as it stood at the effective date of the proposed amendment. The proposed amendment seeks to authorise the payment of enhancements in lieu of BKB's PRMA liability out of monies standing to the credit of Reserve Account No. 2. Those monies

constitute surplus which, in terms of the Act as amended, fall to be dealt with in accordance with the apportionment of surplus provisions of section 15B. Consequently, if the proposed amendment is to be judged in accordance with the Act as amended, it would have to be refused on the ground of inconsistency with the Act. On the other hand if the question of consistency with the Act is determinable with reference to the Act as it stood at the effective date of the proposed amendment, the apportionment provisions of section 15B would not apply and the only question is whether or not it is consistent with the Act in its unamended form.

31. Respondent's counsel submitted that in deciding whether the proposed amendment was consistent with the Act, the Registrar was obliged to apply the law as it stood when the amendment sought was submitted to him; on this basis the Registrar was correct to refuse to register it.

32. Respondent's counsel did not confine himself to arguing that the amendment was correctly refused on that basis. He argued, further, that the Act must, in terms of

section 39 (2) of the Constitution, be interpreted to promote the spirit, purport and object of the Bill of Rights. Regard must therefore be had, so he argued, to section 9(4) of the Bill of Rights which provides that no person may be unfairly discriminated against. The Act deals – so the argument ran – with socio-economic rights; it aims at treating fairly everyone who has an interest in the fund. Developing this argument, he submitted, firstly, that the proposed amendment discriminated against married women who were members of the appellant but who were not members of the MAF and, secondly, that in-service members as of 1 March 1999 who did not waive their rights to the PRMA subsidy, had accrued rights to receive the enhancements, of which rights they would be divested if the amendment were granted.

33. As far as married female employees are concerned, the reason they did not qualify for enhancements in lieu of PRMA subsidies is that, because their husbands are not members of the MAF, they are likewise not members. Not being members, they naturally did not qualify for such a subsidy. There is consequently no question of their being unfairly discriminated against.

34. There is also no merit in the argument that the amendment interferes with accrued rights. Appendix II, introduced by Rule Amendment No. 4, does not identify the source from which the enhancements are to be funded. Rule 4.3.2.3 precluded the use of Reserve Account No. 2 to fund the enhancements. No other source existed. Moreover, the enhancement is described in Rule Amendment No. 4 as being "an additional benefit which is equitable in relation to his interest in the fund". This presumably signifies the ratio between the individual member's credit and the total of all members' credits. Rule Amendment No. 4 does not specify such total, nor does it enable it to be calculated. Rule Amendment No. 4, in the terms in which it was drafted and registered, was thus inchoate and unenforceable. There can accordingly be no question of any member having acquired any accrued or other rights in terms of Rule Amendment No. 4 as presently worded.

35. The issue in this appeal accordingly revolves around the crucial question whether the application for registration must be judged in accordance with Act as it now stands or the Act as amended. The appellant's counsel argued that consistency or

otherwise with the Act must be gauged with reference to the effective date of the amendment. The remedial amendment was intended – so the argument ran - to regularise something that was done in 1999, which was consistent with the Act that governed the appellant's affairs at that time. The respondent's counsel submitted the contrary, namely that the Registrar, in deciding whether or not to register the amendment, must apply the law as it now stands. Applying the Act as amended by the Second Amendment Act, the proposed Rule Amendment is inconsistent with the Act and the Registrar would therefore have been correct not to register it. The respondent's counsel did, however, concede that if the amendment had been submitted to the Registrar prior to the coming into effect of the Second Amendment Act, he would have been obliged to register it. Neither counsel was able to refer the Board to any authority for the respective submissions advanced by each of them on this question. Both rested their argument solely on principle. It is on that basis that the answer to this question must be sought.

36. The Second Amendment Act was not intended to have retrospective effect. What the proposed rule amendment seeks to do is to regularise that which the appellant

intended to bring about by Rule Amendment No. 4 but which objective, through an error of draftsmanship on the part of Alexander Forbes which the appellant did not detect, it failed to achieve. What the proposed amendment is aimed at relates to the period from 1 March 1999 (when Rule Amendment No. 4 came into operation) to 1 September 1999 (the effective date of the revised rules). There can be no question of the appellant's bona fides. The resolution which gave rise to Rule Amendment No. 4 as well as what was conveyed to the employees, clearly indicates that the appellant was under the impression that Rule Amendment No. 4 authorised what is now contained in the proposed amendment. It was, moreover, not unreasonable for the appellant to accept that Rule Amendment No. 4, as drafted by its administrators, correctly reflected the instruction given to them. There is nothing in the Act to prohibit an amendment from being registered with retrospective effect. On the contrary section 12(4) of the Act provides that an alteration to the rules shall take effect as from the date determined by the fund concerned, or, if no date has been so determined, as from the date of registration. See also Shell and BP South African Petroleum Refineries (Pty) Ltd vs Murphy NO and Others 2001(3) SA 683(D) at 692.

37. If the amendment were to be granted with retrospective effect, ie. with reference to a period prior to the Second Amendment Act coming into operation, the appellant would not escape the consequences of the amending legislation. The use of surplus which would, on the registration of the amendment, have been regularised, would nevertheless fall within the ambit of section 15B(6)(b) of the Act which provides that surplus used improperly by the employer prior to the surplus apportionment date shall consist of –

> "(b) The cost of any additional pensions or deferred pensions granted to selected members in lieu of the employer's obligation to subsidise the medical costs after retirement of those members".

It is significant that the "costs" referred to in sub-paragraph (b) are classified as "improper" and not "unlawful". The reason is that it was not unlawful for those costs to have been met by the employer out of surplus. The fact that section 15B(b)(5)(a) of the Act as amended by the Second Amendment Act provides that

the surplus to be apportioned must be increased by the amount of such costs, indicates that the legislature was aware that surpluses had been utilised for that purpose prior to the amendment and that this was part of the mischief at which the Second Amendment Act was aimed at removing.

38. The appellant's statutory valuation date next following the commencement of the Second Amendment Act is 1 April 2004. The appellant will thus have to submit its scheme of apportionment of its surplus within 18 months of that date (section 15(B)(1)(b)).

39. If, after 7 December 2001, a fund were to attempt to evade the provisions of the amendment to the Act by drafting a Rule Amendment that was inconsistent with the new legislation and submitting it for registration with retrospective effect, the Registrar would be justified in refusing to register it. There is however, no basis on which the present application for a Rule Amendment could be classified as an attempt to evade the amending legislation.

40. The employer would be entitled to and undoubtedly will argue that that part of the surplus that has been utilised to pay the additional benefits in lieu of PMRA subsidies should be allocated to it since the credit in Reserve Account No. 2 represented an agreed apportionment of surplus to the employer at the time of the amalgamation of the pension fund and the provident fund. Other stakeholders will no doubt advance contrary contentions. A decision to grant the proposed amendment would not in any way pre-empt the Registrar's decision in terms of section 15(B)(9)(h) as to whether he considers the scheme to be reasonable and equitable and whether it accords full recognition to the rights and reasonable benefit expectations of existing members and former members.

Conclusion

41. For these reasons, we are satisfied that in order to determine whether the proposed amendment complies with the Act, it is, in the circumstances of this case, appropriate to consider its compliance in relation to the law as it stood at the time covered by the proposed amendment. There was nothing in the law as it stood at

that time which could have prevented the Registrar from finding that the amendment was consistent with the Act. He was accordingly not vested with a discretion (cf section 14(c) of the Act). As the amendment was not inconsistent with the Act as it read at the relevant time, the Registrar was obliged to register it and this Board is likewise so obliged.

42. It follows that the appeal must succeed. There remains the question of costs.

Costs

43. In terms of section 26(14) of the FSB Act, the Board may make such order as to costs, including an order regarding the refunding of any fees paid in terms of sub-section (2), as it may deem suitable and fair. The respondent's counsel argued that as it was the mistake on the appellant's part that gave rise to this appeal, each party should be ordered to pay his/its own costs in the event of the appeal succeeding. As it was indeed the appellant's error that led to this appeal, and as the critical issue involved a decision on a novel point in respect of which the

attitude adopted by the respondent was not, in the circumstances, unreasonable, there exists sound reason for departing from the normal rule of ordering the unsuccessful party to pay the successful party's costs. In the draft order handed to the board by the appellant's counsel it is accepted that, in the event of the appeal succeeding, each party should pay his/its own costs, save that the costs of convening the Board should be paid by the appellant. We agree that the order proposed by the appellant's counsel is both suitable and fair. We would only add that the fee paid by the appellant in terms of section 26(2) of the FSB Act when noting the appeal, should be regarded as forming part of the costs involved in convening the board and should therefore not be refundable.

The Order

44. For these reasons the following orders are made :

(1) The appeal is upheld and the Registrar's refusal to register the amendment is set aside.

(2) The Rules of the appellant as they existed on 1 March 1999 shall be amended with effect from that date (a) by the registration of the amendments set out in the following Appendix which replaces Appendix II :

"**APPENDIX II**

SPECIAL PROVISIONS APPLICABLE TO MEMBERS ON 1 MARCH 1999:

The following provisions shall apply to each member in service on 1 March 1999 :

(a) such member shall become entitled to an additional benefit, as determined by the actuary to the fund, equal to the value of any subsidy by the employer of the member's post-retirement medical aid contribution;

(b) the administrators shall keep a record of the amount referred to in (a) and such amount shall be increased or decreased at such a

rate that the trustees in their reasonable discretion, after consulting the actuary, shall from time to time determine, having regard to the investment return on the fund's assets. Hereinafter this amount shall be referred to as the "additional benefit";

(c) if a Category A member retires in terms of rule 5 of Appendix I, he shall become entitled to an additional pension equal to the value of the additional benefit as at the date of his retirement;

(d) if a member, who is not a Category A member retires in terms of rule 5, then a lump sum equal to the value of the additional benefit as at the date of his retirement shall be added to the value of his fund credit at that date;

(e) on the death of the member while in service, a lump sum equal to the additional benefit at the date of his death shall become payable in terms of rule 6.3;

(f) if a member is not a Category A)member transfers out of the fund in terms of rule 9.2 or rule 9.3 of the main body of the rules, then

the additional benefit at the date of transfer shall be added to such member's fund credit;

(g) if a Category A member transfers out of the fund in terms of rule 9.2 of Appendix I then the additional benefit at the date of transfer shall be added to his actuarial reserve as determined by the actuary at that date;

(h) if a member

(i) who is not a Category A member is not retiring in terms of rule 5 but leaves service of his own free will or is dismissed by his employer for reasons other than those provided for elsewhere in these rules; or

(ii) who is a Category A member leaves service for any reason;

then the following percentage of the additional benefit shall become payable at the date of leaving service:

Years of Continuous service	Percentage
1	10
2	20

3	30
4	40
5	50
6	60
7	70
8	80
9	90
10 *or more*	100

For the purpose of the above table

(i) 'Years of Continuous Service' means, for each member, an uninterrupted period of service with his employer;

(ii) where the Years of Continuous service are fractional they shall be calculated accordingly and any period of less than one complete month shall be disregarded;

provided that if a member who is not a Category A)member leaves service in terms of rule 7.2, then the full additional benefit at the date of leaving service shall be payable as a lump sum benefit."; and

(b) by replacing Rule 4.3.2.3 with the following:

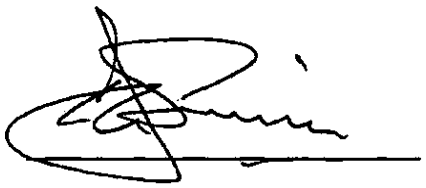
"4.3.2.3 The amount standing to the credit of Reserve Account no.2 shall be used to meet the additional benefit referred to in Appendix II and all or part of the contribution required in terms of rule 4.2.1 until the amount standing to the credit of this Reserve Account is exhausted."

(3) The appellant is ordered to pay the costs involved in convening the Appeal Board, which costs shall be deemed to include the fee paid by the appellant in terms of section 26(2) of the Financial Services Board Act, No. 97 of 1990, which fee shall not be refunded to the appellant.

(4) Save as aforesaid each party shall pay his/its own costs.

DATED at Pretoria this 14th day of DECEMBER 2004

G FRIEDMAN
Chairperson



D K SMITH
Member

K PEMA
Member