IN THE FINANCIAL SERVICES TRIBUNAL

CASE NO: 40/2022 (PFA Ref: WC/00082200/2021NVT)

In the matter between

The Board of the NAMPAK GROUP PENSION FUND	APPLICANT
and	
NAMPAK CONTRIBUTORY PROVIDENT FUND	FIRST RESPONDENT
THE PENSION FUNDS ADJUDICATOR	SECOND RESPONDENT

APPLICATION FOR RECONSIDERATION IN TERMS OF SECTION 230 OF THE FINANCIAL SECTOR REGULATION ACT 9 OF 2017 ("FSR Act") OF A DECISION OF THE PENSION FUNDS ADJUDICATOR

In re: transfer of pension interest under sec 14 of the Pension Funds Act – effect of certification - jurisdiction of the PFA – sec 15G

DECISION

INTRODUCTION

1 The applicant for reconsideration is the Board of the Nampak Group Pension Fund. It is a retirement fund registered in terms of the Pension Funds Act 24 of 1956.

2 The first respondent is the Nampak Contributory Provident Fund, also a retirement fund registered in terms of the same Act.

3 The applicant filed a complaint with the Pension Funds Adjudicator ("the PFA") in terms of section 30M of the PF Act.

4 The PFA dismissed the complaint on the basis that the PFA did not have jurisdiction to adjudicate the complaint.

5 The Pension Fund thereafter filed the present application for reconsideration which is opposed by the Provident Fund on several grounds.

6 What gave rise to this Tribunal decision is the request of the PFA that the application be dismissed summarily under sec 234(4) of the FSR Act on the basis that the reconsideration application is, because of the jurisdictional issue, "frivolous, vexatious or trivial".

7 Because the matter appeared to me to be complex, I decided to consider the issue of jurisdiction rather as a preliminary issue and requested the two Funds to submit argument, which they kindly did. They did not take up the offer of an oral hearing.

JURISDICTION PRINCIPLES

8 The judgment in Makhanya v University of Zululand (218/08) [2009] ZASCA 69; 2010 (1) SA 62 (SCA) ; [2009] 8 BLLR 721 (SCA) ; [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA) dealt with a jurisdictional challenge in a completely different context and all that is said there does not necessarily apply. However, the following principles are important.

9 The substantive merits of a complaint cannot determine whether the PFA has jurisdiction to hear it and even if there is a good defence to the claim, that

does not affect jurisdiction and the assertion of a right may not be thwarted by declining jurisdiction. May I add that although jurisdiction is determined with reference to the case made out by the complaint and does not depend on the merits of its complaint although it is often difficult to separate the issues.

10 Further,

> "that a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language. Yet that is often what is sought to be done under the guise of what is called 'characterising' the claim. Where that word is used to mean 'describing the distinctive character of' the claim that is before the court, as a fact, then its use is unexceptionable. But when it is used to describe an alchemical process that purports to convert the claim into a claim of another kind then the word is abused. What then occurs, in truth, is not that the claim is converted, but only that the claimant is denied the right to assert it."

11 The converse of the last point is also true. To determine what the case is one has regards to substance and not to the form of the complaint.

12 The jurisdiction of the PFA to adjudicate "complaints" derives from sec 30A of the Pension Funds Act 24 of 1956. This means that the PFA must be satisfied before registering a complaint for consideration that a prima facie case has been made out in the complaint as filed that the PFA has jurisdiction. The term is defined in sec 1:

> "complaint" means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging—

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.

13 That is not the end of the enquiry. One must have regard to the Act as a whole and distinguish between the powers of the PFA to make determinations and the powers of the Authority (formerly the Registrar). It is common cause that the PFA does not have jurisdiction to make determinations concerning matters falling within the competence of the Authority. The Act does not envisage a parallel or overlapping system of control over the pension industry.

THE COMPLAINT

14 The complaint by the Pension Fund related to a decision by the Provident Fund to exclude a share of the risk reserves from the transfer value of a transfer of business in terms of sec 14 of the PF Act (para 4 read with para 8 of the complaint). This, the applicant alleged, was an act of administration or an incorrect interpretation and application of the Fund rules – harking back to the introductory words of the definition – and was an improper use of its

decision-making power – referencing (a) – or that the Pension Fund has sustained prejudice in consequence of the decision – relying on (b).

15 The complaint contained a statement of fact and attached the relevant documentation marked Annexures A to J.

16 The complainant sought the following relief:

> "The Pension Fund requests that the Provident Fund be ordered to pay to it a share of the risk reserve, in the ratio that the benefit liability of the fund credits of the transferring members bore at the time of transfer to the aggregate fund, together with fund return thereon from the date of transfer to date of payment. Additionally, it is requested that the Provident Fund furnish the calculation of how this amount is calculated."

THE CONTEXT

17 Before proceeding, it is necessary to contextualise the relief sought by the Pension Fund against the Provident Fund. These facts appear from the complaint and its annexures on which the Pension Fund relied.

18 As one could guess, the two Funds have a common employer member and it would appear that employees had a choice to which fund they would join. But moving from one fund to another was not simply a matter of free choice. Termination of membership has requirements and consequences. These appear from the PF Act, the fund rules and the Income Tax Act.

19 During or about 2013, a group of 299 members of the Provident Fund wished to become member of the Pension Fund – about 6000 did not. That required a transfer of their interest in the Provident Fund to the Pension Fund according to sec 14 of the PF Act (the prescribed procedure for a transfer of assets and liabilities under sec 14 is to be found in Board Notice 208/2011 (GG 34900)),

and the rules of the Provident Fund. Cf Sasol Limited v Chemical Industries National Provident Fund (20612/2014) [2015] ZASCA 113 at [18].

20 The rules of the Provident Fund (10.2.1) dealt with the matter in the following terms:

> (a) . . . if there is an indication that Members . . . wish to leave the Fund to transfer to another Approved Provident Fund, the Trustees shall be empowered to conclude arrangements with any other Approved Provident Fund in terms of which the Fund Credits of those Members of the Fund who wish to become members of the other Approved Provident Fund are transferred to that fund . . ..
>
> (b) Arrangements concluded in terms of paragraph (a) above shall be subject to such terms and conditions as are agreed between the Trustees and the other fund as set out in an amendment to the Rules; provided that where a Member elects to become a member of the other fund, the Trustees in consultation with the persons managing the business of the other fund shall transfer the Fund Credits of those Members of the Fund who elected to become members of the other fund and the eligibility window shall be opened in order to allow for the transfer of such Members to that fund. Thereafter, the transferred Members shall have no further claim on the Fund.

21 Three matters should be noted. It is accepted that the Pension Fund is an approved provident fund. Second, the term Fund Credit is defined in the rules. And third, all is subject to the certification by the Registrar (since 1 April 2019 the Authority) that the provisions of sec 14(1) have been satisfied.

22 The crux of the Pension Fund's complaint relates to the calculation and transfer of the true value of the members' right to share in the surplus accounts on exit and it relies on sec 15G(1):

> Notwithstanding anything to the contrary in the rules, members who cease to be members of the fund should receive, as part of their transfer values or benefit payments, a share of any credit balances in the member surplus account, the investment reserve account and such contingency reserve accounts as the board deems appropriate, in the ratio that the liability of the fund in respect of the past service of the members leaving the fund bears to the liability of the fund towards all its members in respect of past service at that date: Provided that the board may use a reasonable alternative if there are sound administrative reasons why such a calculation cannot be performed.

23 The sub-section deals with three accounts. The first two, namely the member surplus account and the investment reserve account, do not arise. The issue relates to the third, the risk contingency reserve account which, according to the applicant, was overfunded.

24 That explains the relief sought in the complaint which, as said, was that

> "the Provident Fund be ordered to pay to it a share of the risk reserve, in the ratio that the benefit liability of the fund credits of the transferring members bore at the time of transfer to the aggregate fund, together with fund return thereon from the date of transfer to date of payment."

25 The consequences of certification are set out in sec 14(2):

> (a) Whenever a scheme for any transaction referred to in subsection (1) has come into force in accordance with the provisions of this section, . . . the relevant assets and liabilities of the body transferring [the Provident Fund] its assets and liabilities or any portion thereof shall respectively vest in and become binding upon the body [the Pension Fund] to which they are to be transferred.

(b) Any transfer contemplated in paragraph (a) must be effected within 60 days of the date of the certificate issued by the registrar in terms of paragraph (e) of subsection (1).

(c) Any assets transferred in accordance with paragraph (b) must be increased or decreased with fund return [as defined in sec 1] from the effective date of transfer until the date of final settlement.

26 The two Boards concluded an agreement as envisaged by the quoted rules and the necessary application was made to the then Registrar who, on 2 August 2014, issued a certificate as contemplated, certifying that the provisions of sec 14(1) have been complied with.

27 As mentioned, the complaint before the PFA was that the Provident Fund had decided to exclude the risk fund from the transfer values, something apparent from Annexure G. A transfer of assets (excluding any interest in the risk fund) occurred.

THE PFA'S DECISION

28 The PFA analysed the sec 14 application and approval (Annexures G and H) and concluded (rightly) that the inclusion of a share of the risk reserve account in the section 14 transfer value was part of the issues submitted to the FSCA for consideration prior to its approval of the transfer during 2014; and that no provision was made for an inclusion of a share of the risk reserve account in the transfer value (something confirmed by the complaint para 4 and 8). The FSCA approved the section 14 transfer and issued a certificate in terms of section 14(1)(e), confirming that it was satisfied that the provisions of section 14(1)(a) to (d) were satisfied.

29 Accordingly, the PFA said, it was correctly decided that the Adjudicator did not have jurisdiction to investigate and determine matters relating to a section 14 transfer in which a section 14(1)(e) certificate has already been issued by the FSCA. Further, that the Adjudicator has no authority to set aside a decision of the FSCA. See Joint Municipal Pension Fund and another v Grobler and others [2007] 4 All SA 855 (SCA) at paragraphs [26] to [28].

THE AGTERSKOT

30 As anticipated by sec 14(2)(c), the Provident Fund had in due course to transfer an “agterskot” – something provided for in BN 208/2011.

> 13.1 "Agterskot" means any additional benefit that a member becomes entitled to as a result of that member's current or past membership of a fund.
>
> 13.2 The Registrar will permit an adjustment to the quantum of assets of a previously approved transfer where the valuator or the board determines that, with the benefit of hindsight, a revised quantum of assets should be transferred. Such adjustments may also include amongst others, the payment of proceeds resulting from bulking practices, benefits arising from the Statement of Intent, and where applicable, surplus payments as a result of an approved surplus apportionment scheme.
>
> 13.3 The application for an "agterskot" adjustment must refer back to one or more previous transfer applications that were approved by the Registrar and must exclusively address the quantum of assets transferred.
>
> 13.4 For an 'agterskot' adjustment application, Form E must be completed.

13.5 Exactly the same members should be affected by the "agterskot" adjustment and the additional assets must be applied in the same manner as was the case in the original transfer.

13.6 The boards of both the transferor and transferee funds must have agreed to the "agterskot" adjustment.

13.7 The adjustment to the quantum of assets transferred must be accumulated with fund return or by other agreed arrangements, from the effective date of when the entitlement to the "agterskot" arose until the date of final settlement.

31 The two Boards concluded such an agreement pursuant to an actuarial adjustment and made the necessary application to the Authority, which issued a certificate of due compliance with sec 14(1) on 25 February 2018, and the agterskot was transferred to the Pension Fund.

32 It did not include any part of the risk reserve fund but concerned an underpayment relating to the investment reserve account. The PFA's reasoning set out earlier applies to this aspect of the matter.

THE APPLICANT'S SUBMISSIONS

33 The applicant's answer is that the issue post-dates the (original) sec 14 proceedings. As stated in the reconsideration application:

> However, it is submitted that the Pension Fund's complaint relates to something which post-dated the FSB's certification of the section 14 transfer, more specifically it concerned the failure of the Provident Fund's trustees to make a subsequent decision in respect of the Risk Reserve account that was required to be made in terms of section 15G(1) when determining the agterskot application, alternatively there was an incorrect and unlawful decision by the trustees of the Provident Fund in excluding from the agterskot any portion of the Risk Reserve

account. And that being so, it is unnecessary to set aside the Registrar's certification of the section 14 transfer.

34 The premise is incorrect as mentioned earlier. Accepting that the complaint arises from the agterskot application, that does not change the answer provided by the PFA. That application was also under sec 14. Transfer of assets, whether part of the risk account or not, requires a sec 14 certificate. There is no certificate relating to transfer of a risk account credit.

35 The applicant sought in the augmented grounds to shift its ground again by submitting that the Authority, when issuing the sec 14 certificate, did so in the expectation that the Board would still consider its duties under sec 15G. The Board failed to do so and that, according to the submission, is a complaint which is discrete from any challenge to the Authority's approval under sec 14.

36 That was not the complaint and is inconsistent with the complaint and the grounds for reconsideration. As said before, one considers substance and not form. The problem is and remains that both sec 14 applications were by agreement by the two Boards and that a certificate cannot be interpreted with reference to an expectation. It says what it says, and it does not say what it does not say.

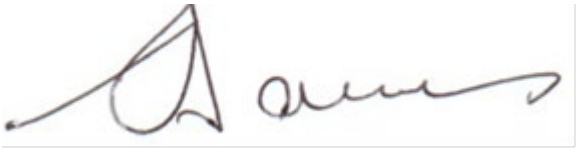
37 To summarise: The PFA cannot "overrule" or change a transfer of assets between funds under sec 14 whether directly or indirectly, and the PFA cannot exercise a discretion on behalf of the Board and order it to transfer assets not permitted by a sec 14(1) certificate.

38 This means that the application for reconsideration must be dismissed. It may be that I have in the course of this decision touched on matters relating to merit but I would under the circumstances be in good company if regard is

had to the Makhanya decision. The related factual issues were more than fully covered by both parties in their submissions and argument.

ORDER: The application for reconsideration is dismissed.

Signed on 24 October 2022.



LTC Harms (deputy chair)