BEFORE THE APPEAL BOARD OF THE FINANCIAL SERVICES BOARD

In the matter between

NWK- PENSIOENFONDS Appellant

and

REGISTRAR OF PENSION FUNDS Respondent

DECISION

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[1] The appellant, NWK-Pensioenfonds ("the Fund"), appeals against the refusal by the Registrar of Pension Funds ("the Registrar") to note, in terms of the Pension Funds Act 24 of 1956, as amended ("the Act"), a scheme submitted by the Fund reflecting a nil surplus as at its surplus apportionment date, 1 April 2004. Apart from his refusal to note the nil scheme the Registrar required the Fund to submit a surplus apportionment scheme in terms of s 15B(1) of the Act.

[2] We have taken into account all the submissions advanced by the parties' counsel but consider that it is necessary to discuss and resolve only those issues which we think are decisive of the matter.

[3] Assuming in favour of the Registrar that his reasons and his counsel's arguments regarding the constitutionality and retrospectivity of ss 15B(11) and 40B, as introduced into

the Act by Act 11 of 2007, are sound, two issues then arise. First, whether the Registrar was correct in accepting that there had indeed been improper utilisation of surplus by the employer. Second, whether he was justified in concluding that the information provided by the Fund from the employer's records did not constitute "incontrovertible documentary proof" that contributions by the employer had been made for the specific purpose of improper utilisation.

[4] It is common cause that if improper utilisation occurred it involved the total sum (including interest) of R20 815 000 and that additional contributions by the employer (interest included) amounted to R23 149 000.

[5] Instead of defining improper utilisation the Act provides in s 15B(6)(b) that it consists, inter alia, of the cost of –

> (i) benefit improvements for executives in excess of the cost that would have applied had they enjoyed the same benefits as other members;
>
> (ii) additional or deferred pensions or lump sum benefits to selected members in lieu of the employer's obligation to subsidise post-retirement medical costs of those members; and
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> (iii) recognising prior pensionable service for selected members, or members transferred into the fund, in excess of any amount paid into the fund in respect of such prior service,

where those costs were incurred by the fund prior to the surplus apportionment date.

[6] In terms of s 15B(5), when the board of a fund apportions actuarial surplus the apportionable actuarial surplus must be increased by the amount of actuarial surplus improperly utilised by the employer (subsec (5)(a)) and where the amount so utilised exceeds the amount apportioned to the employer the excess represents a debt owed by the employer to the fund (subsec (5)(d)).

[7] However, in determining the existence or not of such a debt regard must be had to the terms of subparagraphs (i) and (ii) of s 15B(6)(c). Subparagraph (i) empowers a fund to exclude from surplus utilised improperly any use of actuarial surplus which the Registrar is satisfied was approved, inter alia by members, after a clear and comprehensive communication exercise as part of a negotiated utilisation of surplus by stakeholders, the latter being defined in s 1 of the Act as the various categories of members as well as the participating employer.

[8] Subparagraph (ii) provides that a fund may reduce the cost or value of improperly utilised surplus by any contributions or payments made to the fund by an employer for the specific purpose of such utilisation. In other words, if what the employer paid was specifically to fund the utilisation that would otherwise have been improper, there will have been no cost to the fund, no improper utilisation of surplus and consequently no debt due by the employer to the fund.

[9] The fundamental consideration pertaining to the question whether there was improper utilisation and, if so, whether the exclusion provisions in s 15B(6)(c)(i) and (ii) applied, is highlighted by the Registrar's requirement that the Fund submit a surplus apportionment scheme. Plainly the Registrar's requirement entailed the drawing up of a scheme showing a surplus brought about by the payment of the sum of R20 815 000 into the Fund by the employer. In effect, the Registrar's decision under appeal amounted to a decision that the employer owed the Fund a debt in that amount. And that, of course, implied that the facts that had to be proved entitling the Fund to payment of such debt had been established.

[10] Had the Fund concluded that such debt was due to it by the employer and the latter denied liability, the Fund would have had to sue for payment. In that litigation it would have been for the Fund to establish its entitlement to payment and therefore to prove that improper utilisation had occurred. The incidence of the onus and quantum of proof would have been

the same as in any other civil case. Consequently, before the Registrar could demand that an actuarial surplus be shown in any amount reflecting what he maintained had been improperly utilised, he had to determine that the Fund could satisfy the requirements of proof that the employer owed the Fund a debt in that amount. That, in turn, involved the Fund's being able to show improper utilisation.

[11] Although it is generally unduly burdensome to require a person to prove a negative when that person is not the one who possesses the facts, here the Fund can call on the employer for the necessary information, if it still exists. At most the employer would have an evidentiary duty to produce some relevant evidence. In so far as it was burdened by subsec 15B(6)(c)(ii) with the retrospectively imposed need to show that a payment had been made to offset what would otherwise have been improper utilisation – when there would, at the material time, have been no occasion to record such intention specifically – a lenient approach to examination of the employer's tendered proof would be called for.

[12] The approach taken by the Registrar in relation to proof of improper utilisation was that the Fund had admitted that there had been improper uses of surplus. He detailed them as follows (with our renumbering, and his own annotations in square brackets):

> "(1) From 1 March 1992 senior members became non-contributing members. [Section 15B(6)(b)(i). Although not stated, presumably these "senior members" were "executives" contemplated in the sub-section.]
>
> (2) From 1 March 1996 the pensionable remuneration of members who were also members of SAKAV (medical aid) was increased by 5% which was funded from surplus. [Potentially section 15B(6)(b)(ii)]
>
> (3) From 1 March 1998 the benefit of members who retired after 1 March 1996 was increased by 5% to accommodate the medical aid contributions after retirement which

was funded from surplus. [Section 15B(6)(b)(ii)]

(4) From 1 March 1997 the medical aid subsidies of pensioners who retired prior to 1 March 1996 were funded from surplus. [Section 15B(6)(b)(ii)]

(5) On 1 January 1989 28 members of Noordfed were admitted to the Fund with recognition of full prior pensionable service. The assets transferred in respect of these members were less than the resulting liability. [Section 15B(6)(b)(iii)]".

[13] Although the instances of improper utilisation listed by the Registrar were as catalogued by the Fund in various communications to him, the important thing is that in all the communications the Fund's representative referred to such instances as no more than "possible" improper utilisation. To hold that the Fund admitted that there was in fact such utilisation was to take a misdirected approach. In adopting that approach the Registrar overlooked the question whether the cited instances did indeed constitute improper utilisation, a matter which was fully addressed in the Fund's grounds of appeal.

[14] In so far as the affidavit in support of those grounds includes evidence not before the Registrar when his decision was made, the appeal involved no dispute as to the relevance or admissibility of that evidence and no suggestion was made that remittal was necessary.

[15] The record as thus constituted must be examined to assess whether improper utilisation by the employer was proved on a balance of probabilities.

[16] Taking the instances listed by the Registrar in the same order, there is first the case of the senior members, which we have numbered (1). The Registrar viewed this as a matter falling within subsec (6)(b)(i), assuming adversely to the employer that senior members meant executives. That assumption does not matter. In our view this instance, while it no doubt involved amelioration of the relevant members' contribution obligations, was not stated or shown to have involved benefit improvements. This was therefore not proved to have been

an instance of improper utilisation within the terms of the subparagraph in question.

[17] The next three instances (numbered by us (2), (3) and (4)) all involved exempting the employer from the liability to fund or subsidise certain members' post retirement medical costs.

[18] In a memorandum dated 21 July 1997 concerning the proposed conversion of the Fund from a defined benefit fund to a defined contribution fund, the Fund's actuary referred to an existing 5% increase in pensionable remuneration. It was explained there that the increase was to prefund post-retirement medical fund contributions and indicated how much the employer was contributing to this increase. It was then stated that if the conversion was approved the employer's liability in this regard would fall away with effect from the conversion date, 1 November 1997.

[19] As regards the pensioners who retired before 1 March 1996, it was said in the memorandum that the employer was "currently" (July 1997) subsidising their medical fund contributions. That liability would also cease on conversion. After providing for the exemption of the employer in the abovementioned two respects the proposal was that the remainder of the surplus be apportioned to active members and pensioners.

[20] The proposals referred to (and all the other, presently irrelevant, aspects of the conversion) were circularised to members and, reportedly, carried with 100% member support. Consequently the conversion was duly effected as from 1 November 1997.

[21] Nothing on record indicates that the members' agreement to the conversion only pertained to future matters and did not also signify approval of the pre-conversion prefunding arrangements which had been made to cover the employer's liability to subsidise post-retirement medical costs. By implication, members assented to those retrospectively when they agreed to the conversion.

[22] As regards the decision to increase the benefits of members who retired after 1 March

1996 (which was to operate from 1 March 1998) it is not clear when it was taken but being so soon after the conversion date the probabilities favour the conclusion, either as a contractual implication or a factual inference, that it was intended and agreed by members when they approved the conversion that the remainder of the surplus apportioned to them as part of the conversion process be used for this purpose.

[23] Counsel for the Registrar's sole reason for submitting that one could not accept that members had approved of the conversion was that there was no documentary proof of such approval. There are two grounds for not accepting that submission. First, there is not the slightest indication that in the almost nine years between the conversion date and the submission of the nil scheme any member dissatisfaction was expressed. Had there been anything amiss with the substance or procedure of the pre-conversion process or the conversion itself resulting in disadvantage to any member or class of members one would expect that some evidence of it would have emerged. Second, the Registrar referred in his reasons to the conversion as a matter of accepted fact without in any way suggesting that it had failed to carry sufficient member support. He raised a variety of queries after receipt of the scheme but none of them concerned the adequacy of member approval. Even after the grounds of appeal were filed he did not seek to pursue an enquiry in this regard or to add any further reasons. One accepts readily that the Registrar's prime concern is that required procedures are followed and that optimum attention is given to the protection of members' interests. However that renders the absence of a query in this regard by him particularly significant.

[24] Although the Registrar has not expressed the satisfaction referred to in s 15B(6)(c)(i) it was common cause that the requirements of that provision would be met if the facts, objectively, warranted the existence of such satisfaction. In our view, for reasons given above, there are objectively reasonable grounds for the necessary satisfaction. It follows that

we conclude that instances (2),(3) and (4),which the Registrar regarded as hit by s 15B(6)(b)(ii), were liable to exclusion from surplus by the terms of s 15B(6)(c)(i).

[25] Turning to the case of the Noordfed members, the Fund, when listing this instance referred to their transfer as "acknowledging full service" and then added that the "assets transferred were less than the resulting liability". The last remark might invite the conclusion that the credits these persons received on transfer in order to entitle them to full benefits from the Fund created a deficit. However, it is apparent that the Fund recognised no greater service than had actually been rendered and for which contributions had been made under the "Noordfed" fund. Put another way, there is nothing on record which indicates that the amount with which each was credited on entering the Fund was greater than the sum transferred for each from the old fund. In fact, a rule amendment to accommodate these new members did not provide for additional contributions for their benefit. Consequently there was no proof that this was an instance of improper utilisation because there was no proof that the Fund incurred any cost.

[26] We therefore conclude that improper utilisation was not proved to have occurred and, in addition, that the amounts (unascertainable as they are on this record) concerned in instances (2),(3) and (4) fell to be excluded from any surplus possibly improperly utilised by reason of s 15B(6)(c)(i).

[27] There is a further ground for holding that no surplus apportionment can be shown in a revised scheme as required by the Registrar and that is the exclusion provision in s15B(6)(c)(ii).

[28] First we must remark on the Registrar's approach to the matter of proof as regards this particular provision. We have already pointed out that the retrospective operation of s40B burdens an employer (or the fund, depending on whether one is concerned with proving or disproving) with investigating the existence of evidence as to an employer's intentions at a

time when there was no statutory requirement of the intention to offset what was not then improper utilisation. Clearly the party bearing any onus or evidentiary duty in those circumstances would be justified in expecting some measure of judicial benevolence in assessing the acceptability of such party's tendered evidence. One could well now encounter an absence of conclusive evidence and that would hardly be surprising. It should not too readily conduce to a finding adverse to the party required to prove or disprove.

[29] In this case the Fund conducted an investigation into the employer's records and the salient aspects unearthed were these.

[30] In June 1991 the actuary reported a surplus in respect of expired service, a funding level of 128% and a surplus with regard to future service equivalent to a contribution rate of 2% of total salaries. He considered that to maintain the then employer contribution rate of 13.5% would be more than enough for the Fund's liability in respect of future service.

[31] In August 1991 a management meeting of the Fund resolved that a reserve equivalent to a contribution rate of 2% of salaries remain in the fund and that the balance of surplus possibly be appropriated for improvements (obviously meaning benefit improvements).

[32] A 1993 internal memorandum to all staff advised that employer contributions would increase so as to enable future benefit improvements to be made.

[33] In July 1994 the actuary's report recorded a bigger surplus than in 1991 as regards expired service, a funding level of 125% and a surplus in respect of future service equivalent to a contribution rate of 1.5% of total salaries. He was of opinion that maintaining the then employer contribution rate of 14.24% would be more than sufficient for the liability of the Fund as regards future service.

[34] By the time of the next three-yearly report in 1997, of course, the process of converting to a defined contribution fund was already well under way and reference has been made to the actuary's views and proposals pertaining to the conversion.

[35] The Registrar conceded in his reasons that the resolution of August 1991 and the memorandum of 1993 indicated that additional employer contributions and resultant surplus could be used to enhance members' benefits but he went on to remark that :

> "nowhere do they state that these would be used to fund the additional liabilities which the fund incurred by virtue of what would later be characterised as the improper utilisation of surplus by the employer".

[36] As we have pointed out, there would have been no cause to record such an intention at the time of the events pertinent to the improper utilisation enquiry.

[37] The Registrar then observed that although such might have been the intention of the board of the Fund at that time it was "by no means a certainty".

[38] Several matters require emphasis at this point. First, the relevant intention was that of the employer, not the board. Second, if the Fund wished to claim payment by the employer of its debt to the Fund such intention was not for the Fund to prove but to disprove. Third, the evidential burden on the employer to adduce evidence was not as heavy as the overall burden of proof and in any event never a duty to establish "a certainty".

[39] Later in his reasons the Registrar said that the resolution and memorandum referred to reflected the intention of the employer but gave no indication of the intention of the Fund. As we have said, what mattered was the employer's intention, not that of the Fund.

[40] Then, as regards the contents of the actuarial reports of 1991 and 1994 to which we have referred, the Registrar called them "insufficient, vague and ambiguous" and said they failed to provide "incontrovertible documentary proof". Whatever evidential duty lay on the employer it was not required to prove anything incontrovertibly. And to expect production of documentary expressions of an intention which no legislation then required, was unjustified.

[41] The relevant times all preceded or were effectively contemporaneous with the conversion from a defined benefit fund and as long as that was the nature of the Fund the employer's contributions would have been a matter in respect of which the actuary would have had an overriding interest and responsibility. That being so, and with the Fund always having had more than 100% funding it is likely that the employer had the requisite general intention throughout, at the actuary's insistence, that the additional contributions were for the specific purpose of the expenditure later susceptible to being regarded as improper utilisation.

[42] In addition, the record shows that in instances (2), (3) and (4) above the employer was contributing for the specific purpose of prefunding post-retirement medical aid fund benefits. If those cases did involve improper utilisation the employer's contributions would clearly have been excluded from categorisation as such by reason of the provisions of s15B(6)(c)(ii).

[43] We conclude, therefore, that the Registrar's approach to the application of that subparagraph was incorrect both in regard to what it entailed legally and also in regard to the facts.

[44] It follows that the appeal must succeed. Counsel for the Fund asked for the costs of appeal including the costs of the first hearing, the decision pursuant to which was subsequently set aside on review. He also asked that the Registrar be ordered to note the Fund's nil scheme.

[45] In the event of an adverse appellate result the Registrar did not seek remittal for him to reconsider any of the facts or issues dealt with above. He simply sought dismissal of the appeal. That quest having failed, he must now be ordered to note the Fund's nil surplus scheme.

[46] The first hearing ended with an order dismissing the appeal with costs. When that was set aside the appeal process was incomplete and had to be concluded. The proceedings before

this panel have therefore been a continuation of the appeal. There appears to us to be no reason why the costs of the first hearing should not be costs in the appeal.

[47] The order of this Board is as follows:

1. The appeal is allowed with costs, including the costs of the first appeal hearing.
2. The decision of the Registrar stated in his letter of 3 August 2009 to the Fund's actuary is set aside.
3. The Registrar is ordered to note, in terms of section 15B of the Pension Funds Act 24 of 1956, as amended, the Fund's nil surplus scheme (nil return) submitted under cover of the letter dated 21 November 2006 from the Fund's actuary.

Dated this 29th day of October 2012.

Judge C.T. Howie, Chair

N.P.Dongwana, Member

L.Makhubela, Member