REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:22869/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

DATE 29/4/14 SIGNATURE

In the matter between:

CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND	First Applicant
and	
SASOL LIMITED	First Respondent
SASOL PENSION FUND	Second Respondent
SACWU NATIONAL PROVIDENT FUND	Third Respondent
SASOL NEGOTIATED PENSION FUND	Fourth Respondent

5th to 2448th Respondents Cited in Annexure "A" to Applicant's Founding Affidavit

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JUDGMENT

MAYAT J

PARTIES

[1] The applicant in this matter, the Chemical Industries National Provident Fund, is a pension fund for employees in the chemical industry, which was duly registered in terms of the Pension Funds Act, 24 of 1956 ("the PFA").

[2] The first respondent is Sasol Limited ("Sasol"). The second respondent is a pension fund named the Sasol Pension Fund ("SPF"). The third respondent is a pension fund named the SACWU Pension Fund ("SACWUPF"). The fourth respondent is a pension fund named the Sasol Negotiated Pension Fund ("SNPF"). Unless the context indicates otherwise, SPF, SACWUPF and SNPF shall be referred to individually and collectively as "the respondent funds".

[3] The 5th to the 2448th respondents were cited in the applicant's founding affidavit as members of the applicant. Their names appeared in an annexure to the applicant's notice of motion in these proceedings. Unless the context indicates otherwise, these respondents are referred to individually and collectively in this judgment as "the affected members".

RELIEF CLAIMED

[4] The applicant seeks declaratory relief, which is opposed by Sasol as well as the respondent funds. Such relief incorporates:

i) a declaratory order that the affected members were not validly transferred from the applicant with effect from the 1st of March 2013, and accordingly remain members of the applicant; and

ii) a further declaratory order that since the 1st of March 2013, while the affected members remained members of the applicant, Sasol has been and is obliged, in respect of each of them, to pay members' contributions and its corresponding employee contributions to the applicant.

[5] The applicant seeks no relief against the affected members and only seeks costs against these members in the event that they oppose the application by the applicant.

[6] Sasol and the respondent funds also seek declaratory relief, by way of a counter-application, which is opposed by the applicant. Such relief incorporates:

i) a declaratory order that Sasol is entitled to pay contributions for the affected members to the respondent funds on the basis that the affected members have lawfully exercised an election to be moved from the applicant and are now members of one of the respondent funds; and

ii) an order directing the applicant to take all necessary steps contemplated in section 14 of the PFA, read with directive 6 issued by the Registrar of the Pensions Fund ("the Registrar") to ensure that the assets and liabilities attributable to the members are transferred to the respondent funds.

[7] As set out in greater detail in this judgment, the relief claimed by the applicant as well as the applicant's opposition of the counter-application is premised primarily upon the averment that the affected members are still members of the applicant in terms of the applicant's rules. The relief claimed by Sasol is premised primarily upon the averment that the applicant is compelled to transfer each of the affected members to a respondent fund of such employee's choice. Sasol also seeks an order compelling the applicant to take such steps as are necessary to effect the "transfer" of assets and liabilities of the affected members from the applicant to the applicable respondent fund in terms of section 14 of the PFA.

RELEVANT FACTUAL MATRIX

[8] As already indicated, the applicant was registered in terms of section 4(1) of the PFA for employees in the chemical industry in terms of the PFA, subject to certain rules. As far back as 2002, Sasol and a union concluded an agreement in terms of which Sasol agreed to continue participating as an employer in the applicant. Thus, it is not in dispute that pursuant to such agreement, Sasol was obliged to deduct monthly contributions from employees who were members of the applicant and to pay such contributions to the applicant. It is common cause on the papers that all the affected members became members of the applicant prior to April 2013. It is also common cause on the papers that all the said affected members are still in the employ of Sasol.

[9] In terms of the amended rules of the applicant, which applied in April 2013, a member of the applicant who was still in the service of Sasol, could elect to transfer his or her membership to another approved fund, subject to certain conditions.

[10] It appears from the founding papers that during 2012, Sasol offered its employees a "window period" within which employees could transfer between pension funds. Sasol indicates in this context that such "window period" was previously opened as far back as 2008 and 2009, when certain employees wanted to transfer their membership from the applicant to other pension or retirement funds. However, at that stage, the applicant's rules did not permit the transfer of members of the applicant to another pension or retirement fund. Thereafter, the matter was referred to the pension fund adjudicator and pursuant to a ruling by the adjudicator on the 15th of June 2012, the prohibition on the transfer of members of the applicant was declared to be unlawful and unconstitutional, to the extent that such prohibition constituted an infringement of the right to freedom of association. The applicant was accordingly directed to take all necessary steps to amend its rules in this regard. The amended rules were approved in due course by the Registrar on the 12th of July 2012, and the rules of the applicant were effectively amended in August 2012. The said amended rules incorporated rule 10.2 referred to hereunder. After the

amendment of the applicant's rules, Sasol proposed the "window period" during which members of the applicant could transfer to another pension fund.

[11] After the amendment of the applicant's rules, Sasol also made arrangements for different pension funds, including the applicant, to make presentations at information sessions during the proposed "window period". Sasol indicates in this context that the stated information sessions constituted the most practical way to conduct transfers of large numbers of members from the applicant to another approved fund on the basis of an informed choice by the employees concerned, either jointly or individually.

[12] It appears to be common cause on the papers that all the funds, which participated in the subsequent information sessions, including the applicant, were approved by Sasol. It is also not in dispute in this regard that a certain Freddy Beukes ("Beukes") of Sasol initially directed a letter to the applicant on the 31st of August 2012 stating inter alia that having received "[n]umerous requests ...from employees wishing to transfer from their current Sasol retirement fund to a different Sasol approved fund", Sasol had "agreed" to open a window period from the 1st of October 2012 to the 30th of November 2012, during which Sasol employees would be permitted "a once-off opportunity" to transfer between Sasol approved pension funds. Beukes accordingly indicated at the time to the applicant that employees, who wished to transfer their membership from the applicant, were to be afforded an opportunity to attend information sessions, to be held in the stated window period, so that they could be informed of the benefits offered by the different funds.

[13] In these circumstances, Beukes requested the applicant to approve the window period, which he indicated would commence on the 1st of October 2012. However, notwithstanding the request to the applicant to approve the window period, no such approval was given by the applicant at that stage, nor did the applicant at that stage agree to the requested window period.

[14] Notwithstanding the reference to requests from employees in the above letter from Beukes, the deponent to the answering affidavit, on behalf of Sasol states in the context of the present proceedings that:

> "Pursuant to the Pension Funds Adjudicator's determination and the amendment of the rules of ...[the applicant], SASOL commenced engaging with the retirement funds in which it is a participating employer to revive the process of allowing members to move to a retirement fund of their choice."

[15] Thereafter, on the 6th of September 2012, Beukes distributed a document, apparently comparing the benefits of five "Big Retirement Funds", including the applicant. On the 13th of September 2012, Sasol sent an instruction to all its plants, requesting them to display a notice informing employees of the upcoming window period and the forthcoming information sessions in this respect. The applicant was again asked at the time to approve the window period.

[16] It appears from the papers that on the 18th of September 2012, Beukes then dispatched an email to various funds, including the applicant, informing the said funds of the scheduled dates and venues for the proposed information sessions. Beukes also requested each fund at the time to send representatives to the said information sessions, with a view to explaining their benefits. On the same day, the 18th of September 2012, the applicant advised Beukes that the request from Sasol to approve the window period had been referred to the board of the applicant, which was scheduled to have a meeting in November 2012. Thus, it was indicated at the time that the applicant would only be in a position to act on the said request after the scheduled meeting.

[17] In response to the communication from the applicant pertaining to the scheduled board meeting, Beukes expressed concern on the 19th of September 2012 that the applicant would not be participating in the proposed information sessions. Be that as it may, Sasol then commenced with information sessions on the 26th of September 2012, without the participation of the applicant.

[18] On the 2nd of October 2012, the applicant directed a letter to Beukes, advising him that Sasol's unilateral decision to grant its employees a once-off window period to transfer out of the applicant was "disturbingly inappropriate" inter alia on the basis of the "malicious and misleading" information conveyed to employees with housing loans. Thus, it was indicated at the time that the information sessions in this regard created the illegitimate expectation amongst employees that should they elect to transfer to another pension fund, their outstanding housing loans would be settled. Sasol was also advised at the time that any decision to transfer members in and out of a fund, such as the applicant, must be taken by the board of directors of the fund and that a participating employer, such as Sasol, could merely make a request to such board to consider opening a window period in accordance with the rules of the said fund. Thus, it was indicated that a participating employer such as Sasol could not dictate "how the board should manage the fund and Sasol could not impose a decision on the board of the fund".

[19] On the 11th of October 2012, Beukes responded to the applicant's letter, contending that there had been compliance with the applicant's rules, to the extent that members of the applicant were permitted in terms of the amended rule 10.2 to transfer their membership from the applicant to another fund. Beukes also denied misleading employees in respect of home loans.

[20] Thereafter, the applicant advised Sasol on the 12th of October 2012, that pursuant to a special board meeting, the applicant had resolved to send representatives to the remainder of the proposed information sessions.

[21] It appears to be common cause on the papers that the information sessions commenced from the 26th of September 2012 and continued until December 2012. It is further not in dispute that more than 90 information sessions were scheduled during that period. It is further not in dispute that the applicant was represented at the said information sessions by Sipho Ginya ("Ginya") and Victor Chaane ("Chaane") after the 15th of October 2012, and that Ginya attended 47 such sessions and Chaane attended 6 sessions. Sasol contends that such information sessions were sufficient to enable the

affected members to make an informed choice, after presentations by the applicant as well as other funds were made. Sasol further states in its affidavits on record that after attending the information sessions, Sasol employees were permitted to choose the retirement fund of their choice by signing a "standard form" apparently prepared by Sasol.

[22] On the 7th of December 2012, the applicant and its legal representatives met with representatives of Sasol. The applicant and Sasol agreed that they would co-operate with each other by sharing all necessary information and so facilitate transfers in terms of the applicant's rules. On the 13th of December 2012, the applicant's attorneys requested from Beukes a list of members wishing to transfer from the applicant to other funds. On the 9th of January 2013, Beukes informed the applicant's attorneys that he was at that stage not in a position to provide the information requested.

[23] Against this background, the applicant asserts that it raised a number of concerns pertaining to the information sessions held by Sasol and the transfer forms, apparently signed by the affected members. Thus, for example, it is averred that many transfer forms filled out at the information sessions were not filled out properly and many signatures of affected members were not witnessed properly. It is also averred in the founding affidavit that the Principal Officer of SPF, a certain Lydia Visser, who had attended the sessions, had presented SPF's position relating to the home loan provisions of SPF in an unduly positive light at scheduled information sessions, with a view to unduly influencing employees in attendance at such sessions to transfer their membership from the applicant to SPF. It is also indicated in the founding affidavit that on several occasions, the said Visser had interfered with the choice of employees in attendance at the information sessions, so procuring the consent of such employees to transfer his or her membership from the applicant to a different fund. It is further alleged that the facilitator at the said sessions (apparently from Sasol) appeared to act "in cahoots" with Visser inter alia by answering questions on her behalf.

[24] Against this background, the applicant avers in the founding papers that the process for holding information sessions was fundamentally flawed for a number of reasons. At a broad level it is averred that the timing, duration and arrangements of information sessions do not fall within the prerogative of Sasol, but actually within the domain of the board of the applicant. More specifically, the applicant makes reference to a number of averred flaws at the actual sessions. Thus, for example, it is stated that whilst attendance registers were kept at the information sessions, there was no evidence that all employees in attendance completed them. It is further contended that there was no evidence that all who attended the sessions were present for the full duration of the sessions. The applicant also avers that the financial implications, particularly the tax implications for those members with home loans, was neither discussed, nor raised. In addition, as already stated, the applicant asserts that Visser, acting for SPF, improperly influenced some affected members to sign transfer forms. It is also asserted that many transfer forms filled out at the information sessions, were not completed properly and that Visser interfered with at least one instance of the transfer of one of the affected members from the fund.

[25] The applicant also indicates in its founding papers, that the averred flawed information process also affected a large number of employees who were recipients of home loans. Sasol indicates in the papers on record, that 79% of the affected members do not have housing loans.

[26] A series of communications were subsequently exchanged between the applicant's attorneys and Sasol's attorneys relating to the information presented at the information sessions. The applicant suggests in such correspondence as well as in the papers in the present proceedings that Sasol was the driving force behind the purported transfer of members, subject to Sasol's own timetable, without regard to the applicant's rules. The applicant further suggests that the affected members, who had home loans, were not properly informed at the information sessions of the implications of certain funds for their respective home loans. Sasol in return suggests in its correspondence and papers that the applicant was motivated by self-interest

(and not by its fiduciary duties to the affected members, as averred by the applicant). It is further suggested by Sasol that the applicant was generally reluctant to allow the affected members to choose the retirement fund of their choice despite the amended rules of the applicant in this respect. Thus, Sasol avers in its papers that the applicant is simply using the pretext of non-compliance with its rules to prevent the affected members from joining the retirement fund of their choice. The correspondence between the parties incorporating the averments and counter-averments ultimately culminated in an impasse during or about February 2013.

[27] Thereafter, on the 17th of April 2013, the applicant's attorneys advised Sasol that it had ceased to make contributions to the applicant in respect of some 3000 members. The applicant reminded Sasol as a participating employer in the applicant at that stage that transfers of members to and from the applicant were subject to the applicant's rules. As such, the applicant stated that Sasol was in breach of its obligations to the applicant to the extent that Sasol had failed to deduct the required contributions of each affected member from his or her salary or wages in terms of the applicant's rules and to pay the amount so deducted to the applicant. Sasol emphasized in this regard that the affected members had expressed a choice to have his or her membership transferred from the applicant to one of the respondent funds.

[28] Pursuant to non-payment in April 2013, Sasol received notice from the applicant that it was in breach of the applicant's rules. Thereafter, there was correspondence between the applicant's attorneys and Sasol's attorneys pertaining inter alia to the applicant's legal position and as already stated, the said exchange effectively resulted in a stalemate. At the time, the applicant's attorneys advised Sasol's attorneys inter alia that the interests of the members of the applicant were paramount in the execution of the applicant's fiduciary duties.

[29] Against this background, Sasol avers in the context of the present application and counter-application that 2254 of the affected members elected to become members of the SPF "C-Scheme", 73 of the affected members

elected to become members of SACWUPF and 117 affected members elected to become members of SNPF. Thus, it was contended that the cumulative total of 2444 affected members elected to be "transferred" out of the applicant to one of the respondent funds. As already indicated, it is common cause on the papers that all the affected members remain in the service of Sasol.

STATUTORY AND REGULATORY FRAMEWORK

[30] As already indicated, the applicant was required to register as a pension fund in terms of section 4(1) of the PFA. Upon registration, the Registrar was empowered to endorse the rules of the applicant, provided of course, that the said rules were consistent with the provisions of the Act. Rosemary Hunter *et al*, in "*The Pension Funds Act: A Commentary*" state that the rules of pension funds are the main source of rights and obligations that regulate the relationship between the fund and its members. [1] Thus, the authors also state that the board of a fund can generally only allow a person to become a member and similarly also consider cessation of membership in the said fund if so authorized by the rules of the fund. Therefore, the authors state that :

> "The starting point when determining who is a member of the fund [and logically, also who has ceased to be a member] must be the rules of the fund. The board of the fund can allow a person to become a member and similarly can consider cessation of a member's membership in a fund if so authorized by the rules of the fund. Any act by the fund which is inconsistent with the rules is *ultra vires.*"

[31] Section 13 of the PFA specifically provides that the rules of a registered pension fund "shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming".

[32] It is accordingly accepted in this sphere that the rights and obligations of members, beneficiaries as well as officers of a fund are determinable on

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[1] 2013 edition, at p 59.

the basis of the applicable rules read with the applicable legislation as well as common law principles pertaining inter alia to contracts. As noted in the case of *Lamperelli & another v Eskom Pension Fund* [2] that courts have consistently held that unless the conduct of a board of a fund is authorized by the rules of the said fund, such conduct will be *ultra vires* like any other corporate entity. Reference was made in this context to the cases of *Abrahamse v Connock's Pension Fund* [3]and *Tek Corporation Provident Fund and others v Lorentz*[4], where the binding nature of pension fund rules has been accepted by the courts.

[33] Section 7C further affirms that the object of a board is to direct, control and oversee the operations of a fund "in accordance with the applicable laws as well as the rules of the fund". To this end, the board is enjoined to take steps to ensure that the interests of members in terms of the applicable rules are protected at all times,[5] and to act with due care, diligence and good faith.[6]

[34] Section 7D, which relates to the duties of the board of a fund, provides that such duties include inter alia ensuring that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund, [7] and taking all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with the Act.

[35] Rule 3.4.1 of the applicant provides that subject to the provisions of rule 9.2.4 (relating to broken service, which is not relevant in this case) members of the applicant are not entitled to withdraw their membership of the applicant, whilst they remain in the service of Sasol.

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[2] [2002] 2 BPLR 3087 at 3090, at para [10]
[3] 1963(2) SA 76 (W) at 79D-E
[4] 1999(4) SA 884 (SCA) at 887 para 888G- 889A
[5] Section 7C (2)(a).
[6] Section 7C(2)(b).
[7] Subsection (c)

[36] Rule 4.2 further provides for contributions from Sasol and provides that deductions as well as the employer's contributions in respect of members must be paid to the applicant monthly in arrears. In terms of rule 4.3.1, participating employers are obliged to deduct members' contributions from their salary or wages. Rule 4.3.2 provides that the participating employer is obliged to make payments due and payable to the applicant within seven days after the relevant calendar month.

[37] Rule 10.2 relating to "Transfers out of the Fund" was amended in July 2012. The said amended rule provides as follows:

"10.2.1 Notwithstanding any contrary provisions in these Rules, particularly Rule 3.4.1, existing Members who wish to transfer out of the Fund while still in Service, must make a representation to the Trustees, through their Local Advisory Committee, in writing. Representation is to be made to the Trustees within such a reasonable period as the Trustees shall consider appropriate.

10.2.2 The Trustees must ensure that the representation is investigated and confirmed prior to the submission of an application to the Registrar by conducting a clear and comprehensive communication exercise with the Members concerned in terms of Rule 13.1.8, and by obtaining the explicit approval of all the transferring Members.

10.2.3 The Fund must be satisfied that a transfer is reasonable and equitable and that it accords full recognition to the rights and reasonable expectations of the Members.

10.2.4 Subject to the provisions of Rules 10.2.1, 10.2.2 and 10.2.3, if the transferred Member becomes a member of an Approved Provident Fund or an Approved Pension Fund established for the benefit of employees of the organization to which he is transferred, the Trustees shall transfer the Member's Fund Credit as at the Disinvestment Date plus any interest which may have become due by the Member to the fund, and thereafter, the Member shall have no claim on the Fund."

[38] Pursuant to the amendment of the rules in July 2012, a new rule 13.1.8 also provided that the powers and duties of the board of the applicant included inter alia:

> "13.1.8 to be involved in any communication exercise pertaining to Rule 10.2 with particular emphasis on:
>
> (a) aligning this with any formal adopted communication policy established for the disclosure of information to Members and beneficiaries, ensuring that their rights, benefits and duties are communicated adequately;
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> (b) ensuring that such communication is appropriate, timely, accurate, complete, consistent, cost-effective, useful, comprehensible and accessible at all times;
>
> (c) communicating to Members and beneficiaries in a relevant, informative, transparent, fair and accountable way, including providing information in respect of the benefits, costs, operations, administration and investments of the Fund; and
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> (d) where funds allow Members the option of individual investment choice that the inherent risks should be disclosed;
>
> (e) the recommendation of Principle 9 of the Circular PF No. 130 in respect of Good Governance of Retirement Funds."

[39] To the extent that at least some of the affected members have housing loans, circular PF92 provides in relation to home loans that:

> "If the rules so permit, a fund is allowed to deduct the amount of the loan from the members benefit as section 37A(3)(c) of the Act provides that the provisions of subsection (1)... shall not apply towards reducing or obtaining settlement of a debt which a fund may reduce or settle under section 37D of the Act...The guiding principle should be that the repayment of loans or the

> settlement of guarantees out of the withdrawal benefit of members should only occur if, to the satisfaction of the trustees, no other solution is possible."

[40] Circular PF92 also requires the transferor and transferee fund to engage in a dialogue over such a proposed transfer before the transfer takes place.

[41] The applicant also relied on certain submissions pertaining to the tax implications of the transfer of affected members sought by Sasol.

LEGAL ISSUES

[42] Against this background, the applicant's counsel contended that the primary issue in the context of both the application as well as the counter-application is whether the applicant approved the "transfer" of the affected members from the fund in terms of the rules of the fund.

[43] At a general level, on the basis of section 13 of the PFA, it is not really in dispute in these proceedings that the rules of the applicant are binding not only on the applicant and its board, but also on the affected members as well as officers and persons acting on behalf of Sasol. As asserted in the applicant's founding affidavit in this regard, it is trite in matters of this nature that the rules of a pension fund are binding on the fund itself, its board, its members and any employer who participates in the fund[8]. As such, any act, which is implemented outside the ambit of the rules, is *ultra vires* and null and void. So, for example, Marais JA stated as follows in the *Tek* case, *supra,* in the context of the obligations of trustees of a fund to act in terms of the rules vis-a-vis the said fund's assets:

> "What the trustees might do with the fund's assets; and if what they propose doing or had been ordered to do was not within the powers conferred upon them by the rules, then they could not do it. They had no inherent and unlimited powers as trustees to

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[8] See *Absa Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund (Under Curatorship)* 2012 (3) SA 585 (SCA); and *Chairman of the Board of Sanlam Pensionfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007(3) SA 41 (TPD) at para 34

> deal with a surplus as they saw fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund."[9]

[44] Sasol admits that the affected members remain members of the applicant, but deny that they remain contributing members of the applicant. Sasol further avers in these circumstances that the only process outstanding is the process in terms of section 14 for the purposes of the "transfer values" of members who have moved. Thus, Sasol contends that the failure to allow the transfer of assets and liabilities in terms of section 14 is "unlawful and unreasonable" in the circumstances. In my view, the averments in this context essentially conflates two discrete processes, namely the process relating to the transfer of members from the applicant to the transferee funds (as envisaged in terms of rules 10.2.1, 10.2.2 and 10.2.3) and the process in terms of rule 10.2.4, relating to the transfer of assets and liabilities. The latter process is premised upon the requirements of section 14 of the PFA, but not the former. Therefore, section 14 does not regulate the transfer of members from one fund to another. This section specifically applies to transfers of assets and liabilities (or the "business") from one fund to another. Hypothetically speaking in this respect, members of a fund may cease to become members of that fund in terms of the applicable rules, but equally so they may not do so (in terms of the rules). Moreover, "paid up" benefits (such as accrued retirement savings) may remain in the "old fund" when the member concerned becomes a contributing member of a "new" fund.[10] Rosemary Hunter *et al*, *supra* endorse this view and state that section 14 does not regulate the transfer of members from one fund to another.[11] As such, the learned authors state that:

> "*Members* do not 'transfer' from one *fund* to another. They may cease to be *members* of one *fund* when they become *members* of another, but they may

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[9] fn 4, *supra* 887J-888A

[10] See Hunter *et al*

[11] At p 284 where the learned authors quote the case of *Van den Heever v Cape Joint Retirement Fund & another* [2002] 4 BPLR 3372 (PFA) at para 19. However, the authors also make reference to the case of *Younghusband & others v Decca Contractors (SA) Pension fund & its trustees* [2000] 1 BPLR 88 (PFA) 111H-112C, where the adjudicator made reference to the transfer of complainants from the respondent fund as part of a purchase and sale transaction between two funds.

> also not. [12] To speak of 'transfer of members' is to perpetuate a misapprehension derived from a colloquialism. Thus, if members cease to contribute to one *fund* and commence contributions to another, this does not on its own mean that there is either a transfer of liabilities or even the release of the first *fund's* liabilities in respect of the retirement savings of the affected *members* when they ceased to make contributions to it."

The learned authors accordingly give the example of an employer terminating contributions to one fund *in terms of its rules* (my emphasis) and commencing contributions to another fund and state that such termination of contributions to one fund (with the commencement of contributions to another fund) *per se* does not constitute the transfer of business from one such fund to another. [13]

[45] Hunter *et al* go even further and state that section 14 is not applicable to benefit payments. Therefore, if a benefit, which has accrued to a member, is paid to another fund at his or her request, such accrual does not necessarily constitute a transfer of "business" (in the form of assets and liabilities) as envisaged in section 14 of the PFA.[14] Reference is made in this regard to the *dicta* of Professor John Murphy (now Murphy J) in the case of *Younghusband, supra* where it is stated as follows in relation to section 14:

> " The expression "transfer of business" is not defined in the Pension Funds Act. The term is wide enough to include every single exit and withdrawal of membership from a fund. The general policy and purpose of the provisions favours some limitation recognizing that the net of regulation is aimed at transactions having a potential to impact significantly on the financial soundness of the fund. Generally, one may safely assume, voluntary individual withdrawals fall outside of the ambit of the provisions." [15]

[46] In these circumstances, the submission by the applicant's counsel to the effect that section 14 of the PFA only applies after there has been a

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[12] Paid up benefits, incorporating the accrued retirement savings of the affected members, may remain in the transferor fund when the member concerned becomes a member of another fund. In these circumstances the member concerned is effectively a member of both funds.
[13] at p 284, fn 574.
[14] at p 284
[15] fn 10 at 110I-111A

transfer of members in terms of the rules of the fund is an accurate reflection of the legal position. In theory, the process for the transfer of the affected members from the applicant to another fund (in terms of the applicable rules of the applicant) may be linked or related to the process of the transfer of assets and liabilities as envisaged in terms of section 14 of the PFA. However, the transfer of members from the applicant to the respondent funds and the transfer of assets and liabilities from the applicant to the respondent funds are notionally autonomous processes. As such, these two discrete processes are in the present case only dependent on each other to the extent that rules 10.2.1, 10.2.2 and 10.2.3 govern the transfer of affected members from the applicant to the respondent funds, and the transfer of assets in terms of rule 10.2.4 is then made "subject" to compliance with provisions of rules 10.2.1, 10.2.2 and 10.2.3.

[47] It is important to emphasize that the applicable rule relating to the transfer of the affected members must be examined having regard to their purpose and the context in which they operate.[16] In the present case, counsel for the applicant correctly averred that the provisions of rule 10.2.1, 10.2.2 and 10.2.3 in relation to the transfer of "existing Members, who wish to transfer out of the Fund" are clearly peremptory. These sub-rules 10.2.1, 10.2.2 and 10.2.3 in the context of rule 10.2 in its entirety are clearly not governed by section 14 of the PFA, particularly so given the provisions of section 10.2.4, which are expressly stated to be "subject to" sub-rules 10.2.1, 10.2.2 and 10.2.3. The latter sub-rules require inter alia representation to trustees, in writing, within a "reasonable period", which the trustees consider appropriate; investigation in terms of which the trustees "must" ensure a "clear and comprehensive communication exercise"; submission by the trustees of an application to the Registrar; and a communication exercise in accordance with rule 13.1.8.

[48] Furthermore, it is specifically provided in the rules that the applicant "must" be satisfied that the requested transfer is reasonable and equitable,

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[16]See *Absa Corporation v SAACAWU Provident Fund, supra* fn at para 17

and that it "accords with the rights and reasonable expectations of the Members." More importantly, whilst the implementation of the transfer process (in terms of rule 10.2.4 and section 14) may obviously be triggered by the election of any affected member, it is my view that the notice of election by any affected member *per se* cannot, of course automatically set in motion the procedure in rules 10.2.1, 10.2.2 and 10.2.3, as suggested by Sasol's counsel. It is manifestly clear from the provisions of sub-rules 10.2.1, 10.2.2 and 10.2.3 that the investigation, communication exercise as well as the application to the Registrar must be controlled and implemented by the trustees of the applicant. Therefore, such obligation as the applicant has in this context, must obviously be governed by rules 10.2.1, 10.2.2 and 10.2.3 and the information process provided in rule 13.1.8. The information sessions under the auspices of Sasol cannot by any stretch of the imagination constitute an adequate substitution for the prescribed procedure in terms of rule 10.2, as suggested by Sasol's counsel.

[49] I also do not agree with Sasol's suggestion that the requirements of rules 10.2.1, 10.2.2 and 10.2.3 have effectively been fulfilled in the circumstances of the present case, primarily on the basis of the information sessions conducted by Sasol. By all accounts, the said information sessions were initiated by Sasol and conducted under the auspices of Sasol's "window period". The investigation and assessment by the applicant in terms of rules 10.2.1, 10.2.2 and 10.2.3 constitute a completely autonomous process, with manifestly different objectives. In these circumstances, the averments by Sasol's counsel premised upon the impossibility of performance and the circumstances in which fictional fulfillment of a prescribed process can be inferred, are in my view also misdirected.[17] In any event, it is not the applicant's case that performance in terms of sub-rules 10.2.1, 10.2.2 and 10.2.3 is impossible, but rather that there has been no compliance with the prescribed rules within a "reasonable" period.

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[17] *Transnet Ltd t/a National Ports Authority v The Owner of Snow Crystal* 2008 (4) SA 111 (SCA) at 123 para 28

[50] In these circumstances, even if all the factual averments by Sasol relating to the information sessions, presentations and so forth are accepted, it appears that the process contemplated in sub-rules 10.2.1, 10.2.2 and 10.2.3 has not been completed or followed in the circumstances of this case. Thus, the applicant's counsel correctly avers that no transfer of affected members can take place, from the applicant to another fund in the absence of compliance with the procedure and conditions provided in rule 10.2. Hence, even if it is accepted that affected members had a right to choose a fund to which they wish to belong pursuant to the information sessions, such choice only imposes an obligation on the applicant to commence the prescribed procedure in terms of rule 10.2. Moreover, even if it is assumed in favour of Sasol (for the purposes of argument) that the information sessions conducted by Sasol in the present case were "appropriate, timely, accurate, complete, consistent, useful, comprehensible and accessible at all times" as envisaged in rule 13.1.8, the board of the fund in the present case has not completed the process in terms of rules 10.2.1, 10.2.2 and 10.2.3.

[51] In the final analysis in relation to rules 10.2.1, 10.2.2 and 10.2.3, pursuant to the apparent choices of the affected members, only the board of the applicant could execute the implementation of rules 10.2.1, 10.2.2 and 10.2.3 at all relevant times. Stated in another way, in the absence of compliance with rules 10.2.1, 10.2.2 and 10.2.3, Sasol cannot unilaterally discontinue contributions on behalf of the affected members to the applicant.

[52] If it is Sasol's case that the board of the trustees deliberately failed to implement the process envisaged in rules 10.2.1, 10.2.2 and 10.2.3, (including the investigation and information exercise contemplated in those rules), within a "reasonable" period as suggested by counsel for Sasol, then the appropriate relief requested by Sasol would have been premised upon a mandatory interdict, compelling performance by the applicant of the procedure contemplated in rules 10.2.1, 10.2.2 and 10.2.3.

[53] It may also be mentioned that to the extent that Sasol questions the averred motivation of the applicant in bringing the present application, it is my

view that such averred motivation of the applicant is irrelevant in the context of the present proceedings given my findings relating to the non-compliance with rules 10.2.1, 10.2.2 and 10.2.3. Similarly, the participation of the applicant in the information sessions is also irrelevant in the context of the present proceedings given my findings relating to the non-compliance with rules 10.2.1, 10.2.2 and 10.2.3, and any disputes of fact in this respect are accordingly not germane to the issues in this matter.

[54] My findings in relation to the process contemplated in rules 10.2.1, 10.2.2 and 10.2.3 are endorsed by the fact that rule 10.2.4, specifically envisages "Member's Fund Credit as at Disinvestment plus any interest which may have become due to the Member" pursuant to members of the applicant becoming members of another approved fund, established for the benefit of employees of the organization to which the said employees are transferred, *subject* (my emphasis) to the provisions of rules 10.2.1, 10.2.2 and 10.2.3. Thus, the procedure in rule 10.2.4 in the present case, which falls within the ambit of section 14 of the PFA, applies *after* (my emphasis) due compliance with the mandatory provisions of rules 10.2.1, 10.2.2 and 10.2.3. Stated in another way, I accept that rules 10.2.1, 10.2.2 and 10.2.3 are a necessary precursor to the transfer envisaged in rule 10.2.4.

CONCLUSION

[55] In these circumstances, the mandatory procedure in terms of rules 10.2.1, 10.2.2 and 10.2.3 has not been completed. For the reasons given, it is also my view that the provisions of section 14 of the PFA are not relevant to the relief claimed in the application relating to transfer of members from the applicant to the affected fund. Furthermore, the requirements of rules 10.2.1, 10.2.2 and 10.2.3 are a necessary precursor to the process envisaged in rule 10.2.4, in accordance with section 14 of the PFA.

[56] For the reasons given, there is accordingly no basis for inferring that the mandatory requirements of rules 10.2.1, 10.2.2 and 10.2.3 have been complied with in the circumstances of this case, as suggested by Sasol's counsel.

[57] In these circumstances, the applicant has established a case for the declaratory relief in the applicant's application, premised upon the provisions of rules 10.2.1, 10.2.2 and 10.2.3. By contrast, Sasol has not established that the lawful exercise of the choice of affected members, entitles Sasol to transfer the affected members from the applicant to the respondent funds, nor is there any legal basis in the circumstances of this case, for this court to direct Sasol to comply with section 14 of the PFA.

ORDER

[58] Based on the aforegoing, the following order is made:

(i) It is declared that the 5th to the 2448th respondents stipulated in annexure A to the applicant's founding affidavit were not validly transferred as members from the applicant with effect from 1 March 2013 and remain members of the applicant; and

(ii) It is declared that since 1 March 2013 and while the said 5th to the 2448th respondents have retained their status as members of the applicant, the first respondent has been and remains obliged to pay member contributions and its corresponding employer contributions to the applicant in respect of each of the members in question.

(iii) The counter-application by the first, second, third and fourth respondents is dismissed.

(iv) The first, second, third and fourth respondents, jointly and severally, the one paying the others to be absolved, are directed to pay the costs of the applicant, including costs occasioned by the employment of two counsel.

DATED AT JOHANNESBURG THIS 4TH DAY OF APRIL 2014.

MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Applicant's Counsel	:	CE Watt-Pringle SC J.J. Meiring
Applicant's Attorneys	:	Mervyn Taback Incorporated
Second, Third and Fourth Respondents' Counsel	:	A.E. Franklin SC S. Khumalo
First, Second, Third and Fourth Respondents Attorneys	:	Bowman Gilfillan
Date of Hearing	:	10th of March 2014
Date of Judgment	:	4th of April 2014