IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 5/11/2014.

CASE NO: 74784/2013

In the appeal between:

GEORGE DA SILVA RAMALHO N.O.	First Applicant
AHMED HASSAN JAFFIR N.O.	Second Applicant
CLAUDE NEON LTD (IN LIQUIDATION)	Third Applicant

and

TOMMIE DOUBELL N.O.	First Respondent
CLAUSE NEON PENSION FUND (IN LIQUIDATION)	Second Respondent
THE REGISTRAR OF PENSION FUNDS	Third Respondent
THE FINANCIAL SERVICES BOARD	Fourth Respondent
DAVID CLAYTON McMURRAY	Fifth Respondent
LEON JOHAN VENTER	Sixth Respondent
AVRIL COLETTE LE ROUX	Seventh Respondent
JOAN JENNIFER DE PAIVA	Eighth Respondent
DANIEL JACOBUS BARNARD	Ninth Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
5/11/2014.
DATE SIGNATURE

DAVIS, AJ

INTRODUCTION:

[1] The First and Second Applicants are the joint liquidators of the Third Applicant, Claude Neon Ltd (in liquidation). For purposes relevant to

this judgment, which will become more apparent hereinlater, the Third Applicant shall be referred to as "*the Employer*".

[2] The Second Respondent was the relevant pension fund of employees of the Employer. It is also in liquidation and the First Respondent is its liquidator. The Second Respondent shall be referred to as "*the Pension Fund*".

[3] The Third Respondent is the Registrar of Pension Funds and the Fourth Respondent is the Financial Services Board ("*the FSB*").

[4] The Fifth, Sixth, Seventh and Eighth Respondents were employees of the Employer and trustees of the Pension Fund. The Ninth Respondent was the former managing director of the Employer and was a "*relief trustee*" of the Pension Fund.

[5] This is an application for interim relief by way of which the Applicants seek to prevent the pay-out or distribution of an amount of R6.586 million to erstwhile employees of the Employer and members of the Pension Fund pending the finalisation of an action or application proceedings which the Applicants intend launching.

[6] The targeted funds previously formed part of an "*Employer Surplus Fund*" and was subsequently transferred to a newly created "*Employees' Surplus Fund*".

[7] Of relevance is Section 15I of the Pension Funds Act, No. 24 of 1956 ("*the PFA*"), the relevant portion of which reads as follows:

> "***15I Application of surplus accounts on liquidation of fund***
>
> *On liquidation of a fund in terms of Section 28 or 29, any credit balances in any reserve accounts, the members' surplus accounts and the employer surplus account shall be applied in the following order of priority:*
>
> *(a)* ...
>
> *(b)* ...
>
> *(c) Any remaining balance in the employer's surplus account shall be paid to the employer unless the employer was liquidated prior to the commencement of the liquidation of the fund, in which case it shall be used in the following order of priority, namely-*

(i) to meet the contributions deducted from members' earnings and not paid to the fund;

(ii) to meet contributions due from the employer but not paid to the fund; and

(iii) to be distributed amongst members at date of liquidation and such former members as are eligible in terms of the rules to participate in the distribution."

DISPUTE:

[8] The dispute has been formulated in the useful Heads of Argument delivered on behalf of the parties as follows: The narrow issue is whether the Employer was liquidated before the commencement of the liquidation of the Pension Fund. If yes, then in terms of Section 15I(c) of the PFA, the application fails; if no, the application must succeed.

RELEVANT CHRONOLOGY:

[9] From the formulation of the dispute it is clear that the chronology of events would be decisive of the matter. One date at least, is fixed, namely the date of liquidation of the Employer. This is the date of

registration of the special resolution whereby the Employer was voluntarily wound up in terms of Section 80(1) of the Companies Act, No 71 of 2008, being 7 May 2012. The chronology of the remaining relevant events can be summarised as follows:

9.1 18 May 2005 – The Employer Surplus Account is created in the Pension Fund.

9.2 27 March 2012 – A special meeting of the trustees of the Pension Fund takes place. The minutes thereof indicate that the purpose of the meeting was to discuss the impending liquidation of the Employer. Pursuant hereto the trustees were informed that the contributions by the Employer to the Pension Fund for pension and risk benefits would cease in March 2012. A discussion ensued regarding the process of liquidation of the Pension Fund in terms of Section 28 and the appointment of a liquidator. The consequences of liquidation and the pay-outs by the liquidator of the Pension Fund were also discussed. The minutes lastly also contain the following statement:

> *"The valuator advised that due to the liquidation the Employer would no longer carry any risk on behalf of the*

Fund and thus it was agreed that a resolution would be signed allowing a rule amendment for Employer Surplus to be transferred to the Employee Surplus Account."

9.3 30 March 2012 - The special resolution for the voluntary winding-up of the Employer was taken.

9.4 24 April 2012 – Regarding the events of this day the Applicants' deponent states the following:

> "*22.2 During a Pension Fund board meeting held on 27 March 2012 it was resolved which was further confirmed in a subsequent meeting on 24 April 2012 to establish a Member Surplus Account. This resolution was incorporated in an 'Amendment Document no. 15' ...*".

No minute of this meeting was produced in the papers.

9.5 7 May 2012 – The resolution to have the Employer voluntarily wound up was registered by the Registrar of Companies as aforesaid.

9.6 11 May 2012 – Amendment Document no. 15 is signed (by the Fifth to the Eighth Respondents). In terms of this Amendment

Document to the Rules of the Pension Fund a "*Member Surplus Account*" was created by insertion of the definition thereof into the rules and the insertion was "*back-dated to 1 March 2012*". In terms of this amendment, the remaining credit balance in the Member Surplus Account on the total dissolution of the Pension Fund would be distributed proportionally to its members.

9.7 19 June 2012 – An application for the approval of the liquidator appointed by the trustees of the Pension Fund is lodged with the FSB.

9.8 22 June 2012 – The relevant Registrar approves the rules amendment of the rules of the Pension Fund provided for in Amendment Document no. 15.

9.9 1 July 2012 – The valuator of the Pension Fund signs a report on an actuarial valuation of the Pension Fund, certifying, *inter alia*, the amount in the Employer Surplus Account (and other reserve accounts).

9.10 31 July 2012 – The Registrar of Pension Funds appoints a liquidator. The Registrar's notice of appointment on a

letterhead of the FSB directed to the First Respondent reads as follows:

> *"PENSION FUNDS ACT, 24/1956 ("THE ACT"): VOLUNTARY DISSOLUTION OF CLAUDE NEON PENSION FUND*
>
> *I acknowledge receipt of your application dated 19 June 2012 as well as subsequent correspondence. Your appointment as liquidator has been approved. The period of liquidation shall be deemed to commence with effect from this date of approval in terms of Section 28(2) of the Act. ... Furthermore this office requires the statutory actuarial valuation as at 1 July 2012 ..."*

9.11 The question is therefore, on the aforesaid chronology, whether the liquidation of the Pension Fund commenced prior to 7 May 2012.

THE APPLICANTS' CASE:

[10] The Applicants argue that dissolution of a pension fund takes place in terms of its rules and even where these rules provide for the subsequent nomination of a liquidator which is then approved and appointed by the Registrar and even though such appointment results in the liquidation of the fund, the actual commencement of such

liquidation can predate this appointment. This, the Applicants argue, was the position in the present instance, despite the wording of Section 28(2) of the PFA. (I use the word "*actual*" here because the Applicants argued that Section 28(2) is a mere "*deeming*" provision, suggesting that the "*actual*" facts may be otherwise.)

[11] The relevant rule of the Pension Fund on which the Applicants rely, is the following:

> "***RULE 13 GENERAL –***
>
> *(a)* ...
>
> *(b)* *13.3.2 TOTAL DISSOLUTION*
>
> *(a)* *The FUND shall be dissolved if all of the EMPLOYERS jointly decide or the sole remaining EMPLOYER decides to terminate the payment of contributions to the FUND or such employer(s) discontinue business operations.*
>
> *(b)* *Upon dissolution of the FUND, the TRUSTEES shall appoint a liquidator whose appointment shall be subject to the approval of the REGISTRAR.*

(c) The liquidator shall consult the ACTUARY as to the value of each BENEFICIARY'S entitlement in the FUND and shall apply the assets of the FUND in an equitable manner to ensure that:

...

(iii) the value of the EMPLOYERS' SURPLUS ACCOUNT shall be paid to the EMPLOYERS in such proportions as the liquidator and the EMPLOYERS agree to. In the event that all the EMPLOYERS cease to exist, the value in the EMPLOYERS' SURPLUS ACCOUNT shall be distributed to the remaining MEMBERS in terms of the provisions of Section 151 of the Act."

[12] Save for the cessation of its business and cessation of contributions by the Employer to the Pension Fund, the aforementioned rule did not envisage the liquidation of the Employer. Absent such a liquidation, the rule envisaged a distribution of the Employer's Surplus Fund to the Employer. It however, correctly recognised the applicability of the provision of Section 15I.

[13] In the present instance, now that the Employer was also liquidated, its liquidators seek to avoid the consequences of Section 15I by arguing

that the liquidation of the Pension Fund commenced on 27 March 2012 when the Employer resolved to discontinue business operations and terminate the payment of contributions to the Pension Fund. In this sense, the Applicants equate the "*dissolution*" provided for in Rule 13.13.2(a) with the "*liquidation*" provided for in the PFA.

[14] Moreover, the Applicants further rely on Rule 3.2.6. It provides as follows:

> "*Any trustee will stop operating as such when ... the Fund is dissolved, subject however to the provision of Section 13.13.*"

[15] The *proviso* to the cessation of the trustees' powers, so the Applicants say, only pertains to the duty to nominate a liquidator. Pursuant hereto, the Applicants argue that the resolution by the trustees of the Pension Fund to create the Members' Surplus Account and to provide for transfer of the Funds thereto as envisaged in Amendment Document no. 15 signed by the trustees on 11 May 2012, was invalid.

EVALUATION:

[16] The Pension Fund is regulated by its own rules but subject to the PFA. In my view, the answer to the dispute lies in an appreciation of the

joint reading of the rules with the provisions of the PFA but subject to the supremacy of the latter. This can be done by way of a set of questions commencing with the following: When would a pension fund such as the one in question no longer be able to operate and therefore need to be dissolved? Clearly when the last of its participating employers cease business and/or resolve no longer to contribute to the pension fund. In the present instance the trustees of the Pension Fund were informed hereof on 27 March 2012. The consequence was that the Fund would need to be dissolved.

[17] It is clear from the minute of the meeting on 27 March 2012 that the trustees discussed the various consequences pursuant to the impending demise of the Pension Fund and the relevant benefits of members then intending to resign or go on pension and/or their postponing their retirements so as to benefit from distribution of benefits by the liquidator as existing members of the Fund on date of liquidation. The trustees were properly advised of the provisions of the rules of the Pension Fund as well as the provisions of the PFA. They therefore took the necessary resolutions to amend the rules of the Fund so as to provide for the maximum benefit of employees. These amendments were accepted and registered by the Registrar of Pension Funds. There was no appeal to the FSB in terms of Section 26 of the FSB Act, No. 97 of 1990 against this registration.

[18] After the aforesaid occurrences relating to the Employer had taken place necessitating the dissolution of the Pension Fund, how is such dissolution (and subsequent distribution of funds) achieved? The answer is: by the nomination of a liquidator and the appointment of such liquidator by the Registrar. The actual process of liquidation commences by the liquidator performing all the duties imposed by the PFA regarding the establishment of the values of the Fund and the payment of prescribed costs, advertising of the liquidation of the Fund and thereafter the distribution in accordance with the provisions of the PFA and the directions of the Registrar.

[19] What does the PFA say about the aforesaid process? In my view Section 28(2) of the PFA gives the answer rather unequivocally:

> "*A liquidator shall be appointed in the manner directed by the rules, or, if the rules do not contain directions as to such appointment, by the person managing the business of the fund, but such appointment shall be subject to the approval of the registrar, and the period of liquidation shall be deemed to commence as from the date of such approval.*" (my emphasis)

[20] Is the Applicants' submission correct that, despite the wording of the aforesaid deeming provision, the "*dissolution*" of the Pension Fund in terms of its rules should be equated with the "*liquidation*" thereof and

therefore the date of commencement of liquidation for purposes of Section 15I should be on 27 March 2012? Again, in my view, the PFA provides the answer: Section 28(1) indicates when a pension fund may come to an end by using terminology different from that used in Section 28(2). It reads:

> *"A registered fund may be terminated or dissolved whether wholly or in part in the circumstances (if any) specified for that purpose in its rules and in the manner provided by those rules."* (own emphasis)

[21] Due weight must be attached to the use of different wording in Section 28(1) and Section 28(2) of the PFA. It is a well-known rule of interpretation that, if the same word or expression is used more than once in the same enactment then they will be taken to bear the same meaning throughout the enactment.

See *inter alia*: **Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another** 1957(2) SA 395 (A) 404 and various annotations thereon including **S v Dlamini**; **S v Dladla and Others**; **S v Joubert**; **S v Schietekat** 1999(4) SA 623 (CC).

[22] The corollary of course is that where different words are used, the legislature must be presumed to have intended the difference in meanings ascribed to the different words. This to my mind must also follow as a matter of logic.

[23] Therefore, if the legislature foresaw a sequence of events in Section 15I and provided for a date for the commencement of one of those events, namely the liquidation of a Pension Fund such as it did in Section 28(2), then it did not intend an event described by different wording ("*termination*" or "*dissolution*", as referred to in Section 28(1)) to be visited with the same consequence. In short, "*commencement of the liquidation of the fund*" referred to in Section 15I can only mean such commencement as provided for (in the same enactment) in Section 28(2) and cannot mean the commencement of the process referred to in Section 28(1).

[24] Once the jurisdictional fact providing for the termination of a fund has therefore occurred as provided in Section 28(1), the jurisdictional fact for the applicability of Section 15I only "*kicks in*" once the liquidation of the terminated fund commences as provided for in Section 28(2).

[25] Commencement of liquidation of the Pension Fund therefore only took place on 31 July 2012 in terms of the provisions of the PFA and not on an earlier date as part of the "*process*" of "*dissolution*" as contended for by the Applicants.

[26] I am further fortified in this view if regard is had to what the trustees of the Pension Fund and its auditor and valuator also foresaw at the time. The minutes of their meeting of 27 March 2012 (being the "*resolution*" which the Applicants contend commenced the liquidation of the Fund) indicate this:

> "*A discussion ensued on the process of liquidation as stipulated in Section 28 of the Pension Funds Act (PFA). Salient points of the discussion include the following: The trustees would have to sign a resolution to appoint a liquidator. The valuator said he would send the trustees information on liquidators so that they can appoint a liquidator.*
>
> *After identifying a liquidator there would be forms to be filled and submitted to the FSB for approval. The date of approval of the liquidation would be deemed to be the liquidation date.*
>
> *It was noted that once approval of the liquidator is received the provisions of the PFA would continue to apply to the Fund as if the liquidator was the board. The liquidator would deposit to*

the Registrar the preliminary accounts ... The trustees noted that this process could take up to six months."

[27] Being alive to the aforesaid provisions, the trustees took the preliminary steps to benefit the members of the Fund by resolving to amend the rules of the Fund. Thereafter this amendment was registered by the FSB. A month after such registration the "*necessary forms*" were completed after identification of a liquidator and submitted to the FSB. It was only in excess of a month later, according to the understanding of the trustees and the Registrar, that the liquidation of the Pension Fund "*commenced*". These steps all accorded with the provisions of the PFA.

CONCLUSION:

[28] The "*narrow issue*" as defined by the parties and as referred to in paragraph [8] *supra* must therefore be answered in the affirmative: The Employer was liquidated before the commencement of the liquidation of the Pension Fund. The application must therefore fail.

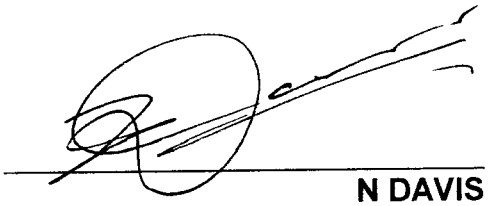
[29] In view of the aforementioned finding, I need not deal with the remainder of the issues raised by the Applicants. These dealt with the probity or not of the resolution taken by the trustees in amending

the rules according to Amendment Document No. 15 as well as the issue of possible invalidity or unconstitutionality of Section 15I as allegedly offending against public policy, which were not pursued during argument.

[30] The opposing Respondents had also made much of the fact that the application should never have been brought or pursued by the Applicants and in particular the Employer's liquidators. It further pointed out that the Applicants were tardy in the delivery of their affidavits, indexes and practice notes. Both parties were however *ad idem* that the matter should rather be heard than struck off or postponed in order to obtain finality and I agree with those sentiments. Having considered the papers and the nature of the dispute, I am however, not persuaded that I should exercise my judgment and award costs on a scale other than as between party and party.

ORDER:

[31] In the premises I make the following order: The application is dismissed with costs.



N DAVIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA