THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

31 May 2018

STATUS: Immediate

Moor v Tongaat-Hulett Pension Fund (518/17)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

1. The Supreme Court of Appeal (the SCA) today dismissed an appeal against an order of the Kwazulu-Natal Local Division of the High Court, Durban (the high court), which had held that the apportionment and distribution of actuarial surplus in the amount of R363.2 million to an employer surplus account in 2012 was lawful. The second respondent, the Tongaat-Hulett Defined Benefit Pension Fund (the Fund), made the surplus apportionment in terms of Rule 11.5.4.1 of its Rules. That Rule formed part of rule amendment no 3 which was approved by the Registrar of Pension Funds (the Registrar) on 13 December 2012.

2. The surplus apportionment formed part of a composite conversion and restructuring exercise (the scheme) by the Fund, approved by the Registrar in terms of s 14 of the Pension Funds Act (the PFA) on August 2013. In terms of the scheme, the Fund's obligations to the appellants (former members of the Fund) and its other pensioner members were outsourced to Old Mutual with effect from 1 April 2013. As a result, the appellant's membership of the Fund was terminated.

3. Aggrieved by this and other apportionments, the appellants lodged complaints with the Pension Funds Adjudicator (in terms of s 30A of the PFA. The adjudicator dismissed the complaints. The appellants appealed against that dismissal to the high court in terms of s 30 P(1) of the PFA, by way of an application. The high court dismissed the application, but granted leave to appeal to the SCA.

4. The crux of the appellants' challenge was that Rule 11.5.4.1 did not comply with s 15C(1) of the PFA, since it referred to 'excess assets' and not 'actuarial

surplus' as s 15C(1) did. They argued that the purported apportionment was unlawful, since Rule 11.5.4.1 was not a rule as contemplated in s 15C(1). The SCA identified the key question as being whether the 20% of the excess assets apportioned to the employer surplus account was an apportionment as contemplated in s 15C. In finding that the answer to this question is in the affirmative, the SCA considered two related questions.

5. First, the SCA held that it was undisputed on the facts that the sum of R363.2 million was in fact actuarial surplus. Secondly, it held that the rule is a rule contemplated in s 15C(1). In answering that question as a matter of law, it held that the narrow, technical interpretation advanced by the appellants would undermine the purpose of the legislation.

6. A further compelling consideration against the appellants' contentions was the fact that the rule amendment and the surplus apportionment were part of a composite, comprehensive conversion and restructuring exercise. The appellants could not cherry-pick and challenge a part of the scheme (the 2012 surplus apportionment), while leaving the rest of the scheme intact.

7. The SCA dismissed the appellants' contentions that the board of the 2nd respondent was conflicted, which gave rise to a reasonable apprehension of bias. It held that to the extent that all the trustees of a pension fund are invariably also members of that fund, there is an unavoidable structural conflict inherent in all funds.

8. An application to lead further evidence on appeal with regard to costs was dismissed, since the further evidence would not have materially affected the outcome.

9. Lastly, the SCA rejected a contention that the principle in *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC) regarding costs should apply in this case. It held that this is not public interest litigation – it concerned a dispute between a pension fund and two of its former members. That emanated from a private relationship governed by a contract (the rules of the pension fund). The appellants had throughout acted personally and not on behalf of other pensioners or members. There was no basis for interfering in the high court's discretion with regard to costs.

10. Both the appeal and application to lead further evidence were consequently dismissed with costs, including the costs of two counsel.

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