



**REPORTABLE**

CASE NOS: SA 30/2016  
SA 32/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**RÖSSING URANIUM LTD**  
**RÖSSING PENSION FUND**

**First Appellant**  
**Second Appellant**

and

**FORMER MEMBERS OF THE RÖSSING**  
**PENSION FUND**

**Respondents**

**Coram:** SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

**Heard:** 1 June 2017

**Delivered:** 30 June 2017

**Summary:** The Rössing Pension fund (the fund) was established by Rössing Uranium Ltd (Rossing) in 1975 to provide pension and other benefits for its permanent employees.

Since 1993, fund members had benefited from a surplus by not having to make contributions. The surplus had over the years been a source of dissatisfaction

amongst members. Members had an expectation that the surplus should be paid out to them in the form of cash. But this is contrary to a Namibia Financial Institutions Supervisory Authority (Namfisa) ruling to the effect that pension pay outs could only be made upon the termination of an employment contract.

The Pension Funds Act, 24 of 1956, (the Act) does not contain any guidelines as to how surpluses in pension funds are to be distributed. The rules of the fund were revised in 2002 to include rule 19.4.2 which dealt with the distribution of a surplus in the fund. It provided that in the event of a substantial surplus, the trustees should make recommendations to the employer for the distribution of the surplus. The rule further provided that the employer would then make the final decision on the distribution of the surplus within the limitations of the Act and the trustees would implement that decision.

The board of trustees of the fund comprised four elected representatives of members of the fund and as well as four trustees appointed by the employer. On 18 March 2011 a committee was created by the trustees of the fund to consider the distribution of the surplus.

In October 2011, the trustees, formulated a position concerning the distribution of the surplus. Acting under rule 19.4.2, the trustees recommended to Rössing during November 2011 that an equal three way distribution of 33.33% each in respect of members (which included pensioners), Rössing and former members should be made.

The Rössing Board considered the trustees' recommendations on 24 February 2012, but decided otherwise on how the surplus should be apportioned, deciding upon a split of 52% for members, 33% for Rössing and 15% for former members.

As a result of the Rössing Board decision, a group of former members of the Rössing Pension Fund (the respondents) challenged, by way of a review application, the decision taken (which they contended was by the trustees) to distribute a surplus in the fund as well as the legality of a rule of the fund which permitted that. The application was opposed by both the fund and the principal employer Rössing Uranium Limited (the appellant).

The High Court reviewed and set aside the decision (of the trustees) on the basis that the trustees had in essence abdicated their decision-making function to the Rössing. The court found that the sole responsibility for the management of the fund vested with the trustees and that it was impermissible for them to act as a 'rubberstamp' for Rössing's decisions and act under its dictation. Rössing and the fund appealed against this finding of the High Court.

The issues to be determined on appeal are whether the relief sought against the trustees as decision maker was competent, whether the decision to distribute the surplus constituted administrative action for the purpose of Art 18 of the Namibian Constitution and whether the former members established that the trustees of the fund or the employer had acted unlawfully.

The Supreme Court held that former members had not established that the fund and the employer had acted unlawfully. The trustees of the fund had acted in

accordance with the rules of the fund, which provided that the final decision concerning a surplus distribution lay with the employer. The trustees had made recommendations to the employer to distribute the surplus. The decision to distribute the surplus in the ratio impugned in the proceedings was made by Rössing as employer and not by the trustees. It was thus not competent to seek to review a decision of the trustees.

The Supreme Court also held that the decision to distribute the surplus did not constitute administrative action for the purpose of Art 18 because of the nature of the functions and powers and exercised by the trustees and the employer in doing so. The appeal succeeds.

---

### **APPEAL JUDGMENT - (26 June 2017)**

---

SMUTS JA (SHIVUTE CJ and DAMASEB DCJ concurring):

[1] This appeal concerns the distribution of a surplus in a registered pension fund and whether a decision to do so constituted administrative action and was lawful.

[2] A group of former members of the Rössing Pension Fund (the fund) challenged a decision taken to distribute a surplus in the fund as well as the legality of a rule of the fund which permitted that. They did so by way of a review application.

[3] The application was opposed by both the fund and the principal employer, Rössing Uranium Limited – (Rössing). They both raised several preliminary points and also opposed the application on the merits.

[4] The High Court dismissed all of the preliminary points and found that the decision to distribute the surplus amounted to reviewable administrative action and proceeded to set aside that decision. That court however declined to set aside the fund rule authorising the distribution of the surplus. It found that the extent to which it accords the employer the power to make a decision to do so is inconsistent with both the common law and the Pension Funds Act, 24 of 1956 (the Act) and held that the rule should be interpreted to require a decision by the trustees as recommended by the principal employer.

[5] The fund and Rössing appealed against that judgment.

#### Factual background

[6] The fund was established by Rössing with effect from 1 August 1975 to provide pension and other benefits for its permanent employees. A second pension fund was established by Rössing in 1984 to provide benefits primarily for white and expatriate employees not covered by the fund. These two funds were however amalgamated with effect from 1 September 1994.

[7] The fund is a defined benefit fund. This means that it is one which undertakes to provide benefits defined in its rules to fund members.

[8] As at 1 April 2012, the fund had 515 active members, 137 suspended pensioners and 690 pensioners. According to an actuarial valuation, the fund at that date had a surplus of approximately N\$454 million. Since 1993, fund members had benefited from the surplus (in each fund and thereafter in the amalgamated fund) by not having to make contributions.

[9] The surplus had over the years been a source of dissatisfaction amongst members. An expectation had arisen that if the surplus were to be distributed, it should be in the form of cash payments to fund members. But this would run counter to a ruling by the Namibia Financial Institutions Supervisory Authority (Namfisa) referred to in the papers which required that no pension benefit may be paid out in cash unless and until the underlying employment relationship had come to an end.

[10] The Act does not regulate how a surplus in a pension fund is to be distributed. The revised rules of the fund which were adopted with effect from 2002 addressed this issue in sub-rule 19.4. Sub-paragraphs 19.4.1 and 2 provide under the heading of 'Actuarial Valuations' that:

- '1 The financial condition of the fund shall be investigated and reported on by the actuary at intervals not exceeding three years. The trustees shall forward a copy of such report to the Registrar and shall cause a copy of such report or a summary thereof to be sent to every Employer participating in the fund.
- 2 If the valuation discloses that there is a substantial actuarial surplus or that there is a deficit that requires to be funded, the manner of dealing with the surplus or funding the deficit shall be considered by the trustees and recommendations made to the principal employer for a decision. The

Principal Employer's decision shall be made within the limitations imposed by the Act and shall be final. Where necessary, the Trustees shall alter the Rules to give effect to such decision.'

[11] The board of trustees comprises four elected representatives of active members of the fund as well as four trustees appointed by the employer. They approached Namfisa about the distribution of the surplus in 2007. Namfisa informed the trustees at the time that an equitable distribution of the surplus should not only take into account the participating employer and members (including pensioners) but also former members of the fund. The trustees appointed a steering committee comprising trustees and representatives of Rössing and the Mine Workers Union of Namibia (the union) which represented employees.

[12] On 18 March 2011 the committee presented a proposal to the trustees setting out how the surplus could be distributed. This recommendation was based upon an agreement reached between the union and Rössing that the surplus be divided on the basis of 42.5% each to the company and the members respectively and the remaining 15% to former members. In October 2011, the trustees formulated their own position concerning the distribution of the surplus. This included a recommendation that it should be fair and equitable and include all stakeholders including former members of the fund. Acting under rule 19.4.2, the trustees recommended to Rössing during November 2011 an equal three way distribution of 33.33% each in respect of active members (which included pensioners), Rössing and former members.

[13] The Rössing Board considered the trustees' recommendations at a meeting on 24 February 2012 but decided that the surplus would be distributed in the following way:

- (a) 15% to former members (by way of cash distribution in a fashion to be determined by the trustees);
- (b) 33% to the company (through a three year contribution holiday); and
- (c) 52% to members (through a three year contribution holiday amounting to 2% and a once off defined contribution to their respective pension accounts which would amount to an approximately 15% enhancement of accrued benefits).

[14] Upon the request of the trustees, Rössing furnished them with an extract from the minutes of the board meeting which provided detailed reasons for the breakdown. Included in the rationale was the fact that both Rössing and fund members had benefited by not having to contribute to the fund from 1 January 1993 and stated that it would be difficult for either to immediately start contributing again. The Rössing Board also referred to the current economic conditions and the medium term financial forecast for commodities and considered that a further three-year period of a contribution holiday for Rössing would be the minimum required so that it would probably not have to contribute again to the fund until the last remaining active member had left it.

[15] The board also took into account the risk on the part of Rössing to make good future deficits if the fund became unable to provide the defined benefits. The



board also took into account the position of active members (including pensioners) as opposed to former members. It was calculated that 2% would be needed to provide active members with a contribution holiday for three years. The board also took into account the greater risk in the hands of members in the future performance of the fund as opposed to former members who had already received their full benefit entitlement in terms of the rules of the fund. The latter would not be entitled to any further benefit in terms of the rules but only possibly an expectation that they could be included in the allocation of a surplus. It was pointed out that the greater risk borne by members (including pensioners) related to the volatility of the market for uranium which could affect the ability of the employer to make future contributions. It was for these reasons that the former members were allocated 15% and existing members a higher percentage of 52%. The board considered that its apportionment was 'thoroughly debated and cognisant of salient issues and fair and equitable' to the respective parties.

[16] The board of trustees accepted the decision of the Rössing Board and proceeded to implement it. The first step of implementation was an amendment to the rules to provide for benefits to be paid to former members and to devise a process for the payment of a portion of the surplus to them.

[17] On 28 March 2012 the fund informed members and pensioners of the fund that the trustees had informed Namfisa of the decision to distribute the surplus in accordance with the ratio decided upon by the Rössing Board on 24 February 2012.

[18] A number of former members launched an application to challenge the decision to distribute the surplus in the High Court on 26 September 2012. It was opposed and was subsequently withdrawn in March 2014.

[19] The present application on appeal was subsequently launched by a group of some 75 former members on 27 August 2014. It took the form of a review application in terms of rule 76 of the Rules of the High Court, directed at setting aside the trustees' decision to distribute the surplus in the ratio of 15% to former members, 33% to Rössing and 52% to current members. The application also challenged the lawfulness of rule 19.4.2.

[20] The application asserted that the decision of the fund was unlawful because its rules as well as the Act could not accord Rössing as the principal employer the right to assets of the fund. It contended that the revised rules, which afforded Rössing, as employer, the overriding power in respect of a surplus amounted to a contravention of the Act and the Income Tax Act, 24 of 1981. It was also contended that the decision of the trustees was unlawful as it was made under the dictation of Rössing as employer and that the trustees had thus abdicated their responsibility and duty to manage the fund to Rössing. The application also contended that the trustees lacked sufficient expertise in reaching their decision and also acted partially by favouring active members over former members and had also failed to ensure that the rules comply with the Act as well as the Income Tax Act without specifying the section(s) in those two Acts. Another ground raised in the application was that the trustees failed to avoid a conflict of interests and had failed to act with due care and diligence and had also failed to convey adequate and appropriate information to former members.

[21] Both Rössing and the fund raised several preliminary points and also opposed the application on the merits. The point of non-joinder of members was raised. They also complained that there had been an unreasonable delay in challenging both the decision to apportion the surplus and attack the legality of rule 19.4.2. The point was also taken that the decision to apportion the surplus did not amount to administrative action and that the relief was incompetent as the actual decision to allocate the surplus had been taken by Rössing as employer as contemplated by rule 19.4.2 and not by the trustees of the fund. The fund also stated that the relief had to an extent become academic as increased pension benefits had been paid out to pensioners. This point would seem to support an argument as to prejudice in relation to the question of delay than constituting a self-standing point of mootness. Given the conclusion reached in this appeal, it is not necessary to further address this issue.

[22] The fund denied that the trustees had acted in breach of their common law fiduciary duties. Rössing denied that it acted in breach of its duty to act in good faith to the fund and denied that its decision and conduct were in conflict with the Act or the unspecified provision(s) of the Income Tax Act. Rössing and the fund each referred to the extended process of negotiation and consultation which had preceded the fund's recommendation to distribute the surplus and Rössing's board's rationale for its decision to apportion the ratio of surplus distribution.

#### The approach of the High Court

[23] The High Court rejected all the preliminary points raised by the fund and Rössing.

[24] After a detailed discussion of the question as to whether the decision by the fund to distribute a surplus constitutes administrative action for the purpose of Art 18 of the Constitution, the court concluded that, although a pension fund is not a statutory body or part of the executive branch of government, decisions of trustees of a pension fund 'not only affect that fund's own members but have an impact upon the whole economy and the social aspects of the public life'. The court consequently held that 'the trustees of a pension fund in circumstances such as the present perform a public function and their decisions may be amenable to judicial review'. The court declined to follow a decision of the South African High Court in *Gerson v Mondi Pension Fund & others* 2013 (6) SA 162 (GSJ) (*Gerson*) which reached a contrary conclusion and distinguished *Pennington v Friedgood & others*<sup>1</sup> because it concerned a meeting of a medical aid fund which that court found not to constitute administrative action.

[25] The High Court proceeded to review and set aside the decision on the basis that the trustees had in essence abdicated their decision-making function to the employer (Rössing). The court found that the sole responsibility for the management of the fund vested with the trustees and that it was impermissible for them to act as a 'rubberstamp' for Rössing's decisions and act under its dictation. The court set aside the decision to distribute the surplus on the basis of the formula determined by Rössing's Board. The court however did not strike down rule 19.4.2 as unlawful, but held that:

'To the extent that rule 19.4.2 accorded to the employer the power to decide how the surplus funds occurring in the fund are to be dealt with, that rule is inconsistent

---

<sup>1</sup> 2002 (1) SA 251 (C).

with the common law, the Act and rule 18.1.1, and should be interpreted to mean that the employer can only recommend to the trustees who must apply their minds and take a final decision.'

[26] The fund and Rössing appealed against the court's judgment and order to this court.

#### Submissions on appeal

[27] Both Rössing and the fund addressed written and oral argument in support of the preliminary points and on the merits of the challenge to the decision. In view of the approach taken by this court, it is not necessary to discuss theirs and the former members' arguments on non-joinder and delay, as is further explained below.

[28] Mr Töttemeyer, counsel for Rössing, referred to the wording and structure of rule 19.4.2 and pointed out that it empowered the employer to make the final decision to apportion the surplus. Counsel also cited the factual sequence in the decision making process which culminated in Rössing's Board's decision on 24 February 2012 which determined the impugned ratio of the surplus distribution. He submitted that the relief sought (and granted) was not competent, given that it was Rössing's board's decision to apportion the surplus and not a decision of the trustees.

[29] Both Mr Töttemeyer and Mr Corbett, who appeared for the fund, argued that the decision to distribute the surplus did not engage Art 18 of the Constitution.

Both contended that the decision did not entail the exercise of public power for the purpose of Art 18. Both relied upon the approach in *Gerson* which in turn relied upon *Pennington* in contending that the challenged decision did not amount to reviewable administrative action.

[30] Mr Töttemeyer and Mr Corbett also submitted that both the fund and Rössing had not breached their respective duties and had properly acted in accordance with rule 19.4.2 which had been approved by the registrar of pension funds. They both relied upon the approach of the (South African) Supreme Court of Appeal (SCA) in *Tek Corporation Provident Fund & others v Lorentz*<sup>2</sup> (*Tek*) and contended that the former members had not established that the decision to distribute the surplus was in conflict with the Act, the fund rules and the common law.

[31] Mr Arendse, SC, who appeared for the former members supported the approach of the court *a quo*. He argued that the former members correctly challenged the decision in rule 76 proceedings and that the impugned decision is properly identified in the notice of motion as that of the trustees. He submitted that Art 18 is to be widely and purposively interpreted (on the strength of the approach of this court in *Immigration Selection Board & another v Frank*<sup>3</sup>) and that the decision to distribute the surplus in the fund engaged Art 18, arguing that it conflicted with the principles set out in the Act and the Income Tax Act.

---

<sup>2</sup> 1999 (4) SA 884 (SCA).

<sup>3</sup> 2001 NR 107 (SC) at 170H-171A and *Chairperson of the Tender Board of Namibia v Pamo Trading Enterprises CC & another* SA 87/2014 (17 November 2016).

[32] Mr Arendse argued that the decision was in breach of duties upon the trustees under the Act, the rules and the common law. In particular, by acting in accordance with the dictates of the employer, the trustees had rubberstamped the employer's decision and did not exercise their own discretion as is required by the Act and rules which vested the management of the fund in their hands.

[33] Mr Arendse also relied upon the approach of the SCA in *Tek* and conceded in oral argument that rule 19.4.2 on its own was not necessarily unlawful but argued that its implementation in the instant matter had rendered the decision to distribute the surplus unlawful.

#### Issues to be determined

[34] The issues to be determined in the appeal concern the competency of the relief sought, whether the decision making in question constituted administrative action for the purposes of Art 18 and finally whether the former members established that the trustees of the fund or the employer acted unlawfully. As already indicated, in view of the approach of this court on those issues, it is not necessary to deal with the preliminary issues of non-joinder and delay.

#### Context of decision making: the Act and the rules of the fund

[35] Before addressing these questions, it is apposite to set out the context of the impugned decision-making, namely a registered pension fund.

[36] As a fund registered under the Act, the fund is a juristic person and owns its assets and is vested with the rights, obligations and liabilities of the fund. The fund, the powers and duties of its trustees and the rights and obligations of

members (including former members) and of Rössing as employer are governed by the rules of the fund, the Act and the common law.

[37] The fund's object is set out in rule 1. It is 'to provide retirement and other benefits for employees and former employees (of Rössing) or their dependants and benefits in the event of the death of employees'. The rules are, in terms of s 13 of the Act, binding upon members, shareholders and officers (of the fund) and upon any person claiming under the rules.

[38] In *Tek*, the SCA correctly found,<sup>4</sup> with reference to the Financial Institutions (Investment of Funds) Act,<sup>5</sup> that trustees of a pension fund owe a fiduciary duty to the fund, its members and beneficiaries. The court in *Tek* also held that an employer is 'not similarly burdened but owes at least a duty of good faith to the fund, its members and beneficiaries'.<sup>6</sup> The rules of the fund determine the extent of Rössing's contribution.

[39] The *Tek* matter also concerned a surplus in a defined benefit fund. The rules of the fund in question quoted in that judgment bear a striking resemblance to the rules of this fund. The Act in its current form is also cast in similar terms to the South African legislation at the time of the *Tek* matter. At that point in South Africa, its legislation also did not include provisions dealing with surpluses in funds. Extensive amendments to the South African Pension Funds Act followed in 2001, shortly after the *Tek* matter. These not only dealt with how fund surpluses are to be dealt with, but also included several other important aspects and

---

<sup>4</sup> In para 15.

<sup>5</sup> Section 2(a) and (b) of Act 39 of 1984.

<sup>6</sup> Para 15.



innovations such as setting out duties of trustees and establishing a specialist tribunal (the office of the Pension Funds Adjudicator) to hear and determine complaints concerning the administration of pension funds. Unfortunately and inexplicably, the Act remains essentially unamended<sup>7</sup> despite the compelling need for legislative reform which would have been readily apparent following the *Tek* matter.

[40] After a survey of the position in England (with regard to 'balance of costs' pension funds), the court in *Tek* held with regard to a surplus in a defined benefit fund:

'Once a surplus arises it is *ipso facto* an integral component of the fund. Unless the employer can point to a relevant rule of the fund or statutory enactment or principle of the common law which confers such entitlement or empowers the trustees to use the surplus for its benefit, the employer has no right in law to the surplus.'<sup>8</sup>

[41] This also reflects the position in Namibia.

[42] In that matter the Pension Fund had taken the position that a surplus lay within the control of the employer. It had taken a contribution holiday. A new fund in the form of a provident fund was created and most members transferred to it. The fund had declined to transfer amounts in excess of members' actuarial reserve to the new fund after a takeover of the employer's business. The employer had also decided to apply the surplus in the fund for the purpose of a contribution

---

<sup>7</sup> Except for minor amendments primarily directed at permitting home loans to members to be advanced against their entitlements in pension funds in Acts 5 of 2011 and 6 of 2014 and for regulations to prescribe minimum or maximum amounts which funds may invest outside Namibia and in particular assets in Act 5 of 2011.

<sup>8</sup> Para 17.

holiday in the new fund and to fund a fund stabilisation account to be used to meet future cost increases in the provision of death and disability benefits.

[43] A former member of the original fund and the provident fund and a current member of the provident fund challenged the legitimacy of the employer's actions. Declaratory orders were sought and to an extent granted by the court *a quo*. On appeal, the SCA stressed that there was no principle in common law which entitled an employer to lay claim to a surplus arising in the fund. Nor was there any provision in the Act at the time which permitted that. Turning to the similarly worded rules, the court in *Tek* found that there was nothing in those rules which explicitly entitled that employer to lay claim to a surplus, either during the life of the fund or upon its liquidation.<sup>9</sup>

[44] The fund in that matter had a rule cast in similar terms to rule 19.4.2. (It was numbered 19.5.2. in those rules). After first stressing that a substantial surplus would need to exist, the court in *Tek* explained the implications of that rule in the following way:

[21] During the continuance of the fund the employer is certainly accorded a good deal of say by rule 19.5.2 but there are limits to it. The limitations imposed seem to me to be designed to ensure that the objects of the fund are realized. Why else would the trustees have to play a role by making appropriate recommendations and the power of the employer be made subject to the limitations of the Pension Funds Act and the Registrar's practice? It is difficult to reconcile those provisions with any suggestion that the employer is free to take a decision which is solely in its own interests but not that of the fund and its members. If it had been intended to confer upon the employer an unfettered power to do what it liked with an identified

---

<sup>9</sup> Paras 19 – 20.

surplus, I would have expected the framers of the rules to say so clearly and unambiguously. In so far as it was contended in the pre-litigation correspondence that any surplus “lies within the control of the employer company” in the sense that the employer has uninhibited access to it, I consider the contention to be wrong.

[22] That does not mean that the employer can derive no benefit whatsoever from the existence of a surplus. A recommendation by trustees that a surplus be retained to counter a perceived risk of future adverse volatility in the investment environment, if accepted by the employer, will benefit the employer in as much as it will not be liable to make contributions to the fund for so long as the surplus exists. But that would be a fortuitous and incidental advantage flowing from a recommendation made by the trustees in the interests of the fund and its members. In so recommending the trustees would not be acting in breach of their fiduciary duties nor would they be acting *ultra vires*. Nor would the employer be acting in bad faith towards its employees in accepting the recommendation.<sup>10</sup>

[45] As was also pointed out by the court in *Tek*,<sup>11</sup> in the case of a defined benefit fund such as the present, the employer’s obligation to contribute arises only when the need arises as is determined by the fund’s actuary. In the case of a surplus, the liability to do so would not necessarily arise. It only arises when there is a need to do so.<sup>12</sup> An employer would not be relieved of its obligation (in a contribution holiday) and would be receiving no benefit to the detriment of members.<sup>13</sup>

[46] The court in *Tek* did not find that the rule in question (19.5.2 in that case) was in conflict with any provisions of the Act although it would not appear that this point was raised in that appeal. Mr Arendse correctly conceded that, on its face,

---

<sup>10</sup> Paras 21 and 22.

<sup>11</sup> At para 23.

<sup>12</sup> Para 23.

<sup>13</sup> Para 23.

rule 19.4.2 of the fund in this appeal does not do so. His argument was rather that, in its implementation, a conflict with the Act or the rules may arise and in this instance arose with rule 18.1.1. It provides:

‘Subject to the provisions of the Act and of these rules, the sole responsibility for the management of the Fund shall be vested in the trustees.’

[47] Mr Arendse argued that by deferring its decision-making discretion on the apportionment of the surplus to Rössing, the fund’s trustees had abdicated their decision-making and sole responsibility for the management of the fund impermissibly to Rössing. This, he argued, vitiated the apportionment decision.

[48] This argument however overlooks the opening portion of the rule. That sub-rule is subject to the provisions of the rules. One such rule is rule 19. Rule 19.4.2 expressly confers the final decision in respect of a surplus distribution to the employer after the trustees have made recommendations to the employer when an actuarial valuation discloses a substantial surplus. Once a decision is made by an employer, within the limitations imposed by the Act, the trustees are to give effect to it. This rule thus qualifies the more general responsibility of managing the fund vesting in the trustees.

[49] It is accepted that the phrase ‘subject to’ in a legislative context conveys what is dominant and what is subordinate or subservient. As was held by a majority of the then South African Appellate Division:

'The purpose of the phrase 'subject to' in such a context is to establish what is dominant 'and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As Megarry J observed in *C and J Clark v Inland Revenue Commissioners* (1973) 2 All ER 513 at 520:

"In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail."<sup>14</sup>

[50] It follows that where the Act and the rules in other specific instances vest some element of the management of the fund in others (such as the fund's actuary and in the case of an employer with regard to a surplus in rule 19.4.2), the Act and the specific provisions in the rules are to prevail over the otherwise overall management responsibility of the fund vested in the trustees.

[51] Once it is accepted that rule 19.4.2 is not in conflict with the Act, the focus shifts to its implementation in this matter.

#### Implementation of rule 19.4.2

[52] Unlike the employer (and the fund) in the *Tek* matter, Rössing (and the fund) did not approach the surplus on the basis that it lay within Rössing's sole control and that Rössing was entitled to it.

---

<sup>14</sup> *S v Marwane* 1982 (3) SA 717 (A) at 747H-748B applied in *Black Range Mining v Minister of Mines* 2014 (2) NR 320 (SC) at para 44.

[53] Rule 19.4.2 contemplates that, once a substantial surplus accrues to the fund, its trustees are obliged to consider a surplus distribution and make recommendations to Rössing.<sup>15</sup> This the trustees did. In fact, the trustees did so in a process which extended over a protracted period and engaged in negotiations with Rössing and the representative union and considered their representations in the form of an agreement as to how to split the surplus. The culmination of this process was for the trustees to recommend to Rössing that the substantial surplus be split equally between Rössing, members and former members (33% each).

[54] After considering the trustees' recommendations, Rössing's Board, after weighing up a number of considerations, decided upon a different split and determined the ratio impugned in these proceedings. It made that decision to provide for the distribution along those lines, as is expressly contemplated by rule 19.4.2. It was not the trustees' decision even though they were part of the decision making process. That is demonstrated by the facts, properly approached in accordance with the *Plascon-Evans* rule.<sup>16</sup>

[55] The fact that Rössing's Board took the decision is not disputed by the former members. Indeed, it is their case that Rössing determined the split and usurped the trustees' function and discretion to do so. But this is what the rule requires. Rössing as employer is given the final decision as to the distribution of the surplus under that rule. This does not mean that it can act against the fund's interests and in bad faith. Firstly, it can only make a decision after a recommendation is made by the trustees (to distribute the surplus). Rule 19.4.2

---

<sup>15</sup> *Lorentz v Tek Corporation Provident Fund & others* 1998 (1) SA 192 (W) at 229H.

<sup>16</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.

also requires that it must act within the limitations imposed by the Act. Rössing recognises that it owes the fund and its members a duty to act in good faith in taking its decision to determine the apportionment of the surplus following recommendations by the trustees. The requirement for its decision to be ‘within the limitations’ of the Act is intended to ensure that the fund’s objects are realised. I agree with the approach of the SCA in *Tek* that this would imply that it would not be open to the employer to take a decision solely in its own interests but not that of the fund and its members.<sup>17</sup>

[56] Furthermore, it was not for the trustees to have made the decision. The trustees’ powers and duties are as set out in the rules. They have no inherent and unlimited powers to deal with a surplus, notwithstanding their fiduciary duty to act in the best interest of the fund and its members. What is suggested by this application and by the court below is that they should have made the decision that is beyond their powers under the rules which confine them to making recommendations to the employer and then implementing the employer’s decision.<sup>18</sup>

[57] It follows that the final decision under the rules to apportion the surplus is vested in Rössing as employer subject to the constraints set out above and after a recommendation is made by the trustees.

[58] The facts also show that it was the Rössing Board which made that decision and not the trustees. It was for the trustees to implement that decision under the rules and if need be, to amend the rules to do so. To decide that the

---

<sup>17</sup> At para 21 quoted above.

<sup>18</sup> *Tek* at para 28.

trustees are the final decision makers would be tantamount to making an entirely different rule which is directly contrary to that contained in the rules and is inapposite. Unless a conflict is shown to exist between rule 19.4.2 and the Act which Mr Arendse correctly conceded was not the case, then that rule remains the current decision-making framework for surplus distribution.

[59] The relief sought by the former members directed at a decision by the trustees in their notice of motion (and granted by the High Court) is thus not competent. The application should have been dismissed for this reason.

[60] The application may have been directed at the trustees in an attempt to characterise the decision-making as administrative action for the purposes of Art 18 but this negates the express wording of the rule. This misconceived approach would in any event not in my view result in the decision-making amounting to administrative action for the purpose of Art 18.

[61] The right to administrative justice is entrenched in Art 18. It provides:

‘Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.’

[62] This court in *Permanent Secretary of the Ministry of Finance v Ward*<sup>19</sup> referred to guidelines and principles which assist in determining whether impugned

---

<sup>19</sup> 2009 (1) NR 314 (SC).



conduct amounts to an administrative act for the purposes of Art 18. The court stressed with reference to the *President of the Republic of South Africa v South African Rugby Football Union & others*<sup>20</sup> (*Sarfu*) that what matters most is not the functionary but the functions performed by him or her. The court in *Sarfu* emphasised that the implementation of legislation would ordinarily constitute administrative action in contrast to policy matters which would not. To distinguish between these, regard would be had to the source of the power, the subject matter and whether it involves a public duty.<sup>21</sup>

[63] This court in *Ward* cited the test articulated by Langa CJ in his judgment in *Chirwa v Transnet Ltd & others*<sup>22</sup> as instructive:

[186] Determining whether a power or function is public is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.'

[64] As was pointed out by this court in *Ward*, and by Langa CJ in *Chirwa*, the application of these principles is not always free from difficulty. Even though the source of a power may be statutory, it does not necessarily follow that every decision of that functionary is to be classified as administrative. This was also succinctly explained by the Judge-President in *Open Learning Group Namibia*

---

<sup>20</sup> 2000 (1) SA 1 (CC).

<sup>21</sup> *Ward* at para 31 and the cases cited there.

<sup>22</sup> 2008 (4) SA 367 (CC) at para 186. See also *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC).

*Finance CC v Permanent Secretary, Ministry of Finance*<sup>23</sup> in the context of the State's actions in the commercial sphere.

[65] The court in *Gerson*, in applying the test articulated by Langa CJ in *Chirwa*, concluded that a decision of a board of trustees of a pension fund in determining whether the applicant in that matter was an eligible spouse for the purpose of the fund's rules did not constitute the exercise of a public power or the performance of a public function and thus did not constitute administrative action for the purpose of judicial review under the Promotion of Administrative Justice Act, 3 of 2000 of South Africa.

[66] The High Court criticised the approach of the court in *Gerson* by reason of its reliance upon *Pennington*. The latter matter concerned the manner in which a chairperson of a registered medical aid scheme conducted the proceedings at a general meeting of the medical aid scheme. The High Court questioned the applicability of *Pennington* to a pension fund. Whilst there are certainly differences in the nature of the issues raised in those respective decisions, the court in *Gerson* referred by way of analogy to the approach followed by the court in *Pennington* which concluded that medical aid scheme meeting proceedings did not constitute administrative action for purposes of judicial review. The analogy was based upon the close reasoning of the court in *Pennington* in reaching that conclusion. The court in *Pennington* found that nothing contained in the empowering Medical Scheme Act, the regulations under it or the scheme rules imported a requirement by the trustees to observe common law principles of natural justice.<sup>24</sup> The court in

---

<sup>23</sup> 2006 (1) NR 275 (HC) at paras 114 - 116.

<sup>24</sup> In para 41.

*Gerson* found that similar considerations arose with reference to the pension fund rules in question and the South African Pension Fund Act.<sup>25</sup> Similar considerations arise in this matter. Nothing contained in the Act or the fund rules render the decision-making in this matter susceptible to review jurisdiction on the review grounds raised in these proceedings.

[67] The reference to *Pennington* by way of analogy by the court in *Gerson* had however followed that court's prior application of the principles articulated by Langa CJ in *Chirwa* in concluding that the board's decision did not involve a 'public' power or function.<sup>26</sup>

[68] The High Court found that the fact that it was the fund which was challenged in the proceedings was of little consequence and what mattered more was the function it performed. The High Court concluded that 'decisions of trustees of pension funds (particularly relating to the entitlement to benefits of beneficiaries) not only affect that fund's own members, but have an impact on the whole economy and the social aspects of public life'. As a consequence, the High Court found that trustees perform a public function susceptible to judicial review.

[69] Whilst a fund is registered by the registrar under the Act, it is not a statutory body. The functions and duties of board members are set out in the rules of the fund which are also registered with the registrar. The rules of the fund are under s 13 of the Act binding upon the trustees. The powers they exercise are those set out in the rules and not in terms of the Act. As the High Court correctly pointed out, the nature of the function is of cardinal importance.

---

<sup>25</sup> In paras 45 – 47.

<sup>26</sup> At para 42.

[70] Article 18 is after all a right to administrative justice. The thrust of the right is directed at ensuring administrative justice in the relationship between the State as bureaucracy and its citizens in carrying out the functions of the State. It does so by guaranteeing the 'right to lawful, reasonable and fair administrative action'.<sup>27</sup> To qualify as an administrative act, it would need to be one of an administrative nature taken by a public body or functionary or on their behalf. In this instance, the act in question on the part of the trustees relates to the management and administration of a privately funded pension fund in recommending the distribution of a surplus in the fund under the rules of the fund to an employer and implementing the decision to distribute that surplus. That is the nature of the function involved in this matter. It does not concern a function of the State or its bureaucracy.

[71] The role of trustees in this context has an impact upon fund members and former members but not in my view on the general public even though it is certainly in the public interest that pension fund trustees exercise their powers to the benefit of the fund and its members. This consideration is however encapsulated in the fiduciary duty which trustees owe to the fund, its members and where applicable, to former members. Trustees' duties have since 2001 understandably been spelt out in the South African Act<sup>28</sup> so that there are statutory duties in addition to those under common law in view of the compelling public interest to safeguard pension rights. But this public interest aspect to the proper exercise of powers and functions by trustees does not in my view mean that their

---

<sup>27</sup> *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 64. See also *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) 313 (SCA) at paras 21 – 25 for an instructive discussion of the question.

<sup>28</sup> Act 24 of 1956, as amended.

function under the rules regarding recommending the distribution of a surplus translates into a public function susceptible to judicial review under Art 18, particularly where their function under rule 19.4.2 is to recommend and the actual decision to distribute the surplus is taken by the employer.

[72] The administration of the fund in the context of this matter does not form part of the relationship of the State as bureaucracy and its citizens. It is rather in the realm of relationships between citizens (being employees and former employees) and corporate entities where protective legislation is mandated to provide regulation and protection for pensioners. The fact that the Act, drafted in the 1950's with minimal substantive changes since independence, is inadequate by failing to provide for the manner in which surpluses are to be distributed is rather a matter for legislative intervention and does not transform the fundamental nature of the function performed by trustees in the fund into the exercise of a public power for the purpose of Art 18. This consideration is reinforced by the fact that the actual power exercised by trustees is not even as decision maker but to recommend a surplus distribution to the employer. The distribution of a surplus in the fund in this context is far removed from the exercise of a public power or function by or on behalf of the State in a bureaucratic sense where the exercise of public power is held to account by Art 18.

[73] Upon an application of the principles enumerated by Langa CJ in *Chirwa*, I share the view of the court in *Gerson* that the conduct of trustees of a pension fund of the kind in question would not amount to administrative action susceptible to judicial review.

[74] Pensioners are however not without remedies against the trustees or the employer where they breach their respective duties. The need for further remedies and safeguards for fund members is an aspect which should enjoy legislative attention.

[75] There was a reference in the court papers to surplus distribution being addressed in draft legislation in 2008 already. Unfortunately that legislative reform has still not come to fruition. The lacuna in the Act with regard to surplus distribution needs to be addressed. Consideration may also be given to spelling out and expanding upon the duties of trustees in statutory form and also for a specialist tribunal for adjudicating upon complaints by members and former members or beneficiaries. In the absence of legislative provisions dealing with these matters, the duties of trustees and their role and that of the employer with regard to surplus distributions are those set out in the rules of the fund and under common law.

[76] To sum up, what the trustees (and the employer) may do with regard to a surplus is set out in rule 19.4.2. A substantial surplus existed as per the actuarial report. The trustees made recommendations to Rössing as employer to distribute the surplus. The employer proceeded to determine a ratio allocating a higher percentage of the surplus to members as opposed to former members. It did so for reasons relating to future risks facing members and the need for them to enjoy a contribution holiday. The employer did not increase the proportion recommended for itself.

[77] The former members have not established that what both the trustees and the employer did in recommending and deciding upon the distribution of the surplus was not in accordance with the rules of the fund. On the contrary, it would seem that the requisites of rule 19.4.2 were met. The former members also did not establish any breach of the trustees' fiduciary duty to act in the best interest of members and beneficiaries of the fund. Nor did they establish any breach of the duty to act in good faith on the part of Rössing as employer. It was incumbent upon the former members to establish either breach to challenge the action of the trustees or employer. This they did not do in these proceedings.

[78] It follows that their application to the High Court should have been dismissed and that this appeal succeeds.

#### Costs

[79] Mr Arendse submitted that in the event of the former members failing in their bid to set aside the decision (and to defend this appeal), they should not be mulcted with costs. He submitted that this was an instance where this court in its discretion should make no order as to costs. Both Mr Töttemeyer and Mr Corbett submitted that costs should follow the result.

[80] The former members are all pensioners seeking to assert a right under the Constitution (to administrative justice). They have not been successful in their attempt to do so. A complicating factor is the lacuna caused by the absence of adequate statutory provisions addressing the distribution of surpluses in pension funds. This would seem to me to be a case where this court, in the exercise of its discretion, should not make any order as to costs against the former members. I

accordingly propose that no order as to costs should be made, as is reflected in this court's order.

Order

[81] The following order is made:

1. The appeal succeeds.
2. The order of the High Court is set aside and replaced with the following:

‘The application is dismissed.’

3. No order is made as to the costs of appeal.

---

**SMUTS JA**

---

**SHIVUTE CJ**

---

**DAMASEB DCJ**



## APPEARANCES

FIRST APPELLANT:

R Töttemeyer

Instructed by Dr. Weder, Kauta &  
Hoveka Inc, Windhoek.

SECOND APPELLANT:

A W Corbett

Instructed by HD Bossau & Co,  
Windhoek

RESPONDENTS:

N M Arendse, SC (with him W  
Boesak)

Instructed by Clement Daniels  
Attorneys, Windhoek.