THE 2003 PENSION LAWYERS ASSOCIATION CONFERENCE

"Contentious and current issues surrounding the surplus legislation"

Andrew Breitenbach[1]

3 March 2003

Introduction

1. I have been asked to speak about contentious and current issues surrounding the surplus legislation. I have chosen three, the first two of which relate to the retrospectivity of the Pension Funds Second Amendment Act, 39 of 2001 ("the amending Act").

2. The first issue is the prospects of success of a rule-of-law inspired challenge to the new section 15B of the Pension Funds Act, 24 of 1956 ("PFA"), that is that the section unjustly interferes with the contractual regime which operated between pension funds, the contributing employers and the funds' members over the periods since their establishment to the date of commencement of the amending Act (7 December 2001).

3. The second issue is the two determinations by the Registrar of Pension Funds ("the Registrar") implicit in PF Circular 109, namely that rule

[1] BComm LLB LLM. Member of the Cape Bar. Most of what is contained in this address comes from or is based on work that I have done with Owen Rogers SC of the Cape Bar, whose incisive thinking has shaped my own views on pension surplus matters. I however accept full responsibility for any errors or shortcomings.

amendments and section 14 transfer schemes submitted before 7 December 2001 should be treated in terms of the law as at the date of submission rather than the date of the Registrar's decision, and that rule amendments and section 14 transfer schemes agreed by the trustees of the funds concerned before 7 December 2001 but not submitted to the Registrar before then should be treated in terms of the PFA, as amended by the amending Act.

4. The third issue is whether members or former members of a pension fund ("A") can lay claim to the credit balance in the employer reserve account in another pension fund ("B") which was created or credited, before 7 December 2001, when members and assets were transferred from fund A to fund B.

5. Before dealing directly with each of these issues, I shall briefly outline the relevant parts of section 15B of the amending Act.

The amending Act

6. The new section 15B(1) of the PFA requires that in the normal course of events the board of a fund ("the board") shall within 18 months after the effective date of the next statutory actuarial valuation of the fund coincident with, or next following, the commencement of the amending Act on 7 December 2001, submit to the Registrar a scheme for the apportionment of any actuarial surplus in the fund (an "apportionment scheme"). The scheme operates from the effective date of the actuarial

valuation (the "surplus apportionment date"), unless the board decides on an earlier apportionment, or the fund is liquidated or converted from a defined benefit fund ("DB fund") to a defined contribution fund ("DC fund"), in which case the date is that determined by the board or that of the liquidation or conversion.

7. The new section 15B(2) provides, *inter alia*, that an apportionment scheme "**may involve**" the improvement of benefits to existing members of the fund, increases to benefits or transfer values in respect of former members of the fund and the crediting of an amount to the employer surplus account. After the allocation, the surplus in the employer surplus account may be debited with any surplus utilised by the employer for, *inter alia*, funding a contribution holiday (see the new definitions of "**contribution holiday**" and "**employer surplus account**" in section 1 and the new section 15E).

8. The words "**may involve**" in section 15B(2) are significantly qualified by the new section 15B(4), which provides that the board shall determine who may participate in the apportionment of actuarial surplus and, subject to certain provisos which are not relevant for present purposes, "**shall include in such apportionment existing members and any former employees who left the fund in the period from 1 January 1980 to the surplus apportionment date**".

9. The new section 15B(5) then deals, in a lengthy proviso, with the allocation of the actuarial surplus between the various classes of

stakeholders whom the board has determined shall participate in the apportionment. The following elements of the proviso are important for present purposes.

10. First, paragraph (a) provides that before any apportionment is done the quantum of the actuarial surplus shall be artificially increased by the amount of "**actuarial surplus utilised improperly by the employer prior to the surplus apportionment date as determined in terms of subsection (6)**". The new section 15B(6) stipulates, subject to a proviso allowing for the exclusion of negotiated utilisations of surplus, four elements of surplus utilised improperly by the employer. The last of these is bound to be very important in practice, namely "**the value of any contribution holiday enjoyed by the employer after the commencement date**" (7 December 2001). This provision must be read with the proviso to the new section 15A(3), which states that after 7 December 2001 an employer may continue taking a contribution holiday provided that its value is added to the actuarial surplus to be apportioned in terms of section 15B(5). It follows that as regards post 7 December 2001 contribution holidays the word "**improperly**" is really a term of convenience. The contribution holiday (or any other "**improper**" use prior to 7 December 2001) is not unlawful, but is provisional in the sense that the surplus so utilised has to be added back to the surplus to be apportioned on the apportionment date. The board, which in the first instance must devise and submit the surplus apportionment scheme, must determine the existence and extent of any improper uses.

11. Secondly, paragraph (b) of the proviso to section 15B(5) provides there are two prior charges against the (augmented) actuarial surplus. The one relates to increases to pensions, which must be "**increased to the minimum pension as determined in terms of section 14B(4)**" (this is a complicated provision which sets out the basis for determining the factor by which pensions must be increased). The minimum pension increase, it seems, is based on the lesser of the investment return earned on the assets of the fund and the change in the consumer price index. The other relates to former members, who "**shall have the benefits previously paid to them, or the amounts previously transferred on their behalf, increased to the minimum benefit determined in terms of section 14B(2) as at the date when they left the fund, with such increase adjusted to the surplus apportionment date using the nett investment earnings of the fund over the corresponding period**". This is one of the most controversial elements of the new surplus apportionment legislation. It creates a new liability, which in many cases will be substantial. The "**minimum benefit**" referred to is the "**minimum individual reserve**" described in the new section 14B(2), which in the case of a DB fund is the greater of "**the fair value equivalent of the present value of the member's accrued deferred pension**" (section 14B(2)(a)(i)) or the aggregate of the member's contributions and the employer's contributions paid in respect of the member, less expenses (section 14B(2)(a)(ii)). In the case of a DC fund, the "**minimum individual reserve**" is the member's individual account determined in accordance with the formula set out in section 14B(1) plus a share of the investment reserve account, the member surplus account any relevant contingency reserve accounts, normally in the proportion that the member's individual account value bears to the total of all

members' individual account values (section 14B(2)(b)). If the total of the increases exceeds the (augmented) actuarial surplus, the amounts of the increases shall be reduced *pro rata* (section 15B(5)(b)).

12. Thirdly, paragraph (c) of the proviso to section 15B(5) provides that the balance of the actuarial surplus (if any) shall be equitably split between existing members, former members and the employer in the proportions determined by the board after taking account of the financial history of the fund.

13. Fourthly, paragraph (d) of the proviso provides that if the amount apportioned to the employer is less than the actuarial surplus utilised improperly by it, the difference shall represent a debt owed by the employer to the fund which the employer must redeem within a period to be agreed by the board. In practice, this may result in a part or the entire value of any contribution holiday taken by the employer since 7 December 2001 having to be repaid by the employer to the fund.

14. Finally, paragraph (e) of the proviso provides that the board shall determine how, in the case of existing members and former members, the allocated portion of the actuarial surplus shall be applied for their benefit.

15. The remainder of section 15B deals with the manner in which the board must approve the apportionment scheme (section 15B(7)), the persons who may do so (section 15B(8)), the procedure for the submission of the

scheme to the Registrar and the notice-and-comment procedure to be followed in relation to the employer, members, former members and any fund to which former members transferred (section 15B(9)) and the circumstances in which the scheme will be referred to the special ad hoc tribunal referred to in section 15K (section 15B(10)).

The prospects of a rule-of-law challenge

16. Prior to the commencement of the amending Act on 7 December 2001 employers participated in pension funds on the basis that members were entitled to the benefits for which the rules made provision, and funding decisions were likewise made on that basis. Had employers known that, *inter alia*, members would be entitled on withdrawal to receive what has now retrospectively been prescribed as their minimum benefits, they might not have participated in pension funds at all. They might have considered other retirement plans or even invested their capital in some other form of business.

17. The current surpluses in pension funds arose from the contractual regime which applied in terms of the rules of the funds in the past, and in DB funds in which the employees' contributions are fixed and the employers are obliged to fund the "balance of cost" the employers' only obligation has ever been to fund the shortfall between the specified members' contribution and the contribution (if any) required to maintain the solvency of the funds. The argument therefore is that it is not right that there should be retrospective statutory interference in this

contractual regime by a statutory appropriation of the surplus to fund a retrospective increase in former members' withdrawal benefits.

48. In the "strong" sense of the term, retrospectivity refers to the situation where a statute is deemed to have been in force from an earlier date than that on which it was in fact enacted. But the term is also used in a "weaker" sense to describe statutes which affect existing transactions and matters (see Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others 1999 (4) SA 1 (SCA) at 7C). In the case of the amending Act, there is plainly no retrospectivity in the strong sense. The amending Act does not purport to be in force from a date earlier than 7 December 2001.

49. There is an obvious overlap between the issue of retrospectivity (in its weaker sense) and the principle of interpretation that a statute is presumed not to interfere with vested rights unless the legislature clearly intended the statute to have that effect. In the cases, there are numerous *dicta* along the following lines: "**An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the statute to have that effect**" (National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 (SCA) par 31). I would point out however that what is necessarily implicit in this statement and others like it is that it is permissible for legislation expressly or by clear implication to be made retrospective.

50. The basis of the presumption against retrospectivity and the requirement that it can be rebutted only by express terms or clear implication is "**elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly**" (per Stevens J in United States Supreme Court in Landgraf v USI Film Products *et al* 511 US 244 (1994) at 265, quoted in Carolus*, supra*, par 36). See also Hayek *The Road to Serfdom* (1946) 64 (quoted in Harris *Legal Philosophies* (2ed 1997) 151: "**Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the rule of law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.**"

51. In South Africa these considerations underlie the rule-of-law requirement that the law be accessible and clear (Dawood, Shalabi and Thomas v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) par 47; President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) par 102 (per Mokgoro J diss.)). Needless to say, retrospective legislation – whether it be legislation that changes the law from what it was at a date in the past (strong retrospectivity) or legislation that henceforth imposes new results in respect of a past event (weak retrospectivity) – poses difficulties for the rule of law, which is a

foundational value of our Constitution (see section 1(c) of the Constitution; Beinart "The Rule of Law" (1962) *Acta Juridica* 99 at 106; Currie and De Waal *The New Constitutional and Administrative Law* vol 1 (2001) 81).

52. These difficulties are particularly acute in the criminal context, so much so in fact that section 35(3)(l) of the Constitution expressly provides that the right of every accused person to a fair trial includes the right "**not to be tried for an act or omission that was not an offence either under national or international law at the time when it was committed or omitted**". In addition, section 35(3)(n) provides that every accused person has the right "**to the benefit of the least severe of the prescribed punishments if the prescribed punishment has been changed between the time that the offence was committed and the time of sentencing**". (See the discussions of "Retroactivity" and "Legality" in the sections on criminal procedure and sentencing and punishment in Chaskalson *et al Constitutional Law of South Africa* 27-94G to 27-97 and 28.2.)

53. However, apart from sections 35(3)(l) and (n), the Constitution contains no express prohibition of retrospective legislation. I have also not been able to find a reported South African case in which retrospective legislation has been challenged on rule-of-law grounds. The only express statement dealing with this issue in a reported South African decision that I have been able to trace is in the following excerpt from De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5ed 1995) at 14-15 which was quoted in Pharmaceutical Manufacturers

Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at par 39 (our emphasis): "**(T)he standards applied by the courts in judicial review must ultimately be justified by constitutional principles, which govern the proper exercise of public power in any democracy. This is so irrespective of whether the principles are set out in a formal, written document. The sovereignty or supremacy of Parliament is one such principle, which accords primacy to laws enacted by the elected Legislature. The rule of law is another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify - albeit not always explicitly - a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, *the rule of law embraces some internal qualities of all public law: that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation*; and that it be applied equally, without unjustifiable differentiation.**"

54. The emphasised words are reminiscent of Prof. L L Fuller's principles of the "**inner morality of law**", which are the requirements of legality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time and congruence between official

action and the declared rules (Fuller *The Morality of Law* (revised edition 1969), discussed in Harris, *supra*, 146). With specific reference to retroactivity, it is to be noted that Fuller's main objection was to the absurdity of today commanding someone to do something yesterday. Fuller denies, however, that laws imposing taxes on gains made at an earlier date are objectionable on the score of retroactivity, since their object is to raise revenue, to command payment now, not to control past conduct.

55. As regards the position elsewhere, a brief survey of four jurisdictions – the United States of America, Ireland, India and Canada – reveals the following.

56. Article 1 sections 9(3) and 10(1) of the Constitution of the United States of America expressly bans the passing of any "**ex post facto Law**", but the ban has been construed as applying only to criminal, penal and criminal procedure laws (see Tribe *American Constitutional Law* (2ed 1986) 632-41; Nowak and Rotunda *Constitutional Law* (4ed 1991) 417-9).

57. In Ireland, in Magee v Culligan (1992) the Supreme Court interpreted Article 15.5 of the Irish Constitution, which provides that parliament must not declare acts to be an infringement of the law which were not so at the date of their commission, more widely to include infringements of the civil law (torts) or criminal law (offences). The Court added however that Article 15.5 did not contain a general prohibition on

retrospective legislation, nor could it be interpreted as doing so. See Doolan *Constitutional Law and Constitutional Rights in Ireland* (3ed 1994) 38-9.

58. According to Seervai *Constitutional Law of India* vol 3 (4ed 1996) 2309, the Indian Supreme Court "**has held in several cases that unless limited by the Constitution, the legislatures in India have power to legislative retrospectively, and also to validate invalid laws or invalid executive acts and notifications.**" (Seervai discusses the relevant cases in some detail at 2310-2312.)

59. In Canada, as Hogg *Constitutional Law of Canada* 48-27 explains, apart from sections 11(g) and 11(i) of the Canadian Charter of Rights and Freedoms (which are similar to sections 35(3)(l) and (n) of the South African Constitution): "**Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise, there would be room for avoidance action by taxpayers during the hiatus between the budget and the enactment of the law. Another common example is a retroactive statute to change the law as it was declared to be in a judicial decision: a law that has been interpreted in an unexpected way, or has been held to be invalid on remediable**

grounds, may be amended or validated retroactively to restore the legal position to what it had been believed to be prior to the judicial decision. The power to enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government. Section 11(g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive."

60. I have seen an opinion on the constitutionality of the Bill that became the amending Act furnished Chris Loxton SC and Jackie Cassette on 2 November 2001. They make the following observations, with which I respectfully agree: "**most proponents of the prohibition against retrospective laws recognize that compliance with the rule of law, and in particular, prospective operation of laws, cannot always be absolute. It will at times have to be balanced against other competing claims and values. Conformity with the rule of law is essentially a question of degree, and should not be slavishly adhered to, especially at the expense of legitimate social goals. Thus the US Supreme Court has consistently held that not all retrospective statutes are unconstitutional, but only those which, upon a balancing of considerations are felt to be unreasonable. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, (73(Harvard Law Review at 694-5).**"

61. Because rule of law challenges based on retrospectivity have not hitherto received the attention of our courts, it is difficult to predict what general approach will be followed in South Africa. It seems clear that

the mere fact that legislation is retrospective (whether in the strong or the weak sense) cannot be sufficient to violate the rule of law. Something more is required, but in the absence of authority it is difficult to say what further circumstance will need to be present to render retrospective legislation repugnant. Having regard to the purpose of the rule of law, it might be said that retrospective legislation will contravene the rule of law where it unreasonably or unfairly impairs the ability of those bound by the law to regulate their conduct in accordance with the law. Circumstances in which it might not be unreasonable or unfair to enact retrospective legislation are given in the passage quoted from the work of Hogg in paragraph 59 above. There may well be other examples.

62. It is also likely that legislation which is retrospective in the strong sense will more readily be found to be inconsistent with the rule of law than legislation which is retrospective in the weak sense.

63. In the present case, the amending Act is certainly not retrospective in the strong sense. The provisions relating to contribution holidays enjoyed after the commencement date of the amending Act are not even retrospective in the weak sense. However, there is retrospectivity in the weak sense to the extent that the PFA now requires the withdrawal benefits of former members to be enhanced to certain minimum levels. The payments made to former members in accordance with the rules which then prevailed constitute concluded matters. The effect of the amending Act is to reopen those matters and to require pension funds to pay certain further withdrawal benefits to the former members

concerned, persons with whom the pension fund would have no subsisting contractual nexus.

64. It is not only the pension fund itself which is affected (and potentially prejudiced) by the imposition of a further obligation in respect of concluded matters. The retrospectivity also affects certain participating employers. In a balance of cost DB fund the level of benefits directly affects the employer's funding obligations. This is a financial commitment which the employer takes into account in assessing the conduct and future of his business. An employer who knows what the current defined benefits are might well elect to contribute in excess of what was required in order to build up "savings" in the pension fund for purposes of taking a contribution holiday at a later date. If the same employer knew that by virtue of legislation the minimum benefits payable to members were substantially higher than those contained in the rules, and that no portion of his contributions would thus be available for a future contribution holiday, the employer might decide that it was uneconomic to continue with the business or might decide that he should restructure it in some way.

65. There are, of course, countervailing considerations bearing on the reasonableness of the retrospectivity of the amending Act. The purpose of the provisions in question is to redress the inequity perceived by the legislature in the way in which former members of pension funds were treated. The perceived inequity includes the payment in the past of paltry withdrawal benefits to employees. Although some employers may deliberately have over-contributed in order to build up "savings" in

pension funds for purposes of future contribution holidays, in many cases surpluses will have arisen simply because of better-than-expected investment returns and/or more withdrawals than anticipated. In many cases, therefore, the surplus would not have been designedly worked for but largely fortuitous.

66. While there might be thought to be obvious unfairness in retrospectively appropriating a surplus which was created through deliberate over-funding by the employer on the strength of the then prevailing legal position, it appears less unfair to appropriate surplus fortuitously generated on contributions which were never intended to do more than fund the then known benefits. In the former case, the employers concerned could complain that they would not have made the over-contribution had they known that there would be a retrospective increase in benefits. In the latter case, the contributions were in fact set with reference to the then prevailing benefits and the employers concerned are not now being asked to pay anything more.

67. I do not know to what extent there was a pattern of deliberate over-funding by employers in South Africa on the strength of the prevailing rules of pension funds. If the position were that a relatively small proportion of pension fund surpluses in South Africa are the result of deliberate over-funding (with a view to providing a "cushion" for future contribution holidays) and if the greatest part of such surpluses arose fortuitously from contributions determined with reference to the then known benefits, the isolated instances of unfair effects might be thought to be completely outweighed by the importance of retrospectively

addressing the past inequities, particularly if no practical way exists of identifying and exempting such surpluses as arose from deliberate over-funding.

68. It might also be said that even in the case of deliberate over-funding, the element of unfairness arising from retrospectivity is not so striking as might on first blush appear. Employers who deliberately over-contributed to their pension funds in the past knew (or should have known) that any resultant surplus would not in fact belong to them. It has generally been accepted since the decision of the Supreme Court of Appeal in Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) that neither the employer nor the members have any right to the surplus. It vests in the pension fund itself. Employers also knew (or should have known) that the PFA could be amended at any time, and has in fact been amended many times since 1 January 1980.

69. It follows that employers' ability to continue taking contribution holidays on the strength of the surplus in pension funds has always been somewhat precarious, even though the surpluses may in part have been created through deliberate over-funding.

70. It may be argued, in response, that while employers always ran the risk of *prospective* changes in legislation, they can legitimately object to *retrospective* legislation. However, even purely prospective legislation could have deprived employers of the ability to continue taking contribution holidays. The retrospectivity in the amending Act relates to

the enhancement of benefits paid to members who withdrew from the fund in the past. However, purely prospective legislation could have been passed which, while not conferring any benefits on past members, improved the future benefits of pensioners and members and required that all existing surplus be apportioned among such pensioners and members to the exclusion of the employer. Indeed, the prospective minimum benefits for which the amending Act makes provision seem to me to constitute liabilities of a pension fund for purposes of calculating the surplus to be apportioned. The minimum benefits in question are payable to members on cessation of membership, liquidation of the fund and its conversion from a DB to a DC fund, as well as to pensioners who are entitled to prescribed minimum pension increases (section 14A(1)). In other words, in assessing the surplus to be apportioned the actuary will have to take into account the Fund's new obligations to existing pensioners and members in respect of their future minimum benefits. This flows from the definition of the term "actuarial surplus" in section 1 of the PFA. If that is correct, it would notionally be possible for a surplus which existed prior to the amending Act to be reduced and even entirely eliminated purely by virtue of the pension fund's additional actuarial liabilities arising from the prospective minimum benefits for which the amending Act makes provision.

71. This indicates that even a purely prospective piece of legislation might have had the effect of precluding employers from taking future contribution holidays. The risk of prospective legislation was one which contributing employers have always run. Viewed in this light, the fact that the legislature chose not to exclude employers from participating in

surplus apportionments but on the other hand spread the net of beneficiaries wider so as to include former members does not seem to me to be strikingly unfair.

72. In the circumstances, although an attack based on retrospectivity is arguable, I think it more likely to fail than to succeed.

PF Circular 109

73. That brings me to the two determinations by the Registrar in PF Circular 109, namely that rule amendments and section 14 transfer schemes submitted before 7 December 2001 should be treated in terms of the law as at the date of submission rather than the date of the Registrar's decision, and that rule amendments and section 14 transfer schemes agreed by the trustees of the fund of funds concerned before 7 December 2001 but not submitted to the Registrar before then should be treated in terms of the PFA, as amended by the amending Act.

74. As explained earlier, among the new provisions inserted in the PFA by the amending Act are the obligation in terms of sections 14A and 14B to provide to members the minimum benefits set out in those sections, and sections 15A to 15K which regulate actuarial surpluses belonging to pension funds.

75. Prior to the amending Act there were no statutory provisions governing the apportionment of surplus. However, it was open to a fund, its members and the participating employer to reach agreement concerning the division of surplus. In most instances the implementation of agreements of this sort necessitated an amendment to the fund's rules, and the amendment required the Registrar's approval under section 12 of the Act.

76. The division of surplus also arose in the past in the context of the conversion of DB funds into DC funds. Such conversions generally involved the transfer of members and associated assets from the existing DB fund to the new DC fund, and required the Registrar's approval under section 14 of the Act.

77. Up to 7 December 2001 the Registrar considered matters of this kind under sections 12 and 14 of the Act in accordance with the law as it then stood. Those arrangements would in many instances not be in accordance with the Act as now amended. For example, the Registrar did not, in considering agreements for the division of surplus, insist that former members going back to 1 January 1980 be considered. And in the context of conversions implemented under section 14, the Registrar did not insist on any particular portion of the surplus being transferred to the new DC fund or being retained in the old DB fund, whereas the amended Act stipulates that if a conversion takes place the mandatory apportionment of surplus required by section 15B be brought forward to the effective date of the conversion (section 15B(1)(*b*)(iii)).

78. I gather that on 7 December 2001 a number of applications of this kind under sections 12 and 14 of the Act had been submitted to but not yet considered by the Registrar. Subsequent to 7 December 2001 further applications of this kind were submitted to the Registrar in circumstances where the agreements for the division of surplus or for the conversion of the funds were concluded prior to 7 December 2001. The Registrar initially refused to approve any applications of this kind on the ground that the amending Act was applicable. The Registrar then sought and obtained legal opinion on the matter, and in the light of that opinion issued Circular PF109.

79. As I was the co-author of an opinion obtained by the Registrar on this issue, which is a privileged document, I am to some extent constrained as to what I can say about the issues now reflected in Circular PF 109. I shall accordingly limit my discussion of this issue today to, first, a general explanation of both sides of the debate as to the applicability of the amending Act to applications submitted to the Registrar before 7 December 2001 and, secondly, an explanation of the reasons why, in my view, all applications submitted after 7 December 2001 are indeed subject to the amending Act.

80. In both cases the main issue to be determined is at what stage (if any) parties seeking approval under sections 12 and 14 arising from arrangements concluded prior to 7 December 2001 could be said to have acquired any vested rights under the law as it then stood. If it is found that rights in this sense were created, the presumption would be that such matters are (to that extent) unaffected by the amendments to the

Act, unless it can be found that the legislature intended the amendments to operate retrospectively.

81. The point of departure is the proposition that where a statute creates a regime for the obtaining of a licence, permit or approval, it cannot be said that every person who could notionally make an application under the Act has acquired a right which would be unaffected by subsequent amendments to the legislation. Something more is required. It is generally accepted that what is required is an application to the administrative decision-maker in question, i.e. that in the absence of a contrary intention in the amending or repealing legislation the application must be determined in accordance with the law prior to the amendment or repeal (important cases dealing with this issue are Mahomed NO v Union Government 1911 AD 1, Natal Bottle Storekeepers and Off-Sales Licencees Association with Liquor Licensing Board for Area 31 and Others 1965 (2) SA 11 (D), Bell v Voorsitter van die Rasklassifikasieraad en Andere 1968 (2) SA 678 (A), Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of Manpower and Another 1984 (2) SA 238 (D), Richard R Currie Properties Ltd v Johannesburg City Council 1986 (2) SA 777 (A) and Chairman, Board on Tariffs & Trade v Volkswagen of South Africa (Pty) Ltd and Another 2001 (2) SA 372 (SCA)).

82. It follows that, in the absence of a contrary intention appearing from the amending Act, persons who, prior to 7 December 2001, submitted amendments and schemes to the Registrar for approval under sections 12 and 14 of the Act, have the right to have those applications disposed

of in accordance with the law as it stood prior to the amendments of 7 December 2001.

83. The question whether a contrary intention appears from the amending Act is not an easy one to answer.

84. On the one hand it may be argued that several provisions in the amending Act do evidence a contrary intention. The amending Act is programmatic in nature, i.e. it changes the law and fixes a series of dates for or for compliance with the innovations it introduces. This suggests that Parliament intended that all pension fund matters, including pre-amendment business, must be dealt with in accordance with the amending Act with effect from those dates. The following two examples illustrate this point:

84.1 Section 15A(3) provides that after the commencement of the amending Act on 7 December 2001, the only portion of the assets of a pension fund that may be used by, or for the benefit of, the employer, is any credit balance in the employer surplus account. The only exception to this is that an employer may continue with a contribution holiday until the actuarial surplus is apportioned, provided that the value thereof augmented by the fund's nett investment return is added to the actuarial surplus when it is apportioned. The employer surplus account is one of the accounts created upon the apportionment of the surplus with effect from the next statutory valuation of the fund. Section

15B(4) requires that a scheme for the apportionment of surplus shall include not only existing members but also any former members who left the fund in the period from 1 January 1980 to the date of the surplus apportionment. This requirement will doubtless reduce the quantum of surplus credited to the employer surplus account. In terms of section 15E(1)(g), read with section 15J, the only circumstance in which actuarial surplus in the employer surplus account in an ongoing fund may be paid to in cash to the employer is where such payment is necessary to avoid retrenchment of a significant proportion of the workforce. What then of applications for rule amendments pending on 7 December 2001 which, if approved by the Registrar, would permit the payment in cash of part of the surplus in the fund to the employer otherwise than upon the liquidation of the fund or to avoid retrenchment of a significant proportion of the workforce? The express intention of the Act, as amended, is to prohibit such payments. Or what of pending applications that have not provided for any allocation to former members? Again, the express intention of the Act, as amended, is to require that such allocations be made.

84.2 Section 14A(2)(*b*), read with section 14A(1)(*c*), provides, inter alia, that in respect of a fund which is registered prior to 7 March 2002 and is converted from a DB fund to a DC fund, the amount to be credited to the member's individual account shall not be less than the minimum individual reserve determined in accordance with section 14B(2). The express intention of the

> Act, as amended, is to secure that result. What of pending applications which provide for credits of less than members' minimum individual reserves?

85. On the other hand, the presumption is against a contrary intention, and there is no express statement that the amending Act applies to pending applications. As to an implication to that effect, it may be argued that there is not enough in the amending Act to override it. While important policy objectives no doubt underlie the amendments to the Act, the retrospective operation of those amendments might be unfair. The funds and the employers in question might have expended considerable time, effort and money in negotiating fair arrangements with the members. If the proposed arrangements are unfair to existing members, that is a matter which the Registrar can adequately address under the statutory provisions which prevailed prior to 7 December 2001. The interests of former members are not so compelling as to require all pending applications to be rejected for non-compliance with the amended Act.

86. However, if, as the Registrar has determined, the amending Act does not apply to applications submitted before 7 December 2001, the same cannot be said of applications submitted thereafter based on arrangements concluded prior to 7 December 2001. In order to be a pending matter in the sense contemplated in the cases, an amendment or scheme must actually have been submitted to the Registrar for approval. Neither an amendment under section 12 nor a scheme under section 14 has any effect until it has been submitted to and approved by the Registrar. The resolution by trustees to amend the rules of a fund does

not have any immediate effect and cannot therefore give rise to vested rights. The same applies to an agreement of transfer to which all relevant parties have agreed but which they have not yet submitted to the Registrar under section 14. The vested right now under consideration and which is recognised in the cases is the right to have an application considered in accordance with the law which prevailed when the application was submitted to the relevant authority. That right cannot come into existence until the application is submitted.

87. I understand however that there may be some who believe that agreements aimed at benefit improvements for members concluded before the commencement of the amending Act should be given effect to because what is required to be apportioned in terms of the amending Act is the surplus as at the surplus apportionment date, whatever that is, not the surplus as at 7 December 2001. The argument is that the amending Act does not prohibit the granting of benefit improvements to members before the surplus apportionment date, even though that would absorb part (or all) of the surplus.

88. In my view, the argument is wrong. It is correct that the surplus which must be apportioned under section 15B is not the surplus existing as at 7 December 2001 but the surplus existing "**as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the commencement date**". But it is not correct to say that the amending Act does not prohibit the granting of benefit improvements to members before the apportionment date. The voluntary use of surplus for such a purpose would seem to amount in

substance to an apportionment of the surplus for purposes of section 15B, so that the use of the surplus for that purpose would only be permissible as part of a scheme of apportionment under that section. Section 15B(1)(*b*)(i) states that if the board of a fund elects to apportion actuarial surplus at a date earlier than the effective date of the next statutory actuarial valuation, it may do so if the statutory valuation date is advanced to such earlier date. It follows that if the board wishes to apportion surplus by improving members' benefits prior to the effective date of the next statutory actuarial valuation, it would be necessary to advance the valuation date and to submit a scheme of apportionment of the surplus existing at the earlier date.

89. The mandatory minimum benefits prescribed by sections 14A and 14B stand on a different footing from the voluntary use of surplus to enhance members' benefits. In practice, however, the effect of the provisions of the amending Act seem to be such that any surplus in a fund which was in existence as at 7 December 2001 could not be applied to fund minimum benefits prior to an apportionment under section 15B. The minimum withdrawal benefits stipulated in section 14A(1)(*a*) only apply from a date 12 months after the surplus apportionment date (section 14A(2)(*b*)(i)). The minimum liquidation and conversion benefits specified in sections 14A(1)(*b*) and (*c*) are stated in section 14B(2)(*b*)(ii) to apply from the commencement date, but sections 15B(1)(*b*)(ii) and (iii) stipulate that in the event of a liquidation or conversion, the effective date of such liquidation or conversion shall be the surplus apportionment date. As regards the prescribed minimum pension increase, this is stated in section 14A(1)(*d*) to be applicable on the

effective date of the first actuarial valuation following the commencement date, which in the ordinary case will coincide with the surplus apportionment date.

Sharing in the surplus in another fund

90. That brings me, finally, to the third issue, which as explained is whether members or former members of a pension fund ("A") can lay claim to the credit balance in the employer reserve account in another pension fund ("B") which was credited or created, before 7 December 2001, when members and assets were transferred from fund A to fund B. This problem will generally arise where B is a DC fund to which most of the members of A, a DB fund, and most of the surplus in A, were transferred before 7 December 2001.

91. In my opinion, the only persons who can permissibly participate in a distribution of surplus under section 15B are the members and former members of the fund in which the surplus exists and the employers participating in the fund. By definition, members or former members of fund A who never became members of fund B cannot be viewed as members or former members of fund B.

92. This conclusion is supported by the provisions of section 15B. Thus, section 15B(5) requires the board to apportion the actuarial surplus in a fund between the various classes of "**stakeholders**" who the board has determined shall participate in the apportionment. In section 1 the word

"**stakeholder**", in relation to a fund, is defined to mean "**a current member, including a pensioner and a deferred pensioner, a former member and an employer participating in the fund**". Section 15B(9)(e) lists the persons who must be given 12 weeks to complain about an apportionment scheme to "**the employer, members, former members, and any fund to which former members have transferred**". And section 15B(9)(h) requires the Registrar to be satisfied that, *inter alia*, the scheme "**accords full recognition to the rights and reasonable benefit expectations of existing members and former members in respect of service prior to the surplus apportionment date**".

93. Perhaps the strongest indication is to be found in section 15B(2)(b), which stipulates that the scheme "**may involve**" two or more of the options listed there. Only members, former members and participating employers are contemplated. The section is clearly exhaustive of the matters which a surplus apportionment scheme may involve. In my view, the section by necessary implication prohibits the distribution of surplus in any other way or to any other persons. The implication is a necessary one because the purpose of sections 15A to 15K is strictly to regulate what may and what may not be done with an actuarial surplus.
