Legal issues that arise in the context of valuations of retirement funds as at their surplus apportionment dates

Presentation to the Retirement Matters Committee
of the Actuarial Society of South Africa

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Introduction

The admirable purpose of the surplus legislation

In the old days occupational retirement funds were as bad as retirement savings vehicles as retirement annuity funds are now – many members did not know that they would be penalised on early withdrawal and for many early withdrawal was not a matter of choice – the members were retrenched, dismissed or transferred.

Remedial legislation was appropriate, as was legislation designed to achieve greater fairness in occupational retirement funding in the future.

Unfortunately the Pension Funds Second Amendment Act of 2001 ("the surplus legislation") was drafted in a hurry and changed by Parliament in a hurry and, as a result, it is worded so poorly that many of the objectives of the legislation have not been achieved.

In my opinion the Registrar is trying to achieve those objectives by means other than the enforcement of the legislation as it is currently worded and this is the subject matter of my address today.

Background to presentation

I have several retirement fund clients which are faced with major dilemmas. The Registrar has

informed them that it does not like the reports on their valuation and so will not approve their surplus apportionment schemes until his concerns regarding the valuations have been addressed to his satisfaction. In essence the Registrar appears to be telling the funds' valuators how the funds should be valued.

To date only one of my clients has initiated legal proceedings with a view to having the Registrar's decision in relation to its valuation set aside. Others are considering their position because there are major impediments to the launching of litigation against the Registrar in regard to his rejection of valuation reports.

The first is, of course, the expense involved. Litigation is an expensive exercise with uncertain result and even if successful, a fund will never recover from the Registrar its full costs of the exercise.

The second impediment is the time that it would take. Boards of funds have been burdened with surplus legislation responsibilities for many years now and both the funds and the members of those boards want to get on with their normal operation and business. Litigation will only extend the period of their uncertainty that will make that impossible. Worse still, it will delay by many months, if not years, the date on which the fund's surplus apportionment scheme may be given effect and members and former members may enjoy the benefits of it. Some of those members and former members may die before enjoying those benefits. It was the picture of pensioners dying off in their dozens, if not hundreds, before they could get the pension increases to which they would be entitled in terms of a pre-surplus legislation surplus distribution scheme that made a retirement fund client of mine settle for millions of rands what we all regarded as an outrageous claim by wealthy former members. So the impediments to litigation are great and for this reason it is only a brave few that even contemplate embarking on it and that, to date, the Registrar's conduct has not been successfully challenged.

In this paper I will be discussing some of the issues which form the subject matter of these cases and I will be expressing my legal opinion on those issues. I will not, however, try to guess what the FSB Appeal Board or a court of law is likely to say about the issue because that may violate the *sub judice* rule.

Topics to be discussed

The issues with which I propose to deal are the following:

- Does the Registrar have the legal power to reject a report on the valuation of a fund on the basis that he does not like the assumptions and methods used in the valuation ?

- Assuming that the Registrar does have that power, can he take into account the fund's proposed surplus apportionment scheme in determining whether or not to reject the report on the valuation ?

Does the Registrar have the legal power to reject a report on the valuation of a fund as at its surplus apportionment date on the basis that he does not like the assumptions and methods used in the valuation ?

Section 15B(1)(a) says:

> "Subject to paragraph (b), the board of a fund shall submit to the registrar a scheme for the proposed apportionment of any **actuarial surplus** . . . as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following, the surplus apportionment date."

So what must be "apportioned" must be the fund's actuarial surplus. But what is that?

"Actuarial surplus" in relation to a fund subject to actuarial valuation is defined in the Act as meaning -

> "the difference between -
>
> (i) The value that the **valuator** has placed on the assets of the fund less any credit balances in the member and employer surplus accounts; and
>
> (ii) The value that the **valuator** has placed on the liabilities of the fund in respect of pensionable service accrued by members prior to the valuation date together with the value of those contingency reserve accounts **which are established or which the board deems prudent to establish** on the advice of the valuator.

It is clear from this definition that what constitutes an actuarial surplus is determined by the fund's valuator in the exercise of his or her professional judgment. The board of trustees, acting on the advice of the valuator, may decide that certain contingency reserves should be established to

provide for future uncertain events but the amount of the provision to be made is a matter for determination by the valuator.

The term "contingency reserve account" is defined in the Act as –

> "an account of the fund to which shall be credited or debited **such amounts as the board shall determine, on the advice of the valuator** where the fund is not exempt from actuarial valuations, in order to provide for explicit contingencies."

When enacting the Pension Funds Second Amendment Act, 2001, ("the surplus legislation"), parliament did not seek to interfere with the exercise by valuators of their professional discretion in the determination of the surplus available at the surplus apportionment dates of retirement funds. It was concerned rather with how such surplus as may be available would be apportioned.

Of course, as we now know, the timing of the legislation was poor as the surplus apportionment dates of most retirement funds subject to actuarial valuation fell during a period during which the markets were down. This, on its own, meant that the amount of surplus available for apportionment in terms of the legislation has been much lower than had been expected and the hopes of thousands of people who had expected to benefit from the legislation, especially former members who left funds when withdrawal benefits were poor, have been frustrated.

The Minister of Finance and the Registrar have sought to minimize some of the problems with the legislation by issuing regulations purportedly in terms of section 36 of the Pension Funds Act ("the Act"). Section 36 authorises the Minister to make regulations "as to all matters which he considers it necessary or expedient to prescribe in order that the purposes of the Act may be achieved" provided that such regulations are "not inconsistent with the provisions of the Act."

There are a number of regulations that have been issued in an attempt to deal with deficiencies in the surplus legislation which, in my opinion, are inconsistent with the provisions of the Act and are accordingly *ultra vires* the powers of the Minister and of no force or effect. I propose to deal with only one today[1] and that is regulation 35 which in sub-regulation (2) purports to empower the Registrar to reject the establishment of a contingency reserve account or the magnitude of the assets credited to that account and in sub-regulation (3) purports to require a fund to "take such

[1] I discussed the others in a paper I presented on 7 May 2003 at a seminar I conducted with Jeremy Andrew at the offices of Edward Nathan (Pty) Ltd. A copy of the paper will soon be available on my new firm's website at www.hunterlaw.co.za.

steps in connection therewith as the Registrar determines and sets out in writing to the relevant fund".

These regulations are inconsistent with the Act as the definitions of "contingency reserve" and 'actuarial surplus by implication exclude any power of the Registrar to approve or disapprove the establishment of a contingency reserve account.

Sub-regulation (4) which purports to require funds to establish contingency reserve accounts to house amounts which would be payable as former member minimum benefit top-ups if the former members could be traced is inconsistent with the Act as section 15B(5)(e) specifically states that a board "may allocate a portion of the actuarial surplus" to such an account for such a purpose.

The Registrar has sought to use his powers in terms of section 16(9) read with section 15(3) of the Act to compel actuaries to value funds on the basis of assumptions that he prefers that they use. But I do not think that it authorises him to do so.

Section 16 of the Act requires registered funds to cause their financial conditions to be investigated and reported on by a valuator at intervals not exceeding three years and to deposit a copy of each such report with the registrar. Section 16(9) says –

> "The provisions of subsection (3) of section 15 in connection with a document relating to the financial position or the revenue or expenditure of a fund referred to therein, shall apply *mutatis mutandis*[2] in respect of a copy of a report deposited with the registrar in terms of subsection (1) of this section and which in the opinion of the registrar does not correctly reflect its financial condition referred to in the said subsection (1)."

Section 15(3) says that –

> "[I]f the registrar is of the opinion that any document furnished by a registered fund in terms of subsection (1) **does not correctly reflect** the revenue and expenditure or **the financial position** (as the case may be) **of the fund, he may reject the said document**, and in that event –
>
> (a) he shall notify the fund concerned of the reasons for such rejection; and
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> (b) the fund shall be deemed not to have furnished the said document to the Registrar . . . ".
>
> [my emphases]

[2] That is, with the changes required by the context.

The use of the word "correctly" suggests that the test is an objective one, whereas, as we know, the determination of financial soundness and the likelihood of its sustainability is a subjective exercise involving individual judgment, albeit based on skill and expertise.

Furthermore, the Act does not define the meaning of the term "financial condition", which is the term used in section 16 and which, by application of the '*mutatis mutandis*' provision in section 16(9), probably should replace the term "financial position" when section 15(3) is read with it.

The term "financial condition" is used in –

- section 12(3)[3] when it imposes certain conditions for the approval of rules and section 24[4] which imposes certain condition for the approval of rule amendments that may affect the financial condition of the fund;

- section 14(1)(c)[5] when it says that a section 14 transfer scheme will be of no force or effect unless the Registrar is satisfied that, amongst other things, the scheme will not render one of the funds that is a party to the scheme financially unsound;

- section 16(5)[6] which authorises the Registrar to require a fund to have its financial condition

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[3] Which states -

> "If any such alteration, rescission or addition [to the rules] may affect the **financial condition** of the fund, the principal officer shall also transmit to the registrar a certificate by the valuator or, if no valuator has been employed, a statement by the fund, **as to its financial soundness**, having regard to the rates of contributions by employers and, if the fund is not in a sound financial condition, what arrangements will be made to bring the fund in a sound financial condition."

[4] Section 24(a)(ii) says –

> "[I]f the alteration or rescission of or addition to the rules affects the financial condition of the fund, a certificate by a valuator as to the financial soundness of the alteration, rescission or addition or, if no valuator has been employed, a certificate by an actuary that the provisions of regulation 2 shall continue to apply;"

[5] Which states that the registrar may not approve a scheme for the transfer of any business to or from a fund unless he is satisfied, amongst other things –

> ". . . that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a **sound financial condition** or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory."

[6] Which states the following:

> "Notwithstanding anything contained in the preceding subsections, the registrar may, with the consent of the Minister, and after not less than one month's notice in writing to any registered fund, require that fund to cause

investigated if he is of the opinion that it is financially unsound;

- section 17(1) which authorises the Registrar to exempt a fund from having to report on its financial condition to be reported on by way of a report on its actuarial valuation[7];

- section 18 which empowers the Registrar to require a fund to prepare and submit to him a scheme by which the fund may be restored to a sound financial condition whenever the Registrar is of the opinion that it is not in such a condition[8];

- section 21 which gives the Registrar the power to require a fund to furnish him with such additional information that he may require to make "the necessary decision" as to a return relating to the financial condition of the fund[9]; and

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such an investigation to be made in respect of the position as at the expiration of any financial year**, if the registrar is of the opinion that an investigation would show that the fund is not in a sound financial condition**: Provided that in the case of a fund which is carrying out the terms of a scheme approved by the registrar in terms of section eighteen, the registrar shall not act in accordance with the preceding provisions, unless he is of the opinion that an investigation would show that such scheme is unlikely to accomplish the objects of that section."

[7] The section says:

> "If the registrar is satisfied that the financial methods adopted by a registered fund are such as to render periodical investigations by a valuator unnecessary, he shall, at the request of such fund, authorize the fund to prepare and furnish to the registrar a statement of its liabilities and assets **in lieu of causing its financial condition to be investigated and reported upon by a valuator** in terms of section sixteen."

[8] Section 18(1) says:

> "When any return under this Act indicates, in the opinion of the registrar, that **a registered fund is not in a sound financial condition**, the registrar shall, save as provided in section twenty-nine, direct the fund to submit a scheme setting out the arrangements which have been made or which it is intended to make to **bring the fund into a financially sound condition** within a reasonable period, and the fund shall deposit such scheme with the registrar within three months from the date of receipt of the said direction, together with a report thereon by a valuator or, in the case of a fund to which the provisions of section seventeen apply, by the auditor of the fund."

[9] The section says:

> "(1) If the registrar is of the opinion that –
>
> (a) any application for registration of a fund or of an alteration or rescission of rules or of an additional rule; or
>
> (b) any return or scheme relating to the **financial condition** of a fund
>
> does not disclose sufficient information to make the necessary decision, the person concerned shall furnish such additional particulars as the registrar may deem necessary."

- section 26 which allows the Registrar to apply to court for an order changing the rules of the fund if, in his opinion, the fund is not in a sound financial condition[10].

It appears from these sections that a fund may be in one of two possible conditions; financially sound or financially unsound. The adjective "sound" is defined in the *New Oxford Dictionary of English*[11] as meaning "in good condition, not damaged, injured or diseased, financially secure." The condition of financial soundness is rather like the condition of pregnancy; either it is present or it is not.

In the circumstances it seems to me, when the Registrar, in the exercise of his discretion in terms of section 16(9) read with section 15(3), is required to decide whether or not a report on the financial condition of the fund is correct, all that he can do is decide whether or not it correctly states that the fund is financially sound or unsound. If the Registrar would prefer the use of an assumption that would reflect a funding level of 150% rather than another that would reflect a funding level of 110%, he may not require that his preferred assumption be used. If, on the other hand, the assumption used by the valuator is an assumption that no reasonable valuator would use, the Registrar would be justified in rejecting the report as an "incorrect" reflection of the financial condition of the fund.

In its judgment in *Fata v The Alexander Consulting Group Ltd*[12], the Supreme Court of British Columbia in Canada said the following:

> "When actuaries perform valuations of pension plans, they must choose from different methodologies and different assumptions in accordance with generally accepted actuarial practice. In view of the speculative nature of the assumptions, it is not possible to say that one assumption is correct and all other possibilities are incorrect. Rather, there is a range of potential assumptions which are generally accepted in actuarial practice. If two actuaries pick different values within the acceptable range in respect of one assumption and otherwise use the same assumptions and the same methodologies, one cannot say that the valuation done by one actuary is correct and that the

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[10] Section 26(1) says:

> "(1) **If in the opinion of the registrar a registered fund is not in a sound financial condition**, and if such fund has failed to act in accordance with the provisions of section eighteen, or if such action is necessary as a result of an investigation under section twenty-five, the registrar may apply to the court for an order directing that the rules of the fund relating to the appointment, powers, remuneration (if any) and removal from office of the board, or relating to such other matter as the registrar may regard as appropriate, be altered in a manner to be specified by the registrar in such application."

[11] 2000 at 1778.

[12] 1997 *CanLII* 1314 (BC S.C). The judgment may be accessed at http://www.canlii.org/bc/cas/1997/1997bcsc11054.html

> other valuation is mistaken. The two actuaries have expressed their opinions, neither of which can be categories as mistaken.[13]
>
> . . . In principle it seems to me that a valuation result cannot be said to be mistaken unless it falls outside a range of values which is produced by employing different assumptions and methodologies, all of which are generally accepted in actuarial practice.[14]
>
> . . . I accept that generally acceptable actuarial practice will itself have a limitation on the choice of some assumptions and methodologies in producing such a range of values. For example, some assumptions are interrelated and it would not be appropriate to choose the interrelated assumptions at the opposite extremes of the two acceptable ranges."[15]

Of course, that is not the end of the matter. As the English High Court said in *Re Imperial Foods Pension Scheme*[16]:

> "The function of an actuary in any situation which is not governed precisely by the provisions of the trust deed [or, in South Africa, the rules of the fund] is to achieve the greatest possible degree of fairness between the various persons interested under the scheme."

It is not, however, the duty of the Registrar to decide whether the actuary has complied with this duty. I do not even believe that he has the power to do so, acting in his capacity as Registrar. A person with a financial interest in the fund and who is aggrieved by the methods and assumptions employed by an actuary may bring his or her complaint to the attention of the board of the fund and, if it does not take the steps to remedy the problem that the person believes should be taken, may refer the complaint to the adjudicator for determination.

Furthermore, as you are all aware, your own professional conduct standards require you to "act professionally and to give professional advice" mindful of the duty of care that you owe which may extend to persons or organisations who or which you can reasonably expect to rely on your advice. Your failure to meet that standard may result in a complaint against you being made to the Actuarial Society, by the Registrar or anyone else with an interest in the matter.

Finally, the Registrar may reject a valuation report which is fundamentally flawed by the failure of the valuator to apply his or her mind to a relevant fact or issue to which his or her mind should have been applied because in those circumstances the report is not a report at all.

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[13] At paragraph 59 of the judgment.

[14] At paragraph 62 of the judgment.

[15] At paragraph 63 of the judgment.

[16] [1986] 1 *WLR* 717.

The Registrar may not, however, determine that a report on the financial condition of a fund as at its surplus apportionment date is incorrect because he believes that the actuary has failed to use assumptions that are fair to all concerned, including former members of the fund.

Unfortunately the Registrar appears to believe that he can. In one case in which he has rejected the report on the valuation of the fund as at its surplus apportionment date and the fund has decided to appeal against his decision to do so, the Registrar said in his reasons for his decision the following:

> "This valuation as at 31 December 2001 may well have been acceptable had it not been for the Pension Funds Second Amendment Act, 39 of 2001 (the surplus legislation).
>
> Traditionally actuaries are known, for good reason, as being conservative in their assumptions. This is appropriate in an ongoing fund where the conservatism protects members, the fund and the employer[17].
>
> The surplus legislation brought about another dimension with the introduction of former members as stakeholders. Whilst a conservative approach was in the best interests of members, the fund and the employer, an over-conservative approach would penalise former members. Under these circumstances, a correct or more objective approach is needed, rather than a conservative or ultra conservative approach."

In this case the main issue in dispute is the assumption made by the valuator of the fund in regard to future salary increases. The valuator assumed that salaries would be increased over the inter-valuation period by CPI plus one per cent. The Registrar has said that the valuator could have used CPIX, the measure of price inflation used by the Reserve Bank in its inflation-targeting programme which would have reduced the fund's liabilities by approximately R1 billion and made that amount available for distribution in terms of the surplus legislation. He has acknowledged in his reasons that, in the long term, CPI and CPIX should "trend together" but pointed out that, over the particular 5 year period examined by the valuator for the purpose of making his salary increase assumption (1998 to 2003), they diverged to a considerable degree. In the circumstances, he said, "this variability must raise concerns as to the use of that period" although the fund's surplus apportionment date fell right in the middle of the period !

The Registrar also expressed the view that the actuary should have made a judgment call that would have been at neither extreme (CPI or CPIX).

[17] It is arguable that actuarial conservatism has not protected employers because it has required them to over-fund funds to the extent that some funds were over-funded to a considerable degree as at their surplus apportionment dates.

In conclusion he has implied in his reasons that the valuator's assumption was "ultra conservative". He has not, however, stated clearly that, in his opinion, no reasonable actuary could have used the assumption used by the actuary in this case. In my opinion this will be very difficult for him to do and this may be fatal to his case, particularly as he has said that, but for the enactment of the surplus legislation, the report on the valuation of the fund may have been acceptable.

What is particularly interesting about this case is that, before the Registrar rejected the report on the valuation of the fund as at December 2001, the fund submitted to him its report on the valuation of the fund as at December 2004 which has showed that the salary increase assumption used by the actuary was spot on. The Registrar said that he would not consider that report until he had decided on the report on the 2001 valuation.

Can the Registrar take into account the fund's proposed surplus apportionment scheme in determining whether or not to reject the report on the valuation ?

One of my clients recently received a letter from the Registrar which included the following statement:

> "2. The Registrar has pended [*sic*] the statutory actuarial valuation report as at 31 December 2001, until the following issues have been explained satisfactorily or have been resolved:
>
> 2.1 . . .
>
> 2.2 Paragraph 6.3(d) [of the application for the approval of the fund's surplus apportionment scheme], read together with the valuator's letter dated 30 June 2005 in response to the Registrar's letter dated 22 April 2005, refers. The level of the solvency reserve is excessive and is not acceptable.
>
> If the excess of the notional pensioner accumulation account over the pensioner liabilities is reserved for, the Registrar requires that it be set aside explicitly for pensioners only. You should refer to par.2(b) of Board Notice 37 of 2003 in this regard."

The board notice to which the Registrar refers in this letter is the board notice on methods of apportionment deemed to be equitable.

What this letter indicates is that the Registrar will only accept a report on the valuation of a fund as at its surplus apportionment scheme, if, read together with the fund's surplus apportionment scheme, it produces an outcome which he believes to be equitable.

I can talk at length about why I do not believe that the Registrar has the power to decide on the equity of a surplus apportionment scheme and why I believe that all he is empowered to decide is whether such a scheme is one of a number of possible schemes that would be reasonable in the circumstances of the fund[18], but that is not the purpose of my address today.

One of the first problems that many of my clients have experienced is that the Registrar has refused to accept the submission of reports on the valuation of funds with surpluses as at their surplus apportionment scheme without the simultaneous submission of their proposed surplus apportionment schemes. I cannot see any legal basis for this. As I have already mentioned, Parliament did not see fit to alter the basis upon which funds are required to be valued for the purpose of statutory surplus apportionment. Furthermore, even if the Registrar has the power to reject a report on the valuation of the fund as at its surplus apportionment scheme on the grounds that the valuation assumptions used are unacceptable to him, then, in deciding whether or not to accept the report on the valuation of the fund, he cannot take into account the proposed surplus apportionment scheme. And if he cannot take into account the proposed surplus apportionment scheme, there cannot be any basis on which he can refuse to look at the valuation report without it.

During my research in preparation for this talk I came across what I found to be a very interesting judgment of the Chancery Division of the UK High Court of Justice in *Stevens, Webb, Brand, Bromwich & others v Bell, Palmer, British Airways Plc and KMR Post*[19]. The case concerned the interpretation of the rules of a multi-employer retirement fund which stated that at intervals of not more than three years, the fund's actuary was required to "make an actuarial valuation of the assets and liabilities of the Fund and . . . report on the financial position thereof to the Management Trustees . . .".

The judge described the valuation process in general terms as follows: I am not going to read it out to you because I am sure that it sounds like "*Fund Valuations 101*" to you but I would like you to take note of what I have highlighted.

> "At regulator intervals, now no more than every three years, the Scheme Actuary has to value the assets and liabilities of the Scheme so that he can determine whether the assets are sufficient to

[18] I have prepared a paper on this issue which should soon be available on the website www.hunterlaw.co.za.

[19][2001] *EWHC* Ch13 (16 February 2001). The judgment can be found at http://bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/2001/13.html
There was an appeal against some of the findings in this matter but not against the findings which I discuss in this paper. See *Stevens & Ors v Bell & Ors* [2002] EWHC Civ 672 (20th May 2002) which judgment can be found at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/672.html

> cover liabilities, or not, and if not by how much. He then has to deal with two questions: so far as liabilities attributable to serve up to the valuation date ("past service") are concerned, do the assets as at the valuation date suffice ? If they do not there is a deficiency which will need to be made up. If they are sufficient then, depending on the margin, there may be a surplus which can be used in other ways. He also has to consider the position for the future, as regards the liabilities that will arise in respect of service after the valuation date ("future service"). Normally, in an ongoing scheme, he would expect to find that a given level of employer's contribution will be needed to make up the difference between what the employees will pay for future periods and what benefit they will become entitled to as a result of those contributions and that service. That would enable him to establish a rate of contribution for the future for employers. If there is a past service surplus, a possible use for some or all of that is to cover what would otherwise be the employer's future service contributions. In making these assessments and valuations, the actuary uses various assumptions, both financial and demographic. **Once thing is certain about the results of the forecasts made using these assumptions is that they will not turn out to be exactly accurate. Nevertheless, by applying his professional expertise, he comes to what he regards as the most appropriate estimate of the likely out-turn of all the relevant facts. He needs to hold a balance between the concerns of the employer and of the beneficiaries and will therefore proceed with a degree of caution in deciding on the assumptions to use when making his forecast."**[20]

This section of the judgment echoes that of the English Court in *In Re Imperial Foods Scheme* to which I have already referred.

The rules of the fund also stated that:

> "[**I**]f the Actuary certifies that a deficiency or disposable surplus as the case may be is attributable to an Employer he shall certify the amount thereof and the Management **Trustees shall** within three months after receiving such certificate **make a scheme for** making good the deficiency or as the case may require **disposing of the disposable surplus . . .**"

The first question that the judge was asked to decide was the meaning of the term 'disposable surplus'. The judge said the following:

> "One of the matters debated before me is the meaning of the phrase "disposable surplus", but it is at least common ground, and clearly correct, that it is not the same as surplus. It doe not follow, from the fact that the Actuary's calculations show a past service surplus of assets over liabilities of a given amount, that this amount is a disposable surplus. The Actuary has to exercise professional judgment in deciding whether any, and if so how much, of a surplus is a disposable surplus. Counsel used the phrase 'raw surplus' to refer to the bare result of his actuarial calculations before he considers how much, if any, is "disposable" and I will adopt that.[21] . . . Once the Actuary has made his first calculations on the triennial valuation which shows a surplus rather than a deficiency, he must consider whether there is a disposable surplus, and if so, how much it is. In performing that task he may make an allowance by way of reserve whether against general contingencies or, I dare say, against more specific factors, so as to reduce the amount available to be considered as

[20] At paragraph 9 of the judgment.

[21] At paragraph 23 of the judgment.

> disposable surplus. He can do this even if he has also built in a measure of reserve at the first stage of his calculation."[22]

The next question the judge was asked to decide was whether, in determining whether there was a 'disposable surplus' the actuary was entitled to take into account how the 'disposable surplus" would be dealt with in terms of the disposal scheme. The judge's answer was that he was not.[23] Significantly, the reason for this was not that the disposal scheme was a post-valuation event. On the contrary, the judge said that the actuary was entitled to take into account post valuation events that occurred before the actuary issued his valuation certificate, including benefit improvements which the fund's board was directed by the employer in terms of the rules to grant. The judge did, however, say, that the actuary could not make provision for directions which he merely expected the employer to give but which had not been given by the time that the actuary came to issue his certificate.[24]

This judgment should comfort a client of mine which has been told that it may not have a currency reserve account because the fall in the currency was a post-valuation event, even though the fall was felt most severely during the period leading to the finalization of the valuation report and, if the fund does not provide for the reserve, it will have been significantly under funded at its following valuation date.

Conclusion

You may be wondering why I have made such a fuss about the Registrar's conduct when I have declared myself to be a supporter of the objects of the surplus legislation.

The reason is this. While economic redistribution is important, so is the rule of law. The rule of law is not some device by lawyers to keep our profession in the ascendancy; it is a device that protects citizens from arbitrariness in governance. It is so important that it is at the cornerstone of our Constitution. The principle that it embodies is that that law should be clear and understandable and that in most cases it should be only prospective in effect so that people can organize their lives in a way which will bring them into conflict with the law as little as possible. Without it citizens would be subject to rules that could be changed at the whim of the rulers, as happened during the

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[22] At paragraph 28 of the judgment.

[23] See paragraph 29.

[24] Paragraph 29 of the judgment.

successive states of emergency in the 1980s when the Internal Security Act authorized the Minister of Law and Order to issue regulations and to change them whenever they did not achieve what he wanted them to achieve.

Believe me, I am not trying to compare the Registrar of Pension Funds with Minister Adriaan Vlok. The motives of the former are honourable where the motives of the latter were not. But our new democracy cannot afford to slip into the habits of the past. We must make our process of law-making better so that those who are tasked with implementing it do not feel compelled to resort to the kinds of tactics that I have described to achieve what I still believe to be the noble objectives of the surplus legislation. And, frankly, I do not believe that it is appropriate for the Registrar's office to rely on the natural reluctance of funds to litigate to seek to achieve what the legislation does not authorize. It is not the Registrar's responsibility to do what Parliament failed to do.