4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0081

P.O. Box 580, **MENLYN,** 0063
Tel: 012 346 1738, **Fax:** 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): W HAZEWINDUS AND ANOTHER ("complainants") v THE TONGAAT-HULETT PENSION FUND ("first respondent"); TONGAAT-HULETT DEFINED BENEFIT PENSION FUND ("second respondent") AND TONGAAT HULETT LIMITED ("third respondent")

[1] INTRODUCTION

1.1 This complaint concerns the apportionment of actuarial surplus in terms of section 15C of the Act.

1.2 The complaint was received by this Tribunal on 15 May 2013. A letter acknowledging receipt thereof was sent to the complainants on 2 July 2013. On the same date, the complaint was forwarded to the respondents requesting them to file their responses by 2 August 2013. A joint response, which was forwarded to the complainants, was received from the respondents on 2 September 2013. On 30 October 2013, further submissions were received from the

complainants.

1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainants are Mr Willem Hazewindus ("complainant one") and Mr Bruce St.Clair Moor ("complainant two"). The complainants were employed by the third respondent, an employer participating in the first respondent until they retired on 30 June 1998 and 31 May 2001 respectively. The complainants are former members and pensioners of the first respondent. The complainants are also former members of the board of the first respondent.

2.2 On 31 December 2001, the first respondent underwent a surplus distribution exercise in terms of section 15B of the Act. In terms of the surplus distribution scheme, all former members and pensioners of the first respondent were brought to the minimum threshold of benefits. A residue of some R300 million still remained in the first respondent as at the surplus apportionment date. The board of management of the first respondent decided to apportion two-thirds of this amount for the benefit of members, certain categories of former members and pensioners. One-third of this amount was allocated to the employer surplus account.

2.3 On 31 December 2007, a future surplus in the first respondent arose. On 10 December 2008, the board of management of the first respondent decided to allocate twenty percent of the total surplus to the employer surplus account and the bulk thereof remained in the first respondent.

2.4 On 31 December 2009, a future surplus again arose in the first respondent. On 31 August 2010, the board of management of the first respondent decided to allocate thirty percent of the total surplus to the employer surplus account. The residue remained in the first respondent.

2.5 On 1 November 2010, Hulamin Limited was unbundled from the third respondent, both entities being participating employers in the first respondent. Consequent upon the said unbundling, the first respondent was split into two funds, namely the second respondent and Hulamin Pension Fund ("HPF"). Following the split of the first respondent, the transfer of business was effected between the first respondent and HPF in terms of section 14 of the Act. The amount standing to the credit of the first respondent was divided between the two employers in a ratio that the defined benefit liabilities of each of their member and pensioner pools bore to the total defined benefit liabilities of the first respondent.

2.6 Furthermore, the one-third referred to in paragraph 2.2 above was further apportioned into the employer surplus account of the second respondent in the amount of R165 728 548 and R70.5 million remained in the first respondent for its own benefit.

[3] COMPLAINT

3.1 The complainants are aggrieved with the decision of the board of the first respondent to allocate a portion of the 2007 and 2009 statutory actuarial valuation surpluses to the employer surplus account to the exclusion of the member surplus account. They state that the allocations have failed to meet the reasonable expectations of the pensioners given the retirement formula and the pension increase policy of the second respondent. They aver that the decisions of the

board are controlled by the employer appointed board members hence the surplus was allocated to the employer surplus account.

3.2 The complainants submit that the future surplus in question was generated almost entirely by the excellent investment returns from 2002 onwards on funds held in the fund on behalf of in-service members and pensioners. They further submit that the employer contributions were determined by actuarial estimation of the funding requirements for future pensions of members, and had been reduced below this level by the utilisation of the 2001 surplus allocation to the employer surplus account.

3.3 The complainants further submit that if surplus is to be distributed, all stakeholders should be included in the distribution. In support thereof, the complainants submit that section 15A(1) of the Act states clearly that all actuarial surplus in the fund belongs to the fund.

3.4 Furthermore, the complainants rely on section 15C(1) which states that the rules may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account. They submit that this contemplates a sharing between the employer surplus account and member surplus account rather than an apportionment to one or the other.

3.5 The complainants further submit that section 15C(2) of the Act stipulates that if the rules are silent on the apportionment of actuarial surplus, which is the case in this instance, any apportionment shall be determined by the board taking into account the interests of all the stakeholders in the fund. The complainants view this as a fundamental principle of the legislation.

3.6 The complainants submit that whereas the allocation of future surplus to the employer surplus account has enabled the employer to contribute at below the actuarially calculated “future service contribution rate” and to take a “contribution holiday”, failure to allocate a portion to the member surplus account has not served the interests of other stakeholders.

3.7 Accordingly, the complainants conclude that the board of the first respondent did not act in conformity with the Act and did not adequately apply its mind in making the allocations.

3.8 Therefore, the complainants request an order declaring the allocations of surplus to the employer surplus account from the actuarial surpluses as at 31 December 2007 and 31 December 2009 illegal as not being in the interests of all the stakeholders in the first respondent.

[4] RESPONSE

Points in limine

4.1 The respondents state that firstly, this Tribunal has no jurisdiction to investigate and determine allocations of the future surplus to the employer surplus account of the first respondent. Secondly, the complainants were board members of the first respondent at the time when the allocations to the employer surplus account of the first respondent were decided upon in 2008 and 2010. The complainants were therefore, party to the very decisions that they now seek to challenge years after the event. Finally, the first allocation of the actuarial surplus in the first respondent as at 31 December 2007 (the valuation date) to the employer surplus account was decided by the board of the first respondent at the board meeting held on 10 December 2008. This complaint was only lodged almost five years after the decision was made. Therefore, this Tribunal is precluded from

making any determination in respect of the first allocation of surplus to the employer surplus account of the first respondent in terms of section 30I of the Act.

Merits

4.2 The respondents confirm the factual background as summarised above. They submit that the board of the first respondent which took the decisions in connection with the actuarial surplus in it as at 31 December 2007 and 31 December 2009 consisted of sixteen trustees and alternates, who included current and retired directors, the complainants as retired directors, company secretaries and senior employees of public companies, and was of appropriate calibre to take the decision.

4.3 According to the respondents, the decisions of the board followed due consideration of detailed written reports by the first respondent's valuator and his presentations to the board. The factors considered by the board included the following:

4.2.1 The relatively high employer contribution rate;

4.2.2 The employer's endorsement of the defined benefit fund's relatively aggressive investment strategy that had produced good returns; and

4.2.3 The fact that most of the actuarial surplus remained in the first respondent and had not yet been allocated.

4.3 The submission continues further that on both occasions referred to in the complaint where a portion of actuarial surplus was allocated, a full quorum of trustees was present when the decisions to make the allocations to the employer surplus account were made. There were no objections to the decisions regarding the allocations, either at the time of the decisions or at subsequent meetings of the board when the minutes recording the decisions were confirmed.

4.4 The respondents draw the attention of this Tribunal to a process that is currently underway. They aver that the said process merits consideration, particularly having regard to considerations of equity. The process being the conversion of the defined benefit scheme of in-service members of the second respondent to a defined contribution arrangement, and the transfer of pensioners to an insurer/annuity provider/s, with enhancements in excess of 47% of their liability/actuarial reserve value (thereby utilising all reserves, notwithstanding the creation thereof in part for the benefit of the participating employer, and some of the surplus) as further detailed below. The respondents submit that the relief sought by the complainants places this initiative in jeopardy.

4.5 The respondents further submit that pensioners have benefited from generous annual pension increases, on average in excess of inflation, during the periods to which the impugned allocations relate.

4.6 The value of the outsourced benefits for pensioners compares favourably to the Notional Pensioner Account and was not adversely affected by the allocations which are being challenged by the complainants. The Registrar of Pension Funds has approved the allocations of surplus and reserves in the process of the conversion of in-service members to a defined contribution arrangement and the outsourcing of pensioners that is currently underway.

4.7 The third respondent sets out to interpret the meaning of section 15C of the Act. Section 15C of the Act reads as follows:

> *"**15C. Apportionment of future surplus***
>
> *(1) The rules may determine any apportionment of actuarial surplus arising in the fund after the surplus*

apportionment date between the member surplus account and the employer surplus account.

(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board taking into account the interests of all the stakeholders in the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment."

4.8 The respondents state that the essence of the complaint is that the board of the first respondent misinterpreted and misapplied section 15C in making the allocations referred to in paragraphs 2.3 and 2.4 above. The complainants argue that this section "contemplates a sharing between the two surplus accounts rather than an apportionment to one or the other". The respondents respectfully submitted that this interpretation of section 15C of the Act is incorrect, and that, properly interpreted, section 15C allows a board to allocate surplus to either or both of the employer or member surplus accounts, depending on the circumstances at the time the allocation is made.

4.9 According to the respondents, the Memorandum on the Objects of the Pension Funds Amendment Bill ("PFA Bill"), 2007, states in paragraph 3.2 on page 9 that the purpose of the amendments to section 15C of the Act was "*to clarify that future surplus can be allocated to either the member or employer surplus accounts or both*". Despite the fact that no such clarification appeared in the PFA Bill itself or in the final amendments to the Act, this statement in the memorandum to the PFA Bill makes it clear that it was the intention of the legislature that an apportionment of future surplus could be made either to the member surplus account, or to the employer surplus account, or to both. That is the interpretation adopted by the board of the first respondent.

4.10 The respondents further submit that the wording of the Financial Services Laws General Amendment Bill (“FSLGA Bill”), 2012, likewise supports the Fund’s interpretation of section 15C of the Act. The amendment being proposed allows allocations of future surplus to members and former members to be made directly, without utilising the member surplus account. No change is proposed in connection with making an allocation to the employer surplus account. The proposed wording of section 15C(2) of the Act, as it appears in the FSLGA Bill, reads as follows:

> "*If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment between the member surplus account, the employer surplus account or directly for the benefit of members and former members, subject to section 15D(1), shall be determined by the board taking into account the interests of all the stakeholders in the fund*".

4.11 The respondents further submit that the inclusion of the word "or" in the proposed amendments to this section of the Act indicates that surplus that arises after a fund's surplus apportionment date may be apportioned or utilised in any one or more of the three options listed.

4.12 The respondents further submit that section 15C(1) provides that the board *may* apportion surplus arising in a fund after its surplus apportionment date. There is no obligation on the board to apportion any or all 'future' surplus. This interpretation is supported by section 15I(b) of the Act which contemplates that there may be unallocated surplus existing in a fund upon liquidation. It should be noted that if the board of the fund decides not to apportion any share of actuarial surplus to the member surplus account or to the employer surplus account, then any unallocated surplus will result in a stronger funding level. This increased funding level could in turn have the effect of reducing the employer contribution rate that would otherwise have been determined by the fund's valuator.

4.13 The respondents further submit that in effect, if the board had elected not to apportion any of the 'future' surplus that had arisen in the first respondent after its surplus apportionment date, the reduction in the required employer contribution rate could have had the same or similar effect as a transfer of a portion of the surplus to the employer surplus account which was thereafter used to fund a contribution holiday. This argument is supported by the following extract from the decision of the Supreme Court of Appeal in its determination of *Tek Corporation Provident Fund v Lorentz* 1999 [4] SA 884 (SCA) ("Tek") at paragraph 9:

> "*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.*"

4.14 The respondents submit that the complainants' interpretation of section 15C to the effect that any allocation of future surplus has to be made both to the employer and employee surplus account is without merit. The respondents further submit that the board was entitled to allocate future surplus only to the employer surplus account if circumstances justified this decision.

4.15 The respondents venture to expound on the reasons for the allocation. They contend that the rules of the first respondent are silent regarding the distribution of surplus that arose after the fund's surplus apportionment date. As such, any apportionment of surplus arising after the first respondent's surplus apportionment date was to be

determined by the board of the first respondent taking into account the interests of all the stakeholders of the first respondent in terms of section 15C(2) of the Act.

4.16 The respondents emphasise that, in making an allocation under section 15C(2), the board of the first respondent exercised the discretion accorded to it by the Act. They contend that the decisions to allocate future surplus taken by the board of the first respondent constitute a proper exercise of its discretion, and that no grounds exist for interfering therein.

4.17 The respondents provide that the correspondence they sent to the complainants sets out the factors the board of the first respondent took into consideration when making the allocations. It reads as follows;

> "a. In a defined benefit fund, the employer carries an underpinning responsibility from inception and throughout the life of the fund, including: underwriting the liabilities of the fund, protecting the benefit structures, and ensuring the appropriate administration and operation of the fund;
>
> b The employer contribution rate to the fund has been high notwithstanding the funding levels;
>
> c. The fund's solvency reserves have been well maintained allowing above inflation pension increase to be given and the protection of benefits going forward;
>
> d. Within the broader retirement fund industry, it is not unusual for defined benefit funds to allocate all actuarial surplus to the employer and not to other stakeholders having regard to the nature of the fund, as explained above."

4.18 In addition to the considerations in 4.17 above, the respondents submit that the board considered the consequences of apportioning the

surplus in either of the two accounts. In allocating the future surplus into the employer surplus account, the board considered that the surplus remains in a fund can only be used for the benefit of the participating employer within the parameters set out in section 15E of the Act (and cannot be withdrawn in cash, for example, other than on liquidation or to avoid the retrenchment of a significant portion of the employer's workforce), whereas allocations to members including pensioners vest immediately and cannot be retrieved by the fund in the event of poor funding levels in future.

4.19 The respondents submit that an employer surplus account protects the fund and could be utilised immediately in the event that an actuarial valuation of the fund revealed a deficit, in terms of section 15H of the Act. On the other hand, allocations to members and pensioners would result in cash leaving the fund and/or an increase in fund liabilities thereby potentially worsening the funding level of the fund. This was not considered desirable at the time when the two allocations in dispute were made to the employer surplus account of the first respondent, particularly in light of the worldwide crash of investment markets in 2008 and the volatility experienced ever since.

4.20 The respondents further submit that in interpreting section 15C, the board placed reliance on external tools of interpretation and reasoned as follows;

> “The memorandum on the objects of the Pension Funds Second Amendment Bill, 2001, stated the following regarding the relationship between minimum benefits and the newly inserted section 15C:
>
> "The Bill also proposes minimum levels of pension increase and minimum levels of interest to be added to member contributions in respect of early leavers. This will prevent the generation in future of surplus as a result of the inequitable treatment of members leaving the fund or receiving pension increases. Future surplus then ceases to be contentious, and can be left to be distributed by the

board of the fund, either in terms of the rules of the fund or, if the rules are silent, in terms of the normal exercise of their fiduciary duties towards all stakeholders."

4.21 Accordingly, the respondents submit that the benefits already afforded to other stakeholders of the first respondent were taken into account when the board decided upon the subsequent allocations of future surplus to the employer surplus account. Furthermore, as noted above, the first respondent (and subsequently the second respondent) has granted exceptional pension increases in recent years. The pension increase policy, in summary, has been to target inflation-based increases, subject to affordability. The following table sets out the increases granted by the first respondent in the years following its surplus apportionment date. The cumulative effect of such increases has been more generous than headline inflation and the pension increase policy:

Effective Date	**Pension Increase**	**Headline inflation**
1 January 2002	9.0%	12.5%
1 January 2004	5.0%	0.3%
1 January 2005	5.0%	3.4%
1 January 2006	7.0%	3.6%
1 January 2007	7.5%	5.9%
1 January 2008	8.0%	8.9%
1 January 2009	10.5%	9.5%
1 January 2010	7.2%	6.3%
1 January 2011	5.0%	3.5%
1 January 2012	6.0%	6.1%
Cumulative (10-year annualised	**7.0%**	**5.9%**

figure)		

4.22 The respondents submit that the average pension increase granted over the nine year period following the first respondent's surplus apportionment date is 7%, which exceeds the average inflation rate measured by the headline consumer price index over the same period (5.9%).

4.23 The respondents further submit that the two-thirds share of residual surplus that was utilised for the benefit of members, certain former members and pensioners in terms of the first respondent's surplus apportionment scheme, as well as the generous pension increases that were granted by the first respondent and the second respondent in recent years, are further evidence that the interests of all stakeholder groups, particularly pensioners, have always been adequately catered for by the first respondent and the second respondent.

4.24 Furthermore, the third respondent submitted that the fact that the pensioners were not prejudiced by the allocations of actuarial surplus to the employer surplus account is also borne out by favourable comparison of the Notional Pensioner Account to the "best estimate" liabilities for pensioners and to the outsource value for pensioners. By way of explanation, the statutory Notional Pensioner Account is effectively an accounting build-up for all pensioners at the valuation date of the notional pensioner assets over the period since each pensioner commenced receipt of their pensions. "Credits" to the Notional Pensioner Account consist of lump sums in respect of the capital liability of retiring members and returns earned, while "debits" consist of pension and commutation payments, and expenses in relation to pensioners. The Notional Pensioner Account was unaffected

and was not reduced by the past allocations of actuarial surplus challenged by the complainants.

4.25 The respondents turned to the complainants' submission about the source of the surplus and denied the averment that the surplus was generated exclusively by the excellent investment returns earned on the investment of the first respondent's assets after the surplus apportionment date. The respondents submit that in fact the sources of surplus have not yet been analysed and reported on by the valuator of the first respondent.

4.26 The respondents further submit that it is arguable whether actuarial surpluses in the first respondent were generated primarily as a result of the employer contribution rate (that was recommended by the fund's actuary) exceeding the rate at which the employer, with the benefit of hindsight of the financial experience of the first respondent, was actually required to contribute in order to maintain the solvency and financial strength of the first respondent.

4.27 The respondents further submit that even if it were to emerge that the surpluses were in fact generated primarily as a result of the investment returns earned on the investment of the first respondent's assets (which investment returns have only been possible because of the employer's willingness to endorse a fairly aggressive investment strategy mindful of the associated risks and rewards), the Supreme Court of Appeal *Tek* has corrected the misconception that surplus may only be utilised for the benefit of the employer where it arose as a result of over-contribution by the employer. The respondents quote paragraph 23 of the *Tek* judgment which reads as follows:

> "While on this topic it would be as well to correct a misconception which led Navsa J to hold that it was not permissible for the employer to avoid making contributions by reliance upon the existence of a surplus save to the extent that the surplus was attributable to past over contribution from the employer. With respect to the learned Judge, I do not think that is correct. It overlooks the distinction between a defined benefit (sic) scheme in which the employer's contribution is fixed and must be paid irrespective of the state of the fund, and a scheme like the present in which it is not and liability to contribute arises only when it is necessary in the estimation of the fund's actuary to ensure the financial soundness of the fund. In the former class of case there is an existing and continuing liability to contribute and using the existence of a surplus to avoid the making of contributions could not be justified. In the latter class of case, of which the present is an example, there is no predetermined and continuing liability to contribute. The liability arises only when need arises. Present a surplus, absent a need and absent a liability. The employer is therefore not being relieved of a liability and is receiving no benefit to the detriment of the fund or its members. It is irrelevant how the surplus arose and whether or not it is attributable to over contribution in the past by the employer. There is simply no liability to contribute in such circumstances."

4.28 According to the respondents, the paragraph quoted above also refutes the argument put forth by the complainants to the effect that a contribution holiday amounts to the employer withdrawing cash from the fund. The court made it clear that there is no continuing liability on the employer to contribute to a defined benefit fund where the employer has a "balance of cost" funding liability and surplus has arisen in such a fund.

4.29 In conclusion, the respondents re-iterate that within the broader retirement fund industry, it is not uncommon for defined benefit funds to allocate all actuarial surpluses that arise in the fund to the employer surplus account and not to other stakeholders, having regard to the nature of the fund. In support of this proposition, the complainants rely on Hunter et al at *Pension Funds Act: A Commentary* (2011) at 434, where the authors say "certain fund rules provide that all future surplus

will be automatically allocated to the employer surplus account." The respondents conclude that the view of the learned authors is that such a rule is not inappropriate if the fund is a defined benefit, balance of cost fund, as is the case with the first respondent.

4.30 The respondents submit therefore, that the allocations of a portion of the surplus to the employer surplus account of the first respondent, pursuant to the valuations of the first respondent as at 31 December 2007 and 31 December 2009, complied with the provisions of section 15C of the Act in all respects and that there is no basis upon which to interfere with the exercise of the board's discretion. Accordingly, the respondents request this Tribunal to dismiss the complaint.

Further submissions

4.31 The complainants confirm that complainant one was an alternate member of the board from 30 November 2001 until 31 December 2010. Complainant two was a member of the board from 1 January 2005 until 31 December 2010. They submit that whilst they acknowledge that as board members they ought to have known about their legal duties, on the question of the surplus allocations in 2008 and 2010 they relied on the advice given to them by the principal officer of the first respondent. They aver that they were not aware of the provisions of section 15C of the Act and their duty to take into account the interest of all the stakeholders in the first respondent.

4.32 The complainants dispute the assertion that payment to the employer surplus account means that no money is leaving the fund. The complainants reason that the ultimate effect of a contribution holiday means a reduction in fund income. They further dispute that in allocating the actuarial surplus, benefits already allocated to members were taken into account.

4.33 Therefore, the complainants request the decision of the board of the first respondent to allocate the actuarial surplus as at 31 December 2007 and December 2009 to the employer surplus account should be set aside.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

Points in limine

5.1 Apart from addressing the merits of the complaint, the respondents also raised three legal technicalities by which they say that the complaint must be dismissed. The first is that this Tribunal has no jurisdiction to investigate and determine allocations of section 15C actuarial surplus. In terms of section 30H(4), this Tribunal lacks jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B of the Act. This Tribunal is not specifically precluded from determining a complaint in connection with a scheme for the apportionment of the future surplus in terms of section 15C of the Act. It follows that this Tribunal has jurisdiction to investigate and adjudicate the section 15C actuarial surplus. Therefore, this preliminary point is dismissed.

5.2 The second preliminary point is that the complainants were members of the board of the first respondent at the time when the allocations to the employer surplus account were decided upon in 2008 and 2010 and therefore, they were party to the very same decisions that they now seek to challenge years after the event. The complainants' complaint relates to the administration of a pension fund by the board and thus, it falls within the definition of a complaint as defined in section 1 of the Act. Furthermore, this Tribunal perused the rules of the first respondent and the provisions of the Act and it could not find either

a rule or provision that precludes former board members of the fund from lodging a complaint as defined in section 1 of the Act. Therefore, this preliminary point cannot be sustained and is also dismissed.

5.3 The third and final preliminary point is that the complaint regarding the first allocation of actuarial surplus in the first respondent as at 31 December 2007 to the employer surplus account is time-barred in terms of section 30I of the Act, because the decision was made on 10 December 2008. Section 30I of the Act imposes certain time limits with regards to lodgement of complaints before the Adjudicator and states as follows:

> "(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
>
> (2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1)."

5.4 Therefore the provisions of section 30I preclude this Tribunal from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years prior to its receipt of a written complaint in that regard.

5.5 The the act or omission to which this complaint relates occurred on 10 December 2008 when the first allocation of a portion of actuarial surplus in the first respondent as at 31 December 2007 to the employer surplus account of the first respondent was made by the board of the first respondent. Therefore, the cause of action arose on 10 December 2008. The complainants were aware of this decision since it was taken when they were still members of the board of the first respondent. Any complaint regarding the first allocation of the actuarial surplus in the first respondent to the employer surplus

account of the first respondent should have been lodged with this Tribunal on or before 10 December 2011. However, the complaint was only lodged on 20 May 2013. Therefore, this aspect of the complaint is time-barred in terms of section 30I of the Act and this Tribunal is precluded to investigate and determine it.

Merits

5.6 The issue for determination is whether or not the board of the first respondent acted in accordance with its obligations in terms of section 15C of the Act in allocating the actuarial surplus in the first respondent as at 31 December 2009 (the valuation date) to the employer surplus account to the exclusion of the member surplus account on 31 August 2010.

5.7 Section 15C of the Act reads as follows:

> *"**15C. Apportionment of future surplus***
>
> *(1) The rules may determine any apportionment of actuarial surplus arising in the fund after the surplus apportionment date between the member surplus account and the employer surplus account.*
>
> *(2) If the rules are silent on the apportionment of actuarial surplus arising after the surplus apportionment date, any apportionment shall be determined by the board taking into account the interests of all the stake-holders in the fund: Provided that, notwithstanding anything to the contrary in the rules, neither the employer nor the members may veto such apportionment."*

5.8 The meaning of sub-section (1) is not in contention. It is in fact common cause between the parties that the rules of the first respondent are silent on the apportionment of future surplus. What remains at issue is the meaning of sub-section (2). However, this Tribunal finds it unnecessary to delve into the merits of the arguments by both the complainants and the respondents in support of their divergent interpretations of the said sub-section. The reason being that, the

meaning of the contested section is quite plain, in that the Act confers an unfettered discretion on the board to apportion future surplus. The only proviso is that the interests of all stakeholders must be taken into consideration. The crisp question therefore, is whether or not in allocating the future surplus exclusively to the employer surplus account, as is competent in law for it to do so, the board took the interests of all stakeholders into account.

5.9 The complainants submit that in allocating future surplus in the manner that it did, the board failed to apply its mind properly during its decision making process. They further submit that they were not conversant with section 15C of the Act. The soundness or otherwise of the board's decision lends itself to the scrutiny of this Tribunal. Therefore whether or not the board is conversant with section 15C of the Act and it properly applied its mind thereon, should crystallise when the board's decision is probed in this determination.

5.10 The reasons advanced by the respondents in support of their submission that the interests of all stakeholders were taken into consideration shall be examined individually in turn.

Contribution holiday

5.11 The complainants submit that in determining the reasonableness of the board's decision, sight must not be lost of the source of the surplus. The complainants ascribe the surplus exclusively to favourable investment returns earned from assets attributable to former members and pensioners when the employer was contributing at a reduced level on actuarial advice. They submit that the employer has taken a contribution holiday as a result of the surplus whereas there is no corresponding advantage to other stakeholders.

5.12 On the other hand, the respondents submit that in allocating the portion of the surplus to the employer surplus account, the board considered, *inter alia,* the fact that no money would be leaving the first respondent. In rebuttal, the complainants submit that because the employer has taken a contribution holiday, the first respondent received reduced income, the effect of which is, as a matter of logic, equivalent to money leaving the first respondent.

5.13 In *Tek supra* the court drew a distinction between a defined benefit fund and a defined benefit, balance of cost fund. It found that regardless of the existence of a surplus, the obligation to pay contributions is a continuing one in respect of a defined benefit fund. For it to avoid paying contributions using a surplus cannot be justified. By contrast, the court held that in a balance of cost fund, there is no predetermined and continuing liability to contribute. Therefore if there is a surplus and there is no need to contribute, the liability to contribute does not arise. The employer is thus not receiving any benefit to the detriment of its members.

5.14 Rule 8 of the second respondent's rules governing contributions by the employer provides as follows;

> **8.2 EMPLOYER CONTRIBUTIONS**
>
> 8.2.1. Each EMPLOYER shall pay to the FUND a percentage (which may be zero) determined by the TRUSTEES, after taking into account the amount certified by the ACTUARY from time to time to be required to cover the costs of the benefits under the RULES, calculated after taking into account the contributions payable by the MEMBERS in terms of RULE 8.1.1 and the assets and the liabilities of the FUND, of the pensionable EMOLUMENTS of those of employees who are MEMBERS. Any EMPLOYEE's contributions required to be paid shall be paid to the FUND at the same time as the corresponding contributions deducted from the salaries or wages of the MEMBERS, provided that:

8.2.1.1 during a maximum period of 6 months after the COMMENCEMENT DATE of the FUND, the EMPLOYER shall not be required to contribute to the FUND; and

8.2.1.2 the contributions due in respect of that period shall be funded at the end of the period from any positive balance in the EMPLOYER SURPLUS ACCOUNT, and

8.2.1.3 should the balance in the EMPLOYER SURPLUS ACCOUNT at the end of the period be sufficient to cover the required contributions, then the EMPLOYER shall immediately pay in the difference to the FUND, although such payment shall not be considered late payment of the contributions for the purposes of RULE 8.3.5.

8.2.2 Each Employer shall pay the Fund the amount determined by the Trustees, after consulting the Actuary, in respect of each Pension payable in terms of RULE 9.4.2

8.2.3 …"

5.15 Rule 8 above places the second respondent neatly within the second category of a defined benefit fund. Further, the respondents correctly pointed out that the allocation of a surplus to an employer surplus account is not limited only to an instance where the surplus has accumulated from over-contribution by the employer *(see Tek above)*. Therefore, there should be no controversy about the employer taking a contribution holiday on the strength of a surplus.

Employer contribution rate

5.16 The respondents submit that the employer contribution rate has been high notwithstanding the funding levels. To the extent that the fund relies on the employer's contribution rate to justify the allocation of future surplus exclusively to the employer surplus account, this submission must be rejected. The reason being that, as the respondents pointed out correctly so, the court in *Tek* above found that

the source of the surplus is irrelevant for the purposes of its allocation in a defined benefit, balance of cost fund.

Above inflation pension increases and protection of benefits

5.17 The respondents submit that its solvency reserves have been well maintained allowing for above inflation pension increases and protection of benefits. This submission refutes the complainants' allegation that the interests of other stakeholders were not taken into consideration in the use of any surplus funds that accrued over the years.

Industry practice in allocating surplus

5.18 The respondents submit that it is not unusual in the retirement industry to allocate surplus exclusively to the employer surplus account having regard to the nature of the fund. This argument does nothing to show how the board considered the interests of other stakeholders in the respondent. The complainants' counter-argument is correctly made when they point out that industry practice should not absolve the board from its duty to apply its mind having regard to the unique circumstances of the fund. Having said that, this point cannot be read in isolation but should be looked at within the context of other considerations the board has had regard to. Accordingly, although there is merit in the complainants' rebuttal, it is not enough to support the argument that the board, overall, did not exercise its discretion properly.

Conversion to a defined contribution fund and the outsourcing of pensioners

5.19 The respondents further submit that its board has put forward a proposal which has been resoundingly accepted by other stakeholders. In essence, the respondent's in-service members will receive

substantial enhancements to their benefits upon conversion from a defined benefit scheme to defined contribution one. It is proposed that the pensioners will receive enhancements to their benefits upon transfer to an outsourced annuity provider. The respondents submit that these enhancements will be in excess of 47% of the stakeholders' benefits and will come from its reserves which were created for the benefit of the third respondent. The respondents submit that this process will be in jeopardy should the complainants succeed in this complaint.

5.20 The complainants are correct in pointing out the flaw in the respondents' argument that should they succeed with this complaint, the conversion process will be jeopardised. What falls to be tested in this matter is not the balance of convenience between the parties, but rather whether or not the interests of the stakeholders were taken into account in making the surplus allocation. It is noteworthy, however, that the complainants do not dispute the assertion by the respondents that the conversion will be in the interests of the affected stakeholders. Instead they cast doubt on whether or not other pensioners and the in-service members are in favour of the conversion. However, the complainants have no mandate to represent other stakeholders. Furthermore, the acceptance of the conversion process by the affected stakeholders is not the question with which this Tribunal is seized. The conversion and outsourcing of pensions is permitted by Rule 3 of the rules of the first respondent.

5.21 In the circumstances, this Tribunal is persuaded that, when allocating the future surplus exclusively to the employer surplus account the interests of all the stakeholders were taken into account pursuant to section 15C of the Act. Therefore, no grounds exist for the board of the first respondent's decision to be set aside.

[6] ORDER

1 In the result, this complaint cannot succeed and is hereby dismissed.

DATED AT PRETORIA ON THIS 19TH DAY OF DECEMBER 2013

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MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties unrepresented