IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Civil Case No. 32/2012

In the matter between:

CHARLES DLAMINI	**1ST APPELLANT**
SIPHO SIYAYA	**2ND APPELLANT**
COXIN TSABEDZE	**3RD APPELLANT**
SANDILE NKHOMA	**4TH APPELLANT**

and

THE REGISTRAR OF INSURANCE AND RETIREMENT FUNDS	**1ST RESPONDENT**
THE SWAZILAND WATER SERVICES CORPORATION PENSION FUND	**2ND RESPONDENT**
ANGELINE MATSENJWA N.O.	**3RD RESPONDENT**
SWAZILAND WATER SERVICES CORPORATION	**4TH RESPONDENT**

Neutral citation:	Charles Dlamini and 3 Others v The Registrar of Insurance and Retirement Funds & 3 Others (32/12) [2012] SZSC 71 (30 NOVEMBER 2012)
Coram:	**S.A. MOORE J.A., DR. S. TWUM J.A. and E.A. OTA J.A.**
Heard:	**15 NOVEMBER 2012**
Delivered:	**30 NOVEMBER 2012**
Summary:	**Application for review – Application for declaration – Common Law review grounds not established – Applicants having no *locus standi* to move application for review – Applicants not entitled to be heard by the Registrar of Insurance and Retirement Funds – Applicants not entitled to declaratory order sought – Appeal dismissed – No order as to costs.**

MOORE J.A.

[1] The four appellants in their personal capacities filed a Notice of Motion under a certificate of urgency seeking the three items of relief which are critical to this appeal. These are:

> "3. Interdicting the **Respondents** from proceeding with and/or finalizing the distribution of the sum **of E43,629,104.00 (Emalangeni forty three Million six hundred and twenty nine thousand one hundred and four)** received by the **Second** and/or **Fourth Respondents** from the **Public Service Pension Fund** pending the finalization of this application.
>
> 4. Reviewing, correcting and/or setting aside the **First Respondent's** decision of the **15th December 2011** as restated in a letter dated **21 December 2011** to the effect that the amount of **E43,629,104.00 (Emalangeni forty three Million six hundred and twenty nine thousand one hundred and four)** received by the **Second** and/or **Fourth Respondents** from the **Public Service Pension Fund** being in respect of the transfer values of the **Applicants** and other former employees of the **Swaziland Water and Sewerage Board** should be distributed indiscriminately to the members of the **Second Respondent** including those who are not former employees of the **Swaziland Water and Sewerage Board.**

5. Declaring that the amount of **E43,629,104.00** received from the **Public Service Pension Fund** vests only in or is an entitlement of the former employees of the **Swaziland Water and Sewerage Board** who are former members of the **Public Service Pension Fund.**

6. Granting **Applicants** costs of this application."

[2] A welcome feature of this litigation is that the interdict was granted by consent of the parties so that the status quo could be preserved while full attention could be focused upon the matters which formed the real bone of contention.

[3] At the end of the hearing, M.C.B. Maphalala J concluded that common law review grounds had not been established and therefore dismissed the application. He made no order as to costs. The appellant responded by noting an appeal on the eleven grounds set out in that notice. But those grounds were condensed in the appellants' heads of argument where the following issues were identified. The contention is that the trial judge had erred in finding that the appellants:

"1.1.1 had no *locus standi* to move the application for review;

1.1.2 were not entitled to be heard by the **First Respondent** before making an adverse decision against them;

1.1.3 had failed to establish any common law grounds for review;

1.1.4 were not entitled to the declaratory Order sought before the **Court aquo.**

BACKGROUND

[4] The background facts have been clearly and sequentially set out in paragraph 8 of the Respondents' Heads of Argument. No serious challenge to them having been made by the appellants, I reproduce them hereunder as being substantially accurate:

"8.1 In 1994, the Swaziland Water Services Corporation (Corporation), (fourth respondent) was established. The predecessor to the Corporation was the Swaziland Water and Sewerage Board (the Board) which was a Government department. Employees of the Board transferred their contracts of employment to the Corporation, without loss of benefit and status.

8.2 At the time of establishment, the Corporation did not have a pension fund, and as such, the employees continued to be members of the Public Service Pension Fund (PSPF) (a Government pension fund).

8.3 In 1998, the Corporation established the Swaziland Water Service Corporation Pension Fund (The Fund) and an actuarial evaluation for all former Water and Sewerage Board employees was conducted.

8.4 Some members of PSPF transferred from the PSPF to the Fund (the transfer date). The transfers were not done at once, but were staggered, depending on the election of the individual member. When each member transferred, a transfer value was determined by an Actuary and the Fund credited each member with that transfer value. Accordingly what was transferred was the cash value equivalent, of a member's benefit at the time in terms of the PSPF scheme. At the time, the PSPF was unable to transfer the cash equivalent of the transfer values. It was contended that the PSPF was under-funded to the tune of 36.8%. This left a deficit of 63.2%, which was to be resolved by the Swaziland Government making a payment as a means of capitalizing the PSPF.

8.5 The Swaziland Government, later made good on its obligation by paying a sum of E18 100 000.00 to the Fund, which amount

represented the deficit of 63.2% as well as contributions in respect of former daily paid employees. The contributions were in the form of payment of their severance allowance. PSPF did not pay the 36.8% to the second respondent. Accordingly, at the inception of the Fund, there was a deficit of 36.8%.

8.6 If a transferring member was obliged to exit the Fund, he would receive his full benefit entitlement, notwithstanding the fact that the 36.8% equivalent had not been received from PSPF. To enable the Fund to meet its obligations towards exiting members, and also to ensure that the members were not disadvantaged by the deficit, less returns were declared to members than the actual returns made by the fund's investments.

8.7 Accordingly all transferring members were never disadvantaged. However the existing members of the Fund (made up of new employees who had joined the Corporation since1994) as well as the former daily paid employees (who had been converted to permanent employees upon joining the Corporation) were disadvantaged, in that their contributions and investments in the Fund did not grow exponentially, on account of the fact that, they had to be used to subsidise payments to exiting members and also make provision to clear the debt in case PSPF did not eventually pay the 36.8%.

8.8 By way of illustration, assume member X transferred from the PSPF and his transfer value was E10 000.00. This would have represented the amount that stood to his credit at the time when he exited the PSPF fund. The actual amount that had been paid in by Government to the second respondent representing the 63.2% would be E6 320.00. Assume further that no additional contributions were made by the member X during the year and that the value grew at an interest of 5% per annum, meaning that the total value of the contribution after one year would be E10 500.00. If member X were then to exit the Fund after the one year, the second respondent would be obliged to pay him E10 500.00 notwithstanding the fact that the actual amount that had been received was E6 320.00

To finance the short fall, the Fund would take profits and/or returns made on investments from monies invested by all the members in order to meet the short fall, in short members who had transferred from PSPF to the second respondent and exited the Fund prior to the receipt of the surplus received their entitlement at the expense of the other members of the Fund.

8.9 The shortfall, being the amount due from PSPF was recorded in the Fund's books as a debt owing by PSPF. In 2010 PSPF then indicated that it was in a position to make the payment of the amount that it was owing plus interest accumulated over the years. The total amount paid by PSPF was calculated (by PSPF's actuary) based on the transfer values of the members

who transferred from PSPF and their exit dates from PSPF (transfer dates). At that stage, and in order to ensure that the amount was distributed fairly, the Fund then obtained the services of an actuary to advise on the distribution premised on the history set out above.

8.10 The Fund also obtained the approval of the Registrar for the distribution method. The Registrar also engaged an actuary and slightly modified the distribution method, to favour those members who had transferred from PSPF. The distribution was approved after extensive consultation between actuaries, the first respondent and the trustees."

HIGH COURT FINDINGS

[5] With his customary thoroughness, M.C.B. Maphalala J recited the several averments and competing arguments disclosed in the papers before him. His findings and conclusions are best expressed in his own words as they appear in paragraphs [36] through [49] of his comprehensive judgment:

"36. It is common cause that the Government of Swaziland as the employer subsequently paid E18.1 million to the Fund which amount represented the deficit of 63.2% as well as the severance allowance in respect of temporary employees. This

payment meant that the government had met the full extent of its liability towards the transferring employees and what remained was the E9.7 million to be paid by PSPF.

37. It is apparent from the evidence that any employee who was a member of the Fund became entitled to their pension benefits inclusive of retirement benefits, retrenchment benefits, terminal benefits death benefits or disability upon the fulfillment of these conditions. The fund honoured these obligations in full notwithstanding that PSPF had not paid the E9.7 million to the Fund. The trustees of the Fund had to utilize available funds in order to meet its obligations to members who were leaving the Fund; and, they received their full benefits at the expense of current members. The funds only vested on individual members upon the fulfillment of the conditions set out in the Fund.

38. It is apparent from the evidence adduced that the transferring members were not prejudiced because they received their total benefits when leaving the Fund; at the same time, it is clear that money belonging to the new employees who joined the Corporation since 1994 was used to make good the shortfall caused by the non-payment of the E9.7 million by PSPF. The money of the new members of the Corporation did not grow because it was used to subsidize pension benefits of transferring members who were leaving the Fund; to that extent, it is the new members of the Corporation who were

prejudiced because the Fund utilized returns made on their investments to make good the payment of pension benefits.

39. It is common cause that in January 2010 PSPF transferred an amount of E43.6 million to the Fund, and, this money was in respect of the shortfall of E9.7 million together with interest calculated from 1998 up to 31st December 2009; there is evidence that the Fund on receipt of the money engaged an actuary for advice on the distribution of the money. It is also clear from the evidence adduced that the Fund consulted the membership widely on the proposed distribution. In addition the Union and Staff Association are represented in the Board of Trustees of the Fund; hence, the argument by the applicants that they were not given a hearing is misconceived.

40. In addition applicants' attorney made a submission to the first respondent where all the concerns of the applicants were outlined. The first respondent in turn engaged actuarial experts to consider the distribution including the concerns raised by the applicants; he further considered submissions made by the Board of Trustees. I am satisfied that the concerns of the applicants were taken on board when the first respondent arrived at the decision to approve the distribution. Similarly, the categorization of the money received as surplus by the second respondent is in accordance with the definition of a surplus in section 2 of the Retirement Fund Directive of 2008; it

simply means the amount by which the assets of a retirement fund exceeds it liabilities.

41. As stated in the preceding paragraphs, the contracts of the transferring employees were not terminated when the Water and Sewerage Board ceased to exist but were transferred to the Corporation; hence their pension benefits had to be transferred from PSPF to the Fund and not to the individual members. The money transferred became an asset of the Fund pending the fulfillment of certain conditions and/or the insured events. It is not denied by the applicants that on receipt of the E43,629.104.00 (Forty three million six hundred and twenty nine thousand one hundred and four Emalangeni) from PSPF, the assets of the Fund exceeded it liabilities and thus created a surplus. The fact that the operations Manager of PSPF Jethro Ndlangamandla listed the names of the transferring employees when transmitting the money does not detract from the fact that the money was an asset of the Fund.

42. The applicants do not have *locus standi* to institute the present proceedings on the basis that the decision to declare the amount as a surplus was made by the second respondent after receiving expert advice from actuaries; furthermore, the applicants are represented in the Board of Trustees of the second respondent by people they elected in trade unions and staff association.

43. The applicants seek to review and/or set aside the decision of the first respondent of the 15th December 2011 to have the amount of E43,629,104.00 (Forty three million six hundred and twenty nine thousand one hundred and four Emalangeni) distributed across the board to all members of the second respondent in the employ of fourth respondent including those who were not previously employed by the Swaziland Water and Sewerage Board. They further seek a declaration of rights to the effect that the amount of E43,629,104.00 (Forty three million six hundred and twenty nine thousand one hundred and four Emalangeni) vests only on the former employees of the Swaziland Water and Sewerage Board; I have dealt with this aspect in the preceding paragraphs that the amount is an asset of the Fund and that members can access the money once the insured events have materialized.

44. With regard to the review, the Supreme Court of Swaziland in the case of **Takhona Dlamini v the President of the Industrial Court and Another** Appeal Case No. 23/1997 approved and applied the decision of Corbett JA in the case of **Johannesburg Stock Exchange v Witwatersrand Nigel Ltd** 1988 (3) SA 132 at 152 A-D where he stated the following:

> "Broadly in order to establish review grounds it must be shown that the President failed to apply his mind in the relevant issues in accordance with the behest of the Statute and the tenets of natural justice … Such failure

> may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the President misconceived the nature of the discretion conferred upon him and took into account irrelevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."

45. In light of the Common Law principles outlined in the Johannesburg Stock Exchange case and approved by the Supreme Court of Swaziland, the applicants have not shown that the decision of the first respondent is reviewable and therefore ought to be set aside for the reasons that the concerns of the applicants were considered by the first respondent acting on the advice of actuarial experts; the transferring employees inclusive of the applicants were represented in the Board of Trustees of the second respondent which applied to the first respondent for leave to distribute the surplus it had declared; the second respondent conducted countrywide consultations on the distribution of the surplus, and the first respondent complied with the law when making his decision with regard to the distribution of the surplus.

46. The first, second and third respondents have also argued that the applicants are not without a remedy since they could appeal to an appropriate forum in terms of the Financial Services Regulatory Authority Act No. 2 of 2010; and that they have not exhausted internal remedies as required by section 80 of the Act. Section 80 of the Act provides that a person aggrieved by a decision of an authorized financial services provider may within thirty days after that person is notified of the decision appeal to the Appeals Tribunal. A person aggrieved by the decision of the Tribunal may appeal to the High Court.

47. In the case of *Koyabe and Others v Minister of Home Affairs* 2010 (4) SA 327 CC paragraphs 35, 36 and 38 read:

> **"35. Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanism, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.**
>
> **36. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the**

autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and functions. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in the Constitution…

38. The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of aggrieved persons or to shield the administrative process from judicial scrutiny."

. *Swaziland Electrical Company v Cebsile Msibi* Supreme Court of Swaziland Case No. 13/11 page 8

48. However, section 80 of the Financial Services Regulatory Authority is not mandatory with regard to the Exhaustion of Internal Remedies; it gives the aggrieved party an option whether or not to exhaust internal remedies or to institute review proceedings. If the applicants had *locus standi*, they could have been perfectly entitled to institute the review proceedings without exhausting internal remedies.

49. The application is dismissed. No order as to costs."

THE APPELLANTS' CASE

[6] The argumentative grounds of appeal make out the appellants' case for allowing the appeal. They contend that the court ***a quo***:

> "1. erred in law and in fact by holding that the **Appellants** had failed to establish common law grounds for review and/or that the Appellants did not show that the decision of the **First Respondent** was reviewable and ought to be set aside.
>
> 2. erred in law by not finding that, the **First Respondent** misdirected himself by labeling the accumulated transfer values of the **Appellants** received from the **PSPF** in the amount of **E43,629,104.00 (Emalangeni forty three million six hundred and twenty nine thousand one hundred and four)** as **"surplus"** in accordance with **Section 2 of the Retirement Funds Directives of 2008** and therefore that he acted outside the ambit and scope of his authority by further stating that the **Appellants'** transfer values were to be distributed to all members of the **Second Respondent** including those who are not former employees of the Swaziland **Water and Sewerage Board** and/or former **PSFP** members.

3. erred in law by not setting aside the **First Respondent's** decision approving the distribution of the amount of **E43, 629,104.00 (Emalangeni forty three million six hundred and twenty nine thousand one hundred and four)** received from the **PSPF** to all members of the **Second Respondent** inasmuch as the amount was received as transfer values of the **Appellants** and other former employees of the Swaziland **Water and Sewerage Board** with a list indicating specific amounts accrued to each individual who was formerly employed by the **Swaziland Government** under the **Swaziland Water and Sewerage Board** and/or was a former member of the **PSPF.**

4. erred in law by not holding that the amount of **E43,629,104.00 (Emalangeni forty three million six hundred and twenty nine thousand one hundred and four)** being the transfer values of the **Appellants** and other former employees of the **Swaziland Water and Sewerage Board** could not be classified as an asset of the **Second Respondent** because transfer values are a liability to the **Second Respondent** and not an asset, hence the amount could not be declared as a surplus vesting in the **Second Respondent**.

5. erred by holding that the **Appellants'** transfer values received from the **PSPF** were an asset to the **Second Respondent** and were therefore properly declared as a surplus thereby overlooking the fact that transfer values are a liability

to a Pension Fund and an asset to the fund members to which they accrue.

6. erred in law by not finding that the **First Respondent** misconceived the nature of his discretion and exercised his discretion wrongly thereby committing a gross irregularity by approving the distribution of the **E43,629,104.00 (Emalangeni forty three million six hundred and twenty nine thousand one hundred and four)** as surplus when in fact it was transmitted to the **Second Respondent** as the **Appellants'** transfer values and insofar as his discretion, in accordance with **Section 2 of the Retirement Funds Directives of 2008,** related to approving the apportionment or distribution of surplus as opposed to the distribution of the **Appellants** transfer values.

7. erred in law by not finding that the **First Respondent** ought to have heard the **Appellants** and/or allowed them an opportunity to make representatives before him before making an adverse decision against them inasmuch as, the **First Respondent** purported to be exercising statutory and/or administrative power or authority when making his decision regarding the distribution of the **Appellants'** transfer values and inasmuch as the **Appellants** had lodged a complaint or an objection with the office of the **First Respondent** regarding the intended distribution.

8. erred by not setting aside the **First Respondents'** decision on the basis that he had not afforded the **Appellants** an opportunity to be heard before making an adverse decision against them and he only communicated his decision to the **Appellants** after he had allegedly exercised his administrative powers in accordance with **Section 2 of the Retirement Funds Directives of 2008.**

9. erred in law by holding that the **Appellants** were not entitled to be heard before an adverse decision was taken against them and notwithstanding that they had lodged an objection or complaint with the office of the **First Respondent** regarding the intended distribution of their transfer values.

10. erred by holding that the Appellants did not have ***locus standi*** to institute the proceedings before the ***Court a quo.***

11. erred by dismissing the Appellants' application and not granting the Orders prayed for."

THE RESPONDENTS' COUNTER ARGUMENTS

[7] The respondents put their ample case in support of the judgment of the ***court a quo,*** and in response to the appellants' criticisms of it at

paragraphs 9.6 to 23 of their heads of argument. Those paragraphs read:

> "9.6 In the present matter, the Registrar was required to exercise discretionary powers, having regard to policy considerations relating to retirement funds, the general interest of fund members and the fund itself, as well as the advice received from the actuaries. It is submitted therefore that there was no material error of law committed by the first respondent and as such, the review was not competent. The court *a quo* was correct in its findings.
>
> 9.7 The appellants in the present matter contend that the first respondent misconceived the nature of his discretion and exercised his discretion wrongly thereby committing a gross irregularity in approving the amount as a surplus. It is submitted that the appellants failed to set out jurisdictional facts to establish the irregularity. The directives empower the Registrar to approve the distribution of a surplus. The exercise of the discretion by the Registrar was proper, as it was in accordance with the requirements of the statute.
>
> 9.8 It is against this backdrop that the exercise of a discretion by the first respondent to approve the distribution proposal that had been made by the first respondent. In essence, the first respondent was enjoined to consider the provisions of the

Retirement Funds Act as well as the directives that are applicable. In so doing, the first respondent was required to apply his mind to the following:

> 9.8.2 Whether the proposal by the second respondent for the distribution of the surplus amount, was fair and equitable in the context of the circumstances of the matter.
>
> 9.8.3 Whether the advice of the actuary engaged by the second respondent could be relied upon for purposes of approving the distribution of the surplus amount.
>
> 9.8.4 Whether the advice of the actuary engaged by the first respondent (Registrar) could be relied upon.

10. On the first enquiry, the crisp issue is whether the Registrar is alleged to have made an error of law or an error of fact. In the case of **De Freitas v Somerset West Municipality 1997 (3) SA 1980** it was said that the court is not empowered to set aside a discretionary decision by an administrator acting within his powers, merely because the administrator made a mistake of fact. In the present matter, it is denied that there was a mistake of fact but the principle is simply enunciated by the following quotation made in the De Freitas case:

> "Where the functionary had the power to decide and applied his mind, the decision can as a general rule not be set aside, even if on the merits it is wrong and in making it, the functionary made an error of law."

11. On the second consideration, it is submitted that the Registrar correctly applied his mind to the relevant consideration and therefore review does not lie. There is nothing irregular in the Registrar considering the advice of actuaries in determining the most appropriate distribution method.

12. It is common cause that both the Registrar and the second respondent sought and obtained professional advice from actuaries on the most equitable distribution method of the surplus amount. In the case of **Minister of Environmental Affairs and Tourism and Another v Scenamatic Fourteen (Pty) Ltd 2005 (6) SA 182,** The Supreme Court of Appeal in South Africa dealt with the principle of when a functionary relies in part on the advice of another person when making a decision. It is emphasized that the functionary is still required to apply his mind to the advice and make his own decision. The head note in the Scenamatic case reads as follows:

> 'A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate. Where the functionary relies on the

> advice of another, the functionary would at least have to be aware of the grounds on which that advice was given. But it does not follow that a functionary would in all cases have to read every word of all the documentation in exercising the discretionary power and may not rely on the assistance of others. What the functionary may not do is adopt the role of a rubber stamp and so rely on advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simple to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his…'

13. In the present matter, the first respondent applied his mind to the issues that were before him and in particular, the issue pertaining to the surplus, clarity on the calculation, the rational for including employees who were not employed by the Swaziland Water and Sewerage Board. See: pages 69 to 70 of the book of pleadings. The first respondent also considered the advice of actuarial experts, on the most equitable distribution. See: paragraph 3.13.2 of the first respondent's answering affidavit at page 72 of the book of pleadings.

14. It is submitted therefore that the applicant's failed to set out a basis for the court to interfere with the exercise of his discretion.

THE GROUNDS FOR REVIEW

15. In the court a quo, the applicants contended that the first respondent had committed an irregularity by labeling the sum of E43,629,104.00 as a surplus and contended that by virtue of this irregularity, he acted outside the ambit and scope of his authority by stating that the transfer values should be distributed to all members of the second respondent. This contention has a number of fundamental flaws:

15.1 Firstly, it is the second respondent that labeled the amount to be a surplus. See: page 85 of the book of pleadings where in a letter from the second respondent to the first respondent, the former wrote:

"We refer to your letter dated 21st February 2011 and to the prior meeting held between SWSC Pension Fund Trustees and your office. You have requested clarity on three main issues. This letter considers each of the issues raised.

Detailed information on how we came to the decision to refer to the transfer values of pension contributions which were fund credits of members transferred from the Public Service Pension Fund (PSPF) to the SWSC Pension fund as 'surplus'".

From the aforegoing, it is clear that it is the second respondent that labeled the amounts as a surplus.

15.2 Secondly, premised on the explanation given by the second respondent, as well as the law, it was correct to regard the amount as a surplus and not anything else. The amount that was received from the PSPF, accrued to the second respondent and not to the individual members of the fund.

It therefore became an asset of the fund, which required that it be distributed to members of the fund in accordance with the law and best practice.

15.3 A surplus is defined as an amount by which the assets of a retirement fund exceed its liability at a particular point in time. The Fund received the E43,629.104.00 in circumstances where it was able to meet its liabilities.

15.4 A fund which is a defined contribution fund such as the second respondent is regarded to be in a position to meet its liabilities, where it is in a position to pay the funds standing to the credit for individual members together with interest. It should also be in a position to pay any fees (be it administrators fees or actuary fees etc). Once it has sufficient funds to meet those obligations, then any amount received in addition, is considered to be a surplus amount, which must then be distributed in accordance with the dictates of the law as

well as in accordance with principles of fairness and equity.

15.5 The amount received could never vest in the individual members of the fund, because in essence, the trustees, provided they had obtained actuarial advice, could have applied the amount to meet the expenses of the fund. The amounts that were transferred therefore did not vest in the individual members of the fund because the rules provide how accruals to individual members are to be effected. This was not such a case.

15.6 In the case of **Tek Corporation Provident Fund supra** the court stated at paragraph 17 **"once a surplus arises it is ipso facto an integral component of the fund".** It is an asset of the fund, which must be dealt with as such, but subject to the provisions of the retirement's directive of 2008 (directive No: 6).

15.7 Fund assets consist of employer and employee contributions. Once contributions are deposited into a fund, they become fund assets until they become due for payment in accordance with the rules of the fund. Individual members do not have a claim to those contributions, which are at that stage, fund assets pending the occurrence of the insured events. In the case of a retirement fund, the insured event would be the

retirement, resignation, dismissal, retrenchment or any other lawful means by which the member can exit the fund.

15.8 The fund assets less the fund liabilities, equals the actuarial surplus. It is accepted that the money from PSPF was intended for the second respondent, and indeed was received by the second respondent, it follows that it became a fund asset and therefore, by the reasoning above, it became a surplus.

15.9 Thirdly, it is not the first respondent that determined that the surplus funds were to be distributed to all members of the second respondent. The first respondent approved a distribution plan that had been submitted by the second respondent. The distribution plan was premised on actuarial advice obtained by the first respondent as well as independent actuarial advice that had been obtained by the second respondent.

16. The second ground of review appears to be premised on what was termed an error of law in classifying the sum of E43,629,104.00 as an asset as opposed to a liability.

16.1 It is submitted that even if the first and second respondents were wrong in coming to that conclusion (which is denied), this does not constitute a ground for

review. Where a functionary has in good faith exercised his discretion, taking into account all relevant considerations, there is no basis for review. It is submitted however, that they were in fact correct, because the monies that were transferred to the second respondent were an asset as they were a credit to the fund. The second respondent has utilized member funds to meet its obligations towards retiring, retrenched, resigned, or deceased members (who had transferred from Swaziland Water Sewerage Board to the second respondent) without the actual money being transferred.

17. The third ground of review was that the first respondent failed to accord the appellants an opportunity to be heard. This ground of review also has no merit.

17.1 The second respondent has detailed the nature and extent of the consultative process that was undertaken before the Registrar's approval was finalized.

17.2 It appears that the ground of not according a formal hearing, is directed at the first respondent and therefore the submissions will be in that respect.

18. In dealing with the notion of according a hearing, two submissions will be made. The context of the present matter is instructive on the approach the court should adopt.

18.1 Members of a provident fund, elect trustees to represent their interests in the fund. The trustees have various duties towards the membership, including the duty to act in the best interest of the fund and the members.

18.2 Where the trustees have consulted with the members on a particular matter, and a decision has been taken pursuant to such consultation process, the ordinary members of the fund have remedies, in the event that they are dissatisfied with the decision taken by the trustees, they have remedies in law which do not include the right to be heard by the first respondent on any decision.

19. The applicants purported to be acted on their own capacity as well as on behalf of unidentified and/or unnamed other persons. In essence, this was some form of class action, and the outcome of the proceedings would have an impact on all the other members of the second respondent, notwithstanding that the majority are not in support. At common law, once a body of persons have adopted a constitution providing for legal personality, then, they act through that body. So, for example, the assets and liabilities of a fund are not assets and liabilities of the individual members. The fund is a legal entity which owns and holds the assets in accordance with the Constitution.

20. The quintessential requisites for a class action are not present in the present application/appeal. The requisites are:

2.1 That the class is so numerous that joinder of all its members is impractical.

20.2 The questions of law and fact are common to the class.

20.3 The claims of the applicants representing the class are typical of the claims of the rest.

20.4 That the applicants through their attorneys will fairly and adequate protect the interests of the class.

See: The Permanent Secretary, Department of Welfare, Eastern Cape Provisional Government V MN NQXUZA and Others, supreme Court of Appeal Case No. 493/2000.

20.5 The applicants therefore failed to establish the right to bring the application on behalf of the other members of the fund. Accordingly, the applicants could only bring the matter on their own capacity.

21. Judicial review is not open to every and any person who may feel he has a gripe with any decision. Courts frequently decline to hear a case and thus decline to decide on the presence of a ground for review because of certain restrictions. The restrictions are:

2.1 The person who brings the application or action and the effect of the irregularity on such a person.

21.2 The timing of the application.

21.3 The nature of the administrative action in question.

21.4 The forum to hear the dispute.

21.5 The effects of a remedy on administrative convenience or good governance.

See: JR De Ville Judicial Review of Administrative Action in South Africa at page 399.

22. At common law the applicants must establish *locus standi* to bring about a review application, however, premised on the notion that they do not have a right to direct their complaint to the first respondent, it follows that they do not have *locus standi* to review the first respondent's decision. Accordingly, the *court a quo's* findings, that they did not have the necessary *locus standi*, must be upheld.

23. It is submitted that the appellants failed to satisfy the requirements for the review and in particular failed to demonstrate that the first respondent had committed an irregularity. Accordingly, the appeal must fail.""

[8] I have incorporated into this judgment the material submitted by counsel on both sides in such full measure because any attempt to paraphrase or precis or condense them runs the risk of diluting their essence and impact even if only partially. The nub of the argument is

whether, in the circumstances of this case, it can be truly said that the trial judge was incorrect when he made the findings which have been reproduced in paragraph [5] above.

[9] Having carefully considered the judgment itself, together with the well reasoned oral and written submissions of counsel on both sides, and the helpful binders of authorities, this Court has come to the conclusion that, though serious questions have been raised by the appellants, they have failed to demonstrate that the findings and judgment of the court ***a quo*** should be disturbed on appeal.

COSTS

[10] The appellant prayed that the appeal be allowed with costs. In the court below, M.C.B. Maphalala J made no order as to costs; evidently because he thought that the appellant had raised matters of public interest which would be settled by the ruling of the court, for the benefit of the natural and corporate personalities concerned, as well as that of the public at large. This Court thinks that the judge ***a quo*** was correct to exercise his discretion in the way that he did on the matter of costs. This Court, for the self same reasons which motivated the court ***a quo,*** will make no order as to costs.

ORDER

i. The appeal is dismissed.

ii. No order is made as to costs.

_____
S.A. MOORE
JUSTICE OF APPEAL

I agree

_____
DR. S. TWUM
JUSTICE OF APPEAL

I agree

_____
E.A. OTA
JUSTICE OF APPEAL

For the appellants : Mr. Shabangu

For the respondents : Mr. Z. Jele