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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO.24 OF 1956 ("the Act"): ELECTRICAL CONTRACTORS' ASSOCIATION (SA) ("first complainant") & CI GREAGER ("second complainant") v FEDSURE GROUP STAFF PENSION FUND SCHEME ("first respondent"); INVESTEC EMPLOYEE BENEFITS LIMITED ("second respondent") AND THE BOARD OF MANAGEMENT OF THE FEDSURE GROUP STAFF PENSION FUND SCHEME ("third respondent")

[1] INTRODUCTION

1.1 The complaint was originally submitted before this Tribunal during 2003 whereafter the Adjudicator at the time, Advocate Vuyani Ngalwana, dismissed the complaint on the basis that this Tribunal had no jurisdiction to determine the matter as the same matter was pending before the High Court. On 22 November 2005, a section 30P application was heard in the Witwatersrand Local Division (as it then

was) where it was ordered that the determination of the Pension Funds Adjudicator issued in this matter on 24 March 2005 be set aside and that the adjudicator reconsider the matter and determine it.

1.2 The respondents have proposed, with the apparent concurrence of the complainants, that in reconsidering the matter, this Tribunal must first make a determination on the various points *in limine* raised by the respondents to the complaint, and only, to the extent that the points *in limine* are not determinative of the complaint, call upon the respondents to deal with the merits of the complaint. In considering the matter, this is the manner in which this Tribunal intends to deal with the complaint. The third respondent is the board of trustees of the first respondent and it appears as if this group is limited to only those who were trustees during 1998 when the issues in dispute arose.

[2] FACTUAL BACKGROUND

2.1 The first respondent was established on 1 January 1960 for purposes of providing pension fund benefits for the employees of Fedsure Holdings Limited ("the principal employer"). The principal employer also permitted participation in the fund by its associated or subsidiary companies. The first complainant, the Electrical Contractors' Association SA, was one such associated company which participated in the fund. The second complainant, the regional director of the first complainant, is a member of the fund by virtue of his employment with the first complainant.

2.2 During April 2001, the business of Fedsure Life Assurance Limited ("Fedsure"), a subsidiary of the principal employer, was acquired by Investec (Pty) Ltd and subsequently became known as Investec Employee Benefits Ltd ("the second respondent"). Pursuant to the said takeover, a large-scale retrenchment exercise of Fedsure employees ensued resulting in concomitant withdrawals from the fund.

2.3 The said fund withdrawals together with certain actions and decisions purportedly taken unlawfully by the respondents now form the subject-matter of this complaint.

[3] COMPLAINT

Third respondent

3.1 The complaint appears to be multi-pronged and directed at each of the respondents jointly and severally. In the first instance, the complainants submit that the first respondent has been maladministered by the third respondents who acted in breach of their fiduciary and statutory duties and in contravention of their legal obligations to the complainants under the policy contract issued by the second respondent to the fund. It is also submitted that the third respondent acted contrary to the rules of the fund in that:-

3.1.1 The third respondents failed to fulfil their duty of good faith to all the members of the fund, including the duty to disclose adequate relevant information to all the fund members when they ought to have done so. The complainants further contend that when the rules of the first respondent were revised in 1998 and in subsequent years, the complainants were never informed of the proposed amendments nor were they invited to participate or consulted in negotiations or discussions in respect of the amendments. It is further contended that the complainants were never informed of how the employer representatives were appointed as fund trustees nor were they advised of the appointment of member representatives to the board of management of the fund. The complainants argue that the third respondent effectively unilaterally decided to effect amendments to the rules without discussion with any of the employers

participating in the fund and that the amendments were biased in favour of those fund members employed by the principal employer.

3.1.2 The third respondent failed to act impartially and with due care and diligence and in the best interests of all the members of the fund (including employees of the first complainant) when they ought to have done so. The large-scale retrenchment exercise undertaken by the principal employer, the complainants submit, had a significant adverse effect on the benefits of the fund members, including the employees of the first complainant, and on the amount of surplus available for distribution. It is argued that the fund trustees had a fiduciary duty to *"take some form of action to protect all of"* the fund members, including the employees of the first complainant, and employees of other associated companies, and were obliged not to take decisions which prejudiced the fund members' positions. It is the complainant's further argument that the trustees were bound in terms of their common law fiduciary duties, the Act, the Financial Institutions (Investment of Funds) Act, 1984 and the Financial Institutions (Protection of Funds) Act, 2001 to act with impartiality in respect of all members and beneficiaries. The complainants further submit that the trustees, being the employees of the principal employer and/or its subsidiary companies, knew or ought to have known, prior to the retrenchment exercise, the adverse effects such an exercise would have on the members of the fund who were employed by the other participating employers. The third respondent should have ensured that all members of the fund were treated equally.

3.2 The third respondent failed to fulfil its duty to act with due care and diligence in respect of the management of the fund *"particularly with regard to the management of the first respondent's funds or the funds*

linked to the first respondent when they ought to have done so". The complainants assert that during 2001 and 2002, they were advised by the second respondent that the fund's assets invested in the second respondent's guaranteed fund had suffered significant losses and as a result certain actions had to be taken by the trustees, including the declaration of a 0% bonus in 2001 and the adjustment of the non-vesting bonuses by a maximum of 12%. The complainants further submit that the trustees of the fund had a duty to act with due care and diligence to ensure that the fund's monies were invested in the best interest of all the members of the fund. The complainants submit that such investments were poorly administered by the first and second respondents to the prejudice of the fund and its members.

3.3 The third respondent failed to prevent a conflict of interest of its rights and pension entitlements in the fund and those of all the other members of the fund, including the employees of the first complainant, when they ought to have done so. The complainants aver that on 23 April 1992, the third respondent effected an amendment to the fund rules which was to apply with retrospective effect to 1 April 1992. Such amendment, according to the complainants, related to an insertion in the fund rules of a provision making the payment of retrenchment benefits the exclusive preserve of the employees of the principal employer. The complainants further contend that the consent of the other employers participating in the fund was never solicited in that regard.

3.4 The third respondent failed to comply with the requirements of the Act when it ought to have done so. The complainants argue that when the third respondent effected retrospective amendments to the rules in 1988 with regard to retrenchment benefits to be payable only to the employees of the principal employer, the third respondent acted unlawfully in that it ignored the determination by the Pension Funds Adjudicator in *Group of Concerned Sapref Pensioners v Sapref Pension Fund & Others* [2000] 1 BPLR 44 (PFA) which ruled against the retrospective amendment of rules.

3.5 The complainants further submit that all the amendments to the 1988 rules that were purportedly effected by the third respondent are invalid and of no force and effect as there was, at the time, no properly constituted board of management as required in terms of section 7A of the Act. The complainants further submit that the trustees were, with effect from 1 August 1996, enjoined by section 8 of the Act to appoint a principal officer to be responsible and accountable for the performance of various duties in terms of the Act. In terms of section 7A(1), they contend, the rules of the fund ought to have been amended to make provision for the establishment of a management board. In light of the fact that no rules were amended to make provision for such an appointment, the complainants submit that the 1988 amendments to the rules are therefore not legally valid.

Second Respondent

3.6 In addition to the conduct they impute to the third respondent as set out above, the complainants submit that the second respondent acted in violation of its legal obligations to the complainants as enshrined in the policy document issued by the second respondent to the fund in the following respects:

3.6.1 The second respondent failed to manage and invest the contributions paid by members to the fund in the interests of all the members, including the first complainant and its employees and the employees of the other associated employers. The complainants further aver that they understood the Fedsure Life Guaranteed Fund to mean a separate portfolio of investment which the second respondent held and would hold on behalf of the fund in which the contributions of the complainants and those from other associated employers and other similar

pension fund schemes would be invested by the second respondent and which would:

> "(i) guarantee the capital value of the contributions paid by the complainants in respect of the fund;
> (ii) be a form of low-risk investment;
> (iii) be "ring-fenced" in the sense of being kept entirely separate from other investments made and managed by the second respondent on behalf of the fund and its members;
> (iv) offer smoothed bonuses and investments that would provide stable and consistent investment returns with as little market-related volatility as possible;
> (v) build up a bonus stabilisation reserve fund when the markets were up and draw on such a reserve fund to supplement bonuses when markets were down;
> (vi) provide sustainable and competitive long-term investment returns; and
> (vii) protect the complainants and the fund against normal investment volatility."

3.7 The complainants further aver that they believed and understood that member contributions to the fund would be managed and invested by the second respondent in accordance with its fiduciary and statutory duty to act entirely in the interests of the complainants and with the necessary skill, care and diligence required of a fund manager and administrator. The second respondent, it is submitted, failed to meet the required standard.

3.8 It is further contended by the complainants that the second respondent failed to act in accordance with the terms and conditions of the policy document it issued to the fund, in particular, in respect of the investment of fund monies or *"fund linked to the First Respondent"*. It is alleged that the second respondent failed to invest the member contributions in a guaranteed fund as such fund had ceased to exist. The second respondent instead, it is submitted, placed the investment in the second respondent's *"Net Main Life Fund"* and that the second

respondent utilised monies from the said fund to make strategic investments in its subsidiary or associated companies.

3.9 The complainants further submit that by investing the contributions paid by policyholders into the same “pot” of money invested by shareholders and by failing to establish and maintain a separate guaranteed fund, the trustees and the second respondent breached their statutory duties to observe the utmost good faith and to exercise proper care and diligence in respect of the administration, operation and management of the fund.

3.10 It is further submitted by the complainants that notwithstanding the fact that the trustees were aware that there was no separate guaranteed fund, the trustees, some of whom were the directors of the second respondent, failed to have the situation rectified and continued to remain in breach of their contractual and statutory duties, particularly in respect of the investment of assets. It is further alleged that the trustees were aware by April 2001 that the second respondent’s guaranteed fund was experiencing financial losses, yet, it is submitted, it was only in February 2002 that the second respondent transferred the fund’s assets to a cash portfolio.

3.11 The complainants further submit that the second respondent revoked bonuses when there was no provision in the policy or in the 1988 rules authorising it to do so. The complainants state that there was a legal obligation on the second respondent to declare an income bonus and a capital growth bonus on 31 December of each year. In August 2001, however, the second respondent advised that the final guaranteed bonus declaration as at 31 December 2000 and the interim guaranteed bonus rate from 1 January 2001 were 0%.

3.12 The complainants submit that the second respondent’s conduct, in making the 0% bonus declaration acted in breach of its obligations to

the complainants in terms of the provisions of the policy in that the second respondent failed to declare an income and/or capital growth bonus when it ought to have done so; the second respondent failed to credit the deposit account and/or the capital growth account when it ought to have done so; the second respondent failed to transfer 10% of the opening balance in the capital growth account to the deposit account when it ought to have done so.

3.13 It is further averred by the complainants that they and other employers participating in the fund were never consulted by the second respondent and the trustees about the investments made by the second respondent and the consent of the members was never sought in terms of section 19(4) of the Act which provides that no registered fund shall invest any of its assets in the business of a participating employer where the fund has been established as an audit-exempt fund. The complainants further allege that as a result of the said contravention of the Act, they are at a loss as to the fund investments made by the second respondent. Such breaches by the second respondent, they submit, have caused the complainants to suffer loss of an amount being the difference between the aggregate amount of the bonuses paid to the first complainant and its members for the period 1999 to 2001 and the aggregate amount of the bonuses which would have been payable to the first complainant and its employees over the said period, but for the breaches of the second respondent and the fund trustees. In a similar vein, the complainants argue that the second complainant was a member and therefore a beneficiary of the fund since 1986 and he has accordingly suffered loss occasioned by the second respondent's conduct in that regard.

Disclosure of information

3.14 The complainants also seek disclosure of certain information by and require certain documentation from the respondents. Such information

and documents, it is submitted, will enable the complainants to quantify the losses they have suffered on account of the respondents' alleged unlawful conduct. This Tribunal does not intend to repeat the information requested by the complainants because such is apparent from the papers and is common knowledge between the parties. The complainants further seek this Tribunal to order the respondents to disclose the information and make available to the complainants the requested documentation.

3.15 The complainants further seek an order that, after receipt of the said information and documentation from the respondents and the calculation of the losses allegedly suffered, the complainants will be entitled to approach the Adjudicator for an order that the second respondent and the trustees who were acting as such at the relevant time, pay to the employees of the first complainant, including the second complainant, the amount of the losses allegedly suffered by them as a result of the alleged maladministration of the fund by the trustees and the second respondent.

3.16 Furthermore, the complainants seek this Tribunal to order the actuary to the fund to determine the effect on the pension benefits of the members of the fund had the amendments to the 1988 revised rules (which were allegedly applied with retrospective effect and which were allegedly not lawfully passed by a validly constituted board of trustees) not been effected. The complainants further seek that they be permitted in terms of the order to appoint, at their sole discretion, an independent actuary (at the cost and expense of the fund) to verify the actuarial calculations made by the fund's actuary and that the complainants' actuary be afforded free access to any documents to enable him/her to verify such calculations.

3.17 Finally, the fund seeks this Tribunal to order that the fund's actuary determine the effect on pension benefits of the employees of the first

complainant had the assets and liabilities of the fund been paid out to the participating employers prior to the retrenchment exercise undertaken by the principal employer. In the event of the fund's actuary finding that a greater transfer value would have been payable to the employees of the first complainant who were members of the fund, if the assets and liabilities of the fund had been paid out prior to the retrenchments by the principal employer, then this Tribunal is sought to order that the second respondent effect payment of the value of the shortfall to the employees of the first complainant who were members of the fund at the material time.

[4] RESPONSE

4.1 The respondents have in their response raised a plethora of preliminary points relating, inter alia, to *locus standi*, jurisdiction and prescription. I will deal with each of the preliminary points in turn.

Locus standi

4.2 The respondents argue that the first complainant has no *locus standi* to lodge the complaint because there is no contractual privity between the first complainant in its capacity as the employer and the second respondent, on the one hand, and the first complainant and the fund on the other. By way of an explanation, the respondents reason that on application by the first respondent, a group assurance policy is issued by the second respondent to the fund for the benefit of the fund members. It points out that the fund's obligations to its members is contained in the fund rules and such rules oblige the first complainant as the employer to remit its own and the employees' contributions to the second respondent as the administrator of the fund. The respondents further argue that the first complainant, as the employer, is only a nominal contracting party to the policy issued by the second

respondent and has no rights in terms thereof nor does it have any contractual nexus with the fund.

4.3 In light of this submission, the respondents submit, the first complainant has no legal standing to enforce obligations arising in terms of the policy and that it is only the fund that can enforce such obligations. Likewise, the respondents argue that the first complainant has no legal standing to enforce the fund's and its trustees' obligations towards the members of the fund. Only the fund has the legal standing to do so. The respondents submit that it follows from its argument that it is not competent for the first complainant to lodge a complaint as defined in the Act.

4.4 The respondents further aver that, a member has no legal standing to lodge the complaint relating to any allegations against the second respondent for the alleged maladministration of the fund or breaches of the policy contract for the reason that there is no contractual privity between the second respondent and the members of the fund. For this reason, the respondents further aver, the second complainant as a member of the fund has no legal standing to lodge a complaint in respect of the conduct of the second respondent whether in terms of the policy, contract or otherwise.

Jurisdiction of the Adjudicator

4.5 As regards the complainants' request for information, it is argued on behalf of the respondents that such a request does not constitute a complaint as defined in the Act in that it does not relate to the administration of a fund; the investment of its funds and/or the interpretation and application of its rules.

4.6 The respondents submit that there is nothing in the Act or in the Promotion of Access to Information Act, 2 of 2000 (PAIA) which empowers the Adjudicator to grant the relief sought by the complainants in respect of the request for information.

Interpretation of the policy document

4.7 The respondents submit that the Adjudicator has no jurisdiction to entertain a "complaint" relating to the second respondent's alleged mismanagement of the investment of the fund's assets and the alleged breaches of the policy on account of the fact that such a "complaint" does not constitute a complaint as defined in the Act.

4.8 As regards the allegation that the complainants have suffered damages as a result of the second respondent's unlawful conduct; the respondents submit that as the first complainant is an employer, it has no *locus standi* to lodge the complaint. Furthermore, it is submitted that Condition 8 of the provisions of the policy document states that the employer shall have no beneficial interest in the policy except as may be provided for in the fund's rules relating to "Lien over benefits". The respondents submit that if the employer has no beneficial interest in the policy, then there is no basis upon which the first complainant could have suffered any loss arising out of the conduct of the second respondent and it is only the fund which could have a right of recourse against the second respondent.

4.9 The respondents further submit that the complainants' allegation that the second respondent failed to act in accordance with the terms and conditions of the policy *"particularly in respect of the investment of the Respondent's fund or funds linked to the First Respondent"* is flawed in that the contributions paid to the second respondent by the fund constituted premiums in terms of the policy and, as such, the premiums

became the property of the second respondent on receipt of such from the fund and that the fund's only asset are its limits against the policy.

4.10 Finally, the respondents submit that the Financial Institutions (Investment of Funds) Act, 1984 and the Financial Institutions (Protection of Funds) Act, 2001, particularly section 2 thereof, finds no application to persons in the position of the complainants and therefore no statutory duties contemplated in section 2 were owing to the complainants.

Prescription

4.11 The respondents aver that all the complaints relating to the constitution of the board of management and the amendment of the fund rules have prescribed in that the complaints arose more than three years before the date (26 April 2003) on which the complaint was received by the Adjudicator in writing.

Multiplicity of actions

4.12 The respondents contend that there are various pending court actions instituted by various pension funds which operated under the aegis of the fund against the second respondent and other defendants in which there is an overlap with the allegations made in this complaint. The respondents further submit that it would be undesirable for the same issues to be determined simultaneously by the High Court and the Adjudicator on account of the strong likelihood of the two fora coming to different conclusions in respect of the same issues.

[5] DETERMINATION AND REASONS THEREFOR

Points in limine

Locus standi

5.1 The provisions of section 1 of the Act define what constitutes a complaint.

5.2 A “complaint” is defined in the following terms:

> **“complaint”** means a complaint of a complainant relating to the administration of a fund, the investments of its funds or the interpretation and application of its rules, and alleging-
>
> (a) That a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
> (b) That the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
> (c) That a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
> (d) ...”

A “complainant” is defined thus:

> **“complainant”** means-
>
> (a) Any person who is, or who claims to be-
>
> (i) A member or former of a fund;
> (ii) A beneficiary or former beneficiary of a fund;
> (iii) An employer who participates in a fund;
>
> (b) ...
> (c) ...
> (d) Any person who has an interest in a complaint;”

5.3 This Tribunal disagrees with the submission raised by the respondents that because no contractual nexus exists between the first complainant

and the second respondent on the one hand and between the second complainant, the fund and the second respondent on the other, it follows therefrom that neither of the parties is competent to enforce the contractual rights arising out of the relationship between the fund and the second respondent.

5.4 The Adjudicator is required by section 30D of the Act to dispose of complaints lodged in terms of section 30A(3) in a procedurally fair, economical and expeditious manner. A “complainant” is defined as including a member or former member of a fund and an employer who participates in a fund. It is apparent from the complaint that the first and second complainants have lodged the complaint in their respective capacities as a participating employer in the fund and member or former member of the fund. The complainants, therefore, fall within paragraph (a)(1) and (a)(ii) of the definition of a “complainant”.

5.5 To the extent that an argument might be made that the right on the part of the complainants to lodge a complaint and claim damages for loss allegedly suffered does not arise *ex contractu* but from the rules of the fund read together with the policy document, regard may be had to the definition of a complaint in section 1 of the Act, in terms of which a complainant enjoys statutory protection against prejudice in consequence of the maladministration of a fund. Expressed differently, regardless of the contractual rights and obligations in this matter, all that the complainants have to allege is that the unlawful and negligent conduct or omission by the second respondent in its capacity as the administrator of the fund has resulted in the complainants sustaining prejudice as a consequence of the maladministration of the fund.

5.6 The potential liability of the second respondent in this matter, if proven, would be akin to delictual liability, in that it wrongfully and culpably mismanaged the investments of the fund (in accordance with its duty in terms of the policy and the fund rules) resulting in the complainants

suffering prejudice thereby. All that needs to be alleged is that had the second respondent not mismanaged the investments of the fund, the complainants (second) would have had a greater claim to the benefits of the fund. Hence, any denial of liability on the basis of the absence of a contractual nexus between the complainants and the fund and the second respondent would not exclude liability on the grounds of maladministration.

5.7 It follows from the above that the complainants have legal standing to lodge a complaint against the second respondent on the basis of the definition of a “complaint” in section 1 of the Act.

5.8 The point *in limine* is therefore without basis and is accordingly dismissed.

5.9 This Tribunal accordingly finds that the complainants have *locus standi* to lodge this complaint against the second respondent.

Jurisdiction of the Adjudicator: Request for Information

5.10 It is contended by the respondents that the complainants’ request for information from the second respondent and the fund does not constitute a “complaint”, as defined, to the extent that it does not relate to the administration of a fund; the investment of its funds and/or the interpretation and application of its rules. The respondents submit that there is nothing in the Act or PAIA which empowers the Adjudicator to grant the relief sought in respect of the request for information.

5.11 Among the information and documentation required by the complainants are the particulars of persons who were the trustees of the fund at the relevant time, when the retrenchment exercise initiated by the principal employer commenced, how many withdrawals were made from the fund at the relevant time; what the amount of the

shortfall experienced by the fund was at the relevant time. The complainants also seek, *inter alia*, copies of the relevant policies of insurance and endorsement issued at the relevant time together with copies of the consolidated rules of the fund.

5.12 Section 7C(2)(a) provides that one of the objects of the board of trustees is to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of "termination or reduction of contributions to a fund by an employer... and withdrawal of an employer who participates in a fund".

5.13 Section 7D lists certain duties of a board of trustees, including those to:

> (c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund
>
> (d) ...
>
> (e) ...
>
> (f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Investment of Fund) Act, 1984 (Act No.39 of 1984), and all other applicable laws."

5.14 It is also clear from the foregoing that the trustees of the fund are, in terms of section 7D(c), obliged to furnish the complainants with adequate and appropriate information to enable them to exercise their rights in terms of the rules. This Tribunal has, in terms of chapter VA of the Act, jurisdiction to pronounce on this matter.

5.15 Furthermore, both fund trustees and administrators are considered to be "persons dealing with funds of, and trust property controlled by, financial institutions", and as such fall within the ambit of section 2 of the Financial Institutions (Protection of Funds) Act, 2001. The definition

of “financial institution” in this Act includes “any person or institution referred to in the definition of ‘financial institution’ in section 1 of the Financial Services Board Act”, which, in turn, defines a “financial institution” as including any pension fund organisation registered in terms of the Act or any person referred to in section 13B of the Act administering the investments of such a pension fund or the disposition of benefits provided for in the rules of such a pension fund. The entity referred to in section 13B of the Act is the administrator of pension funds. It goes without saying that the present complaints are lodged against the second respondent in its capacity as the administrator of the fund.

5.16 Section 10 of the Financial Institutions (Protection of Funds) Act, 2001 makes it clear that any person who contravenes any provision of this Act or fails to comply with any duty s/he has in terms of the Act is guilty of an offence, liable to a fine or imprisonment and in addition liable for any profit she made, “and for any damage suffered by the institution, trust, beneficiary, or principal as a result of the contravention or failure”.

5.17 It is also clear that the second respondent as the administrator, tasked with the delegated duty of investing the fund’s assets on behalf of the fund, owes a duty of utmost good faith and must exercise the same care and diligence required of a trustee in the performance and discharge of her duties (section 2(a) and (b) of the Protection of Funds Act).

5.18 The question that then arises is whether or not this Tribunal has jurisdiction to apply this Act and hold administrators liable on the basis thereof. Section 30E(1) of the Act empowers the Adjudicator to make the order that any court of law may make. Thus the Adjudicator has jurisdiction in this regard and has the power to make the order that the High Court may make (see *Mes v Art Medical Equipment Pension Fund and Others* [2005] 4 BPLR 332 (PFA).

5.19 The point *in limine* is, therefore, also without basis and is accordingly dismissed.

Interpretation of the policy document

5.20 For the same reasons enunciated in the above paragraphs, this Tribunal finds the point *in limine,* that it has no jurisdiction to entertain the "complaint" relating to the second respondent's alleged mismanagement of the investment of the fund's assets and the alleged breaches of the policy contract on the ground that such a grievance does not constitute a "complaint" as defined, to be without foundation and is accordingly dismissed.

5.21 In a similar vein, the submission by the respondents that section 2 of the Financial Institutions (Investment of Funds) Act, 1984 and the Financial Institutions (Protection of Funds) Act, 2001 does not apply to persons in the position of the complainants and that as a result, no statutory duties were owing to the complainants is found to be without basis and is rejected. The reasons therefor appear above.

Prescription

5.22 At the time of the lodging of the complaint section 30I of the Act which dealt with time barring provided 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 writing.
>
> (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complaint became aware of such occurrence, whichever occurs first.
>
> (3) The Adjudicator may on good cause shown or of his or her motion –

(a) Either before or after the expiry of any period prescribed by this chapter extended such period; [or]

(b) Condone non-compliance with any time limits prescribed by this chapter."

5.23 It is clear that at the time the complaint was lodged, the Prescription Act, 68 of 1969 did not apply to proceedings before the Adjudicator. The situation has since been changed by the amendment of section 30I of the Act during 2007. In the instance, the complainant's complaint shall be determined by the legislation that was applicable at the time it was lodged.

5.24 It appears that the complaint relates to events which occurred more than three years before this complaint was received by this Tribunal. To be exact, the complaint was received by this office in May 2003. In light of the protracted submissions contained in the complaint, it is difficult to discern exactly when the cause of action arose. The complaint seems to stem from events that occurred in 1988 when the first respondent's rules were purportedly amended to make provision for the mass withdrawal of fund members allegedly without the requisite authority but there appears to have been ongoing deliberations between the complainants and the respondents until sometime in 2002. The complaint appears to be time-barred for the purposes of section 30I(1) of the Act. There is a good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997(1) SA 124 (CC) the court said (at paragraph [11]):

> "Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memory of ones whose testimony can be obtained

> have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken."

5.25 However, the enquiry does not end there as this Tribunal needs to satisfy itself as to whether or not good cause has been shown or exists, for it to extend the three-year limit or to condone the non-compliance therewith. The Supreme Court of Appeal has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited 1962* (4) SA 531(A) (at 532 C-F), the court said:

> "In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for what would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

5.26 It is not apparent from the complainants' complaint when they first became aware of the irregularities alleged in their complaint. It appears that the complaint arose from the alleged unlawful amendments to the fund rules in 1988 and the subsequent amendments up to 2002. As earlier indicated, the complaint was received in May 2003. The import of this is that the lodgement of the complaint has not exceeded the stipulated three-year period.

5.27 In any event, even if this Tribunal is incorrect in asserting that the stipulated time period has been exceeded, it is of the view that, taking into account the importance of the issues raised in the complaint, from the point of view of all the parties to the complaint, it would be in the interest of justice for this Tribunal to find that good cause exists enabling it to extend the time limit prescribed for lodging a complaint in terms of section 30I(1) and condone the non-compliance with the time-limits prescribed in the section.

5.28 This technical point is accordingly dismissed.

Multiplicity of actions

5.29 The respondents contend that there are various court actions instituted by several pension funds which operated in terms of some sort of an umbrella arrangement with the fund, against the second respondent and other defendants in which there is a significant overlap with the allegations made in this complaint. On this basis, the respondents then submit that it would be undesirable for the same issues to be adjudicated simultaneously by the High Court and this Tribunal as there is a strong likelihood that the two fora would reach different conclusions in respect of the same issues.

5.30 These submissions are, for the purpose of this complaint, irrelevant. This is because the requirement in section 30H(2) that the earlier proceedings should be in respect of a matter which would constitute that the subject-matter of the investigation of a complaint would also require that the parties to the dispute be the same (see *Meyer v Iscor Pension Fund* [2000] 5 BPLR 533 (PFA)). It is clear and is admitted by the respondents that the parties to this complaint are not the same as the parties in the disputes before the High Courts.

5.31 This Tribunal also finds this point *in limine* to be without foundation and it is accordingly dismissed.

5.32 In the circumstances, all the technical points raised by the respondents are dismissed and the respondents will, when necessary, be called upon to submit their comprehensive response to the merits of the complaint.

DATED AT JOHANNESBURG ON THIS 1st DAY OF AUGUST 2012

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MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court
Complainants: Represented
Respondents: Represented