

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/341/98/SM

In the complaint between:

S S KHAMBULE

Complainant

and

CNA LTD, now CNA (PTY) LTD

First Respondent

**CNA GALLO (1990) PROVIDENT FUND,
now the MILLENNIUM ENTERTAINMENT GROUP
AFRICA LTD FUND**

Second Respondent

CNA PROVIDENT FUND

Third Respondent

**PRELIMINARY RULING IN TERMS OF SECTION 30J OF THE PENSION FUNDS
ACT OF 1956**

1. This is a complaint concerning a housing loan, lodged with the office of the Pension Funds Adjudicator on 9 September 1998. At that stage the complainant had not lodged a complaint in writing with either the employer or the fund as required by section 30A (1) of the Pension Funds Act of 1956 ("the Act"), but a written complaint dated 23 November 1999 was subsequently lodged with the employer on the complainant's behalf by the Wits Law Clinic. Not being satisfied with the replies received from the employer's Mr Norman Bailey, Labour Relations Advisor, dated 7 December 1999 and 30 March 2000, the complainant reverted to this office. My senior investigator thereafter joined the fund and forwarded the original complaint on the complainant's behalf to the employer and the fund for their responses. There has therefore been substantial compliance with section 30A of the Act.

2. The complainant is Sylvester Siphon Khambule. At the time of the events giving rise to the complaint in February 1996 he had been employed by Consolidated News Agency Ltd (the first respondent) for seventeen years and had been a member, from 1 October 1990, of the CNA Gallo (1990) Provident Fund, which changed its name as from 1 January 1998 to the Millennium Entertainment Group Africa Ltd Fund (the second respondent). I refer to the first and second respondents here as “the employer” and “the fund” respectively. Since a change in ownership of the company in 1997 the employer is currently Consolidated News Agency (Pty) Ltd t/a CNA, and the complainant is now a member of the CNA Provident Fund, (the third respondent) to which the assets and liabilities of the old fund were transferred.
3. The complaint relates to the administration of the fund. Essentially, as will be seen from the facts, the complainant alleges that the manner in which the employer and/or the fund operated a scheme utilising provident fund monies to provide a housing benefit for fund members entailed maladministration of the fund, resulting in prejudice to himself.
4. The complainant and employer were invited to attend an informal hearing in Johannesburg on 16 August 2000 before my senior investigator, Sue Myrdal. At that early stage the fund was not asked to attend as investigation was still proceeding as to which fund was involved. The employer’s representative declined to attend (despite having earlier asked for a personal meeting to discuss the issues) and Ms Myrdal met with the complainant only on that date. Accordingly in making this preliminary determination I have relied on the documentary evidence and submissions, and on the investigation of the complaint by Ms Myrdal, under my supervision, which investigation included hearing the oral submissions of the complainant and placing these before the respondents for written comment, together with various questions. Written responses have now been received from Mr Peter Scott, Human Resources Executive of the employer, Mr Norman R Bailey, Labour Relations Advisor of the employer, and Mr Tony Remas of Edward Nathan

& Friedland (Pty) Ltd, legal representative for the old and new funds, that is, the second and third respondents.

5. I set out the facts in detail below, indicating where there is a dispute of fact between the parties.
6. According to the complainant, several workers at CNA were introduced to a Mrs Esmarie Prinsloo by Mr Norman Bailey, Labour Relations Advisor of CNA. He told them that she was a professional who would assist them with their housing needs. The complainant states that in Mr Bailey's presence Mrs Prinsloo explained to the workers that they could make a loan from their provident fund for housing purposes.
7. The complainant subsequently decided to apply for a loan of R25 000 to purchase a house he had found through Progress Estate Agents. The purchase price was R65 000; he planned to utilise a small state subsidy and arranged for a bond with First National Bank for the balance.
8. The complainant states that he took the unsigned Deed of Sale in respect of the house he had found to Mrs Prinsloo at her office (designated "Housing Administration) in the CNA Head Office building, to show her the details of the property he intended to purchase. According to the complainant no-one else was present at the time. She then gave him a housing loan application form which he filled in, signed and dated, the date being 16 February 1996. An examination of this document reveals that signatures with the same date, 16 February 1996, have also been appended in the space provided for signature of "Member's Employer" and "Trustee".
9. On the same occasion the complainant signed several other documents which Mrs Prinsloo placed before him for signature. In response to questioning from my

investigator he stated that he did not read these carefully at the time, for the reason that he was excited at the prospect of owning his own house and trusted his employer. Furthermore he at all times assumed that Mrs Prinsloo was a representative of the employer.

10. Copies of these documents have been furnished to this office by the respondents. They are:

10.1 an Authority for Salary Deduction, wherein he authorised CNA Ltd to deduct R336.44 from his salary monthly and pay same to Fulfords, administrators of the provident fund;

10.2 an Acknowledgement of Debt: Housing, wherein he admitted liability in the amount of R25 550 and confirmed that the fund could deduct this amount from the benefit due to him should he exit from service, to pay off the outstanding balance to Fulfords;

10.3 an Acknowledgement of Debt: Surety, wherein he admitted liability in the amount of R25 550, being the "full amount of the surety owing by the company issued on my behalf to Fulfords" and confirmed that the fund could deduct this amount from the benefit due should he exit from service to pay either the company or Fulfords;

The above documents are all signed by the complainant as well as by a person (the same person in each case) signing for the employer.

10.4 a document without a heading which reads as follows:

I, the undersigned, Sylvester Sipho Khambule, ID No. *[filled in]* Employee No. *[filled in]* hereby authorise HENMONT INVESTMENTS to disburse loan monies on my behalf and make payments as and when required for the following:

Purchase Price		R _____
Transfer Fees		R _____
Electrical, Water and Sewer Connections (Only new houses)		R _____
Attorney Bond Fees		R _____
Henmont Administration Fees		R 550.00
FNB Loan Settlement		R _____
Deposit Payment		R _____
Town Council Fees		R _____
Clearance Fees	R _____	
Arrears	R _____	
Settlement	R _____	
Cheque costs		R _____
Other <i>Progress Estates</i>		R 25 000.00
Other _____		R _____
Other _____		R _____
Other _____		R _____

This document is signed by the “Client” (the complainant), the “CNA Manager”, and the “Housing Officer”. The signature against the designation “Housing Officer” is not the signature of Mrs Prinsloo; however it is the same (illegible) signature that has been appended as a “Witness” in the two Acknowledgement of Debt documents mentioned above. The date 16/2/96 follows each signature.

11. On 26 February 1996, using a CNA letterhead and signing herself E. Prinsloo: Housing Co-ordinator, Mrs Prinsloo wrote the following letter to Progress Estate Agent:

RE: HOUSE SALE BETWEEN JOSEPH MUSHI AND OUR EMPLOYEE SYLVESTER SIPHO KHAMBULE

Herewith confirmation that our employee SYLVESTER KHAMBULE's deposit of R25 000 will be available on the 4th of March 1996.

12. Some days later Mrs Prinsloo called the complainant to her office as his cheque was ready. She gave him a letter dated 29 February 1996 boldly headed "CNA HOUSING MEMO", and signed by herself, E. Prinsloo, Housing Co-ordinator, referring to the attachment of his cheque for R25 550. The complainant states that he queried the extra amount of R550 for administration costs as he did not feel any administrative services had been rendered to him, but ultimately he felt obliged to accept this. According to the complainant at no stage did Mrs Prinsloo explain to him that she represented an independent consultant or any entity other than CNA. Mrs Prinsloo then gave him the cheque drawn on the fund in the amount of R25 550, dated 29 February 1996, made out in his name, and marked "Not transferable". She asked him to sign the back of the cheque, saying that she would take it to Absa Bank; the complainant understood this to mean that she was going to pay the seller. He did not realise that his signature was an endorsement of the cheque to Henmont Investments. (The complainant in fact states that he never heard or noticed the name "Henmont Investments" until months later, after his transfer fell through, when CNA wrote to inform him that Henmont was to be liquidated.) Once the complainant had signed the cheque, Mrs Prinsloo took it back.
13. Three months later the complainant received another "CNA Housing Memo" from Mrs Prinsloo, dated 28 May 1996. The letter enclosed for his reference a copy of her letter also dated 28 May 1996, on a CNA letterhead, to attorneys De Villiers Scholtz regarding the supposedly imminent transfer and explaining how the complainant would be paying the bond and transfer costs.

14. However the transfer never took place; it appears that the seller did not have proper title, and on 16 April 1997 the complainant received a letter from De Villiers Scholtz enclosing a refund after deduction of wasted costs. The R25 000 held by Henmont was never refunded to the complainant. In the meanwhile however he had commenced repaying his loan to the fund, and deductions in respect of these loan repayments have continued to be made from his salary every month.
15. It appears that over the succeeding months several other employees who had made loans from the provident fund were similarly affected in that, where the housing deal had fallen through or the employee had changed his mind, Henmont failed to refund the monies.
16. In response to the growing unhappiness of the affected members, the fund and the employer applied for the liquidation of Henmont Investments, having explained the situation to the members and obtained cession of their claims. A provisional liquidation order was granted against Henmont on 4 August 1998 in the Witwatersrand Local Division. (It was soon afterwards that the complainant first sent his complaint to this office.) The liquidation process is still proceeding and the employer has pointed out that members should expect a shortfall of funds. To date no monies have been recovered for the members.
17. The respondents' version of the facts differs only slightly from the complainant's. Save to state that the use of the company's stationery by the housing consultant or Henmont was not authorised by the company, the employer's version of the facts in its response is set out in almost identical wording to that used in the responses prepared by Mr Tony Remas on behalf of the second and third respondents (the old and the new funds), these responses themselves being almost identical. Accordingly in summarising the respondents' version of the facts I shall deal here with the response of the second respondent ("the fund").

18. The response refers to a section entitled 'The Background to the Relationship between the Applicants and the Respondent' in the affidavit of Mr Guy Hayward, the acting chairman of the board of trustees of the fund at the time of the loan made to the complainant. This affidavit was made in the course of the application by the fund and the employer for the liquidation of Henmont Investments.

19. Mr Hayward states in his affidavit that four years earlier an agreement had been concluded between the fund, the employer and Henmont, in terms of which Henmont would assist employees in the lower income group to acquire and/or erect their own homes. He states

“Unfortunately a great degree of uncertainty exists in regard to the precise nature of the contract concluded. A copy of the written agreement (I am informed that there was one) cannot be located.”

20. According to Mr Hayward Henmont was initially paid a monthly retainer by the employer. Subsequently the contractual relationship was altered and Henmont began charging each individual member a flat administration fee of R550 for each housing application.

21. Mr Hayward goes on to describe the “housing loan process”. Employees, having located a suitable house or housing development would apply for a housing loan from the provident fund administered by Fulfords (the administration was later taken over by Alexander Forbes), which would source funds for the relevant purpose from an employee’s cash benefit “pool”. The loan would be applied for by way of the completion of a housing loan application form. He states:

“Provided the application fell within the rules and parameters permitted by the Second Applicant [*the employer*], and provided that the application fell within the rules applied by the administrators of the fund, the loan would be approved and granted.”

22. Mr Remas explains the next steps that would take place:

“On approval of the application for a housing loan by the member:

- * the amount of the loan was advanced by the old fund to the member by way of a cheque issued by the old fund to the member and clearly marked “not transferable”;
- * the member would acknowledge his indebtedness to the old fund by signing the surety document and thereby giving an undertaking to effect repayments to the old fund;
- * in terms of an agreement with the housing consultant, the cheque, though marked “not transferable” was endorsed by the member and made payable to Henmont. It is the understanding of the old fund that notwithstanding the fact that a cheque was marked “not transferable”, Henmont had an arrangement with Absa Bank Limited in terms of which such endorsed cheques were deposited into the bank account of Henmont. Henmont thereafter paid the developers or the sellers of houses, as the case may be, on behalf of the members.”

23. The facts regarding ensuing events relating to the failure of Henmont to refund monies to the members and the liquidation of Henmont are common cause between the parties.

24. As I have stated above, the complaint relates to the alleged maladministration of the fund; essentially the complainant alleges that the manner in which the employer and/or the fund operated the scheme utilising provident fund monies to provide a housing benefit resulted in prejudice to him, for which he seeks compensation.

25. The respondents have raised various points *in limine* with which I deal hereunder.

26. Mr Norman Bailey of CNA has pointed out that he has prepared his response on behalf of the new company, CNA (Pty) Ltd; and he submits that my office does not

have jurisdiction over this new company. In view of my finding that the fund bears liability rather than the employer, I do not propose to canvas his specific allegations.

27. The second and third respondents, the old and new funds, have submitted points *in limine* which are virtually identical. Since it is the old fund with which the complaint is concerned, I shall deal here with the submissions of the old fund, that is, the second respondent.
28. The fund submits firstly that the complaint as set out in the complainant's letter to this office is not directed against the fund or the employer, and no "complaint" as defined, or cause of action, has been made out against it, since the manner in which the fund conducted its operations as regards the housing loans cannot be said to have amounted to the maladministration of the old fund resulting in prejudice to the members, for the reasons that: the fund played no part in the use by the complainant of the monies loaned to him by the fund; there was no legal relationship between Henmont and the fund and Henmont cannot be said to have acted as the agent of the fund; and the fund and the employer instituted liquidation proceedings on behalf of members, including the complainant, against Henmont.
29. The fund submits further that neither the complainant's letter to my office nor my investigator's letters referring the complaint allege a complaint as envisaged in the definition of a complaint in chapter 1 of the Act. The definition reads as follows:

"complaint" means a complaint of a complainant relating to the administration of a fund, the investment 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) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.

30. The fund maintains that the complainant's principal complaint is clearly against Henmont and that he seeks a finding that the company is vicariously liable for its conduct by alleging that its employee, Esmarie Prinsloo, was employed by the company. The fund submits that even if this were true (which it maintains it is not) the complaint would not fall within the definition of the term.
31. I cannot agree that the complaint is directed against neither the employer nor the fund, nor do I accept that no complaint as defined in the Act has been alleged. The complainant formulated his complaint in his letter received by my office on 9 September 1998 as follows:

"My problem with the company is this. I have applied for provident fund for the sum of R25 500 for housing loan. CNA introduced one white lady to us as staff to work for them on that project.

So we had some complaints about this lady and we approach management. They did not take it serious until our monies went missing. So CNA took the lady to court and she was liquidated. So my problem is that CNA wrote me a letter telling me that maybe some of my monies I won't get it. So Prof I need your help because the company has employed the lady not me. And the other thing is this working for a company for almost seventeen years and they told that I left with R11 000 and R25 500 that I have already taken from the fund, nothing left.

So Prof I will appreciate if you can help me to find exactly how much I am suppose to get for 17 years...If they are treating me badly I will like your advice and expose the company.”

32. The complainant is not a highly educated man and he has expressed his complaint in words which reveal that he does not make a clear distinction between the fund and the employer. However he is clearly unhappy with the way in which the employer and the fund have gone about dealing with him with regard to his provident fund monies. This in my view amounts to a complaint relating to the administration of the fund, and the housing scheme which was under the auspices of the fund, by the employer and/or the fund, and the complaint comprises an allegation of maladministration in consequence of which he has suffered prejudice.
33. That the complaint is not precisely formulated in the way that the fund and/or the employer would like it to be does not preclude my jurisdiction. My investigator's letters to the employer and the fund make it abundantly clear that the respondents are required to answer a charge of maladministration, the long list of questions included therein indicating the details of the alleged maladministration under investigation. The questions are prefaced with the following paragraphs:

I advise that I met with the complainant, Mr S S Khambule, in Johannesburg on 16 August 2000. He advised that the abovementioned fund and employer planned and executed a scheme whereby provident fund monies were utilized to provide some kind of housing benefit for members. According to Mr Khambule the members were introduced to a Mrs Prinsloo by Mr Norman Bailey CNA Labour Relations Advisor, and advised that she was “professional” who would assist them in making loans from their provident fund monies for housing purposes. The allegation is that the scheme has been maladministered resulting in prejudice to members.

We are therefore investigating this matter as a possible instance of maladministration of the provident fund by the fund and/or the employer resulting in prejudice to members. In this regard we require, in terms of section 30J of the Pension Funds Act, that you furnish us with the following information.

There follows a list of questions relating to requests for, *inter alia*, documentation on the application for a housing loan and documents relating thereto required by the application, minutes of trustee meeting/s approving the loan, copy of the cheque endorsement and supporting documentation, names and addresses of the trustees and principal officer, details of the relationship between the fund, the employer and Henmont Investments, details of the total amount of money paid out of the fund which was ultimately paid to Henmont Investments, and the amount of money which was ultimately lost to the members.

34. The fund's view that "the manner in which the old fund conducted its operations as regards the housing loans cannot be said to have amounted to the maladministration of the old fund resulting in prejudice to its members" for the reasons it advances, cannot sustain a plea that no complaint has been made out against it, since it goes to the merits: the substance of the dispute is precisely whether the actions of the fund in operating the housing loan scheme and making the loan to the complainant may, upon scrutiny, be said to constitute maladministration. That is the issue I have to decide, and it lies at the heart of my jurisdiction.
35. In my view there is thus no basis to the respondents' point *in limine*. To the extent, however, that the fund may still feel that it has not had a sufficiently particularized complaint to answer, it now attains another opportunity to respond to this preliminary determination, wherein my preliminary view is set out.
36. The fund has also raised the point that the complaint was premature in that the complainant did not submit a written complaint to a fund or an employer participating in the fund as required in terms of section 30A(1), which reads:

Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.

The fund maintains that

“the failure of the complainant to comply with the provisions of the Act has frustrated the old fund in dealing with the complaint in accordance with its dispute resolution procedures.”

37. As I have shown in paragraph 1 above the complainant did in fact submit a written complaint to the employer, and it was because neither the employer nor the fund thereafter dealt with the complaint to his satisfaction that he reverted to this office. Furthermore there was nothing to prevent the fund in dealing with the complaint in accordance with its dispute resolution procedures at any time after the further referral of the complaint to it by this office. I reiterate my finding that there has been substantial compliance with the requirements of section 30(A).
38. I turn now to the substance of the complaint.
39. It is perfectly legal for a pension or provident fund to make a loan to a member for housing purposes. In fact it is a desirable practice to assist fund members who otherwise could not afford the security of their own housing, provided the loan is secured and all parties are protected. Loans are authorised by section 19(5)(a) of the Act (section 19 deals with “Investments”). Section 19(5)(a) reads as follows:

A registered fund may, if its rules so permit, grant a loan to a member by way of investment of its funds to enable the member -

- (i) to redeem a loan granted to the member by a person other than the fund, against security of immovable property which belongs to the member or his or her spouse and on which a dwelling has been or will be erected which is occupied or, as the case may be, will be occupied by the member or a dependant of the member;
- (ii) to purchase a dwelling, or to purchase land and erect a dwelling on it, for occupation by the member or a dependant of the member; or

- (iii) to make additions or alterations to or to maintain or repair a dwelling which belongs to the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member.

Sections 19(5) (b) to (d) and 19(5A) and (5B) specify that such a loan must be secured by either a first mortgage on the property, or a pledge of the benefits to which the member is entitled in terms of the rules of the fund, or both, and set out various other conditions relating to the interest rate, term, and limits to the value of the loan.

40. The fund's rules do permit the granting of a loan to a member. Rule 39 deals with "Bank Account and Investments" and sets out the powers of the trustees as well as the conditions to be attached to housing loans. Rule 39.1 and 39.2 read as follows:

39.1 A bank account shall be opened in the name of the fund and all moneys received on account of the fund shall be paid into such bank account and the administrators shall be given appropriate signing powers to enable them to operate such account and to make such investments as the trustees shall decide from time to time.

39.2 The trustees shall have full power, subject to the provisions of the Act, to lend, invest, or put out at interest, place on deposit, make advances of, or otherwise deal with all moneys of the fund upon such securities and in such manner as they from time to time determine and to realize, vary, reinvest, or otherwise deal with such securities as they from time to time determine, to effect policies of insurance issued to the fund by a person or persons lawfully carrying on insurance business within the meaning of the Insurance Act No. 27 of 1943, or to delegate, on such terms and conditions as they shall specify their power to make investments of any type to a sub-committee of such of their members as they may nominate, or to a financial institution as defined in the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984) or to a person approved in terms of section 4 of the Stock Exchanges Control Act, 1985 and may defray expenses incurred as a result of such delegation out of the moneys of the fund; provided that

39.2.1 *[deals with prohibitions and exceptions on loans to employers]*

39.2.2 a loan may be made to a member to enable the member

39.2.2.1 to redeem a loan...

39.2.2.2 to purchase a dwelling, or to purchase land and erect a dwelling on it, for occupation by the member or a dependant of the member, or

39.2.2.3 to make additions or alterations to a dwelling which belongs to the member or his or her spouse and which is occupied or will be occupied by the member or a dependant of the member.

Rules 39.2.3 to 39.2.5 then set out the details regarding the security for the loan and all the other conditions relating thereto, mirroring exactly the wording in section 19(5) of the Act.

41. Where the fund grants a loan to a member as provided for in terms of section 19 and the fund's rules it is clearly the fund rather than the employer that has the responsibility for administering the scheme; this is borne out by the fact that neither section 19 nor the rules concerning housing loans mention any role played by the employer or any duties of the employer in the administration of the scheme. Thus while the employer may well be involved in the scheme, the administration of the scheme must fall within the general ambit of the object of the board of a fund set out in section 7C of the Act, being to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
42. Neither the Act nor the rules lay down specific duties and procedures relating to the application for and approval of a loan, other than the conditions relating to the loan itself.
43. In determining the duties of the trustees of a fund in regard to administering a housing scheme instituted in terms of section 19(5) and rule 39.2.2 one will have to

have regard therefore to the statutory duties regulating the actions of trustees as set out in section 7C and 7D of the Act. These sections read as follows:

Section 7C Object of board

- (1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
- (2) In pursuing its object the board shall -
 - (a) 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 an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
 - (b) act with due care, diligence and good faith;
 - (c) avoid conflicts of interest;
 - (d) act with impartiality in respect of all members and beneficiaries.

Section 7D Duties of board

- (1) The duties of a board shall be to -
 - (a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;
 - (b) ensure that proper control systems are employed by or on behalf of the board;
 - (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) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;

- (e) obtain expert advice on matters where board members may lack sufficient expertise;
- (f) ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Investment of Funds) Act, 1984 (Act No.39 of 1984), and all other applicable laws.

44. Thus while in terms of rule 39.2 the trustees have full power to lend, invest, etc. the moneys of the fund and also to delegate their power to make investments of any type to a sub-committee of their members or a financial institution as defined in the Financial Institutions (Investment of Funds) Act, 1984 or a person approved in terms of section 4 of the Stock Exchanges Control Act, 1985, all these powers are “subject to the provisions of the [Pension Funds] Act”, and in particular to the general fiduciary duties of section 7C to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times, and to act with due care, diligence and good faith, as well as the specific duties listed in section 7D, particularly (1)(b), being the duty to ensure that proper control systems are employed by or on behalf of the board.
45. On the face of the application form used for housing loans it is clear that the duty to approve loans lay with the trustees and that there was in any event no delegation of this responsibility. The form is prefaced with the words:

This form is to be completed and submitted with

- Proof of ownership of the land or dwelling to the satisfaction of the trustees
- Full details of the purpose for which the loan will be used and an official quotation for the costs thereof.

At the bottom of the form, followed by the space for signature of the “Member’s Employee”, “Trustee” and “Administrators”, the following words are set out:

We confirm that this loan application complies with the Rules of the Fund and further complies with the terms and conditions of the Fund's housing loan scheme as approved by the Trustees of the Fund.

46. Clearly, as one would expect in view of their abovementioned duties, it is the trustees that have to be satisfied with the application, and clearly what is envisaged is a process whereby the application is completed, submitted with the supporting documents required, considered by the trustees (as well as the employer and administrator) for its compliance with the fund's rules and the terms and conditions of the housing loan scheme, (and also in the case of the trustees for its satisfactory proof of ownership of the property) and then either approved if it so complies or turned down, the decision being communicated to the applicant.
47. This is somewhat at odds with the statement by the acting chairman of the board of trustees, Mr Guy Hayward, that
- “provided the application fell within the rules and parameters permitted by the Second Applicant [*the employer*], and provided that the application fell within the rules applied by the administrators of the fund, the loan would be approved and granted.”
48. In fact it seems that the procedure contemplated on the face of the form was not carried out: according to the complainant, the only person present when he filled in the forms were himself and Mrs Prinsloo, and immediately after he filled in the application form she placed before him, for his signature, the acknowledgement of debt forms, authority for salary deduction, and the authority to Henmont to disburse monies on his behalf (*not*, it should be pointed out, to receive moneys into the bank account of Henmont). These arrangements should only logically have been entered into once the application was approved. The signatures of the other parties were all appended on the same date, leaving no room for a process of consideration by the trustees of the application. In fact, the fund has conceded, in response to a request from my investigator for the minutes of the trustees

meeting/s approving the loan, that housing loans were not approved on an individual basis by the trustees; no minutes were able to be furnished.

49. The first problem then is that the trustees did not properly approve the application and therefore did not properly authorise the loan. If they had properly considered the application they would have had to bear in mind their fiduciary duties in terms of section 7C to “take all reasonable steps to ensure that the interests of the members in terms of the rules of the fund and the provisions of this Act are protected.”
50. What would the reasonable steps be in this context? In my view they would include, while not necessarily being limited to: satisfying themselves that the money would be used for the purpose for which it was intended and building in safeguards to ensure this; and enquiring and satisfying themselves as to the process for payment of the loan moneys to the seller or developer or contractor of the property concerned, ensuring by means of appropriate safeguards that there was no possibility of the moneys being disbursed to any third party. The obvious practical safeguard that should reasonably be insisted upon if the member’s interests are to be protected, in the situation where a member seeks to purchase a house from a seller, is to require that the finances relating to the property transaction are held in trust in an attorney’s trust account, thereby affording the member the protection offered by the attorney’s fidelity fund. This would mean paying the moneys directly to the attorney on the member’s behalf rather than paying the loan moneys to the member.
51. The trustees of the fund did not do any of these things. They therefore did not fulfil their duty to take the reasonable steps required to protect the interests of the member applying for the loan; and they failed to act with due care, diligence and good faith in this situation. While the interests of the fund were secured by means of the member’s pledge, deductions continuing to be made from his salary, the interests of the member were not protected by the trustees. The fact that they must

have knowingly allowed Henmont Investments to operate as they did, allowing members to pay their monies into Henmont's bank account, exacerbates the trustees' dereliction of duty. The possibility of the default by Henmont and the loss this would entail for members who were unprotected from it was always present and the fund should have taken steps to remove this possibility.

52. The breach by the board of trustees of the second respondent of its statutory duties in terms of section 7C and 7D, these duties being part of its object to administer the fund ("to direct, control and oversee the operations of a fund"), constitutes maladministration. It is clear that as a consequence of the maladministration of the fund the complainant has suffered prejudice that he would not have suffered if the fund had not been maladministered.
53. Maladministration is akin to a delict; by way of relief therefore the complainant must be placed in the position he would have been in had the maladministration not occurred. Since the complainant is now a member of the third respondent and since the moneys lost by the complainant would, if not loaned for housing purposes, have been a part of his transfer value on moving to the third respondent, the damages payable must be paid into his current fund to increase his member's share therein.
54. Accordingly I hereby issue a rule *nisi* in terms of which the respondents are called upon to show cause, if any, within 30 days of this preliminary determination, why the following order should not be made final:
 - 54.1 The second respondent is ordered to pay to the third respondent, within six weeks of the date of the final order, the amount of R25 500, increased by the fund rate of return for the second respondent from 16 February 1996 to date of payment;

54.2 The second respondent is ordered to repay to the complainant, within six weeks of the date of the final order, the total amount of all accumulated loan repayments made by the complainant since the inception of the loan, increased by the fund rate of return for the second respondent from 16 February 1996 to date of payment;

54.3 Upon payment to it in terms of 54.1 above by the second respondent, the third respondent is ordered to allocate the payment to the member's share in the third respondent.

DATED at CAPE TOWN on 17th MAY 2001.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR