IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/390/99/NJ

In the complaint between:

G D Crous	**Complainant**

and

The Imatu Staff Pension Fund	**First Respondent**
Imatu Staff Provident Fund	**Second Respondent**
Imatu Staff Retirement Fund	**Third Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

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1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act 24 of 1956 (**"the Act"**). The complaint is two-fold. The first complaint relates to whether the complainant was properly and adequately advised of the options available to her upon transferring out of the first respondent. The second complaint relates to the investment of the funds of the second and third respondents.

2. An investigation was conducted by my investigator, Naleen Jeram. No hearing was held in this matter. Accordingly, in determining this matter I have relied exclusively on the documentary evidence, written submissions and additional information, all obtained during the course of Mr Jeram's investigation.

3. The complainant is Gina Dominique Crous, an adult female, of Goodwood, Western Cape.

4. The first respondent is Imatu Staff Pension Fund, a pension fund duly registered under the Act (**"the fund"**). With effect from 30 June 1998, the fund became a "closed fund" in that no new members were admitted. The second respondent is the Provident Fund: Imatu Staff, a pension fund duly registered under the Act ("**provident fund"**). The third respondent is the Imatu Staff Retirement Fund , also a pension fund duly registered under the Act (**"retirement fund"**). The fund, retirement fund and provident fund are represented, Mr J D L Claassens, the principal officer of all three funds.

5. The complainant commenced employment with Independent Municipal and Allied Trade Union **("IMATU"**) on 1 October 1985 as an administrative assistant. At this point she became a member of the fund, a defined benefit fund.

6. During 1998, the participating employer in the fund, IMATU, embarked on a programme involving the restructuring of pension benefits afforded to its employees. With effect from 1July 1998, the employer decided to establish two new defined contribution pension funds, namely, the provident fund and the retirement fund. In February 1998, all members of the fund were sent a detailed brochure together with annexures explaining the merits and benefits afforded by the various options. In essence, the member had to decide whether she intended to remain with the fund or transfer to the provident or retirement fund or both. In the event of the member transferring to both funds, her own contributions were transferred to the retirement fund and the employer contributions to the provident fund. The reason for the split was for tax purposes as will appear below. Hereafter, the fund held various presentations to verbally explain the benefits of the various funds. The complainant attended the presentation held in Cape Town. The complainant elected to transfer to the retirement fund and provident fund. The relevant rule authorising the transfer of the complainant reads as follows:

PART 8A: SPECIAL PROVISIONS IN REGARD TO TRANSFERS TO THE RETIREMENT

FUND: IMATU STAFF AND PROVIDENT FUND: IMATU STAFF

1. Members shall have the option to become members of the Retirement Fund: Imatu Staff and Provident Fund: Imatu Staff as from 1 July 1998.

2. If a member has elected to be transferred to the Funds in clause (1) above -

   (1) the member transfer credit shall be transferred to the Retirement Fund: Imatu Staff where member transfer credit shall mean, in regard to a member, the cash benefit which the member would have received from the Fund if he/she had terminated his/her service with the employer immediately before his/her entry to the Retirement Fund: Imatu Staff;

   (2) the employer transfer credit shall be transferred to the Provident Fund: Imatu Staff where employer transfer credit shall mean, in regard to a member, the member's reserve value plus the member's portion of the surplus as calculated by the Actuary less the member transfer credit.

Such amounts shall be applied on behalf of the member in terms of the rules of the transferee fund.

7. The fund computed the complainant's transfer value as follows:

OORDRAGWAARDE OP 1 JULIE 1998

LIDGEDEELTE	R 37,947
WERKGEWERGEDEELTE	R 96,949
BASIESE OORDRAGWAARDE	R134,986
AFTREERESERWE	R105,698
SURPLUS TOEDELING	R 12,030
TOTALE OORDRAGWAARDE	R252,624

The complainant's own contributions in the amount of R37,947 were transferred to the retirement fund and the balance was transferred to the provident fund. As stated the reason for splitting the transfer value was for taxation purposes in that the Income Tax Act permits a deduction for member contributions only in a pension

fund whereas only employer contributions in provident fund are tax deductable. Hence, by transferring to both the pension and provident funds, the complainant and IMATU enjoyed the benefit of having their contributions as a tax deduction.

8. After successfully completing the transfer to the respective funds the complainant elected to resign with effect from 31 August 1998. According to the complainant, the primary reason for her resignation was that there was no scope for her advancement in her current employment and she needed to assist her husband in his business.

9. The relevant rule in the retirement fund regulating the complainant's withdrawal was rule 7.2, which reads:

> **Termination of Service**
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> If a Member's service is terminated before the Normal Retirement Date (whether voluntarily by the Member as a result of retrenchment, redundancy, dismissal as a result of misconduct or any other reason), and he/she is not entitled to retirement benefits from the Fund, the benefit is equal to the Member Share and he/she may exercise one of the following options:
>
> **Cash benefit:**
>
> 1. The Member may choose that a cash benefit equal to the Member Share be paid to him/her; plus
>
> 2. ... (retrenchment benefit)
>
> **Transfer to another fund:**
>
> 3. The Member may choose that the cash benefit (as above) be transferred from him/her to another fund which has been established for the payment of annuities or retirement benefits and which has been approved by the Fund for this purpose.

Member's share is defined as the composition of the member's transfer credit and

his contributions for retirement benefits plus fund interest. The constituent elements of a members share are defined as follows:

> **Member Transfer Credit** in regard to an Old Fund Member means the Member's own contributions to the Old Fund with interest until his/her entry to the Fund at the rate at which interest would have been added in terms of the rules of the Old Fund in the calculation of his/her cash benefit in terms of those rules at resignation from the service of the Employer immediately before entry to the Fund.
>
> **Contribution For Retirement Benefits** in regard to a Member means the Member's own contributions to the Fund.
>
> **Fund Interest** means interest at a rate determined by the Administrator from time to time, taking into account the rate of net investment return that the Fund earns and is expected to earn. The rate may be determined with a view to keeping the rate relatively stable over time.

For the period 1 July 1998 to 31 August 1998 the administrator of the provident and retirement fund declared a fund interest rate of negative15% due to the crash in the market (details of which appear more fully below).

10. In terms of rule 7.2, the provident fund computed the complainant's benefit as follows:

Members Contribution	R 1,760.32
Members share transferred ex Pension Fund	R37,947.00
	R39,707.32
X 85% = R33,751.22	

The amount of R39,707.32 was multiplied by a factor of 85% to effect the negative 15% fund interest rate. Thus, her benefit amounted to R33,751.22.

11. Rule 7.2 of the provident fund also regulated the complainant's early withdrawal benefit and the rule is worded exactly the same as in the retirement fund.

However, member's share is defined as the composition of the employer's transfer credit, contributions for retirement benefits plus fund interest. Employer's transfer credit is defined as:

> in regard to an Old Fund Member means the amount which was transferred from the Old Fund to the Fund to be applied in respect of the Member, less the Member Transfer Credit.

Contributions for retirement benefits is defined as:

> In regard to a Member means the contributions made to the Fund for the Member by the Employer, less the Fund's average expenses per Member. These expenses include the cost of benefits other than retirement benefits and fees paid to consultants of the Fund.

Fund interest is defined exactly the same in the retirement fund. As stated provident fund also declared a fund interest rate of negative 15% for the period 1 July 1998 to 31 August 1998.

12. The provident fund computed the complainant's benefit as follows:

Employer's Contribution	R 3,602.04
Employers contribution transferred ex Pension Fund	R214,677.00
	R218,279.04

X 85% = R185,537.18

The amount of R218,279.04 was also multiplied by a factor of 85% to reflect the negative 15% growth of the provident fund. Thus, the total benefit due to the complainant from both funds amounted R218,288.40 less tax, being R185,537.18 plus R33,751.22.

13. The complainant was unhappy with the above benefits. She firstly argued the fund did not properly inform her that the transfer value of R252,624.00 would be subject to the investment performance of the funds. In the alternative, she contended that

the provident and retirement funds were guilty of maladministering the funds' investments in that they did not properly invest the monies. No arguments were advanced as to how the monies were improperly invested.

14. Mr Claassens acting on behalf of the funds averred that prior to transfer, all members of the fund were sent a lengthy 26 page document illustrating the advantages and disadvantages of moving out of the fund. The concepts of a defined benefit and a defined contribution fund and pension and provident fund were fully explained. In particular, he referred to the following sections in the document:

Section 3: What's the difference between the existing pension fund and the new retirement fund

Existing pension fund	**New retirement fund**
Retirement benefits are determined according to a formula contained in the rules of the fund and can therefore be calculated with relative ease.	determined in advance and depend on the contributions for retirement benefits and the investment returns earned on these contributions.
The employer carries the risk of poor investment.	The member carries the risk of poor investment returns, but enjoys the benefit of good investment returns.
The retirement benefits cannot be	

Section 4: What's the difference between a defined benefit fund and a defined contribution fund?

Defined benefit fund	
The retirement benefits are defined in a formula in the rules of the fund. The benefit at	retirement can therefore be calculated with relative ease (eg. two percent of salary at retirement for each year of membership).

	Defined contribution fund
The employer carries the risk of poor investment returns. If good investment returns are earned, benefits can be improved.	The benefit at retirement is unknown and depends on the contributions by the member and employer with regard to retirement benefits, plus the investment returns on them. The amount of the benefit at retirement is therefore not guaranteed.
	The member carries the risk of poor investment returns, but benefits from good investment returns. Good investment returns therefore mean larger retirement benefits for members and vice versa.

Section 11: What are the disadvantages of each fund?

New retirement fund

The benefit at retirement is uncertain and difficult to determine in advance, since it depends on the investment returns and level of contributions. The risk of poor investment returns is borne by the member.

Section 12: What factors should you consider before making a decision?

Risk

With the Retirement Fund, the member bears the investment risk, but also benefits from high investment returns. This should compensate for the risk in the long term, but a person's attitude to risk will obviously play a role in his or her choice. If you are comfortable with investment risks from which you may or may not benefit you would probably choose the retirement fund. With the Retirement Fund the member also bears the risk of possible increases in the cost of death and disability benefits, but enjoys the freedom of flexible death benefits.

Guarantee

If you find it acceptable to enjoy defined and guaranteed benefits with little room for individual needs, the present fund should meet your needs.

15. Mr Claassens further contended that several presentations were held further explaining the contents of the transfer and elaborating on the information contained in the document. At the end of each presentation, the members were free to ask questions or raise any queries on uncertainties. On the strength of the documentation sent to the members and the presentation held, Mr Claassens concluded that the complainant should or reasonably ought to have been aware that her benefit in a defined contribution funds were subject to the investment performances of the funds. Accordingly, he requested the first complaint to be dismissed.

16. With regard to the complainant's second complaint. Mr Claassens confirmed that both the provident fund and the retirement fund's assets were invested in Sanlam's 100 plus portfolio and 200 plus portfolio. Both portfolios consisted of approximately 50% investment in equities. The balance was invested in bonds, property, cash, offshore assets and social investments. He submitted that the trustees in exercising their power of investment took such care as an ordinary prudent person would take when investing for the benefit of other people. The funds' monies were invested in portfolios which aimed to achieve maximum proceeds over the long term, but with prudence and without exposure to unfavourable risks. He contended that the fall on the stock market in 1998 had a negative effect on the investment returns of the funds over a short term. As a result, the investment return earned for the period 1 July 1998 to 31 August 1998 (the complaint's withdrawal date) amounted to a negative rate of 15%. However, he contended that the market crash effected all financial institutions and the negative return in many ways was beyond the control of the funds. According to Mr Claassens had the member remained a member for another 12 months, whereafter the investment performance of the fund dramatically improved to such an extent that she would have received her full transfer value plus investment performance of the funds. Therefore, he concluded that the trustees of the funds did comply with their fiduciary duties with regard to the

investment of assets and cannot be held liable for the market crash resulting in a negative return on a short term basis.

17. Turning to the complainant's first complaint. As I have held previously, the failure by a pension fund to provide relevant and adequate material information required by members to make an informed choice clearly constitutes a breach in its duties to act in good faith and with due care and diligence. This duty becomes more compelling where the member has to make a decision (especially upon transfer to another fund) which may have adverse consequence for him/her.

18. In this case, there is no doubt the fund was under a duty to inform the complainant that her benefit in defined contribution funds were subject to the investment performances of the funds and may decline if the funds' investments perform badly. The lengthy documentation provided to the complainant clearly informs her of this danger. The document in four different sections clearly states that the member carries the risk of poor investment returns, but simultaneously enjoys the benefit of a good investment return. Further, the fund held information meetings where these issues were fully canvassed and discussed. On the other hand, the complainant is not an illiterate person. She has matriculated and obtained a diploma in accounting. At the time of her resignation she was senior administrative assistant. Whilst there is a duty on pension funds to provide adequate material information to members, there is also a correlative duty on pension fund members to actively seek information and clarify their position before making a significant decision. That is, once the fund has provided the basic information and held an information meeting discussing the issue, the onus shifts to the complainant to seek further information or professional advice before transferring out of the fund. The complainant failed to seek further advice or properly evaluate clear and coherent information given to her. Thus, I find that no fault may be ascribed to the fund and the first complaint is dismissed.

19. As for the second complaint, in both the retirement and provident funds the board of management has the power to invest the funds' funds. Rule 9.4(2) in the

retirement fund and rule 10.4(2) in the provident fund regulate this power as follows (the rule reads the same in both funds):

> Without detracting in any way from the generality of the previous provision, the Board has the following powers:
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> 1. to receive, administer and apply the moneys of the fund in accordance with the Rules and applicable legislation;
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> 2. in the name of the Fund to institute, conduct, defend, compound, settle or abandon any legal proceedings by or against the Fund;
>
> 3. to delegate any of its powers and duties to any institution or person including a board of Officers;
>
> 4. to effect policies with one or more Insurers for the purpose of insuring the benefits payable in terms of these Rules and to maintain existing policies for as long as it may deem fit; and
>
> 5. generally to do whatever, in its opinion, is conducive to attaining the objects of the Fund.

20. The board in both funds decided to invest the respective assets of the funds in Sanlam's 100 plus portfolio and 200 plus portfolio. The fact that markets all around the world, including the Johannesburg Stock Exchange "crashed" in July/August 1998 resulting in the funds' assets decreasing in value does not in itself imply that the assets were improperly invested. As stated, the assets of the funds were invested in the portfolios for long term growth and importantly to provide for benefits payable in terms of the rules of the funds. This is borne out by the fact that the fund only suffered a negative investment performance for a short period of time and a year after the market "crashed" it recovered all the losses sustained during the crash and already commenced showing a positive investment return. In addition, the complainant has not produced any convincing evidence to show that the assets were improperly invested causing prejudice to the members of the fund. Thus, I find the assets in the respective funds were not improperly invested and

accordingly the funds have not been maladministered in any way.

21. Finally, it must be borne in mind that had the complainant remained in the fund and not transferred to the respective funds her withdrawal benefit in the defined benefit fund would have been considerably less, as in terms of the early withdrawal benefit rule, she would only have been entitled to her own contributions plus interest thereon. According to Mr Claassens, this would have amounted to approximately R40,000 which is 81% less than the benefit of which she eventually received. Thus, in the light of all factors the complainant has not fared too badly by moving out of the fund. Accordingly, for the aforegoing reasons the second complaint is dismissed.

DATED at CAPE TOWN this 6th day of April 2000.

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John Murphy
Pension Funds Adjudicator