IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/825/99/JM

In the complaint between:

Hospitality Industry Provident Fund **Complainant**

and

Southern Sun Hotel Interest (Pty) Ltd **Respondent**

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

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1. **The complainant seeks a determination directing the respondent to provide stop order facilities for the repayment of home loans granted by the complainant to its paid-up members who are employed by the respondent.**

2. The complainant is the Hospitality Industry Provident Fund ("HIPPF"), a registered pension fund. The respondent is Southern Sun Hotel Interests (Pty) Ltd, an employer trading in the hospitality industry which has an ongoing relationship with the fund.

3. The parties have furnished me with written evidence and submissions. Additionally a hearing was held in Johannesburg on 22 February 2000. No evidence was led but both parties made submissions. The HIPPF was represented by Adv M Brassey SC instructed by Ms N Howard of Cheadle Thompson & Haysom. The respondent was represented by Adv A Redding instructed by Mr B Patterson of Denys Reitz.

4. As will appear more fully below the respondent has raised four preliminary points and the

HIPPF has made application for me to dispose of the matter on the basis of an exception. Before dealing with these it is necessary to sketch the background to the complaint, much of which is common cause.

5. The respondent was admitted to the HIPPF initially in 1969. Prior to 1 August 1994 the respondent paid ongoing contributions to the fund on behalf of its employees who were members. On 25 March 1994 the respondent entered into a collective wage agreement with SACCAWU a representative trade union, in terms of which bargaining unit employees at certain hotels would withdraw from the fund and transfer either to the Southern Sun Retirement Fund or the SACCAWU National Provident Fund. Clause 30 of that agreement regulates retirement benefits and reads as follows:

> 30. **RETIREMENT BENEFIT FUNDS**
>
> 30.1 The company and the union agree that all members of the Hospitality Industry Pension Fund ("the Fund"), who are employees of the company, shall be transferred out of the fund:
>
> 30.1.1 as soon as possible after the conclusion of this agreement; and
>
> 30.1.2 as soon as possible after the withdrawal by the company from the Fund; and
>
> 30.2.3 as soon as possible after the fulfilment of the conditions precedent referred to in 30.5 below.
>
> 30.2 The parties agree that all transferring members of the Fund will receive the members' benefits which shall at least include the employee's contribution, the company's contribution, all bonuses and interest due.
>
> 30.3 All transferring members will be given the option of placing the

benefits received from the Fund into either the Southern Sun Retirement Fund or the SACCAWU National Provident Fund ("the nominated funds").

30.4 The parties record that clause 30 of this agreement is divisible from the remainder of the agreement and should the parties not be able to give effect to the provisions contained in clause 30 of this agreement due to the non-fulfilment of any of the conditions precedent contained hereunder, the parties agree to renegotiate clause 30 of this agreement as soon as possible after the company gives notice to the union in writing of the non-fulfilment of any of the conditions precedent.

30.5 This entire agreement is subject to the fulfilment of the following conditions precedent by not later than 6 (six) months, or such later date as the parties may agree in writing.

30.5.1 withdrawal of the company from the Fund;

30.5.2 the transfer of the member's benefits as defined above to either of the nominated funds.

30.6 The parties shall use their best endeavours to procure the fulfilment of these conditions precedent as soon as reasonably possible after the signature date. If all of these conditions precedent are not fulfilled by the date specified in clause 30.5, clause 30 of this agreement shall be of no force or effect and no party shall have any claim against the other party for anything done hereunder or arising therefrom.

30.7 With effect from the date of transfer into either of the nominated funds, the contribution rates will be increased to 3.5% from the company and 3.5% from the individual employee.

30.8. With effect from 1 April 1994, all employees of the company who are not members of any retirement fund will be required in terms of their contracts of employment to become a member of the nominated funds mentioned above on the same contribution rates as set out in 30.7. Each employee will exercise his/her individual choice in electing which of the nominated funds to join.

30.9 It is specifically recorded that the company will not participate in or accept any responsibility for any retirement fund other than the Southern Sun Retirement Fund.

6. The HIPPF was not party to this agreement. Subsequent to the conclusion of the agreement, on 13 April 1994 the respondent sent a letter to Fedlife Assurance Limited, the administrators of the fund at that time, advising that it intended to cease participation in the fund. This letter reads as follows:

> **You are aware that the Southern Sun Group have been (sic) reconsidering their participation in the Hospitality Pension Fund for some time now.**
>
> **The Group currently participates in at least 5 different Pension/Provident Funds and our long term intention is to achieve the rationalisation of our retirement arrangements under one fund. The main Southern Sun Group Retirement Fund administered by Ginsburg Malan & Carsons has been selected as the core Fund for this purpose.**
>
> **Following extensive negotiations with the Union and our members of the fund we have now received their mandate to discontinue our participation in the Hospitality Industry Pension Fund and to arrange for the transfer of our members to alternative funds.**
>
> **We therefore wish to advise that we are giving three months notice of our intention to withdraw from the Fund in terms of Rule 7.16.1. We would like to meet with yourselves as soon as possible in order to discuss the terms under which Southern**

Sun member's benefits would be transferred.

We confirm the risk cover will continue until the end of the notice period and/or cessation of premium payments.

Insofar as any trustee approval for a transfer to another approved fund is required, we would mention that such approval be obtained from a meeting constituted in terms of the rules and confirm that Southern Sun has not agreed to any transfer of administration. We request such approval as you may require, be obtained as a matter of urgency. Kindly ensure we are kept informed of any proposed meeting which may be held by the trustees to discuss these issues.

We would also like to take this opportunity of thanking Fedlife for their services in the past and look forward to a continued working relationship in the future.

7. Rule 7.16.1 of the then applicable rules referred to in the letter read as follows:

7.16.1 On the happening of any one or more of the following events:

expiry of 3 months written notice given by the Employer to Fedlife to discontinue Contributions; or

written notice being given by Fedlife in respect of any Employer whose Contributions are at least 3 months in arrear or who has been guilty of a material non-compliance with these Rules and/or Policy.

That part of the Policy attributed to the Employer or Employers affected may be treated as follows:

the portion of the Policy providing retirement benefits shall be made paid-up, and

the portion of the Policy providing any other benefits shall immediately terminate.

8. The rule deals with the discontinuation of contributions and does not govern the termination

of participation by an employer admitted to the fund.

9. In accordance with the agreement of 25 March 1994, the employees employed at respondent's hotels where SACCAWU is the sole representative ("the SACCAWU hotels") ceased to be contributing members of the HIPPF and became contributing members of the SACCAWU fund or the Southern Sun Retirement Fund. In terms of the then applicable rule 7.16.1 the policy securing their benefits in the HIPPF became paid-up.

10. Because of a number of unforseen complexities the members' benefits in the HIPPF were not transferred in terms of section 14 of the Act to the SACCAWU fund, or the Southern Sun Retirement Fund, and have since remained as paid-up benefits in the HIPPF. Consequently, the conditions in Clause 30.5 of the collective agreement were not complied with and, in terms of clause 30.6, clause 30 of the agreement became null and void six months after conclusion of the agreement.

11. At respondent's hotels where the trade union ECCAWUSA is the sole representative union, employees are permitted to join the HIPPF, the SACCAWU fund and the Southern Sun Retirement Fund. Some of these employees remain members of the HIPPF and the employer makes contributions on their behalf.

12. On 4th June 1996 the respondent entered into a collective agreement with ECCAWUSA in respect of its members. Clause 29 of that agreement governs retirement benefits. It reads:

> 29. **RETIREMENT BENEFIT FUNDS**
>
> 29.1 All employees of the Company are required to become members of an approved retirement fund.
>
> 29.2 Approved retirement funds shall include the SACCAWU National Provident Fund, the Southern Sun Retirement Fund and subject to clause 29.3 The Hospitality Industry Pension Provident Fund

"HIPPF" as well as any other fund that employees are required to join in terms of applicable legislation.

29.3 The Company's acceptance of the HIPPF as an approved fund is subject to the Union securing an irrevocable written undertaking in the form annexed hereto as Annexure "C" from the trustees of the HIPPF by no later than 30 June 1996.

29.4 In the event that the requirements set out in 29.3 above are not met, in full, HIPPF shall not be accepted by the Company as an approved fund. In these circumstances the once off election to transfer to HIPPF as set out in 29.7 below shall be withdrawn.

29.5 With effect from 1 April 1996, the contribution rates for all employees who are members oft he SACCAWU National Provident Fund or the Southern Sun Retirement Fund or, where applicable, the HIPPF shall be 7.5% of the basic rate of pay from the individual employee and 7.5% from the Company.

29.6 Contribution rates for other approved retirement funds shall remain unchanged.

29.7 Subject to clause 29.3 and retirement or provident fund rules all employees covered by this agreement shall be permitted to make a once off election to transfer from either the SACCAWU National Provident Fund or the Souther Sun Retirement Fund to the HIPPF. This option is available until 31 July 1996 whereafter no further transfers will be permitted.

29.8 The Company shall grant five (5) paid working days leave per annum to any employee who is nominated to act as a trustee of an

approved Pension Provident or Retirement Fund to attend to trustee meetings and training.

29.9 In order to give effect to the above the Company and the Union will structure a series of briefing meetings to appraise employees of the options available.

29.10 It is specifically recorded that the Company will not participate in or accept any responsibility for any retirement fund other than the Southern Sun Retirement Fund. The Company will, however, provide the other approved Funds with basic administrative services.

13. From the evidence available there appears to have been compliance with clause 29 of this agreement. The HIPPF was not a party to the agreement.

14. In accordance with these agreements, therefore, the employees at SACCAWU hotels ceased to be contributory members of the HIPPF and became contributing members of either the SACCAWU National Provident Fund or the Southern Sun Retirement Fund. At the hotels where ECCAWUSA is the sole representative union, the agreements allow employees to join the HIPPF, the SACCAWU National Provident Fund or the Southern Sun Retirement Fund. Many of the ECCAWUSA hotel employees remain contributing members of the HIPPF and the respondent continues to pay the contributions of these members to the fund and to provide stop order facilities for home loans in respect of them. The members who are the subject of this complaint are the members of the other two funds at the SACCAWU hotels but who have a paid-up benefit in the HIPPF.

15. As explained earlier, the respondent made no contributions to the HIPPF between the period 1 August 1994 and November 1996. However, it commenced contributing again after November 1996. That date being the implementation date of the retirement benefits clause in the 1996 ECCAWUSA wage agreement. In sum, the respondent contributed to the fund from 1969 until August 1994, ceased for two years and then recommenced making

contributions in November 1996.

16. The HIPPF's submits that many of the employees at the SACCAWU hotels remain "paid-up" members of the fund. This, it claims, was a consequence of the application of the then applicable rules, and in particular rule 7.16.1, which provided that on the expiry of the three months written notice by the employer to discontinue contributions that the portion of the policy providing retirement benefits shall become paid-up.

17. It is the practice of the HIPPF to grant home loans to members in terms of section 19(5)(a) of the Pension Funds Act and rule B1.8.10 of the now applicable rules. To facilitate this process and to provide an efficient means of collecting repayments, the HIPPF decided to amend its rules obliging employers to provide it with stop order facilities for the repayment of loans. The amendment was effected by a resolution of the trustees on 8 May 1998 in the form of an appendix to the rules, being appendix 2. The appendix is headed **"Addendum to the Rules of the Provident Fund to the Hospitality Industry"** and then is described as an **"Agreement of participation covering employers"**. The body of the amendment reads:

> **In commencing contributions to the Fund, a contributing employer agrees to be bound by the Rules and other contracts or agreements entered into by the Trustees on behalf of the Fund as well as the following arrangements relating to the proper and effective running of the Fund:**
>
> 1. Acknowledges the contractual status, responsibilities and duties of the trustees and understands that the Trustees have the full power to act and make decisions in respect of matters associated with the Fund;
>
> 2. Where required agrees to provide the specified representatives of the Fund employed by the Company paid time off to attend Fund meetings, whether trustee meetings or member forums, national or local;
>
> 3. Agrees to meet the financial obligations related to collection and payment of contributions, insurance premiums and loan repayments to the Fund before

the seventh day of each month;

4. Agrees to meet the administrative obligations for the submission of Member information to the Fund each month and at such other times as shall be required and to provide stop order facilities for the repayment of loans and other amounts owing to the Fund or to Badiri Housing Association (a non-profit housing association administering housing loan investments for the benefit of Fund members);

5. Agrees to assist the Fund in tracing dependents or members;

6. Agreed to provide the Trustees with three months notice in writing in the event of termination of participation together with written confirmation from the members in the Company's employ of their agreement to such termination;

7. Agrees to allow authorised representatives of the Fund access to Company premises in order to meet with Fund members.

The Trustees of the Fund hereby agree to be bound by these contractual arrangements and undertake to manage and operate the Fund as set out in the Rules and specifically;

1. Agree to endeavour to establish effective Employee/Employer relationships through the provision of adequate employee benefits and servicing thereof;

2. Agree to notify the employer in writing of any contentious matters that may affect the employer financially;

3. Agree to ensure that members communication is provided.

18. Despite this somewhat unconventional form, the rule amendment was registered by the Registrar of Pension Funds in terms of section 12 of the Act on 26 June 1998 and was made effective from 1 January 1998.

19. Paragraph 4 of the appendix obliges employers to provide stop order facilities for the repayment of loans and other amounts owing to the fund or to the housing association which administers housing loan investments for the benefit of fund members.

20. On its understanding of the rules and the definition of a member in the rules and the Pension Funds Act, the HIPPF grants home loans to both paid-up members and contributing members.

21. The HIPPF is furthermore of the view that the respondent has remained an admitted employer since 1969 and is thus obliged in terms of paragraph 4 of the rule amendment to provide the fund with stop order facilities for home loan repayments by not only contributing members but also any paid-up member who is also a member of any other fund. It has called upon the respondent to provide stop order facilities for the repayment of these loans, but the respondent has steadfastly refused to do so. Hence it seeks an order declaring that the respondent is obliged to provide stop order facilities for the repayment of home loans granted to any of the paid-up members of the HIPPF who are employed by the respondent.

22. The respondent takes the view that its participation in the fund is not in accordance with the ordinary rules but is limited in that it has not been admitted nor has it participated in the fund as an employer in respect of the SACCAWU members who have remained in the HIPPF since 1 August 1994. It claims that its participation as an employer since June 1996 has been solely in respect of the ECCAWUSA members in terms of the ECCAWUSA wage agreement and that it is not subject to the ordinary rules of the fund, having specifically refused to be bound to them. It places particular reliance on clause 29.10 of the agreement which records that the company will not participate in or accept any responsibility for any retirement fund other than the Southern Sun Retirement Fund. Nevertheless, the company

does undertake to provide other approved funds with basic administrative services.

23. The respondent's initial stance appears to have been that the SACCAWU members were not entitled in law to remain as HIPPF paid-up members. However, because of the practical difficulties concerning the determination of transfer values for the purpose of section 14 transfers, it relented and agreed on 13 December 1995 that the SACCAWU members could indeed remain as paid-up members. This agreement is recorded in correspondence between SACCAWU and the respondent. In a letter dated 13 December 1995 the principal officer of the SACCAWU National Provident Fund makes the following statement:

> **The HIPPF is quite prepared to respect the choice made by members on the option form they designed. They, however, would like to be clarified on whether Southern Suns and SACCAWU would accept the choice of members who opt for the HIPPF.**
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> **In meetings held between Southern Sun and SNPF-Southern Sun Committee it was already agreed in principle that this will be the case, but these members should contact HIPPF direct with any queries/requests.**

24. In the letter of response dated 31 January 1996 the Industrial Relations Director of the respondent confirms and qualifies the statement in the letter as follows:

> 1. **MEMBERS TRANSFER OPTION**
>
> As discussed in several previous meetings with members of your Union, we confirm our willingness to accept instances where our employees choose to leave their monies with HIPPF rather than transfer such monies into either of the approved funds. We must however, emphasise that the Company will not make contributions to any fund other than those designated as approved funds.

25. In subsequent correspondence, the respondent consistently took the view that despite this concession it was not a participating employer in the HIPPF. For example on 2 August

1996 the respondent expressly advised the HIPPF that contrary to the statements of the principal officer in its correspondence, the agreement with ECCAWUSA simply provided that the respondent would provide the HIPPF with administrative services in respect of ECCAWUSA members, as it did with other funds, and that this did not mean it was a participating employer. The only retirement fund in respect of which the respondent saw itself as a participating employer was the Southern Sun Retirement Fund. The relevant part of this letter reads:

> **In respect of our agreement with ECCAWUSA it is necessary that we draw to your attention the fact that the Company is not a participating employer. The collective agreement provides for the Company to assist other approved funds with basic administrative services only. In the circumstances we request that you submit in writing, for our consideration, details of the administrative requirements of your fund. Once we have had an opportunity to examine this information we will revert to you with our comments.**
>
> **Where employees who are subject to the ECCAWUSA agreement decided to move from the Souther Sun Retirement Fund to the HIPPF the transfer will be effected in terms of the rules of the fund. Should you have any particular queries or concerns in this regard please revert to us with these details and we will attempt to provide the necessary clarity.**

26. The HIPPF responded to this letter on 12 August 1996, the relevant part of which reads:

> **Regarding the status of Southern Sun within the HIPPF, it is completely irregular for a company which has active members, and therefore remits monies to the Fund and is involved in processing insurance claims and loans, not to sign the Agreement of Participation. Large sums are handled and there are serious fiduciary duties attached to these transactions and procedures.**

27. The matter came to a head during 1997 when the HIPPF sought to obtain the respondent's cooperation in deducting stop orders for home loan repayments. On 27 February 1997, the principal officer of the HIPPF sent a letter to the respondent complaining about the refusal of certain managers to process the stop orders. This letter reads:

We have received negative responses from Sandton Crowne Plaza, Milpark Garden Court and Sandton Sun regarding administration of housing and education loans. It appears local management at these units are unwilling to process and manage the HIPPF loan system for our members.

We believe this is a contravention of your undertaking to provide basic administration services and request your intervention so that members can enjoy the full benefit of HIPPF services.

We would appreciate your urgent response as many workers have applied for loans and are putting a great deal of pressure on us to action them. Without your company's co-operation this is, of course, impossible.

28. In its response of the same date, the respondent indicated that it had not furnished an undertaking of the nature alleged by the principal officer.

29. Not long after that, the rules were amended to include appendix 2 and the matter ultimately came to a head in a letter addressed by the principal officer of the fund to the Industrial Relations Director of the respondent on 7 July 1998. This letter reads:

CLARIFICATION OF THE SOUTHERN SUN GROUP'S STATUS IN HIPPF

Thank you for your fax of 5 June, 1998. Arising out of your fax we wish to clarify the situation in that in our view a serious confusion now exists on the company's part with respect to the rights and duties of the parties in terms of the rules of the HIPPF and the need to fulfill the fund's fiduciary duty.

It is our understanding that the HIPPF is an "approved" fund recognised by the company. The fund has both active and paid up members in the company's employ. However, at this point the company is only recognising full rights of membership in respect of certain members and certain employees (eg freedom of choice re membership of approved funds, stop order facilities for loans, access to company premises for HIPPF agents etc).

In your fax you state that"matters associated with housing loans and stop order facilities are dealt with in collective bargaining with majority representative trade unions as are other substantive terms and conditions of employment". The HIPPF does not believe that such matters are in fact "matters for substantive bargaining" - they are basic administrative requirements related to the proper running of benefit funds and are binding on all employers who are members of such funds. These are not matters that affect the company contribution rate to retirement funds they have no financial implication and are purely services provided in terms of the Pension Funds Act.

In addition, we enclose a copy of an annexure to the HIPPF rules which deals with these matters - this annexure as at 1 January, 1998 was binding on all participating companies in the HIPPF. Accordingly we call upon you to confirm that all the services stipulated in the annexure will be implemented by the company at all its plants where there are HIPPF members and where there are company employees who wish to join the HIPPF or change their status from paid up to active.

We must stress that the decision to suspend pay outs to paid up members who you informed us were still employed by the company was made on the understanding that these members are employed by a participating company.

As we are receiving requests for loan stop order facilities from paid up members on a daily basis and from other employees who wish to change their status and join HIPPF as active members, we request you urgent confirmation that this will be put in place. Hoping for a speedy resolution to this matter in the interests of fund members and your employees' housing and other benefit requirements.

30. The respondent replied to this letter on 21 July 1998 in the following terms:

We acknowledge receipt of your faxed letters dated 7 July 1998 and 14 July 1998. We do not intend to deal with each and every allegation contained in your letter. Our failure to do so should not be construed as an admission of the correctness thereof and our right to respond should this prove to be necessary is strictly reserved. We do however wish to make the following comments:

1. In circumstances where our Company is not a participating employer we

deny that we have any responsibility to fulfill to the HIPPF.

2. The status accorded to the HIPPF as an "approved" fund arises out of our collective agreement with ECCAWUSA. This agreement has no relevance to anything other than the collective relationship which exists between the Company and ECCAWUSA in respect of the hotels at which they enjoy majority representation namely; Holiday Inn Garden Court Milpark and Holiday Inn Crowne Plaza Sandton.

3. Your views on collective bargaining or any other aspect of our organisation's affairs are of no interest to the Company.

Our position remains as set out in our letter dated 5 June 1998.

31. After this there was further correspondence involving the parties' attorneys and ultimately a complaint was lodged with this office.

32. The crisp issue for determination is whether the respondent is admitted to the fund as an employer and as such is bound by the amendment to the rules effected on 1 January 1998 to make stop order facilities available for the repayment of housing loans.

33. The HIPPF submits that the rules of the fund are binding on the respondent and that the respondent has at all material times been an employer under the rules. In terms of section 19(5)(a) of the Pension Funds Act, and rule B1.8.10 of the rules, the fund is entitled to grant home loans to its members. The rules define a member to include paid-up members and oblige employers to provide the HIPPF with the stop order facilities for the repayment of loans made to members.

34. The respondent, as already explained, denies that it is an employer in terms of the rules, **but maintains that it participates only to the extent provided in terms of its collective agreements which expressly stipulate that the respondent will not**

participate or accept any responsibility for any retirement fund other than the Southern Sun Retirement Fund, and that it will only provide basic administrative services to other funds. It denies that it has ever agreed to provide the paid-up members with stop order facilities or that is it bound to do so in terms of its limited participation.

35. The respondent also denies that it has not withdrawn from the fund. It submits that it withdrew in totality from the fund with effect from 1 August 1994, but that it has subsequently been admitted in respect of the ECCAWUSA members only in terms of the collective agreement between ECCAWUSA and itself. The fact that it grants stop order facilities in respect of such employees, does not mean that it is obliged to do so in respect of the paid-up members who contribute to the other funds.

36. Shortly before the hearing, on 14 February 2000, the complainant's representative filed a notice of intention to seek leave to argue certain issues separately as on exception. It was submitted that the respondent's reply disclosed no defence in fact and law to the complainant's case and it was submitted that the complainant is entitled on that basis to the relief claimed. At the hearing Mr Redding on behalf of the respondent argued that I should not uphold the exception without hearing oral evidence.

37. Before dealing with the exception and Mr Redding's argument, it is necessary to deal with the points *in limine* raised by the respondent in its response.

38. At the hearing the respondent changed its position in relation to the first and second points *in limine*. The first alleged that the complaint was fatally defective because it had not been brought by either a trustee or the board of trustees and thus was not a complaint of a "complainant" as defined in the Act. The second alleged that the complaint was fatally defective because the complainant sought to rely on a contract to which the respondent was not a party. Both points were abandoned.

39. The third point *in limine* relates to the application and interpretation of rule B2.8.0 of the

fund's rules. Its reads:

> **Any dispute which may arise in regard to claims or interpretation of these RULES shall be decided by the TRUSTEES; provided that if any person affected by the decision of the TRUSTEES is dissatisfied with a decision, he shall have the right to refer the matter to arbitration or to the Pension Funds Adjudicator appointed in terms of section 30C(1) of the ACT.**

40. The respondent submitted that the complaint constitutes a dispute "in regard to claims or interpretation" of the rules and alleged that it had not been afforded an opportunity to appear before the trustees in order to explain why it is not bound to make deductions from the salary of the paid-up members who have remained members of the HIPPF, based on its view that this would be in breach of the various collective agreements entered into between the respondent and the representative trade unions. Because the procedure envisaged in the rule has not been complied with, it contended that the complaint was premature and should not have been lodged in terms of section 30A, and accordingly that I lack jurisdiction to investigate and determine it.

41. It is common cause that the respondent was not afforded an opportunity to appear before the trustees in an oral hearing.

42. On its interpretation of the definition of an employer and a member, the respondent alleges that the rules do not bind it and thus that **the resolution of the dispute between the parties depends on an interpretation of the definitions in the fund's rules. Although not relating to a claim, the dispute is nevertheless submitted to be a dispute in regard to the interpretation of the rules.**

43. The complainant denies that the dispute falls within the purview of rule B2.8.0, which it regards as applicable only to claims under the rules and matters directly concerned with the interpretation of the rules. The complaint, it is also contended, does not relate to the interpretation of the rules but rather the application of the rules or the administration of the fund.

44. It was argued furthermore that the trustees, in fact and law, have in any event decided in the exercise of their discretion that the respondent is obliged to make the deductions and payments. Such decision was lawfully taken after giving the respondent, by exchange of correspondence and otherwise, whatever hearing it was entitled to in law. In rebuttal of this latter point, Mr Redding submitted that the hearing by correspondence was not sufficient because it was conducted with the principal officer of the fund rather than the trustees. In his view the rules require the trustees to gather together and make a decision such as that contemplated in rules B1.5.0 and B1.5.9 which require decisions of the trustees to be based on consensus, failing which the matter must be referred to a vote and if deadlocked to an arbitrator.

45. I am inclined to accept Mr Redding's submissions that the dispute does indeed concern an interpretation of the rules and that the correspondence between the employer and the principal officer did not constitute a hearing. However, I cannot accept that the lapse in this regard excludes my jurisdiction or that the failing is of such materiality to justify remitting it to the HIPPF for a decision, especially when the fund is the complainant in these proceedings.

46. Mr Brassey argued that being invested with the powers of a court of law in terms of section 30E of the Act, I can in the exercise of my discretion assume jurisdiction over a matter notwithstanding the rules entrusting the decision of the issue to the trustees. It is important to note that rule B2.8.0 is not an arbitration clause requiring submission to private dispute resolution for a final and binding decision. Rather it is a clause delineating the administrative organ of the fund entrusted with the task of determining disputes. I was urged to interpret the clause taking into account the presumption against the ouster of the jurisdiction of the ordinary courts and tribunals. Reference was also made to *Universiteit van Stellenbosch v JA Louw* 1983 (4) 321 (A) at 333G where it was stated:

> **It has always been recognised that an arbitration agreement does not necessarily oust the jurisdiction of the courts...the onus of satisfying the court that it should not,**

in the exercise of its discretion, refer the matter to arbitration is on the party who instituted the legal proceedings...In *Rhodesian Railways v McIntosh*...it was said that the discretion of the court to refuse arbitration where such an agreement exists, was to be exercised judicially, and only when a "very strong case" had been made out.

It is not possible to define, and certainly undesirable for any court to attempt to define with any degree of precision, what circumstances would constitute a "very strong case". In *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) Colman J at 391H refers to English authorities which say: "There should be compelling reasons for refusing to hold a party to his contract to have a dispute resolved by arbitration"

47. From this it is clear that a court or a tribunal has a discretion not to hold a party to an arbitration agreement provided there are compelling reasons not to do so. While Mr Redding is correct that rule B2.8.0 does not introduce an arbitration clause, the principles in *Universiteit van Stellenbosch* case are equally applicable to internal dispute resolution clauses. Accordingly, I accept that I have a discretion to condone non-compliance with the rules provided there are compelling reasons for doing so. **Mr Brassey advanced a number of reasons why I should exercise my discretion in favour of the fund in this regard. Firstly, there would be little point in remitting the matter back to the trustees when they have so evidently taken up a position. The respondent's plea is in essence a dilatory plea about process rather than substance and any reference back to the trustees would be hopelessly formalistic. Moreover, there has been adequate correspondence and ventilation of the issues between the parties during which one may assume the principal officer has acted as the agent of the trustees. There may be some merit in remitting a the matter back to a board of trustees when they are required to fulfill a discretion which they have failed to exercise. But that is not the case here. We are dealing with the determination of a point of law on a matter of obligation. This question of law is resolvable on the papers and there is no material consequence of any failure by the trustees to formally adhere to the provisions of rule B2.8.0.**

48. In reply Mr Redding formulated the issue as being whether certain procedural rights with inherent process value have been complied with. The employer has a right to persuade the trustees. And to negate such a right would be contrary to the requirements of public policy favouring a proper adherence to the principle of *audi alteram partem*.

49. As interesting as both counsels' arguments may be, it seems to me there may have been no need to rely upon them. The right to lodge complaints with the office of the Pension Funds Adjudicator is governed by section 30A of the Pension Funds Act. It provides as follows:

> **30A. Submission and consideration of complaints.—**
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> 1. *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.
>
> 2. A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
>
> 3. If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

Regardless of the rules, a complainant, including the board of trustees of a fund, has the right to lodge a written complaint with the fund or an employer who participates in a fund. Should the complainant not be satisfied with the response, it may then lodge the complaint with the Adjudicator. The board of trustees has the right to lodge the complaint *notwithstanding the provisions of the rules.*

50. Unfortunately this point was not argued on the papers, nor by counsel in the hearing. But it would seem to me to be dispositive of the third point *in limine*. The statutory right to lodge a complaint takes precedence over any provisions of a pension fund rule to the contrary. The opening phrase of section 30A(1) aims to give effect to the policy of consumer protection underlying Chapter VA of the Act, by ensuring that parties are able to have complaints resolved by an external independent agency. Many pension fund rules include anachronistic provisions allowing for the determination of disputes by the board of trustees with the result that the board is often made the judge in its own cause. T**he legislation aims to combat this and the statute is formulated generally, providing that the statutory right to lodge a complaint cannot be extinguished or qualified by a contrary provision in the rules. Rules of pension funds do not equate automatically with contractual terms, they are more akin to domestic subordinate legislation imposed often unilaterally upon those subject to their terms. Contrary provisions in the statute naturally take precedence over them, especially when the statute consciously modifies the scope and application of the rules.**

51. Even if I am mistaken in this, I accept Mr Brassey's submission that I have a discretion in this regard and for the reasons advanced by him I would assume jurisdiction in the present case since the fund and the trustees, being the complainants in the dispute, are willing to submit to my jurisdiction without first pronouncing on the dispute. Moreover, while the correspondence may fall short of a hearing in the strict sense, it is unlikely that the board was unaware of the respondent's view or that it has failed to consider it. I would add that my ruling is influenced by and is in conformity with my statutory obligation in section 30D to dispose of complaints in an economical and expeditious manner.

52. Accordingly, the third point *in limine* is dismissed.

53. The fourth point *in limine* avers that the deduction of monies from the employees who are paid-up members of the fund by the respondent constitutes *the provision of a benefit* and that any dispute about it is an alleged unfair labour practice in terms of the Labour Relations

Act and thus falls to be determined by the structures established by that Act. In terms of item 2(1)(b) of Schedule 7 of the Labour Relations Act, the unfair conduct of an employer in relation to the promotion, demotion or training of an employee or relating to the *provision of benefits* to an employee will be an unfair labour practice. Item 3 of schedule 7 permits any party to refer a dispute about an alleged unfair labour practice to a bargaining council or the Commission for Conciliation, Mediation and Arbitration ("CCMA") for the purposes of conciliation. If the dispute remains unresolved it may be referred to arbitration by the CCMA. By contrast, unfair labour practices involving discrimination must be referred to the Labour Court.

54. For the respondent's point *in limine* to succeed, it would have to be shown that the complaint in this instance is indeed a dispute regarding the unfair conduct of the employer relating to the provision of benefits to an employee and in addition that the CCMA has exclusive jurisdiction in relation to such disputes.

55. Section 30A of the Pension Funds Act grants complainants the right to lodge complaints. A complaint is defined 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;

The complaint lodged by the fund in this instance relates to the interpretation and application of the fund rules, in particular appendix 2, and alleges that a dispute of fact and law has arisen in relation to the fund between the fund and the employer and thus falls within paragraph (c) of the definition. Alternatively, the complaint alleges that the employer who participates in the fund has not fulfilled its duties in terms of the rules of the fund, namely the duty to make stop order facilities available. Hence, the dispute falls within the definition of a complaint.

56. The next question is whether the same dispute can be categorised as alleged unfair conduct of the employer relating to the provision of benefits to an employee. In my view the repayment of loans by way of a stop order constitutes no benefit to employees within the contemplation of item 2(1)(b), but is a benefit for the fund itself. The benefit provided to the members or employees is the provision of a loan. The stop order arrangement is a form of administrative assistance to the fund. The granting of a stop order to a fund is akin to a garnishee order enjoyed by a creditor. The debtor derives no or little benefit from such an arrangement. While the availability of stop order facilities may operate as an inducement to the provision of loans to members, it does not necessarily follow that the non-existence of such an arrangement would prevent members from obtaining housing benefits.

57. More importantly, the fund has no *locus standi* under item 2(1)(b) of schedule 7, which governs disputes between employers and employees and provides for an equitable jurisdiction. The CCMA's jurisdiction does not extend to disputes between a board of a pension fund and an employer. The complaint concerns a dispute of law in relation to the fund between the fund and the employer, alternatively it relates to the employer's duties in terms of the rules of the fund. It is not a dispute between the employer and its employees relating to the provision of benefits. **The fund's claim is in any event under the**

common law, the Pension Funds Act and the Constitution and is narrower than the equity based jurisdiction. The complaint is not located in equity but is in terms of the rules of the fund, nor does the complainant seek equitable relief.

58. Even were one able to categorise the dispute as one falling within item 2(1)(b) of schedule 7 of the Labour Relations Act, that of itself would not confer exclusive jurisdiction on the CCMA. Section 157(1) of the Labour Relations Act confers exclusive jurisdiction on the Labour Court in respect of all matters that elsewhere in terms of the Labour Relations Act or in terms of any other law are to be determined by the Labour Court. There is no similar provision conferring exclusive jurisdiction on the CCMA in respect of unfair labour practices falling within its jurisdiction. Nor, I believe, does the fact that the Labour Court acts as the upper guardian of the CCMA confer such exclusive jurisdiction.

59. Some reliance was placed on section 210 of the Labour Relations Act which provides:

> **If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.**

However, there is no conflict between the Labour Relations Act and the Pension Funds Act in this instance. Inasmuch as jurisdiction over a dispute may be concurrent (which is not the case here), such would be an instance where the difference between the two statutes would be capable of reconciliation. It is only when provisions are not capable of reconciliation, or are mutually destructive, that a conflict arises - *Handel v R* 1933 SWA 40.

60. For these reasons, the fourth point *in limine* is also dismissed.

61. As explained earlier, after the respondent filed a response and the complainant replied, the complainant filed what in practice is an exception. The exception reads as follows:

BE PLEASED TO TAKE NOTICE that, at the hearing of this matter, the Complainant will apply for the separation of the following issue so that it can be argued as on exception:

1. The Respondent does not deny, and thus admits, that the Rules of the Hospitality Industry Pension Fund are embodied in Annexure HIP1 and HIP2 to the Complaint (see para 5 of the Complaint and para 29 of the Response);

2. The Respondent admits that

    2.1 in 1969 it began making contributions on behalf of its employees who were members of the Fund (see, in particular, para 32.7 of the Complaint);

    2.2 it ceased making contributions in respect of such employees on 1 August 1994, whereupon they became paid-up members of the Funds (see para 30.2 of the Response);

    2.3 it thereafter resumed making contributions in respect of certain of its employees with effect from 4 June 1996 (see para 30.2 of the Response).

3. By reason of the aforegoing, the Respondent

    3.1 became an employer within the meaning of the term under the Rules of the Fund;

    3.2 became bound by such rules;

4. The Respondent accordingly became bound under the rule annexed as HIP3 as read with HIP2 to make deductions, by way of stop orders, from employees who are members of the fund in repayment of housing loans as contemplated by those annexures;

5. By reason of the aforegoing, the Respondent's reply discloses no defence in fact and law to the Complainant's case and the Complainant is accordingly entitled to the relief claimed in para 43 of its Complaint.

62. The determination of the dispute on exception, therefore, depends on whether the respondent can be considered to be an employer in terms of the rules, whether the paid-up members are members in terms of the rules, and whether the amendment to appendix 2 is binding on the employer.

63. If the answer to these questions is in the affirmative, then the respondent has a duty in terms of the rules to grant stop order facilities in respect of loans made to such paid-up members.

64. The term "employer" is defined in the definition section of the rules to mean "an employer trading in the hospitality/catering industry who has been admitted to the fund". A "member" is defined to mean "a person who has qualified for and has been admitted to membership of a fund (including paid-up members)".

65. It is true that the rules of the fund fail to use the expression "employer" in an entirely consistent manner. In some instances the word is used together with the definite or indefinite article, or it is qualified as "a new employer" or a "participating employer". Rule A1.1.2 provides that a new employer or class of employee may only participate in the fund with the agreement of the trustees. Rule A1.2.1 provides that a member may not withdraw from the fund while he remains in service of a participating employer unless, by virtue of a change in his employment conditions he becomes eligible to join another retirement fund arranged by the employer. Likewise, appendix 2 speaks of a "contributing employer". Nevertheless, it is equally true that the rules make no express provision for employer

participation to be limited. Status as an employer in the fund is not determined with reference to an employer's employees status as members. There is no rule exempting employers from the application of the rules in respect of paid-up members. A proper reading of the rules as a whole suggests that employers admitted for the fund are bound by all rules applicable to employers as a class.

66. The rules regulating paid-up membership are also not as clear as they might be. The definition of a member includes paid-up members. Rule A1.2.0 deals with the cessation of membership. It reads (with emphasis supplied):

> **A1.2.0 Cessation of membership**
>
> **A1.2.1 Subject to RULE A1.2.3, a MEMBER may not withdraw from the FUND while he remains in the SERVICE of a participating EMPLOYER *unless, by virtue of a change in his employment conditions, he becomes eligible to join another retirement fund arranged by the EMPLOYER.***
>
> **A1.2.2 Membership shall cease on cessation of SERVICE with a participating EMPLOYER *unless the MEMBER remains entitled to a benefit in terms of the RULES.***
>
> **A1.2.3 Membership shall cease at the discretion of the TRUSTEES should a MEMBER bring the FUND into disrepute or cause the FUND to suffer financial loss. Provided that before such cessation take place an enquiry shall be held at which a MEMBER shall be afforded the opportunity to represent himself.**

67. This should be read together with rule A5.0.0 dealing with withdrawal benefits:

> **A5.0.0 WITHDRAWAL BENEFITS**
>
> **A5.1.0 Cash withdrawal benefit**
>
> **A5.1.1 A MEMBER who resigns or is dismissed who does not qualify for a retirement benefit shall be paid the cash amount.**

A5.1.2 Payment of the cash amount shall be made as soon as possible from the date the MEMBER'S SERVICE ceased.

A5.2.0 Preserved benefit

A5.2.1 A withdrawing MEMBER may choose in place of the cash payment in Rule A5.1.0 above to have a preserved benefit. In this case the cash benefit, described in the schedule, will be transferred to an approved retirement annuity fund or another APPROVED FUND.

A5.3.0 Retrenchment benefit

A5.3.1 A MEMBER who is retrenched shall be paid the benefit in A5.1.0.

A5.4.0 Paid up benefits

A5.4.1 In lieu of the cash payment provided for in A5.1.0, a MEMBER who withdraws may choose *to have a paid-up deferred benefit payable* from his NORMAL RETIREMENT AGE retained in the FUND for his benefit. Each MEMBER who elects to retain his money in the FUND in this way shall be entitled to receive a certificate stating the amount of the retirement benefit he will receive.

68. The accumulative effect of these rules is that a member ceases to be a member on the grounds set out therein. In terms of rule A1.2.0, membership shall cease on the cessation of the member's service with the participating employer, unless the member remains entitled to the benefit in terms of the rules. There is a permissive provision which allows a member to withdraw from the fund while he remains in the service of a participating employer if, by virtue of a change in his employment conditions, he becomes eligible to join another retirement fund arranged by the employer. But there is no express provision granting an entitlement to a paid-up benefit to a member who remains in service. **While rule A5.4.1 deals with the situation where a member can become a paid-up member on resignation or dismissal, and although rule A1.2.1 provides that a member is entitled to withdraw from the fund while still in service in order to transfer to another fund arranged by the employer, there is no express provision that he**

is entitled to leave his benefit in the fund as a paid-up benefit. Thus, according to Mr Redding, paid-up membership is only possible in terms of rule A5.4.0 when a member has been dismissed or resigned.

69. Relying on these uncertainties and ambiguities, Mr Redding submitted that the amendment in appendix 2, requiring contributing employers to provide stop order facilities for the repayment of loans paid to members, imposes no obligation in respect of paid-up members who remain in the service of the employer. He advanced two propositions in support of this. Firstly, he maintained that if the rules are interpreted against the surrounding circumstances it becomes clear that the words "contributing employer" used in the amendment in relation to "member" limit the application of the amendment to persons in respect of whom an employer actually makes active contributions in terms of the rules. Secondly, the position of the existing paid-up members in the present case is not in fact covered by the rules at all. He argued therefore that I should not decide the complaint on the exception or exclusively on the papers but rather should refer it for further evidence of the surrounding circumstances to obtain the true intention of the parties in relation to the rule amendment. The evidence of the surrounding circumstances, in his submission, will demonstrate that the words "contributing employer" read with the reference to "member" in clause 4 of the amendment meant the amendment to be applicable only to persons in respect of whom an employer makes active contributions in terms of the rules. This would then exclude the SACCAWU paid-up members, who are the subject of the complaint, because the respondent only makes contributions in respect of the ECCAWUSA members.

70. In the law of contract it is entirely permissible when construing the terms of a contract to have regard to the words used in their contextual setting as well as any admissible evidence of the surrounding or background circumstances. The interpreter is entitled to receive evidence of the background and circumstances under which a contract is concluded so as to understand the broad context in which the words to be interpreted were used - see *Total South Africa (Pty) Ltd v Dekker NO* 1992 (1) SA 617 (A). Moreover, where the language of the contract is unclear it is acceptable to have regard to the circumstances and subsequent conduct of the parties showing the sense in which they acted in respect of the document -

see *Coopers & Lybrand & Others vs Bryant* 1995 (3) SA 761 (A) at 768 A - E.

71. The respondent amongst other things wishes to adduce evidence in relation to its collective bargaining agreements in respect of which it submits that the paid-up members are in violation of their contractual obligations and which would indicate that it does not consider itself bound by the rules of the fund. However, such a contention misses a fundamental point. The fund is not bound by the collective agreements in terms of section 23 of the Labour Relations Act, being neither a party nor one to which the agreement can be extended. Rule B1.2.2 makes the provisions of the rules binding upon all admitted employers. And the rules can be amended only in accordance with the amending power in the rules. Rule B1.2.1 and B1.2.2 require amendments to be signed by at least three trustees and the principal officer, notified in writing to the Registrar and approved by the SARS. All employers admitted to the fund and the members of the fund cannot, even with the concurrence of the fund, waive the provisions of the fund's rules (registered in terms of section 12 of the Pension Funds Act) by agreement, collective or individual, and thus the employers remain bound by the rules irrespective of the terms of any collective agreements. If the members are in breach of their obligations under a collective agreement, that is a matter between them and their employer. The employer's obligations under the rules are determined by the rules themselves and any applicable amendments. Hence, any evidence in relation to the terms and operation of the collective agreements has no bearing on the determination of the complaint.

72. In passing, it should be mentioned, the only relevant agreement would seem to be that of 25 March 1994 which contemplated the transfer of members in the HIPPF to one of the other funds. This agreement was conditional on the withdrawal of the company from the HIPPF and the transfer of member benefits to one or other of the nominated funds. Clause 30.6 of the agreement provided that the pension fund arrangements would become null and void unless the conditions were fulfilled within 6 months of the conclusion of the agreement or such later date that the parties may agree in writing. These conditions were not fulfilled and the agreement accordingly ceased to have any force and effect after expiry of the period.

73. Leaving aside the scope and operation of the collective agreements, Mr Redding further argued that if regard is had to the background circumstances it would become clear that at the time of amendment it was "the manifest intention of the parties to the agreement" (meaning Appendix 2, the rule amendment) that it would only cover employers who actually contributed in respect of employees and that it did not cover employees or members in respect of whom there is no contribution, namely the paid-up members. Moreover, there was an avowed special arrangement in terms of which the employer undertook to give support only to active or contributory members and not to paid-up members. It would therefore, according to Mr Redding, be inappropriate to enforce the literal meaning of the rule contrary to the provisions of this agreement, and the background and surrounding circumstances would confirm this.

74. Mr Brassey, correctly in my view, submitted that the principles governing the admissibility of evidence of background and surrounding circumstances for the purpose of interpreting contracts are inapplicable in relation to the interpretation of pension fund rules. Although pension fund rules are initially established by agreement, thereafter they become self regulating of the relationships involved and can be overridden by the application of the amending power of the board of management. Pension fund rules should be looked at in much the same way as one would approach a collective agreement entered into in a bargaining council or other forms of subordinate legislation. There is no scope for rectification or for interpretation with reference to circumstances. Variations, alterations or rescissions are dealt with by the power of amendment and are subject to the regulatory supervision of the Registrar in terms of section 12 of the Act and have statutory binding effect in terms of section 13.

75. Surrounding circumstances are permitted as an aid to the interpretation of subordinate legislation but only to the extent that the court is able to take judicial notice of them. The interpretation of such provisions by means of explanatory evidence is not permissible. In *Consolidated Diamond Mines of South West Africa Ltd v Administrator*, *SWA & Another* 1958 (4) SA 572 (A), Steyn JA explained the basis of this rule as follows:

> **There are a number of other matters, proved by Affidavit, upon which the Appellant relied as surrounding circumstances relevant to the meaning of the proclamation. Insofar as they are well-known in the Territory that a court would be entitled to take judicial cognisance of them, they have, of course, to be considered. But where evidence is necessary to prove them, I am not satisfied that they may be properly invoked in aid of the proclamation. Counsel have been unable to point to a single incidence in our law where such evidence was admitted for the purpose of construing a statute, and I know of none.**

76. Accordingly, even were I to receive evidence of the parties' intentions, I could not rely on it as an aid to interpretation of the rule. Besides, the application to lead evidence on the rule is premised on the incorrect assumption that the employer's consent is of relevance. There is no obligation on the fund to obtain the consent of the employer before amending the rules. The power of amendment in this instance rests exclusively with the trustees. The rule amendment in appendix 2 therefore falls to be interpreted with the assistance of the ordinary aids of interpretation, which exclude reliance upon evidence of surrounding background circumstances. Nevertheless, given the timing of the amendment, if anything the surrounding circumstances suggest the amendment was consciously adopted to require the respondent in the face of its opposition to provide stop orders. There is nothing to suggest, nor has it been contended, that the trustees have acted unlawfully or improperly in this regard.

77. It is common cause that the employer has been a contributing employer to the fund since 1969 except for the period between August 1994 and November 1996. When an employer discontinued contributions, in terms of rule 7.16.1 which was then applicable, it did not follow that it ceased being an employer in terms of the rules. The only consequence was that the benefits became paid-up. In terms of the now prevailing rule 3.4.1 an employer's discontinuation of contributions is termed a "partial termination". The implication being that termination is not total and that therefore the employer remains an employer. The rule reads:

> **B3.4.1 In the event that an EMPLOYER wishes to discontinue contributions to the FUND, the EMPLOYER must provide the TRUSTEES with proof satisfactory to**

> **the TRUSTEES that the majority of MEMBERS employed by that EMPLOYER are in favour of such discontinuance. Such proof would not be required if the EMPLOYER is wound up or ceases to carry on business. Such EMPLOYER must then give the TRUSTEES three months' written notice of its intention to discontinue contributions.**

78. There appears to be no other rule regulating an employer's withdrawal from the fund. In the absence of a rule regulating the termination of employer participation, withdrawal by the employer would have to be by means of reasonable notice or a rule amendment, most likely the latter.

79. The initial stance of the respondent was that it had totally withdrawn as an employer from the fund. However, this is inconsistent with the fact that it allowed paid-up members to remain in the fund (failing to take disciplinary action for breach of the collective agreement) and that it continued to make contributions in respect of certain of its employees. As such it can be described as a "contributing employer". While it is correct that the respondent made no contributions to the fund from 1 August 1994 to November 1996, this suspension of contributions did not constitute a withdrawal from the fund by the respondent and a consequent cessation of its status as an employer admitted to the fund. Even were the letter of 13 April 1994 to Fedsure to constitute proper notice to withdraw from the fund on reasonable notice, the respondent's subsequent conduct and participation possibly amount to a waiver or simply renewed participation. Nor has it pointed to any rule permitting it to participate in a limited manner. Once an employer participates in a fund it is bound by the rules applicable to employers, unless it is exempted in terms of the rules. There is no such exemption in this instance.

80. Accordingly, I am satisfied that the respondent is an employer in terms of the rules of the fund, and is bound by them.

81. For the following reasons I am also satisfied that the paid-up members are members of the fund in terms of the fund's rules, but also in terms of the definition of a member in the Pension Funds Act. This reads:

"member" means, in relation to—

(a) a fund referred to in paragraph (a) of the definition of "pension fund organization", any member or former member of the association by which such fund has been established;

(b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund;

The paid-up members have not received their benefits from the fund nor has their membership been terminated in accordance with the rules of the fund.

82. While it is correct that the rules do not deal with the question of paid-up membership in a satisfactory manner, it seems clear to me that paid-up membership is not restricted to those instances where a member has resigned or is dismissed. Rule A5.0.0 governing withdrawal benefits does not deal exhaustively with paid-up membership. **A member who remains in service of an employer, but who transfers to another fund would either have to transfer that benefit to the transferee fund or would have to leave it as a paid-up benefit. Practically speaking there are no other options. Members remaining in service would not be entitled to receive a cash withdrawal benefit in terms of the income tax legislation. Nor is there any statutory or contractual obligation on such members to transfer their member shares to the transferee fund. Accordingly, the necessary implication of the rules, (read as a whole, and in context, in order to give them practical efficacy), is that it is permissible even in the absence of an express provision to leave the member's share in the fund as a paid-up benefit, in accordance with industry practice, where it shall earn interest in terms of the definition of**

a member's share in the rules, at a rate declared by the trustees on the advice of the actuary. In which event, one can only conclude that such persons are paid-up members and hence members of the fund in terms of the definition of a member in both the rules and the Act.

83. As an employer the respondent is bound by the rule amendment in Appendix 2 in terms of which it "shall be required to provide stop order facilities for the repayment of loans" to members, including paid-up members. By reason of the aforegoing, the respondent's reply discloses no defence in fact or in law to the complainant's case and the complainant is accordingly entitled to the relief claimed.

84. The complainant has sought an order for costs. This would seem to be an appropriate case to apply the ordinary rule of awarding costs to the successful party.

85. The order of this tribunal is as follows:

85.1 It is declared that the respondent is obliged to provide stop order facilities for the repayment of home loans which the complainant has granted to any of its paid-up members who are employed by the respondent.

85.2 The respondent is ordered to pay the complainant's costs on the highest scale in the Magistrate's Court.

Dated at **CAPE TOWN** this 13th day of March 2000.

_____

John Murphy

Pension Funds Adjudicator