IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/9/98

In the complaint between:

C M Low **Complainant**

and

BP Southern Africa Pension Fund **First Respondent**
BP Southern Africa (Pty) Ltd **Second Respondent**

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

Introduction

This is a complaint in terms of section 30A(3) of the Pension Funds Act of 1956.

On 20 January 1997 the complainant lodged a complaint with the principal officer of the first respondent.

When the first respondent failed to deal with the complaint to the complainant's satisfaction, he lodged a complaint with the office of the Pension Funds Adjudicator under cover of a letter dated 26 February 1997. As the Adjudicator was appointed only with effect from 1 January 1998, the complaint remained in abeyance until the appointment of the Adjudicator.

The thrust of the complaint is that the committee of management through certain decisions and a rule amendment applied pension fund monies selectively to

improve the interests of the active members of the fund without due regard to the interests of the pensioners and beneficiaries. Essentially, the complainant alleges that these decisions and the rule amendment amount to unfair discrimination. In his request for relief, the complainant does not seek to have the committee's decision set aside or declared unlawful, rather he requests me to make an order effectively extending the benefit granted to the active members under the rule amendment to the pensioners and the beneficiaries as well.

The first respondent has raised four preliminary points and contests the merits of the complainant's claim. It also has raised the question of the joinder of the pensioners and beneficiaries (approximately 500 in number) who have an interest in the determination of the complaint.

A preliminary hearing was held at the offices of the Pension Funds Adjudicator on 20 March 1998 in which the question of legal representation was settled by an agreement allowing each party to be legally represented in the proceedings before me.

A further hearing was held on 27 November 1998 at the High Court, Cape Town. During argument it was agreed that I should decide the preliminary points before making a decision on the joinder of other interested parties and further investigating the merits of the complaint.

The complainant was represented by Adv W Burger SC and Adv E Fagan, instructed by attorneys Herold Gie & Broadhead, Cape Town. The first respondent was represented by Adv P Hodes SC and Adv J Newdigate, instructed by Sonnenberg Hoffman & Galombik, attorneys of Cape Town. The second respondent was joined in the proceedings by agreement and in accordance with the discretion granted to me in terms of section 30G(d) of the Pension Funds Act of 1956. The second respondent was not formally represented and advanced no submissions.

No oral evidence was led and the parties relied exclusively on the documentary

evidence and arguments presented by counsel.

Having completed my investigation I have determined the complaint as follows. These are my reasons therefor.

Background to the complaint

The complainant is a retired member of the first respondent. He was employed by the second respondent for a number of years in a variety of capacities including that of financial director.

Although the complainant brings this complaint in his personal capacity, it is apparent that he acts in an informal sense as a representative of other pensioners and beneficiaries. The relief he seeks in terms of his complaint, were it to be granted, would have a significant impact for all the pensioner members of the fund. This fact raises important and difficult questions of joinder. For reasons which shall become evident, it is unnecessary to consider this issue fully.

The first respondent is a pension fund duly registered under the Pension Funds Act of 1956.

The second respondent is a company duly incorporated in accordance with the company laws of South Africa and is the principal participating employer in the fund.

On 26 October 1990, the first respondent amended rule 26 of its rules to increase the pension benefit payable to members with more than 20 years accredited service from 1.25% to 1.5% of final pensionable salary for each year of service in excess of 20 years. The amendment came into operation on the date in which the amendment was effected, namely 26 October 1990. Consequently the amendment, with its increased benefit, was applicable only to employees who had not yet retired on 26 October 1990. The complainant retired prior to this date.

The incentive to amend the rules came from a survey conducted by the first respondent's actuary, which revealed that the benefits package offered by the first respondent to its members was lower than the level at which the principal employer wished to be positioned in the job market, in relation to both current and future employees. The package had become unattractive to current and future employees because pensioners would only be able to achieve the maximum pension payable (75% of final salary) should the pensioner be employed by the principal employer for 40 years. Although this length of service had previously been possible, the prevailing circumstances in the job market in 1990 made such length of employment highly unlikely. By virtue of circumstances prevailing in the petroleum industry throughout the world, staff can no longer regard themselves as permanently employed for their entire working lives. Thus, the underlying assumption that pensionable benefits should be based on a lifetime of service to the company is no longer tenable. Secondly, the majority of current and future employees of the second respondent are no longer being employed directly after completing their schooling. Most new employees are recruited after completing tertiary education and this reduces the potential period of service with the employer by a minimum of 3 years. Frequently, this figure will be greater. Prior to 1994 the prevailing law in South Africa required all white males to perform 2 years of military service, which further reduced the period of employment with the principal employer.

After receiving the report from the fund's actuary, the committee amended the rules to provide for an additional second tier benefit upon retirement of 0.25% of the final pensionable salary for each year of service in excess of 20 years. The actuary estimated that the past service cost of granting the amendment was approximately R5.6 million, and that such costs could be absorbed by the fund which was estimated to have a past service surplus as at 30 August 1990 in the amount of approximately R92.5 million. The future cost of the increased benefit is to be funded by future service contributions.

In sum, the motivation for the amendment was to ensure that long-serving employees would not be unduly prejudiced and that they could realistically aim to

receive 75% of their final salary as a pension.

The complaint of the complainant is that the motive to make the second respondent more competitive in the employment market place is not a proper consideration in the administration of a pension fund. He also contends that the trustees did not attach proper weight to the interests of the pensioners in that the past service surplus in the pension fund (built partly by past pensioner contributions) could easily have accommodated an extension of the benefit to the pensioners. The argument, basically, is that the committee is not entitled, in the exercise of its fiduciary duties, to favour one beneficiary or group of beneficiaries against another. All beneficiaries of the fund should be treated impartially and without discrimination.

In the period between October 1990 and November 1995 numerous discussions took place between the complainant and various persons with responsibility for the decisions of the first and second respondent concerning the amendment. Eventually, on 17 November 1995, the committee in response to requests from some of the pensioners again reviewed the situation and reaffirmed the October 1990 decision.

The first respondent in its written response raised, in addition to its defence on the merits, four *in limine* defences to the complaint. These are: prescription, the complaint was lodged out of time in terms of the Act; waiver; and non-joinder. In addition, counsel in their heads of argument raised an additional plea that the complainant was not entitled to the relief sought, in the sense that the Adjudicator has no jurisdiction to grant the relief. I shall deal with this matter first, before dealing with the other preliminary points.

Entitlement to relief sought

In his complaint, the complainant seeks the following relief:

"**That the pension of the complainant and the pensions of all other pensioners and beneficiaries as at 26 October 1990 now be adjusted cumulatively from 1 November 1990 by an amount equivalent to the additional benefit that would have been payable had the trustees (the committee) declared the amendment to the rules on 26 October 1990 applicable to pensioners and beneficiaries.**
That damages be awarded equivalent to a loss of interest to date on the additional pension payable since 1 November 1990."

In the heads of argument submitted by counsel on behalf of complainant, the request for relief is stated as follows:

"**....that the Adjudicator should make an order compelling the respondent to exercise its power in terms of rule 51(1)(d) and declare the amendment made to rule 26 on 26 October 1990 applicable also to pensioners. It is submitted, further, that the extension of the amendment to pensioners should be made retrospective to 26 October 1990 in order to ensure equal treatment of all members of the Respondent.**"

Rule 51(1) reads as follows:

(1) The Committee may, with the concurrence of the Company, and subject to sub-section (2) of this Rule, make new Rules or alter or rescind any existing Rule (hereinafter referred to as an "amendment") PROVIDED THAT:-

(a) the Actuary shall first report on any such amendment that affects the financial position of the Fund; and

(b) no such amendment (other than one made in terms of Rule 41) shall operate to reduce a Pension being paid at the date of such amendment; and

(c) no such amendment shall cause a reduction in the actuarial reserve held for Members in respect of their Accredited Service up to the date of such amendment; and

(d) no such amendment shall, except to the extent that it expressly

declares the contrary, have the effect of granting or imposing rights and obligations on any Pensioner or his Eligible Spouse or Eligible Child or Eligible Dependant different from those granted and imposed by the Rules as they stood at the date on which he left the Service; and

(e) every amendment made in terms of this Rule shall, except as otherwise indicated in writing by the Company to the committee, to be binding on all the Employers on and after the date on which it comes into effect.

The complainant, according to the respondents, is seeking, in effect, an order requiring the respondent to extend the amended benefit to him and other pensioners retrospectively, and that rule 26 should be amended under rule 51(1)(d) in order to bring this about. The complainant does not seek to set aside the rule amendment but wishes it to be corrected to be more inclusive.

Counsel for respondent argued that rule 51 gives the committee a wide discretion in exercising its powers and its duties, and there is nothing in the rules, either expressly or implicitly, which requires that all members or groups of members must be treated in precisely the same way. Rule 51 makes it clear that the committee may legitimately distinguish between active members and other categories of members. In other words, differentiation is sanctioned in terms of the rules themselves. Nevertheless, the respondent conceded that in exercising the power of amendment, the committee must act in good faith and with impartiality in respect of all members and beneficiaries. Yet, Mr Newdigate, in argument before me, submitted that even if the respondent had breached its fiduciary duty, this would not justify the relief sought. In his view, it would be inappropriate for me effectively to amend the rules of the fund in order to grant what practically would amount to a pension increase.

In support of this proposition, Mr Newdigate referred me to my own comments in *Group of Concerned SAPREF Pensioners v The SAPREF Pension Fund & Another* (PFA/KZN/25/98 unreported). There I cited the following remarks of Warner J in

Mettoy Pension Trustees Ltd v Evans & Others **[1991] 2 All ER 513 @ 550G:**

> **In my opinion it is not correct to say that the rights of the beneficiaries under the scheme are satisfied when they have received their mandatory benefits and that anything more lies in the bounty of the employer. I think the beneficiaries have a right to be considered for discretionary benefits.**

Commenting on these *dicta*, I stated:

> **It does not follow that any court or adjudicator without more should require the employer to grant pension increases which will increase the employer's immediate funding burden. Nor are the courts likely to require increases which will increase the employer's funding burden in the future by holding it to set patterns of increases. Disputes about pension increases and contribution holidays, in the absence of a clear statutory or contractual right to an increase or a holiday, can be classified as disputes of interest. Unlike disputes of right, disputes of interest concern the creation of new rights, such as disputes over wage increases or the modification of contractual rights, or even the amendment of pension fund rules. Disputes of right, on the other hand, concern the infringement, interpretation and application of existing rights embodied in contracts, statutes or rules. Collective bargaining, negotiation, mediation and joint problem solving are the preferred methods for resolving disputes of interest, while adjudication is normally considered the appropriate method for resolving disputes of right. Consequently, the role of an adjudicator in this area is limited generally to acting as the custodian of the *process* whereby new entitlements are concretised through negotiation and ultimately agreement. Normally, an adjudicator will hesitate to set the substantive terms of the outcome of a negotiation. This, as a general rule, will be left to the respective bargaining power of the parties. Powers, discretions, rights and duties brought to bear in the process nevertheless have to be exercised reasonably and fairly.**
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> **This pluralistic framework ought not to be applied mechanistically. The distinction between disputes of right and disputes of interest is not hermetically sealed. - see *Metal & Electrical Workers Union of SA v National Panasonic Co* (1991) 12 *ILJ* 533 (C) @ 537 E - F. The categorisation has been described as more analogous to a semi-permeable membrane through which disputes that are normally of one type may pass and be handled by procedures usually reserved for disputes of the other.**

This will be especially so in disputes of interest where the bargaining power of one party is totally out of equilibrium with the other, for instance by virtue of a lack of organisation, or the incapacity to invoke equal weapons of last resort, with the result that the outcome of negotiations yields a manifestly unjust result, or one at variance with the prevailing social *mores*. In which event, judicial intervention may be justified to strike the appropriate balance in the substantive outcome. Much will depend on the circumstances.

Relying on this line of thought, Mr Newdigate prevailed upon me to avoid setting substantive outcomes. The argument raises fundamental questions about the relief which I am able to grant.

My powers to grant relief in relation to complaints is spelt out in section 30E(1)(a) of the Pension Funds Act of 1956 which reads as follows:

(1) In order to achieve his or her main object, the Adjudicator -

(a) shall, ... investigate any complaint and may make the order which any court of law may make;

This section, in turn, must be read with section 30D which defines my main object as follows:

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

These provisions make it plain that I am able to make the order which *any court of law* may make in order to dispose of a complaint. The limitations upon my power are contained within the definition of a complaint which is defined in section 1 of the Act extensively 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.

Where a *decision* of a pension fund is alleged to be unfairly discriminatory, a complaint to that effect would be a complaint relating to the administration of the fund or the application of its rules and would allege that the decision of the fund was in excess of its powers, or an improper exercise of its powers, (which in most cases would take the form of a breach of one of the fiduciary duties). Alternatively, the complainant may allege that the discriminatory decision has led to prejudice in consequence of the maladministration of the fund.

A complaint that a *rule* is discriminatory will be a complaint relating to the interpretation and application of the fund's rules, alleging that a dispute of law has arisen in relation to a fund between the fund and the complainant. The dispute of law being whether the rule is invalid on the grounds of unconstitutionality, unreasonableness or illegality.

The claim that a discriminatory decision or rule is invalid is primarily a claim that the decision or rule is unreasonable or unlawful by virtue of being contrary to the Bill of Rights.

Section 8(2) of the Constitution provides:

> **A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.**

This provision means that the rights in the Bill of Rights may bind pension funds directly in their dealings with members. To determine whether a particular right is applicable in a complaint, one has to take account of the nature of the right and the duty imposed by it. The right potentially at issue in this matter is the right to non-discrimination in section 9(4) of the Constitution. It reads:

> **No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).**

Section 9(3) reads:

> **The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.**

The right in section 9(4) explicitly applies to persons other than the state, and strongly suggests that the anti-discrimination provisions should be applied horizontally between citizens. It is relatively safe to assume that the right to equality can be applied suitably in this complaint. Anti-discrimination provisions are applied horizontally in other jurisdictions, frequently by means of anti-discrimination legislation, but also through the common law and the process of judicial interpretation. Any alleged infringement of the right to equality by a pension fund will give rise to a dispute of law in relation to the administration of the fund or the application of its rules falling within the range of the definition of a complaint.

Besides this direct application of the Bill of Rights, section 39(2) of the

Constitution requires me to apply the Bill of Rights indirectly in the following terms:

> **When interpreting any legislation and when developing the common law or customary law, every court, *tribunal* or forum must promote the spirit, purport and objects of the Bill of Rights.**

Section 1(a) of the Constitution identifies human dignity, the achievement of equality and the advancement of human rights and freedoms as among our founding democratic values. These values add content to the common law and statutory fiduciary duties and the statutory rights of complainants derived from Chapter VA of the Pension Funds Act.

There can be little argument, therefore, that unfairly discriminatory decisions and rules will be an improper exercise of power, maladministration or illegal, as contemplated in the definition of a complaint. However, it does not follow, that every decision or rule that differentiates amounts to discrimination. Firstly, the differentiation must amount to "discrimination". Secondly, such discrimination must be unfair. Thirdly, there should be no justification for the unfair discrimination. I shall discuss these matters more fully later.

Counsel's submission is concerned less with my authority to make a finding of unfair discrimination than it is with the appropriate relief in the event of such a finding. As I understand Mr Newdigate, he contends that the appropriate remedy would be to set aside the offending decision or rule. The complainant has not asked for such relief, instead he has asked me to extend the benefits and to amend the rule for that purpose. Another possibility, should I find the committee's decision or the rule to be invalid, would be to direct the committee to amend the rules and to submit such amended rules to the Registrar for approval in terms of section 12 of the Pension Funds Act of 1956.

The question here is: Am I empowered to make such orders? Section 30E(1)(a), allows me to make the order which any court of law may make. What orders can a

court of law make when faced with unjustifiable unfair discrimination?

If one proceeds on the assumption that unfair discrimination is a constitutional matter, the question is regulated by section 172(1) of the Constitution. It provides:

> **When deciding a constitutional matter within its power, a court -**
>
> **(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and**
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> **(b) may make any order that is just and equitable, including -**
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> **(i) an order limiting the retrospective effect of the declaration of invalidity; and**
>
> **(ii) an order suspending the declaration of invalidity for any period and on any condition to allow the competent authority to correct the defect**

Thus, as an administrative tribunal dressed with the authority to determine the legality of pension fund rules and conduct, and related disputes of law, and the power to make any order that a court of law may make, I have the power to declare rules or conduct inconsistent with the Constitution to be invalid to the extent of the inconsistency. Section 172(2)(a) of the Constitution makes it clear that I lack the jurisdiction and power to make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President. Such an order would fall within the exclusive domain of the Supreme Court of Appeal, a High Court, or a court of similar status, and requires confirmation by the Constitutional Court. Nevertheless, constitutional scrutiny of the rules of pension funds and their decisions clearly falls within my jurisdiction.

It is not unusual for administrative tribunals in other legal systems with fundamental constitutions to refuse to apply laws or to uphold conduct on the basis of inconsistency with the Constitution. In *Douglas / Kwantelen Faculty*

Association v Douglas College **(1990) 27 D LR (4TH) 94, the Canadian Supreme Court held that a tribunal must respect the constitution so that if it finds invalid a law that it is called upon to apply, it is bound to treat it has having no force or effect. (See also *Tetreault - Gadoury v Canada* (1991) 81 DLR (4th) 121; and *Cuddy Chicks v Ontario* [1991] 2 SCR 5).**

In terms of section 172(1)(b), when deciding a constitutional matter within my power, I am permitted to make any order that is just and equitable, including those specifically mentioned in the section, which aim to manage the possible harmful effects of a declaration of invalidity some time after the decision was taken or the rule made.

This discretion does not limit me to granting relief to set aside a decision. It would be equally acceptable for me to correct a decision or a rule amendment. Such a remedy could take the form of a *mandamus* recognised in our common law. Normally, the *mandamus* is available to compel the performance of specific statutory duties or to remedy the effects of unlawful action already taken (see Baxter *Administrative Law* 690).
Furthermore, a court can make an order aimed at minimising or correcting a finding of invalidity by "reading in" provisions that the rule maker has not included. The constitutional remedy of "reading in" involves adding words and provisions to the legislation or rules in front of the court. (see Chaskalson *Constitutional Law of South Africa* (Jutas 1998) @ 9 - 7).

A declaration of invalidity, therefore, is not the only just and equitable order available to remedy a discriminatory decision or rule.

The submission that the relief sought in this case, if granted, would amount to an award of a pension increase, is also misguided. The gist of the complaint is discrimination and the relief sought is for compensation to remedy the effects of the alleged unlawful conduct. In *Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd* (1998) 19 *ILJ* 858 (LC) Seady A J addressed similar arguments concerning the relief to be granted under the unfair

labour practice jurisdiction to remedy discrimination in the pension law context. The remedial power granted to the Labour Court under that jurisdiction is akin to the constitutional remedies. The court has power to determine unfair discrimination disputes on terms it deems reasonable. The learned acting judge's comments on the remedy are instructive. At 860A - C she observes:

> **Item 4(1) gives the court the power to determine unfair discrimination disputes 'on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation'. No maximum or minimum compensation is prescribed, neither is the court given any indicators, other than reasonableness, for deciding when to order compensation and how to calculate it. Mr *Heimstra* and Mr Maluleke urged the court to interpret these powers on the basis adopted by the previous Labour Appeal Court when considering claims for compensation in terms of s 46(9) of the old Labour Relations Act. That provision, formulated in almost identical terms, was held to require the applicants to prove what financial loss they have suffered, that it was caused by the unfair labour practice and that this amount be moderated taking into account the interests of both the employer and the employees. Given the lack of explicit statutory guidance, this approach seems appropriate.**

On this basis, the participating employer was ordered to correct the discrimination by paying the difference in contribution rates paid into the fund on behalf of the members from the date when the employer received the dispute referral documents. In this way the court avoided the problem of prescription and the potentially crippling effect of requiring an employer to remedy discrimination retrospectively over an extended period.

Creative judicial remedies of this kind can be expected in a constitutional state committed to redressing past inequalities. They reflect precisely the balancing envisaged by the remedial power conferred by section 172(1)(b) of the Constitution.

As a consequence, the respondent's preliminary point that the complainant is not entitled to the relief sought is unfounded. Should he prove unfair discrimination the relief sought would be competent.

Prescription and time limits

The respondent contends that the complainant's claim has been extinguished by the passage of time in terms of the Prescription Act 68 of 1969. According to the respondent, the complainant bases his claim on a right or entitlement to two related things:

that the respondent perform a particular act, namely amending its rules in order to make provision for an increased benefit for the pensioners; and

that the respondent pays such increased benefits to the complainant and other pensioners.

If this is indeed the entitlement at issue, it may well give rise to a corresponding debt as contemplated in the Prescription Act. The respondent submits that because the debt became due on 26 October 1990, or alternatively on the complainant's version sometime between December 1991 and October 1992, the 3 year prescriptive period in section 11 of the Prescription Act would have expired well before the present proceedings were instituted.

The complainant advances three alternative arguments in rebuttal of the respondent 's defence of prescription. The first reason is that the 3 year period provided for in section 11 of the Prescription Act had not elapsed by the time the complainant lodged his complaint. Secondly, the complainant's claim is not a debt as intended by the Prescription Act. Thirdly, by virtue of section 30I of the Pension Funds Act, the provisions of the Prescription Act are not applicable.

On the first point, the complainant identifies the decision of the committee on 17 November 1995 in which it refused to extend the benefit granted to the active members as the decision with which he takes issue. There is nothing in the actual wording of the amendment of 26 October 1990 which indicates that it does not

extend the increased benefits to pensioners. The reason it was not extended is to be found in the wording of rule 51(1)(d) (above) which provides that no amendment shall have the effect of granting or imposing rights and obligations on any pensioner except to the extent that it expressly declared contrary. The amendment to rule 26 made no such express declaration, thus the contention is that decision of the meeting of 17 November 1995 was a fresh decision not to extend the benefit.

The respondent argues that the complainant's submission is misleading. It maintains that the criticisms of the complainant have at all relevant times been directed at the failure of the respondent to include pensioners in the extension of benefits decided upon on 26 October 1990.

The documentary evidence submitted is somewhat ambivalent in this regard. In his complaint the complainant speaks of appealing against the decision of the 17 November 1995. He also points to a potential conflict of interest in "voting against participation of pensioners in the amendment on 17/11/95". The minutes of the committee's meeting on 17 November 1995 are likewise ambiguous. On the one hand, it records various persons at the meeting describing the item on the agenda as "a new proposal to increase benefits". Whereas it is also evident that some kind of review of the decision of 20 October 1990 was being requested.

Despite these ambiguities, I am satisfied that the decision in issue is that of the 26 October 1990. While I hesitate to hold the complainant (a layman) strictly to the terms of the pleading he drafted before obtaining legal representation, it is evident that it is the earlier decision which he seeks to reverse. In the second paragraph of his complaint he states as follows:

> **The thrust of the complaint is that the trustees comprising the committee of management applied discretionary pension fund monies under their control to gratuitously improve the interests of the active members of the fund without due regard for the powers they were able to exercise to similarly advance the interests of the pensioners (and beneficiaries) on an equitable basis.**

Likewise, the relief he seeks gives a clear indication that it is the earlier decision which is at issue. He asks for compensation backdated to the date of the rule amendment, not to the later date in 1995 when the matter was reconsidered.

Accordingly, I am in agreement with the respondent that the mere fact that the same decision was affirmed more than 5 years later in no way introduced a new cause of action upon which the complainant is now entitled to rely. The complainant sees the decision of 26 October 1990 as amounting to discrimination and seeks compensatory relief for that discrimination.

This brings us to the question of whether a claim for relief based on alleged discrimination can be considered to be a debt for the purposes of the Prescription Act. Chapter III of the Prescription Act is concerned with the effect of time on "debts". Before the complainant's claim can be extinguished in terms of the Prescription Act it would have to be a debt. The term debt is not defined in the Act, but has been held to mean the correlative of rights, on the passive side of an obligation. It therefore denotes a duty to perform in terms of an obligation. The concept encompasses not only an obligation to pay money, but also an obligation to do something. (See *Oertel en Andere N.N.O. v Die Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A), 370 B - G.)

Be that as it may, it is doubtful whether a complaint in relation to the administration of a pension fund or concerning the interpretation and application of its rules alleging *ultra vires*, maladministration or a dispute of law can properly be classified as a debt.

Mr Burger, on behalf of the complainant, argued that a complaint is really *sui generis*, something akin to a review of unlawful administrative action. Although the complainant may stand to benefit financially if he is successful, this would be secondary and consequential upon the respondent's amendment of its rules. A debt is normally exigible as between a debtor and creditor and gives rise to an immediate complaint either out of contract, delict or statute. We are not dealing

with a relationship between a creditor and a debtor as much as we are dealing with a relationship between functionaries (the management committee) and a membership of a voluntary association. Although there are contractual aspects to the complainant's membership of the respondent, the relationship between the complainant and respondent is *sui generis* and is interwoven with statutory prescriptions which have not arisen voluntarily, but as an obligatory component of the complainant's employment with the company.

Prof M M Loubser in his article: *Is a Right of Rescission subject to Extinctive Prescription* 1990 (53) *THRHR* 43 discusses the meaning of the concept of debt in relation to the meaning of a right. At p51 he comments:

> **The term "debt" commonly refers to the relationship between parties where the one has a duty to render some performance and the other has a correlative right to such performance. In this sense, "debt" is the correlative of a claim by another, and the claimant may impose the duty on the debtor to behave in a certain way, for example to pay, to deliver or to allow something. Whereas a right in the sense of a claim clearly has a correlative "debt", it must be determined whether other kinds of legal right also involve a correlative debt.....**

Prof Loubser identifies four categories of rights in this wide and generic sense. They include:

(a) a right in the sense of a claim to some performance by another;

(b) a right in the sense of a liberty or privilege to do or not to do something;

(c) a right in the sense of a power, which signifies the ability of someone to alter the existing legal condition of himself or of another person; and

(d) a right in the sense of an immunity which signifies freedom from the power of another person.

He goes on to describe the correlatives of these various forms of right as:

(a) a duty to render the required performance - in other words a debt;

(b) a duty not to interfere with the exercise of the liberty or privilege;

(c) a liability to have one's legal rights altered by the exercise of a power by another; and

(d) a disability to exercise power legally over a person with an immunity.

In terms of this scheme, a claim against a pension fund not to exceed its powers by acting unconstitutionally, unreasonably or unlawfully most probably constitutes a power or competence whereby a person with the right (the complainant) seeks to alter the legal position of himself and other interested parties.

Relying on Salmond, Prof Loubser makes the point that a power differs from a claim or right in the strict sense in that a power has no corresponding duty. Thus he states:

> **The right to make a will corresponds to no duty of any other person. Likewise the right to sue in a legally valid manner does not necessarily correspond to a duty to pay. The correlative of a power is described as follows:**
>
> > **"The correlative of a power is a liability. This connotes the presence of a power vested in someone else against the person with the liability. It is the position of one whose legal rights (in the wide sense) may be altered by the exercise of a power.... The most important form of liability is that which corresponds to the various powers of action and prosecution. Such liability is independent of the question whether the particular action or prosecution will be successful, and is therefore independent of (say) the duty to pay damages for a civil wrong..... a person who has committed no tort is also liable to be sued in tort, though in this case the action will fail."**
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> **Whereas the correlative of a debt in the sense of a claim to some performance by another is clearly a debt in terms of Act 68 of 1969, there is some doubt whether the correlative of a power or competence termed a "liability" in the preceding quotation can also be described as a "debt".**

Thus, it would seem that the complainant's right to complain against discrimination and to seek a remedy against discrimination cannot be understood as a being a "debt" in the true sense of that term. This interpretation is borne out by the available possibilities for relief against discrimination. Had the complainant simply sought an order setting aside the discriminatory rule, it could hardly be said that the right to have the rule set aside could ever prescribe. Rules, law and conduct inconsistent with the Constitution are objectively invalid *ab initio*. The principle of objective invalidity was succinctly expressed by Ackermann J in *Ferreira v Levin N O* 1996 (1) SA 984 (CC), where he made the point that a court order pronouncing legislation or a rule invalid does not of itself invalidate the law. It merely declares it to be invalid. He expanded on this proposition as follows:

> **This does not detract from the reality that pre-existing laws either remain valid or become invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not.**

Likewise, nor can a claim for compensatory relief remedying ongoing discrimination within the prescriptive period prescribe simply because the initial discriminatory decision was taken more than three years before the complaint. A just and equitable award of compensation, however, would have to take into account prescription of the underlying secondary debt, akin in nature to a delictual damages claim, arising outside the prescriptive period.

In short, the liability of a pension fund not to act unreasonably, unfairly or unconstitutionally cannot be considered to be a debt in terms of the Prescription Act. Therefore, the provisions of the Prescription Act of 1969 do not totally bar the complaint.

Even if I am mistaken in the conclusion that the complainant's cause of action does not in all respects constitute a debt, I remain of the view that the provisions of the Prescription Act do not apply in their entirety to complaints made in terms of Chapter VA of the Pension Funds Act of 1956 by virtue of the provisions of section 30I of the Pension Funds Act read with section 16(1) of the Prescription Act.

The relevant part of section 16(1) reads as follows:

> **....the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after commencement of this Act.**

Section 30I of the Pension Funds Act reads as follows:

> **Section 30I Time limit for lodging of complaints**
>
> **(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.**
>
> **(2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.**
>
> **(3) The Adjudicator may on good cause shown or of his or her own motion**
>
> **(a) either before or after expiry of any period prescribed by this Chapter, extend such period;**
>
> **(b) condone non-compliance with any time limit prescribed by this**

Chapter.

Section 30I falls to be read together with section 30H(1) and (3). These provisions read as follows:

Section 30H Jurisdiction and prescription

(1) The Adjudicator shall, subject to section 30I, investigate a complaint notwithstanding that the complaint relates to a matter which arose prior to the commencement of the Pension Funds Amendment Act, 1995.

(3) Receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act, 1969 (Act No 68 of 1969), or the rules of the fund in question.

With reference to these sections, the enquiry is:

Does section 30I, read with section 30H, prescribe a specified period within which a claim has to be made or an action needs to be instituted in respect of a debt? or

Does section 30I, read with section 30H, impose conditions on the institution of an action for the recovery of a debt?

If the answer to one of these questions is in the affirmative, then one is required to enquire whether the provisions of sections 30I and 30H are inconsistent with the provisions of Chapter III of the Prescription Act.

Assuming that a complaint against a pension fund alleging *ultra vires*, maladministration or a dispute of law constitutes a debt in terms of the Prescription Act, then it would seem that sections 30I and 30H prescribe a specified period within which a claim is to be made or an action is to be instituted in respect of that debt. Section 30H(1) makes it clear that, *subject to the provisions of section 30I*, the Adjudicator has the power to investigate a complaint

which relates to a matter which arose prior to the amendment of the legislation in 1995. The power to go beyond 1995, however, is subject to the provisions of section 30I which introduces a three year limitation unless good cause is shown. Such a provision, is plainly inconsistent with section 11(d) of the Prescription Act, providing as it does for prescription after 3 years. Moreover, section 30I(3) affords me a discretion, which can be exercised appropriately in favour of a complainant to suspend, to delay or to interrupt prescription on grounds different to those provided for in the Prescription Act.

That is not to say that the Prescription Act is excluded in its entirety. The provisions of the Prescription Act which are consistent with the provisions of section 30I read with section 30H may conceivably be applicable. (See *Standard General Insurance Co. Ltd v Verdun Estates (Pty) Ltd* 1990 (2) SA 693 (A) @ 697 J).

In sum, even if the complaint gives rise to a "debt", the provisions of section 30I operate to allow me to investigate a complaint where "the act or omission to which it relates occurred more than three years before the date on which the complaint is received", provided good cause is shown.

As I stated in *Sligo v Shell Southern Africa Pension Fund & Another* (PFA/WE/54/98):

> **The suggestion that the Prescription Act is incorporated by reference in section 30H(3) of the Act is also without merit. The purpose of that provision is clear, namely to ensure that parties are not discouraged from approaching the Adjudicator for fear of any claim they might wish to prosecute in a civil court (or any other institution) becoming prescribed.**

The essential difference, it seems to me, between the prescriptive regime provided for in section 30I of the Pension Funds Act, and that of the Prescription Act, is that complainants, at my discretion and on good cause shown, will enjoy greater protection against their rights being extinguished. The extension of this protection to claimants is justified by the ongoing and accruing nature of pension

rights and the special privileges enjoyed by pension funds. Pension rights are usually the most important assets possessed by the majority of our citizens. The content of these proprietary rights in the past have frequently been determined by unrepresentative committees of management with extensive powers to amend the rules governing entitlement. Moreover, pension rights are only concretely realised at a point in time when the recipient is in a vulnerable situation. Normally benefits are paid out on the loss of employment or death, resulting in a member having limited means and resources at his or her disposal to contest any dispute about entitlement.

Recent amendments to the Pension Funds Act aim at redressing this imbalance by introducing a significant degree of consumer protection. The complaints adjudication process established by Chapter VA of the Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. As I stated in the *Sligo* decision, it is an interventionist instrument of policy enacted in the interests of greater social security and consumer protection. Pension rights build up over a period of years and represent the most significant property entitlements of a vulnerable sector of society. The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of those benefits. To accomplish this end the Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner. The grant of a power to go beyond the three year prescriptive period, considered normal in commercial transactions, should be construed in this context. It introduces a measure of flexibility by granting the Adjudicator a discretion (to be judiciously exercised) to go beyond the normal prescriptive period.

Mr Hodes, on behalf of the first respondent, has sought to persuade me that my decision in the *Sligo* matter is incorrect. He argued that the only place in Chapter VA of the Pension Funds Act where prescription is dealt with is section 30H, and he contended that section 30H(3) is clearly predicated upon the continued existence of the provisions of the Prescription Act. I have no difficulty with this proposition, except that it gives inadequate consideration to the fact that the

provisions of the two statutes need to be harmonized, and to the express terms of section 30H(1) which subject the prescriptive regime to the Adjudicator's discretion in 30I(3) to go beyond the three year period when investigating a complaint and awarding just and equitable relief. As I have already discussed, the fact that a secondary debt consequential upon the fund's unlawful conduct might normally be regarded as prescribed will be a highly relevant factor in the grant of just and equitable relief. Moreover, going beyond the three year period will not revive expired rights, a consequence described by counsel as untenable, it means simply that pension rights expire on different terms and conditions than other commercial and contractual rights.

For the aforegoing reasons, I am satisfied that even were the complainant's claim to be classified as a debt, then section 30I is inconsistent with the key provisions of the Prescription Act, in particular, section 11 and 12, and thus I have a discretion to investigate a complaint involving a debt related to an act or omission occurring more than three years before the date on which the complaint was received. A favourable exercise of that discretion will depend upon the existence of good cause.

Complaint out of time - the existence of good cause

It follows that, regardless of whether the complainant's claim constitutes a debt or not, I am obliged to enquire into whether good cause has been shown permitting me to investigate the complainant's complaint, because the act or omission to which it relates occurred more than three years before the date on which the complaint was received by my office.

As stated, the provisions of section 30I(3) permit me to extend a time period or to condone non-compliance with a time limit provided there is good cause. This means, broadly speaking, that late complaints may be condoned depending on factors such as the degree of lateness, the explanation therefor, the importance of the case, the complainant's prospects of success, the possibility of prejudice to either party and the existence of good faith endeavours to settle the dispute. -

MAWU v Filpro (Pty) Ltd **(1984) 5 *ILJ* 171 (IC);** ***Venter v Renown Food Products*** **(1989) 10 *ILJ* 320 (IC).**

As I stated in ***Vandeyar v UTICO Staff Pension Fund*** **(PFA/GA/4/98):**

> **Section 30I aims at ensuring finality and certainty in the affairs of pension funds and aims at promoting efficiency by providing an incentive for the expeditious enforcement of complaints. All legal systems accept that the operation of obligations should be limited by requiring enforcement within a reasonable period of time.**

The act which is the subject of the complaint took place on 25 October 1990, more than six years before the complainant lodged his complaint. There is some debate as to when the complainant became aware of the trustees' decision. Details of the amendment were made available to all pensioners at the latest in the 1991 annual report of the respondent, and such annual report was sent to all pensioners, including the complainant, during or about December 1991. The complainant admits that the information was contained in the 1991 annual report, but avers that the report was issued to members only in the last quarter of 1992, two years after the decision had been made. Even accepting the complainant's version, he lodged his complaint four and half years after he claims to have acquired knowledge of the decision. This is not an inordinately long delay and such delay should be measured against the fact that prior to 1998 it was not practically possible to submit a complaint to the Pension Funds Adjudicator. However, there are three factors of varying weight which lead me to conclude that good cause does not exist for condoning non-compliance with the three year time limit.

Firstly, the respondent has made out a convincing case that it will be prejudiced should I investigate the complaint and rule upon it despite the passage of time. The cost of meeting the complaint is estimated to be in the region of R7 million. Given the substantial actuarial surplus, it is probably correct that the adjustment sought by the complainant is affordable to the fund. But the question of affordability is only one consideration to be taken into account in determining

prejudice. The committee of the respondent has taken a number of decisions involving the approval of subsequent amendments to rules based upon the correctness of the October 1990 decision. Such decisions have required the committee to establish the actuarial effect of the amendment on the fund and the actuary has been required to certify that the amendment will not cause a reduction in the actuarial reserve. Each such actuarial certification and financial enquiry has been conducted on the basis of the correctness of the October 1990 decision and the lack of challenge to the decision. Moreover, pension increases granted subsequent to October 1990 have been based on an evaluation by the second respondent and the first respondent of the financial resources and capabilities of the fund to meet its increased obligations, and these decisions have also relied on the correctness of the October 1990 decision.

In other words, the failure of the complainant to decisively challenge the lawfulness of the October 1990 decision, led the respondent to believe its decision was secure. The point ought not to be overstated. Normally, parties can be expected to bear the consequences of any illegal or unreasonable conduct on their part. Nevertheless, the finality and certainty brought about by prescriptive periods ought not to be too readily disturbed, especially where funds have based much of their future conduct upon a reasonable assumption of legality. The respondent has made out a compelling case that it is unable to call certain witness, that certain evidence which it may wish to lead is unavailable and that the passage of time has had an impact on its capacity to present its case on the merits to the best possible advantage.

The second reason advanced by the respondent for finding an absence of good cause makes a similar point but relates more to the manner in which the complainant prosecuted the complaint and the consequent delay. The complainant alleges that at all times he pursued the matter with due diligence and that any delay that eventuated was not caused by him, but by the respondent. As already mentioned, the complainant avers that the decision first became known to him in the last quarter of 1992. In February or March 1993, he met with various officials of the first and second respondent and sought participation by the excluded pensioners in the adjusted benefit. This was refused. Because of

certain rule amendments which were under consideration at that time, the complainant considered it impolitic to press the matter any further for a period of one year. The negotiations pertaining to the revised rules were completed in early 1994. Between May 1994 and November 1995 there was certain correspondence between the parties touching on the issue. Eventually on 17 November 1995 the committee of the first respondent decided against the participation of the excluded pensioners in the adjusted benefit.

At this stage the complainant sought to invoke the dispute procedure under rule 52. Rule 52 reads as follows:

> **Any dispute which may arise in regard to the interpretation or application of these Rules shall be decided by the Committee, whose decision shall be final and binding on the Employers, Members and Pensioners and other beneficiaries and their heirs, dependants and legal representatives PROVIDED THAT if any party to the dispute is dissatisfied with the Committee's decision the Committee shall at the Fund's expense, refer the dispute to Senior Counsel, whose decision shall be binding on all the parties.**

In terms of the procedure, the committee was at first required to declare that the rule had been correctly interpreted and applied. This it did at a meeting held on 8 March 1996.

On 3 April 1996 the complainant duly declared his dissatisfaction with the decision. On 9 May 1996 the complainant met with the respondent's legal adviser and its principal officer in order to discuss the procedures involved in referring the dispute to senior counsel. It was agreed that a joint brief would be submitted, and that a draft brief would be prepared by the legal adviser for approval by the complainant and the committee.

All these efforts on behalf of the complainant indicate that he plainly endeavoured to settle the dispute in good faith. However, the respondent rightly objects to the fact that the complainant did nothing for a period in excess of a year (from February or March 1993 until July 1994) because he considered it impolitic at that

stage to press the matter further. The failure to press the matter further at that stage, contributed to the first respondent's reasonable assumption that its decision was acceptable. Likewise, the complainant, on his own version, did very little between July 1994 and November 1995 to pursue any of his legal remedies. Despite this, the respondent appears to have been willing to engage the rule 52 procedure.

According to the complainant, at the meeting on 9 May 1996, the various points of contention to be included in the brief for senior counsel were discussed, including the complainant's view that at common law the trustees were bound to act evenhandedly as between sectional interests in the exercise of their discretionary powers. During the meeting, Mr Germeshuys, the respondent's legal adviser, expressed an opinion that the common law did not apply in view of the express wording rule 51(1)(d). The complainant claims he was persuaded by this opinion at the time to accept that no legal remedy existed and that recourse to the dispute procedure or the courts would be fruitless.

With respect to the complainant, I find this submission not entirely credible. The complainant previously held the position of financial director of the second respondent and his correspondence to the respondents reveals that he was well aware of the processes involved in administering the pension fund. His hesitation in pressing his legal remedy, to my mind, was influenced more by his reluctance to engage in litigation with the fund and his former employer than it was a result of him relying on incorrect legal advice. This conclusion is borne out by the fact that on more than one occasion the complainant in correspondence categorised the dispute as one of morality rather than law. In drawing this distinction the complainant led the respondent reasonably to believe that he was seeking a solution of the issue by means other than legal remedies.

In a similar vein, shortly after the meeting aimed at formulating the dispute for senior counsel, the complainant was invited to a conference to review the governance of the fund. On 25 May 1996 he addressed a letter to the chairman of the respondent informing him that he would hold off further action, pending the

outcome of the conference. Apparently nothing came of the conference or of subsequent discussions between the chairman of the first respondent and the second respondent's head office in London.

All of these discussions and negotiations around the issue, as I have said, indicate that the complainant was acting in good faith to attempt to resolve the dispute. However, they also create the impression that the complainant was backing away from legal action. His approach to the dispute probably lulled the first respondent into a false sense of security that it would not face litigation on the issue, leading it to make decisions on the assumption that the rule was safe from legal challenge .

Whether or not the complainant's conduct amounted to a waiver of his rights to pursue legal action, is open to some doubt. For the reasons that follow, it is unnecessary to decide whether or not his conduct amounted to a waiver. The fact remains that in rule 52 the complainant had a legal remedy to refer the dispute to senior counsel at the fund's expense. Here was an accessible, expeditious, cost-effective and fair means of resolving the dispute. Yet, the complainant failed to invoke the remedy. Even if he were badly advised by the second respondent's legal adviser, a man in the position of the complainant could reasonably be expected to seek independent legal advice on the issue, instead of relying on argumentative submissions put to him by his adversary's legal representative.

Whether the preceding arguments, on their own, exclude the existence of good cause entirely, is debatable. The complainant's efforts to settle the matter in good faith should to some extent also count in his favour. Moreover, although the act about which he complains occurred in 1990, its effects are ongoing, and these, if unlawful, can be remedied by the grant of prospective relief. Hence I am compelled to give consideration to the merits of the complaint of discrimination before I can properly exercise the discretion vested in me in terms of section 30I(3).

The third and perhaps most important reason, therefore, for finding that there is not good cause to extend the time limit, is that the complainant has limited

prospects of success on the merits. Although the merits of the matter were not argued before me, there is sufficient documentary evidence enabling me to pronounce upon the complainant's prospects of success. In any event, the representatives of the parties have indicated that it is not their intention to lead additional evidence on the merits.

The complainant's case is that the decision of 26 October 1990 and the subsequent rule amendment are both discriminatory in their nature and effect. Were he correct in this contention, the decision and the rule would be unconstitutional and/or unreasonable. As discussed earlier, unconstitutional and unreasonable decisions and rules generally will be in excess of the powers of a fund or an improper exercise of a fund's powers. Alternatively, such decisions and rules could amount to maladministration on the part of the fund or can be categorised as a dispute of law. And I have the power to declare the rule or decision to be invalid or to correct it by means of a *mandamus*, the process of "reading in", or by other just and equitable orders.

The complaint is cast in the contention that the discrimination inherent in the decision of 26 October 1990 was in breach of the committee's fiduciary duties to treat all members and beneficiaries impartially and to act in good faith. These fiduciary duties do not oblige the respondent, in all circumstances, to treat all members identically. In *Edge v Pensions Ombudsman* [1998] 2 All ER 547 (ChD) @ 567- 8 the court commented on the nature and reach of these duties as follows:

> **In relation to a discretionary power of that character it is, in my opinion, meaningless to speak of a duty on the trustees to act impartially. Trustees, when exercising a discretionary power to choose, must of course not take into account irrelevant, irrational or improper factors. But, provided they avoid doing so, they are entitled to choose and to prefer some beneficiaries over others. The Pensions Ombudsman recognised that that was so for, in para 41 of the determination, he said:**
>
> > **The trustees' duty to act impartially between the different beneficiaries does not equate with a duty to exercise their discretion on all occasions in such a way as to produce equal benefits of equal value to all beneficiaries. Nor does it even require that all beneficiaries receive some benefit from an exercise of a discretion. It is**

> **permissible to exercise a discretion in such a manner as to omit particular beneficiaries, or a class thereof. But the discretion to exclude those beneficiaries must not be the result of undue partiality towards the interests of the preferred beneficiaries.**

Bar the final sentence, I would fully agree with para 41. The last sentence, however, distorts in my opinion, what has gone before. What is "undue partiality". The trustees are entitled to be partial. They are entitled to exclude some beneficiaries from particular benefits and to prefer others. If what is meant by "undue partiality" is that the trustees have taken into account irrelevant or improper or irrational factors, their exercise of discretion may well be flawed. But it is not flawed simply because someone else, whether or not a judge, regards their partiality as " undue". It is the trustees' discretion that has to be exercised. Except in a case in which the discretion has been surrendered to the court, it is not for a judge to exercise the discretion. The judge may disagree with the manner in which trustees have exercised their discretion, but, unless they can be seen to have taken into account irrelevant, improper or irrational factors, or unless their decision can be said to one that no reasonable body of trustees properly directing themselves could have reached, the judge cannot interfere. In particular, he cannot interfere simply on the ground that the partiality shown to the preferred beneficiaries was in his opinion undue.

There is much wisdom in the English approach which can be of profit to the process of adjudication in South Africa. However, one should approach the English position with some caution and in the full knowledge that the judicial deference evident in the cited passage derives from the practice and doctrine of a legal system constructed upon the idea of parliamentary sovereignty.

In South Africa, the supreme law is contained in our written Constitution, which proscribes unfair discrimination. As mentioned earlier, when interpreting any legislation and when developing the common law, every court, tribunal or forum, in terms of section 39(2) of the Constitution, is obliged to promote the spirit, purport and objects of the Bill of Rights. This obligation applies equally when interpreting the statutory or common law fiduciary duty of trustees to act impartially. The interpreter is expected to give the duty content with reference to the constitutional proscription on unfair discrimination. The purpose of equality

rights in our Constitution are remedial and are designed to protect those groups which suffer social, political and legal disadvantage in our society. They envisage a more activist role for the judge than that countenanced by the English legal system.

The starting point, evident in the *Edge* decision, when applying discrimination jurisprudence to retirement funds is to recognise that not all forms of differentiation are outlawed. Inequality means differentiation without fair or reasonable reasons or justification. Our Constitution reinforces this idea in section 9 by prohibiting only *unfair* discrimination and permitting the justification of unfair discrimination on reasonable grounds in accordance with the provisions of section 36 of the Constitution, the so-called limitation clause. For the purposes of this complaint, it is unnecessary to embark upon an analysis of these admittedly complex constitutional provisions. Suffice it to say, before the complainant's complaint of a breach of fiduciary duties or discrimination can be upheld, it will have to be shown that the differential treatment introduced by the rule amendment was unfair and not justifiable on reasonable grounds. In keeping with the provisions of section 9(5) of the Constitution, the onus to establish the fairness and justifiability of the discrimination normally would rest upon the respondent.

In general terms, differentiation may be illegitimate either because its objective is illegitimate or because it is an unduly onerous means of achieving a legitimate objective or because it is arbitrary - *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC). The crux of the complaint is that the committee was motivated by a desire to make the participating employer more competitive in the employment market place. This the complainant alleges is not a proper consideration in the administration of a pension fund and can be considered to be an illegitimate objective.

The object of the pension fund is spelt out in rule 4 of the rules as follows:

> **The object of the fund is to provide benefits for employees or former employees upon their retirement from employment and for dependants of employees or of**

former employees upon the death of such employees or former employees.

At first glance, the enhancement of benefits for active employees falls within its permissible objectives.

I have already discussed the justification for the rule amendment. To recap: the committee was guided by two considerations in deciding to differentiate between older ex-employees of the company and younger employees still employed by the company. The majority of the younger active employees of the company are no longer being employed by the principal employer directly after completing their schooling, as was the case in the past. They tend to be recruited subsequent to completing tertiary qualifications, and in some instances after doing military service. This reduces the potential period of service with the principal employer by at least 3 years and in many instances by 5 or 6 years. These circumstances prompted the granting of better benefits, by means of the amendment to the scheme, for the benefit of the latter group, once they obtained 20 years service. It is hoped this will have the effect of making the employment package available to current and future employees of the principal employer more competitive.

This stated objective, in my view, is entirely legitimate. The contention that an amendment aimed at gaining a competitive edge for the employer in the job market is illegitimate, fails to take account of the close relationship between the contract of employment and pension fund membership. The employer is a participant in the fund and the trustees are duty bound to consider its interests. The employer undertakes in the employment relationship, within the context of a defined benefit fund, to provide certain pension benefits to the employee. The employer's obligation in that relationship is to make such contributions that will ensure the defined benefits. These defined benefits can be adjusted on an ongoing basis for a variety of reasons. Thus, the participating employer may fall on better or worse times; collective bargaining pressures may result in enhanced benefits and so on. By the same token, the object of obtaining a competitive edge in the job market can and should be pursued by the committee. Better employees will lead to better results for the company, which obviously will be in the long term

interests of the pension fund.

Furthermore, the net effect of the adjustment in favour of the active members is limited to those with more than 20 years service and the percentage improvement amounts to between 2.22% and 6.67% for employees with between 25 and 40 years of service. Such an adjustment can hardly be considered disproportionate or as an unduly onerous or arbitrary means of achieving a legitimate objective.

Insofar as the complainant's complaint may amount to a claim to participate in the actuarial surplus in an ongoing defined benefit fund, his rights in that regard are limited. In *Re Courage Groups Pension Schemes* [1987] 1 all ER 528 Millett J held:

> **While they (the members) have no legal right to participate in the surpluses in the existing schemes, they are entitled to have them dealt with by consultation and negotiation between their employers with a continuing responsibility towards them and the committee of management with a discretion to exercise on their behalf.....**

To the extent, if any, that the respondents may have fallen short in their duty to consult and negotiate, this defect has been cured by the subsequent negotiations and discussions which took place between October 1990 and 1996. However, it needs to be emphasised, members of defined benefit funds do not have a *right* to the surplus. At most they have a legitimate expectation that their interests will be properly taken into account and balanced against other competing interests whenever the committee takes a distributional decision drawing upon the surplus. One ought not lose sight of the fact that in an ongoing defined benefit fund a surplus does not represent any particular assets. It is simply an actuarial opinion that the scheme is better funded than a particular method required. The situation is different when the fund is liquidated. Once the winding up of the pension fund starts, the surplus will crystallise into a real (as opposed to an actuarial) surplus and the rights and the interests of the parties in the surplus will also acquire a more concrete content. Many of the English decisions dealing with the distribution of surpluses have been decided in the context of a winding up or a significant restructuring. In such instances, the pensioners' expectations to

share in the surplus may acquire greater force. In *Thrells Ltd v Lomas* [1993] 2 All ER 546, the court was ready to give extended protection to the pensioners' interests in a winding up situation. At pp 556 - 7, the learned judge in that case stated as follows:

> **Second, it is true that in a " balance of costs" (defined benefit) scheme the employer's obligation is to provide the necessary balance of contributions no more. It may be that if actuaries were gifted with perfect foresight of the outcome of future uncertainties ..... unintended surpluses would not usually arise from employers' contributions ..... but, thirdly, it is necessary also to have in mind that this scheme itself provided for the trustees to have power to increase benefits. That power ranks ahead of the provisions that any remaining balance of the scheme funds should be paid to the company. When a scheme so provides, members have a reasonable expectation that if the scheme funds permit, namely if there is a surplus after providing for the estimated liabilities or in a winding up for the actual liabilities, the trustees will exercise that power to the extent that it is fair and equitable in all the circumstances, having particular regard to the purpose for which the power was conferred.... A trustee should not decline to exercise [the power to apply surplus] solely on the ground that the employer was under no legal obligation to provide the surplus.**

At the time of the decision to effect the rule amendment in this matter, 20 October 1990, the fund was not winding up or restructuring in any way. It is true that the fund was in surplus to the tune of R92 million and that approximately R6 million of that surplus was applied for the benefit of active members with more than 20 years service to the exclusion of other members. Nevertheless, for the reasons stated above, I am satisfied that the power of amendment and the power to increase benefits was exercised in a reasonable and equitable manner in the circumstances. The existence of a surplus in a defined benefit fund does not mean that the committee of management is obliged to apply it to the benefit of each and every member of the fund. The surplus can be applied on a differential basis, provided such differential treatment can be justified as fair and reasonable. For the reasons set out above, I am satisfied, that in this case, the committee of the first respondent acted properly in favouring the category of members which it

did. Accordingly, the complainant has little prospect of success on the merits. For the aforegoing reasons, I am of the opinion that good cause has not been shown to extend the period or to condone non-compliance with the time limit prescribed by section 30I(1) of the Pension Funds Act. For this reason I decline to investigate the complaint further and the complainant's complaint is dismissed.

The respondents have raised other preliminary points concerning the complainant's alleged waiver of his rights and his failure to join other affected parties. Because of my decision on the question of good cause it is unnecessary to deal with them.

DATED AT CAPE TOWN THIS 2ND DAY OF DECEMBER 1998.

.....
John Murphy
PENSION FUNDS ADJUDICATOR