IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/17/98

In the complaint between:

Wellington Tatiya	First Complainant
Irene Mziki	Second Complainant
Mninawa Dlelaphantsi	Third Complainant
Donna Maluka	Fourth Complainant
Salmina Haywood	Fifth Complainant
Nomsa Jeje	Sixth Complainant
Sydia Futshane	Seventh Complainant

And

The Liquor and Catering Trade (Cape) Pension Scheme	First Respondent
The Members of the Management Committee of the Pension Fund for the Liquor and CateringTrade, Cape	Second to Twenty Second Respondents
Fedlife Assurance Limited	Twenty Third Respondent

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

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956, in which the complainants seek an order compelling the respondents to obtain and provide to the complainants certain information. In addition, the complainants seek a declarator that certain monies, being unclaimed benefits, have reverted to the first respondent (hereinafter "the Scheme") for

the benefit of the remaining members of the Scheme. Thirdly, the complainants seek an order directing the 23rd respondent (hereinafter "Fedlife") to apply the unclaimed amounts for the benefit of the remaining members of the Scheme, including the complainants.

For reasons which shall become apparent more fully later, I have chosen to limit the issue for determination in this matter (and the concomitant relief granted) to that concerning the disclosure of information.

The complainants in substance contend that the complaint about the refusal to disclose information is a complaint relating to the administration of the fund alleging an improper exercise of powers, maladministration resulting in prejudice to the complainants and a dispute of law within the meaning of a complaint in terms of section 1 of the Pension Funds Act of 1956.

The complainants are all employed in the Liquor and Catering Trade in the magisterial districts of Bellville, Goodwood, Simons Town, Somerset West, Strand, the Cape and Wynberg. They are all members or former members of the first respondent ("the Scheme").

The first respondent is the Liquor and Catering Trade (Cape) Pension Scheme. The Scheme was initially established in terms of a collective agreement and fell under the jurisdiction of the Bargaining Council for the Liquor and Catering Trade, Cape - the Pension Fund Agreement for the Liquor and Catering Trade (Cape) ("the pension fund agreement") published in Government Notice No. R1298, Government Gazette of 24 June 1983. The pension fund agreement was promulgated in terms of section 48 of the Labour Relations Act of 1956 and was binding on all employers and employees who were engaged or employed in the Liquor and Catering Trade, in the areas mentioned above. The period of operation of the pension fund agreement was extended by means of Government Notices from time to time, and finally with effect until 31 July 1997. The agreement has not been renewed since. I was advised by the respondents' attorney at the hearing that the fund is registered in terms of the Pension Funds Act of 1956.

The 2nd to 22nd respondents are the members of the Scheme's management committee constituted in terms of the rules of the Scheme, which is responsible for administering the Scheme.

The 23rd respondent is Fedlife Assurance Limited, a registered insurer. The benefits under the Scheme are assured under an insurance policy issued by the 23rd respondent ("Fedlife"). Fedlife is at present continuing to underwrite the pension scheme. Additionally, as shall become apparent later, Fedlife plays an important role in administering the Scheme and has significant powers in this regard.

After extensive correspondence between the parties, the attorneys of the complainants lodged a written complaint with the Office of the Pension Funds Adjudicator on 23 January 1997. The respondents have raised a number of jurisdictional points related to the manner, form and substance of the complainants' complaint. These are dealt with fully below.

After an exchange of correspondence, I convened a hearing at the Labour Appeal Court in Cape Town on 12 May 1998. The complainants were represented by Mr A Steenkamp of Cheadle Thompson & Haysom. The respondents were represented by Mr J Bortz of Werksmans. None of the parties adduced oral evidence under oath. However, at the hearing, Mr Allan Horwitz, the principal officer of the Hospitality Industry Pension and Provident Fund (HIPPF), sought my permission to address certain submissions to me. In view of the HIPPF's interest in the proceedings, I granted Mr Horwitz the indulgence, but required him to put his submissions in writing and to make them available to the respondents' attorneys.

On 14 May 1998, Mr Horwitz furnished me with a written memorandum headed:

> Memorandum to the Pension Funds Adjudicator in respect of retirement funds in the catering sector: the problems of dormancy, unclaimed benefits and the distribution of surpluses for the benefit of live and transferring members.

The respondent has not felt it necessary to furnish me with a response to the memorandum.

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

Background to the complaint

As already stated, the complainants are all employed in the Liquor & Catering Trade in the areas of the Western Cape described above. The first, second, fourth and fifth complainants wish to transfer the benefits to which they are entitled to another fund, namely the Hospitality Industry Pension & Provident Fund (HIPPF). The third, sixth and seventh complainants allege that they have transferred their membership to the HIPPF, but claim that not all their benefits have been transferred. The respondents have no knowledge of this and aver that no application for transfer has been received by the respondents in respect of these applicants. Nothing turns on this.

The principal issue underlying the complaint relates to the extent to which transferring or withdrawing members of the Scheme might be entitled to share in any surpluses of the Scheme generated by the reversion of unclaimed benefits as contemplated in rule 23 of the Scheme's rules. Rule 23 provides as follows:

> "**Reversion of Unclaimed Benefits"**
>
> Payment of any benefits due under the Scheme shall only be made on application to the Council. Monies remaining unclaimed for five years as from the date on which such monies became due shall revert to the Scheme to be applied for the benefit of the remaining members in such manner as the actuary of Fedlife deems expedient and thereafter no further claim shall rest against the Scheme, provided that the Council shall always retain the discretionary right to direct Fedlife to pay such unclaimed monies to any person entitled thereto under the Rules, if such person claims the benefit after the expiration of the five year period and provided further that unclaimed death benefits shall

be dealt with in terms of Rule 5."

The complainants interpret this rule to mean that when monies which are due are not claimed for 5 years, such monies automatically revert to the Scheme to be applied by the actuary of Fedlife for the benefit of the remaining members. They claim that the 5 year prescriptive period referred to therein commences running on the date on which the monies become due. The complainants argue that it is therefore necessary to determine when any monies payable in terms of the Scheme become due in order to determine whether the 5 year period has elapsed, and therefore whether such monies have reverted to the Scheme to be applied for the benefit of the remaining members. The complainants aver that there are many persons who qualify for the payment of benefits under the Scheme, but whose benefits have remained unclaimed for 5 years or more from the date upon which their benefits became due. The information sought by the complainants in this complaint is for the purpose of calculating the amount of money which has reverted to the Scheme in terms of rule 23.

As the complainants see it, there are three categories of members whose benefits may revert in terms of rule 23 on account of the monies remaining unclaimed for 5 years as from the date on which such monies became due. These are:

(i) Members who cease to be employed in the trade before they qualify for any benefit under the rules, but who leave monies in the fund in terms of rule 13.1 with the aim of receiving a pension at normal retiring date, (being the last day of the month in which the member turns sixty) and then fails to claim the benefit due.

(ii) Members who elect to take a cash withdrawal but fail to collect the refund which is due in terms of rule 13.4 one year after leaving the trade.

(iii) Dependants who fail to claim death benefits within the 5 year period.

Rule 13 of the rules governs withdrawal benefits. It reads : -

Withdrawal Benefit

If a member ceases to be employed in the Trade before he qualifies for any other benefit under these Rules, he may choose one of the following options:

13.1 He may leave his Contributions in the Scheme and at his Normal Retiring Date receive the pension purchased for him by his Share of the Fund as at that date.

13.2 He may elect option 13.1 and in addition continue to make contributions equivalent to but not more than the Contribution at the time of cessation, direct to the Council or Fedlife. Such contributions will not be refundable to the Member (other than on his death or disablement before retirement) and will be applied by Fedlife in terms of a separate retirement annuity policy to purchase an additional pension for him at his Normal Retiring Date, subject to such terms and conditions as may be agreed with Fedlife.

13.3 **Special Option**

13.3.1 He may elect the above option 13.1 and in addition obtain, on making application to Fedlife within thirty days of ceasing to be employed in the Trade and without production of evidence of health, an individual policy for a sum assured not exceeding the amount of the insured Lump Sum Death Benefit for which he was covered under these Rules.

13.3.2 The policy granted under 13.3.1 above shall be issued at the rate of premium applicable to the Member's age next birthday after the date of ceasing to be an Eligible Employee and shall be subject to the terms and conditions on which policies of such a class are then being issued to the general public, including any imposed in respect of acquired immuno-deficiency syndrome (AIDS) and/or infection by any human immuno-deficiency virus (HIV).

13.4 He may take, in full and final settlement of all entitlement under the Scheme of himself or anyone claiming under him, a cash refund of the net Member's Contributions, together with compound interest at the rate of three per centum (3%) per annum thereon. This refund will only be paid after he has been out of the Trade for at least one (1) year. Should he rejoin the Trade within the one-year period, he will automatically retain his rights hereunder and may then not draw the refund.

Provided that a Member who has been employed for less than 26 weeks in the Trade and then leaves the Trade, may on application, be paid his withdrawal benefit 6 weeks after his last Contribution.

Before dealing with the specifics of the complaint, and the respondents' response to it, a fuller understanding of the basis of the complaint can be gained from Mr Horwitz's submissions as amplified by his memorandum. The submissions deal with the history of retirement funds in the catering sector and furnish an explanation of the problem and extent of dormant fund membership in the sector. He concludes with a proposal to remedy the problem. His main contentions are as follows:

1. In the late 1960s the bargaining councils in the liquor and catering sector established defined contribution pension funds in Johannesburg, Cape Town, Durban, Pietermaritzburg and the Natal South Coast. Initially the funds were administered by the bargaining councils, but by the early 1980s administrative functions were transferred to professional administrators, usually being insurance companies such as Fedlife.

2. The funds were underwritten by the insurance companies who also assumed certain fiduciary duties and powers of administration and investment. These companies fulfilled the main functions of administration, including data capturing and collation, preparation of benefits statements, payment of claims and the maintaining of financial records. The funds do not have independent principal

officers, external auditors or independent actuaries.

3. For the last decade, the bargaining councils in Johannesburg, Durban and Pietermaritzburg were dis-established. The bargaining council in Cape Town is currently being liquidated but the respondent will continue to be underwritten and administered by Fedlife. The bargaining council for South Coast (Kwazulu-Natal) continues to exist with its provident fund continuing to be underwritten by Fedlife.

4. The Durban fund has been liquidated with all its members having had their benefits paid out.

5. The Johannesburg fund has been reconstituted as the Hospitality Industry Pension & Provident Fund (HIPPF) of which Mr Horwitz is the principal officer. This fund has changed its scope and has become a national fund. After some litigation with Fedlife, funds were transferred to the HIPPF in respect of members of the erstwhile Johannesburg fund. The HIPPF was administered by Southern Life. It is now totally independent of any insurance company and has become a private fund with its own independent principal officer, external auditor and independent actuary.

6. The problem of dormant membership is widespread among the funds in the liquor and catering sector. Dormant members of a fund are those who have ceased to make monthly contributions but who have left their savings in the fund. Such members, however, do not receive benefit statements because the fund has lost all contact with them. As such, they differ from paid-up members, being members who ceased to contribute on a monthly basis but who leave their savings in the fund, receive benefit statements and are eligible for loans.

7. Of the 59 600 members of the Scheme, it is estimated that approximately 49 700 members of the Scheme are dormant. In other words, less than 20% of the members of the Scheme can be described as active members, meaning that the Scheme administrators have lost contact with approximately 80% of its membership in respect of whom it holds assets equalling approximately R180

million.

8. It is Mr Horwitz's submission that "sleeping" and "lost" members should form a very small component in a well managed fund. He maintains that when this category exceeds the number of live and paid-up members, it is a clear sign that serious problems exist which need to be tackled. He proposes that the first step in tackling the problem is to gather and collate appropriate information in order to determine the exact spread of liabilities for each category of membership (active, paid-up and dormant). Such information will also ensure that accurate benefit statements are prepared and that the surplus available for distribution and/or general utilisation is properly identified.

9. Mr Horwitz advances six reasons for the development of the dormancy problem. These are as follows:

9.1 The rules of the fund provide for extended payout periods. The rules of the Scheme initially provided that a withdrawing member would only receive a benefit cheque two years after leaving the trade (See Rule 13,4 above). This period was then reduced to one year. Extended withdrawal periods have meant that many members have lost contact with the funds for a wide variety of reasons. In particular, the funds apparently do not keep forwarding addresses and take the view that the onus for securing a benefit lies with the member rather than with the fund or the administrator.

9.2 The sector is characterized by high labour turnover. Many of the employees in the sector are migrant black workers from rural areas. By virtue of the operation of the infamous pass laws, many of these workers were obliged to return to the homelands on an annual basis to renew their permits to work in the city. Many did not or were not able to renew these permits and lost contact with the retirement funds which did not maintain records of their home addresses.

9.3 Labour mobility in the sector has also meant that because workers move frequently from job to job, members frequently obtain more than one account number in a fund. This problem is further compounded by the fact that many of the migrant workers have used aliases to secure work permits under the pass law system. This duplication of records and accounts has meant that some members fall into the category of both active and dormant membership.

9.4 Until recently, the practice of the funds has not been to distribute information or to communicate with membership about their benefits and their rights to secure those benefits.

9.5 Much of the data which the funds do have is of poor quality in that many employers have failed properly to record the correct personal details of black employees. Furthermore, the systems of the bargaining councils and underwriters prior to computerisation made it difficult to collate and keep track of a membership made up of a highly mobile and illiterate workforce.

9.6 Neither the bargaining councils nor Fedlife have a programme designed to reduce and manage the dormancy problem on an ongoing basis. The problem is dealt with on an ad-hoc basis when a member wishes to retire or withdraw from the fund. Only at this point does the fund administrator check to consolidate all records.

10. The consequence of the dormancy problem is that the funds in the sector have developed huge surpluses which are not distributed for the benefit of active and transferring members. As stated, the Scheme, has a dormant membership of more than 80% of the entire body of members. The same applies to the South Coast Provident Fund. In the Pietermaritzburg Provident Fund the dormant members make up in excess of 90% of the membership.

11. The suggestion made, therefore, by the complainants and the HIPPF (the fund to

which the complainants wish to transfer) is that the surpluses arising from dormancy (and reverting to the funds in terms of rule 23) should be unlocked for the benefit of members. Wage levels are historically low, resulting in low rates of contribution. Workers after a lifetime in the industry consequently achieve low retirement benefits. The application of the surpluses generated by the unclaimed benefits to enhance these benefits, it is argued, would be the most just and legitimate application of the funds, especially in a defined contribution arrangement.

12. The practical solution proposed by Mr Horwitz to remedy the problem is based upon his experience in the HIPPF. At the time the Johannesburg Liquor and Catering Fund transformed into the HIPPF there were 36 000 dormant members. The HIPPF embarked on a programme of action to address the problem. Firstly it interviewed all active members and gathered information to eliminate duplications in the dormant records. It then checked which dormant members had birth dates which were over retirement age, and which had no birth dates. Thereafter, it advertised in the press calling on dormant members to come forward. In a final attempt to locate the dormants, it visited all participating companies, meeting with the members and gave them and the employer a list of dormants from the establishment.

    Afterwards an actuarial valuation was conducted and the number of dormants was reduced from 36 000 to 22 000. Over 700 dormants were paid out and duplications were largely consolidated. A surplus of R50 million was distributed to active members and pensioners. At the date of this complaint the HIPPF spread of liabilities is: active members = R60 million; paid-up members = R6 million; dormant members = R60 million. A final investigation is being undertaken with a view to further releasing the surplus to active members.

In general terms, it would appear that the aim of the complainants in this complaint is to obtain sufficient relevant information to enable them to pressurize the respondents to follow a similar course of action and to make out a case for the enhancement of their benefits by an application of the surpluses that have arisen as a result of the reversion

of unclaimed benefits in terms of rule 23 of the Scheme's rules.

In June 1997 the complainants instructed their attorneys to address a letter to the respondents with a view to obtaining the information they need to exercise and protect their rights under Rule 23. The correspondence endured for some six months until eventually the complainants lodged the complaint on 23 January 1998.

The information required

In paragraph 14,1 of the complaint the complainants request an order directing the respondents to obtain and provide to the complainants the following information:

"14.1.1 the names of all members of the Scheme who have ceased to be employed in the liquor and catering trade, Cape ("the trade") before qualifying for any other benefit under the Rules of the Scheme, as contemplated in Rule 13 of the Rules, and who have not received payment of their benefits;

14.1.2 the date when each person ceased to be employed in the trade, the name of his or her employer at the time, and details of the member's share of Fund at the exit date;

14.1.3 the name of each of the persons referred to in paragraph 14.1.1 above who has left his or her contributions in the Scheme as contemplated in Rule 13.1;

14.1.4 the names of the persons referred to in paragraph 14.1.1 above who elected the option referred to in Rule 13.2;

14.1.5 the names of the persons referred to in paragraph 14.1.1 above who elected the option referred to in Rule 13.3;

14.1.6 the date of birth, and the Normal Retiring Date as contemplated in the Rules, of each of the persons referred to in paragraph 14.1.1 above;

14.1.7 the benefits under the Scheme which became due to each of the persons referred to in paragraph 14.1.1 above who have reached their normal retirement age as contemplated in the Rules, how such benefits are calculated, and the date upon which such benefits became due;

14.1.8 the names of the persons referred to in paragraph 14.1.1 who have lodged claims in terms of Rule 13.4, but who have not received payment in terms of such claims; furthermore, full details of all such claims, including the date upon which the claim was made, the date upon which the benefits payable in terms of each claim became due, the amounts due to such persons, and how such amounts are calculated;

14.1.9 the names of all members of the Scheme who have died, and the date of death of each of these persons;

14.1.10 the current value of all the amounts which, in the light of the facts and circumstances provided in terms of the paragraphs set out above, have reverted to the Scheme in terms of Rule 23, and how such amounts are calculated;

14.1.11 the date on which the Fund last had correspondence from or other contact with the members referred to in paragraph 14.1.1 and full details thereof;

14.1.12 details of any decision of the trustees regarding the procedures to be followed in cases where the Fund loses contact with members."

The respondents contend that there is no duty upon them to furnish the information sought by the complainants. In the first place, they raise a number of points *in limine* alleging that I do not have jurisdiction to determine the complaint. Secondly, they argue that the complainants have not shown that they have suffered prejudice and in the absence of prejudice there is no basis for the complaint. Thirdly, it was argued, that the complainants had to failed to demonstrate any nexus between the rights which they may have in terms of the rules and the extensive information required. I understand this latter argument to maintain that the information sought is not reasonably required for the

exercise or protection of any of the complainants' rights.

The jurisdictional points *in limine*

The respondents raise five jurisdictional points *in limine.* All of which are dismissed for the reasons that follow:

1. In terms of section 30A(1) of the Pension Funds Act of 1956, a complaint may only lodged with a fund or an employer participating in a fund. The management committee of the Scheme (2nd to 22nd respondents) and Fedlife (23rd respondent) are neither a fund nor an employer as defined in or contemplated by the Act and therefore the respondents contend that there is no basis in law for a complaint to be lodged against them in terms of the Act and that I therefore have no jurisdiction to grant any relief against these respondents.

   Section 30A(1) reads:

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

   The respondents' contention confuses the procedure required by Section 30A with the appropriate parties to a complaint. Section 30A should be read together with Section 30G which provides as follows:

   > The parties to a complaint shall be -
   >
   > (a) the complaint;
   >
   > (b) the fund or person against whom the complaint is directed;
   >
   > (c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;

(d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.

Section 30E(1)(a) allows the Adjudicator when investigating a complaint, to make the order which any court of law may make. Plainly, therefore, the Adjudicator may grant relief against any party to the complaint as contemplated in section 30G. The purpose of section 30A is to delineate the procedure for the lodging of a complaint. It does not aim to limit the power of the Adjudicator to grant relief only against a pension fund or an employer.

The complaint in this matter is directed against the pension fund, the management committee and Fedlife. The latter two bodies constitute "persons against whom the complaint is directed" as contemplated in section 30G(b). They are also persons "whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint", as contemplated in section 30G(d).

That the management committee of a fund should be considered as having a sufficient interest in the matter goes without saying. Likewise, the rules of this particular fund grant Fedlife significant powers. In terms of Rule 18.6 of the rules, in the event of the bargaining council ceasing to exist or no longer wishing to administer the Scheme, as seems to be the case here, or in the absence of a pension fund agreement in terms of the Labour Relations Act, Fedlife virtually steps into the shoes of the bargaining council as the administrator of the fund. Rule 18.6.3 provides that Fedlife shall assume any powers of discretion formerly assumed by the council under the rules. It too, therefore, has a sufficient interest in the matter to be made a party to the complaint.

Accordingly, I am satisfied that the 2nd to 23rd respondents are persons who have a sufficient interest in this matter to be made a party to the complaint. In any event, the complaint is directed against them by the complainants and this in itself grants me jurisdiction in terms of section 30G(b).

2. The respondents further contend that the complainants have not followed the correct procedure for lodging a complaint under section 30A(1). The attorneys of the complainants lodged the letter of complaint with the bargaining council and not with a fund or a participating employer as required by the section. The respondents mistakenly refer to the letter from the complainants attorneys to the bargaining council dated 23 June 1997 - (Annexure "H" to the complaint) as the letter of complaint. This letter is indeed addressed to Mr K Barnes, the secretary of the bargaining council. The true letter of complaint is Annexure "B" to the complaint dated 21 November 1997 addressed to the respondents' attorneys. Whatever the case might be, Mr Steenkamp, who appeared on behalf of the applicants, pointed out that in terms of rule 1 of the rules Mr Barnes is the *ex officio* secretary of the Scheme. Moreover, the letters are headed: *"Liquor & Catering Trade (Cape) Pension Scheme: Reversion of Unclaimed Benefits"*.

   In as far as Annexure "H" may be construed as the letter of complaint, it is incorporated by reference in Annexure "B" addressed to Werksmans Attorneys. As for their claim only to act for the bargaining council and Fedlife, at the time they received the complaint on 21 November 1997, they had already indicated that the provisions of rule 18.6 were in operation, putting Fedlife effectively to position as the administrator of the fund. As such, it was proper and appropriate for the complainants to lodge the complaint with them.

3. The third jurisdictional contention is that the complaint is not a complaint by virtue of it not making an allegation as contemplated in the definition of a complaint. Section 1 of the Act defines a complaint 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 consequent 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; **9.23.3**"

The respondents' argument makes the somewhat spurious claim that before a complaint can be considered to fall within the definition, the complainant is required to expressly make one of the four allegations referred to in the definition. Annexure H makes no such express allegation.

Again the respondents mistakenly describe the letter of complaint as Annexure "H". The true letter of complaint, Annexure "B", refers to the complaint as a dispute regarding the interpretation and application of the rules and by implication alleges a dispute of law regarding the entitlement to the information requested.

Were I to accept the respondents' contention, it would totally undermine the functioning of the Adjudicator. The purpose of Chapter VA of the Pension Funds Act, governing the consideration and adjudication of complaints, is to introduce an informal dispute resolution process. Most complainants lodging complaints with the Adjudicator are unrepresented, are frequently indigent and often have a low level of literacy. To require formal particularity in the lodging of a complaint would be a self-defeating exercise. In determining whether a referral is a complaint in terms of this section, the interest of justice require that I should be guided by the substance of the complaint, as indicated by its subject matter

rather than by formalistic technicalities.

In substance, the complainants' complaint relates to the administration of the fund and the interpretation and application of its rules and alleges that the refusal of the respondents to furnish information constitutes either an improper exercise of its powers, maladministration or a dispute of law. Accordingly, their complaint is a complaint as contemplated by the Act.

At the hearing, Mr Bortz raised the additional point that paragraphs (a), (b) and (c) of the definition of a complaint have to be read cumulatively. In other words, complaints other than those alleging an employer dereliction of duties under paragraph (d), would have to include an allegation of an excess of powers, maladministration *and* a dispute of fact or law. Plainly, this is not the intention of the legislature as is evident by the use of the disjunctive "or" in the section. The use of the semi-colon in the preceding paragraphs makes it abundantly clear that the legislature intended one allegation to suffice. Had the legislation intended otherwise it would have used the expression *and* rather than *or*.

4. The respondents further maintain that the complainants' complaint does not constitute a complaint by virtue of it being a complaint which "does not relate to a specific complainant". They contend that it appears from the correspondence that the relief being sought from the bargaining council was the taking of certain steps in the interest of the members of the Scheme as a whole and that the letter of complaint does not relate to a complaint by a specific complainant but rather relates to and was made on behalf of all the members of the Scheme.

The point obviously is without any merit. The complainants seek the disclosure of information for the purpose of determining the amount of unclaimed benefits which have reverted to the Scheme for the benefit of the remaining members of the Scheme. The complainants fall within the category of remaining members of the Scheme. Hence, the relief they seek directly affects their interests and the complaint relates to each one of them specifically.

5. The final jurisdictional issue raised by the respondents is based on the provisions of section 30H of the Act. Section 30H(2) provides that the Adjudicator shall not investigate a complaint before the lodging of the complaint, if proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.

   During June 1996 an application was made to the Cape Provincial Division of the High Court under case number 3998/96 in which certain applicants (none of them complainants in this matter) sought certain information from the bargaining council and the management committee of the Scheme and Fedlife. The applicants in that case obtained an order by consent against the first and second respondents in that case, but not against Fedlife.

   Much of the information sought in that matter bears relation to the information sought by the complainants. However, in my view, much of it differs from that forming the basis of this complaint. In particular, the High Court order does not require the respondents to provide the same level of specificity in relation to names, dates of birth and dates of entitlement of the dormant members such as is sought in this complaint. Moreover, none of the complainants was an applicant in the proceedings before the High Court.

For the aforegoing reasons, I am satisfied that I have jurisdiction to determine this matter.

The right to the disclosure of information

The complainants aver that they are entitled to the information set out above because it is necessary to calculate the amount of money which has reverted to the Scheme to be applied for the benefit of the remaining members in such manner as the actuary of Fedlife deems expedient in terms of rule 23 of the rules.

The complainants base their entitlement to the information on the common law fiduciary duties of the board of management of a pension fund. These duties are codified in

section 7D and 7C of the Pension Funds Act of 1956. Section 7D(1)(c) includes among the duties of a board, the duty to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund. Additionally, Section7C(2)(b) and (d) requires the board of a fund in pursuing its objects to act with due care, diligence, good faith and with impartiality in respect of members and beneficiaries. However, in terms of section 7E of the Act, section 7C and 7D only apply in respect of existing pension funds with effect from 15 December 1998 and in respect of funds registered after the amendment on or after 19 April 1997. The evidence shows that the Scheme was registered before the amendment and therefore the provisions of section 7C and 7D shall only apply to it from 15 December 1998.

Be that as it may, in *Lorentz v Tek Corporation Fund & Others* 1998(1) SA 192 (W), the High Court held that pension fund trustees are obliged to conduct the affairs of a pension fund in accordance with the common law regarding the fiduciary duties of those who occupy positions of trust in the wide sense. Moreover, section 2 of the Financial Institution (Investment of Funds) Act 39 of 1984 applies to pension funds. Section 2(a) imposes a duty on the managers of a fund to observe the utmost good faith and to exercise proper care and diligence in the safe custody, control or administration of the fund. In other words, despite section 7E of the Pension Funds Act, trustees remain under a duty to act in good faith.

In other areas of administrative and employment law, the courts have consistently held that duty to act in good faith incorporates the duty to disclose adequate relevant information. This is particularly so when individuals face an impending decision which may have adverse implications for them.

Section 32 of the Constitution of 1996 grants private citizens the right to access information held by the state and to any information that is held by another person and that is required for the exercise or protection of rights. However, item 23(2) of schedule 6 of the Constitution has suspended the operation of this section until the enactment of national legislation to give effect to the right. In the interim, the right of access to information is limited to “all information held by the state or any of its organs in any

sphere of government insofar as that information is required for the exercise or protection of any of their rights." Even though pension funds perform quasi-governmental functions they are not organs of state, meaning that members of pension funds do not have a direct constitutional right to information held by the fund.

Accepting that the complainants do not have a constitutional right to information, the complainants still have a right to information derived from the common law fiduciary duties as currently codified in section 2 of the Financial Institutions (Investment of Funds) Act 39 of 1984. Despite the absence of the constitutional right, it remains permissible, in terms of section 7 and 8 of the Constitution of 1996, to rely on the constitutional right as an aid for interpreting the common law and statutory right. It would seem to be just and equitable, therefore, that the boards of management of pension funds in terms of their duty to act in good faith should be expected to disclose such information as is reasonably required for the exercise or protection of any right. The failure to furnish such information, without appropriate justification, will constitute an improper exercise of the board's powers and will amount to maladministration of the fund as contemplated in the definition of a complaint in section 1 of the Pension Funds Act.

In *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 @ 615, Traverso J set the parameters of the constitutional entitlement to information in the following terms:

> Put differently, the information does not need to be *essential* but it has to be more than just useful for the protection of the right, there must be an element of need..... It is therefore self-evident that the right to information is not an absolute one but will exist only if it is reasonably required to protect or enforce any other right.

Hence, before there can be a right to information, the complainants must show that they reasonably require the information to protect or exercise some antecedent right. Although not expressly couched in these terms, the antecedent right upon which the complainants rely is their right under rule 23 to have the unclaimed monies reverting to the Scheme to be applied for their benefit in the manner deemed expedient by the

actuary. In other words, after the expiry of the 5 year prescriptive period, the unclaimed benefits revert automatically to the Scheme and the actuary is obliged to properly exercise his or her discretion on the application of such monies.

Generally, the respondents argue, that there is no nexus between the rights of the complainants and the information sought, and that the complainants have not shown that they have suffered any prejudice. Mr Bortz contends that because the rules do not provide members with a right to transfer to another fund there is no basis for the complaint. This argument misconstrues the complainants claim. The complainants do not assert a right to share in the surplus for the purpose of transferring to another fund. As stated, the right sought to be protected is the right to have the unclaimed benefits applied for the benefit of the remaining members in the manner deemed expedient by the actuary.

To the extent that Mr Bortz's argument appears to require the complainants to identify some irregularity on the part of the actuaries under rule 23 before the information can be disclosed, I find myself in respectful agreement with the comments made by Schwartzman J in the unreported decision of *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* (case number 97/016109 High Court, Witwatersrand local division) when he stated at page 15 of the judgment:

> The respondent then submitted that before the applicant is entitled to any documents it must establish a jurisdictional basis for its claim in the sense of a known or identified irregularity in the tender process and that anything less bars the remedy. The respondent produced no authority in support of this proposition.
>
> Most administrative acts are determined in the absence of the parties affected thereby. This is particularly so in the case of tenders. To hold that a tenderer such as the applicant is required to lay a jurisdictional basis before being able to assert its constitutional right to information would serve to undermine the basis on which I am required to interpret the Bill of Rights.....
>
> To uphold the respondent's submissions would also be subversive of the object of section 32 and 33 of the Constitution, would stultify the development of accountability

> and transparency in administrative decision making and would represent a step back to the dark past ..... in which officials who acted in secret could hide behind a wall of silence.

Earlier the learned judge made the observation that sight of the documents could well result in forestalling any further litigation, which in itself would be a good reason for ordering their production at this stage.

Similarly, in this matter the provision of information will advance the principle of accountability and transparency in decision making by the pension fund. The object of all pension funds is to provide benefits for members and former members in the event of retirement, disability or death. In circumstances were a pension fund holds R180 million of assets on behalf of 59 000 members, of whom only approximately 9 000 are active, one would have hoped that the pension fund, acting in keeping with its fiduciary obligations, would have readily laid bare its records to its membership for the purpose of embarking upon a consultative process to determine the best manner by which the unclaimed monies can be applied for the benefit of the remaining members of the Scheme.

Such a consultative process, conducted in the spirit of a joint problem solving exercise and in good faith, can accomplish a great deal and might well avoid unnecessary and time consuming litigation. The exercise conducted by the HIPPF serves as a pertinent example of how to address the problem of dormancy in order to unlock the unclaimed benefits surplus, accumulated on behalf of the members and for their benefit.

Once again, I do not understand the complainants to contend that they have a right to share in the surplus, nor, at this stage, a right to transfer anything more than their withdrawal benefit to another fund. As stated, the right which they seek to protect or exercise, and for which they reasonably require the disclosure of information, is the right to have the unclaimed benefits applied for the benefit of the remaining members. It is the exercise of their right to obtain such information as will enable them to determine whether or not their right to have such monies applied for their benefit has been infringed or not.

On this basis, I also do not accept Mr Bortz's submission that the complainants are obliged to show that they have suffered prejudice before the information can be said to be *reasonably required* for the exercise or the protection of the antecedent right. In this respect I am guided by the finding of Traverso J in the *Aquafund* case *supra* @ 617-8 where she held:

> I proceed now to deal with Mr Hiemstra's final submission, namely that in any event the Applicant has failed to show that it has suffered prejudice, and accordingly has no prospect of success on review. He argued that the applicant would have to show that it would be entitled to be awarded the contract or that the contract between the state and the successful tenderer should and could be set aside. But this argument is based on a misconception of the *right* which the Applicant is seeking to protect. The right which the applicant is seeking to protect is *not* the right to have the decision of the board reviewed with a view to eventually being awarded the contract. It is the right to obtain such information as will enable it to determine whether or not its right to fair administrative action has been infringed or not. If it is accepted that every person is entitled to lawful administrative action, it must follow that in a "legal culture of accountability and transparency" ..... manifested in the Constitution, a person must be entitled to such information as is reasonably required by him to determine whether his rights to lawful administrative action have been infringed or not. If a person is not able to establish whether his rights have been thus infringed, he will clearly be prejudiced. He need not rely on the assurances of the relevant organs of state (in this case the Tender Board). To so hold, would revive relics of the past which are inconsistent with the spirit of the Constitution.

All the information sought by the complainants under paragraph 14.1 of the complaint is relevant to the protection and exercise of their rights under rule 23.

Admittedly, the right in rule 23 is not absolute. It is a right to have any monies, remaining unclaimed for 5 years as from the date on which such monies became due, to revert to the Scheme for the benefit of the remaining members in such manner as the actuary of Fedlife deems expedient. Hence, before the right concretizes for the real benefit of the complainants a number of conditions shall have to be fulfilled. These are:

the monies must be due;

the monies must be unclaimed;

the monies must be unclaimed for 5 years as from the date due; and

the actuary must exercise his discretion to determine the manner in which the reverted monies shall be applied for the benefit of the remaining members.

Additionally, any rights arising under the rule are subject to the proviso that the council (or Fedlife) shall always retain the discretionary right to pay such unclaimed monies to any person who was previously entitled thereto under the rules, if such person claims the benefit after expiration of the 5 year period.

Yet, the rights of the complainants are rights nonetheless.

The information sought is aimed at acquiring a full profile of the membership of the Scheme, for the purposes of determining the amount of unclaimed benefits. Only once such information has been provided will the complainant's be in a position to decide for themselves how best to protect and exercise their rights under rule 23. It is hard to see how the disclosure of such information can harm the Scheme or the members of the Scheme. Most of the information requested relates to the identity and the claim status of the members of the fund. One would have expected the Scheme, in these days of computerisation, to have had this information available at the press of a button, and that pursuant to its fiduciary obligations it would have made it readily available in the interests of transparency and the advancement of the best interests of the members of the Scheme. Viewed in this light, it is more than apparent that the complainants *reasonably* require the information for the protection and exercise of their rights under rule 23.

Nevertheless, Mr Bortz, on behalf of the respondents, resists the disclosure of

information on two further grounds. Firstly, he argues that the information should only be disclosed where special circumstances exist and secondly he relies on considerations of practicality.

The special circumstances argument relies on the provisions of section 35 of the Pension Funds Act of 1956. In terms of that provision members of pension funds have a right to obtain copies or inspect certain documents, these documents are limited to the rules of the fund, the financial statements and the valuators' reports. Mr Bortz submits that if the complainants require any information other than that referred to in section 35 of the Act, the complainants need to demonstrate that special circumstances exist which entitle them to information beyond that which is available to them in terms of the section.

To my mind, the argument overlooks the fact that (by virtue of the definition of a complaint in section 1 read with the provisions of Chapter VA) the complainants also have a right to the effect that the fund should not be maladministered and that the functionaries of the fund should exercise their powers properly. The right sought to be protected and exercised by the complainants in this matter is in essence a concomitant of these rights.

Even accepting Mr Bortz's submission, the complaint reveals that the Scheme is conducting its affairs in a somewhat unusual manner. The fact that the fund is in possession of R180 million on behalf of a membership of whom 80% are dormant, clearly constitutes special circumstances warranting the disclosure of further information for the purposes of further investigation and the commencement of a programme of remedial action.

In relation to the practical problems associated with the delivery of the information, the respondents maintain the following:

1. The information sought in paragraph 14.1.1 namely, the names of those members who have left the trade before qualifying for any other benefit and who have not received payment of their benefits, will not serve any useful purpose for the applicants as it will include benefits of members that cannot be regarded as

unclaimed. I understand this argument to mean that such information is irrelevant. In a narrow and isolated sense this may well be, but if such information is taken together with the other information sought it is obviously essential for the purposes of determining the full extent of dormancy.

2. The respondents further claim that it is not possible to separate dormant records into the different categories, as this information is not available to the administrator of the Scheme until the member actually claims or reaches an age whereby the benefit can be regarded as unclaimed in terms of the rules. There are four possible categories:

> members who have multiple records;
>
> members who are preserving their benefits until retirement, rather than cash in their benefits before that date;
>
> records for which members are currently not employed in the industry but will return later to recommence contributions; and
>
> records that are truly unclaimed and that the member is either unaware that the benefits exist for him or that the member has passed away and his dependants are and will remain unaware so that the administrator is also unaware of his death.

It is the respondent's contention that only the final category can be regarded as unclaimed.

This may indeed be so, although I daresay it is at least debatable. The argument seems to suggest that the complainants should be satisfied with the respondents' undertaking as to what the true value of the unclaimed benefits in fact is.

Moreover, the argument confuses the date when benefits become "due" and the claim for payment. Payment to the member takes

> place on application by him or her. This fact does not determine when the benefit becomes due. The due date of a benefit is determined with reference to the rules, dates of birth, employment records and dates of death. One would have thought that such information would be available to a properly administered pension fund as a matter of course. If the information is not available, the Scheme is duty bound to embark upon an exercise similar to that embarked upon by the HIPPF to put itself in a position to obtain it. Fairness, accountability, and good governance demand that it does so.

The complainants then reasonably require all the information in order to make an informed decision on the future conduct of the complaint. They need to be placed in a position where they can objectively scrutinise the Scheme's computation of the amount of the unclaimed benefits. For that purpose they require a full profile of the entire membership.

3. The respondents concede that Fedlife can from its records determine how many members of the Scheme appear to have passed normal retirement age by 5 years, but argue that it does not follow that it is then possible to determine whether or not the benefits concerned have reverted to the fund in terms of rule 23. The respondents state that where monies are not claimed for 5 years, such monies do not automatically revert to the fund to be applied for the benefit of the remaining members. They refer in this regard to the provisos to rule 23 namely that the council always retains the discretionary right to direct Fedlife to pay any unclaimed monies to any person entitled thereto after the expiration of the 5 year period; and that unclaimed death benefits are to be dealt with in terms of rule 5. Again, the argument misses the mark.

Firstly, rule 23 does indeed provide for the automatic reversion of the unclaimed benefits, despite the existence of the provisos. The provisos will have to be borne in mind as relevant considerations by the actuary when taking his or her decision to apply the unclaimed monies for the benefit of the remaining

members. Nevertheless, this does not mean that the monies do not automatically revert.

Secondly, the argument mistakenly presupposes that the complainants are only entitled to the information if they establish that there are unclaimed monies. The purpose in providing the information, as already stated, is to put the complainants in a position to determine whether indeed there are unclaimed monies and whether the actuary has acted properly in applying such monies for the benefit of the remaining members. To hold otherwise, would essentially require the complainants to accept the say so of the Scheme.

4. Finally, the respondents argue that the information sought is both costly and time consuming to provide and is of a nature not *normally* given to the members of a fund. To start with, it must again be emphasised, the situation in which the Scheme finds itself is an *abnormal* one. The existence of such a large component of dormant members is a clear sign that a serious problem exists needing a remedial programme to correct it. The information sought in this matter is of a kind that every pension fund needs to have. Should the Scheme not be in possession of such information, the complainants do it a service by requiring it to upgrade its management and data collection systems for the benefit of the proper administration of the Scheme and its members.
The 1996 financial statements of the Scheme reveal that more than R1 million per annum is allocated as an administration fee to both the bargaining council and Fedlife. One would have hoped that such monies would have been applied on an ongoing basis to ensure that the data required in this matter was readily available. If such is indeed not the case, then one trusts that the accumulated administration fees will be sufficient to cover the cost of obtaining the information, the collation of which, as I have already intimated, can only benefit the Scheme.

Accordingly, I find that the complainants reasonably require the information referred to in paragraph 14.1 of the complaint to establish whether their rights under rule 23 of the rules have been violated or not. I shall order accordingly hereunder.

Other Relief

The complainants also seek a declarator declaring that the unclaimed monies have reverted to the Scheme in terms of rule 23 and further an order directing Fedlife or the actuary of Fedlife to apply the amounts for the benefit of the remaining members of the Scheme.

In my view, the complainants are somewhat premature in seeking this relief. The complainants appear to concede this in paragraph 39 of the complaint where they aver that once the information sought has been obtained by the respondents and provided to the complainants, it should become clear what sum of money has reverted to the Scheme in terms of rule 23. Before granting the declarator and directing the actuary to a particular course of conduct, I need to be in possession of the information and a clear picture of the amounts involved.

Accordingly, it is my intention to suspend these proceedings temporarily and to afford the complainants an opportunity to seek the additional relief on these papers as supplemented by them, and responded to by the respondents, once they have obtained the information in terms of this determination.

Relief

The interlocutory order of this tribunal is as follows:

1. The respondents are directed to obtain and to provide to the complainants the information set out in paragraph 14.1 of the complainants' complaint within 30 days of the date of this determination.

2. The respondents are directed to provide the complainants with copies of all documents and computer data storage material which contain or relate to the information referred to in paragraph 14.1 of the complaint.

3. The respondents attorneys are directed to file with this tribunal immediately upon expiry of the 30 days period an affidavit setting forth the manner in which this order was executed detailing the documents or computer data storage material provided to the complainants, together with the documents provided. A copy of such affidavit shall be served upon the complainants' attorneys.

4. The question of the costs of this complaint is reserved for decision in the proceedings for the further investigation of this complaint. In the event that these proceedings are not reconvened, no order is made as to costs.

DATED at CAPE TOWN this 27th DAY of MAY 1998.

.....

Prof John Murphy
PENSION FUNDS ADJUDICATOR