IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/198/98/SM

In the complaint between:

MARTIN HELLAWELL **First Complainant**

ALAN MARNITZ **Second Complainant**

and

BOART LONGYEAR PENSION FUND **First Respondent**

ALEXANDER FORBES FINANCIAL SERVICES,
a division of ALEXANDER FORBES (PTY) LTD **Second Respondent**

BOART LONGYEAR,
a division of ANGLO AMERICAN CORPORATION
OF SOUTH AFRICA LIMITED (AMIC) **Third Respondent**

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

Introduction:

This is a complaint lodged on 15 November 1998 with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956.

The complainants are Martin Hellawell and Alan Marnitz, who were employed by

Boart Longyear for twenty and twelve years respectively, prior to their resignation on 31 January 1998 to form a closed corporation that, by prior agreement with Boart Longyear, contracted similar services back to Boart Longyear to those which they had performed during their employment, on an "outsourcing" basis.

The first respondent is the Boart Longyear Pension Fund, a defined benefit pension fund registered under the Pension Funds Act of 1956. It is administered by the second respondent, Alexander Forbes Financial Services, a division of Alexander Forbes (Pty) Limited, a company duly incorporated in accordance with the company laws of South Africa. The third respondent is Boart Longyear, a division of Anglo American Corporation of South Africa Limited (AMIC), a company duly incorporated in accordance with the company laws of South Africa, and erstwhile employer of the complainants.

The essence of the complaint is that the complainants allege that, prior to their resignation, they were led, by representatives of the employer and of the fund's administrator, to believe they would receive a higher transfer value (as they understood it, an amount that included both their own and the employer contributions) on exiting the fund than the transfer value they were actually paid after they had resigned (an amount representing their own contributions plus a slight enhancement). Apart from the issue of alleged misrepresentation, there are also several questions of interpretation of the applicable rules.

The complaint therefore relates to the administration of the fund and the interpretation and application of its rules, and alleges that the complainants sustained prejudice in consequence of the maladminstration of the fund by the administrator, and that a dispute of fact or law has arisen in relation to the fund between the fund and its administrator on the one hand and themselves on the other; alternatively that a decision purportedly taken in terms of the rules by the

administrator was an improper exercise of its powers.

No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on supplementary information obtained from telephone conversations conducted with the parties by my senior investigator, Sue Myrdal. Ms Myrdal has furnished me with a full report.

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

The complaint

After a period of discussions and negotiation with their employer, Boart Longyear Springs ("the company"), the complainants, together with two other colleagues, entered into a contract with the company on 15 January 1998. In terms of the contract they would resign on 31 January 1998 in order to conduct business in the name of A.M.G. Instrumentation CC as contractor to Boart Longyear; as from 1 February 1998 the contractor would "provide a similar service [an engineering instrumentation service] to the company as that provided by its individual members during their employment with the company." A retaining fee was payable by the company for a period of six months, renewable by agreement, and the contractor agreed to render services on a priority basis to the company for an agreed hourly rate, a restraint of trade being placed on the contractor vis a vis any direct competitor of the company for any period during which a retaining fee was paid.

The complainants have stated that, during the negotiations, they raised the question of the transfer of their pensions and whether they would receive an amount equivalent to both employer and employee contributions on exiting the fund. This

was a fair question since the wording of the rule covering withdrawing employees who had more than ten years service did not readily permit the ascertainment of their entitlement, either in the original rule or in the summary booklet (as I shall indicate below).

The second complainant stated that Mr Pienaar, engineering manager of the company and signatory to the abovementioned contract, informed them that this issue would have to be dealt with in terms of pension fund rules and was "not in his hands"; he then referred the complainants to the personnel department to discuss the matter. The first complainant has stated that, as far as he remembers, Mr Pienaar assured them that they would receive their own plus the company's contributions. The complainants then enquired of the personnel department's Ms Rita Stephens, who dealt with company benefits, what their transfer values would be. The second complainant also simultaneously made his own independent telephonic enquiry with Alexander Forbes, administrator of the pension fund, where he dealt with a Mr Adeel Cassamsha. Ms Stephens supplied the complainants with figures she received by email on 5 January 1998 from Mr Cassamsha; they corresponded exactly with the figures Mr Cassamsha had given the second complainant over the telephone, the email (with my emphasis) reading as follows:

> **"The Actuarial calculations are done and are as follows:**
>
> **A Marnitz R133 938{tc \l1 "A Marnitz R133 938}**
> **D B Taljaard R 77 352**
> **M Hellawell R214 734**
> **B V Searle R 39 839**
> **J H Rodgers R 16 414**
>
> **Please note that a member needs to have completed at least ten years service to qualify for the above."**

The complainants resigned in due course on 31 January 1998 and subsequently were informed by Alexander Forbes that the information they had been given was incorrect and that they would only be paid their own contributions, plus an unspecified rate of interest. The difference was significant: Mr Hellawell, after twenty years service, was paid R86 870, (R127 864 less than quoted) and Mr Marnitz, after twelve years service, was paid R59 229 (R74 709 less than quoted); hence their complaint to this office.

The last sentence in Mr Cassamsha's email is a reference to the respondent's rule 7 dealing with withdrawal benefits, as amended up to the date upon which the complainants resigned (a later amendment dealing with withdrawal benefits, dated 7 April 1998, does not apply to them). I set out below the relevant portions of the rule, with the non-applicable portions summarised in italics for the sake of completeness:

7.1

7.1.1 (a) A Member who withdraws from Service of his own free will or for reasons not specifically provided for in these Rules shall be paid in cash his Accumulated Contributions at the date of leaving Service *[plus any amounts relating to additional voluntary contributions]* .

(b) A Member who has completed at least five years Service and who is retrenched or made redundant shall be paid in cash twice his Accumulated Contributions at the date of leaving Service *[plus any voluntary contributions].*

7.1.2 A Member may elect that part or the whole of his cash withdrawal benefit be transferred to any approved retirement fund.

7.1.3 Payment of a Member's cash withdrawal benefit may be deferred for up to six

months.

7.1.4 A Member who withdraws from Service after completing at least ten years' Pensionable Service and who elects to transfer part or the whole of his withdrawal benefit to an approved retirement fund shall be entitled to the value of his pension in terms of Rule 5.1 as determined by the Actuary based on his Final Average Salary and Pensionable Service at the date of his withdrawal *[provided that voluntary contributions may be taken in cash]*

7.2 Transfer to an associated company

If a Member is transferred to an associated company, a transfer value as determined by the Employer in consultation with the Actuary shall be paid for the Member's benefit to the pension fund operated by such associated company provided that if the Member does not join such fund the transfer value shall be paid to any approved retirement fund of the Member's choice.

The definition of "Anglo Associated Company" in the fund's rules reads as follows:

"any company which constitutes or is a subsidiary or associate of Anglo American Corporation of South Africa Limited."

Employees of Boart Longyear receive a Pension and Benefit Fund booklet summarising the rules; the summarised version of rules 7.1.4 and 7.2 above reads as follows:

"5.1.2 <u>Service of 10 years or more</u>

If you leave after completing 10 or more years' service, you may transfer the present value of your pension based on your salary and service with the Employer at date of withdrawal (as determined by the Actuary), to any approved retirement fund. Any additional voluntary contributions you have made during your service plus additional withdrawal interest may be refunded in cash.

5.2 <u>Transfer to an associated company</u>

If you are transferred to the service of a Boart Longyear subsidiary or an associated company before your Normal Retirement Date and that company does not participate in this Fund, your Employer may pay to your future employer's pension or provident fund or any other approved retirement fund an amount equivalent to the value of pension benefits you have built up with The Boart Longyear Pension Fund.

NOTE

The value of your pension in 5.1.2 AND 5.2 above is calculated actuarially and can be greater or smaller than the cash withdrawal benefit in (5.1.1). In the latter event, the greater amount will be paid."

The complainants maintain that they are entitled to payment of their full actuarial reserve value in accordance with rule 7.2, read with paragraph 5.2 of the booklet, because they have been transferred to an associated company. They state:

> **"Boart Longyear has contractually retained AMG Instrumentation's services since the 1st of February 1998 and has supplied us with more than 80% of our workload to date. Thus we can safely say that we are associated with Boart Longyear."**

The complainants have thus framed their complaint around two issues: an allegation of prejudice to themselves as a result of misrepresentation by the administrators of the fund, this being an instance of maladministration; and in the alternative, as it were, an allegation that they should in any case be paid out on a different (and more favourable) basis to ordinary withdrawers, by virtue of having transferred to an "associated company" in terms of rule 7.2, this being also an allegation of maladminstration, on the basis that a decision not to so pay them, purportedly taken in terms of the rules by the administrator, was an improper exercise of its powers and based on an interpretation of the rules which the complainants dispute.

The response

The sole initial response to the complaint was furnished on behalf of the fund by Andrew Tunstall of Alexander Forbes, in a letter dated 2 June 1998 addressed to a financial consultant who was assisting the complainants with their grievance. My investigator, seeking a fuller response, wrote to Mr Tunstall on 11 June 1999 and inter alia specifically requested

> **"* copies of the first and second quotations provided to the complainants at the time of their resignation from Boart Longyear and referred to in your letter dated 2 June 1998;**
>
> *** your submission as administrators of the Boart Longyear pension fund, regarding the steps taken by yourselves to establish whether or not the contracting company is an "associated company" of Anglo American Corporation of South Africa Limited. It is the fund's responsibility to determine this point, furnishing reasons, and if necessary, engaging in discussions with Boart Longyear and Anglo American Corporation."**

On the same date (11 June 1999) my investigator also wrote to Boart Longyear, requesting, inter alia,

> **"your submissions regarding the complainants' assertion that, during initial discussions with yourselves and Alexander Forbes, they were assured that both their own and the company contributions to their retirement funding would be transferred into a preservation fund.**
>
> **I also require your written submissions as to whether the newly formed company, AMG Instrumentation, is an associate of Anglo American Corporation of South Africa Limited by virtue of its association with your company. Please set out the factual basis for your opinion."**

Mr Tunstall of Alexander Forbes furnished a reply on 2 July 1998 which essentially repeated his letter of 2 June 1998, with the addition of a few paragraphs of further explanation at the end. I set out the letter in full:

"The resignation of Messrs M Hellawell and Mr A Marnitz at 31 January 1998 were processed in terms of the Rules of the Boart Longyear Pension Fund, at that time.

The provisions of Amendment 4 to the Rules, effective from 1 February 1997, which improved withdrawal benefits, were applied.

In terms of the Rules of the Pension Fund, the withdrawal benefit on resignation is a refund of "Accumulated Contributions", (including transfers from previous funds). "Accumulated Contributions" are defined in the Rules as the member's own contributions to the Fund, with interest.
After 10 years service (as is applicable in the cases of Messrs Hellawell and Marnitz), the member has an option to transfer the benefit to an approved retirement fund, in which case "present value of accrued pension" is payable. The transfer benefits due in respect of Messrs Hellawell and Marnitz reflect this provision.

I am led to believe that Messrs Hellawell and Marnitz were originally quoted incorrect withdrawal benefits, based on their Actuarial Reserve Values in the Fund. Such a calculation takes into account full prospective service to normal retirement age. As was subsequently explained to both Members, this was in fact incorrect. The correct withdrawal benefit, ie the "value of accrued pension", takes account of service to date of resignation, which is in terms of the Rules. The second quotation was based on this benefit.

Rule 7.2 deals with "Transfer to an Associated Company", and provides that the transfer value be determined by the Employer in consultation with the Actuary. This value is transferable to the new Employer's pension fund, or, if no such fund exists, to an approved retirement fund of the member's choice.

An "Anglo Associated Company" is defined in the Rules of the Pension Fund as being "any company which constitutes or is a subsidiary or associate of Anglo American Corporation of South Africa Limited."

Alexander Forbes are not aware that Messrs Hellawell and Marnitz are employed at such an associated company.

In terms of Amendment 7, effective 1 May 1998, members resigning after 10 years service may preserve their Actuarial Reserve Value (ARV) in a retirement annuity (though not in a Preservation Fund). They would not be entitled to ARV as a cash withdrawal benefit. In this particular case, this provision is irrelevant as the members resigned at 31 January 1998.

With reference to your fax of 11 June 1999, to Mr F Fitzpatrick of Boart Longyear, and the complainants' assertions that they were informed that "both their own and the Company's contributions would be transferred into a preservation fund":

Please note that such a statement on our part would be inaccurate and irrelevant, and that at no time did we make such a statement. The Boart Longyear Pension Fund is a defined benefit fund, and as such the level of the Company's contribution at any time is a function of the assets and liabilities of the Fund, and the actuarial funding level. There are periods in the lives of many defined benefit funds where no Company contribution is required at all. Thus the concept of a member receiving "the Company's contributions" is without meaning. What is true is that the members' normal withdrawal benefit (usually some mathematical function of his own contributions – in this case contributions with interest) may be enhanced such that the benefit becomes equal to an actuarially determined value. In such cases, the amount of the enhancement logically comes from either the Company's contributions, or from investment returns that may have been in excess of the interest rates used to calculate normal withdrawals.

The benefits paid to Messrs Hellawell and Marnitz upon their withdrawals from the Fund in January 1998 were so enhanced, and the final benefits were equivalent to the values of their accrued pensions.

The benefits paid, compared with the normal cash withdrawal benefits in terms of the Rules of the Fund, were:

<u>Mr Marnitz</u>: cash withdrawal benefit: R51 228; benefit actually paid: R59 229
<u>Mr Hellawell</u>: cash withdrawal benefit: R79 929; benefit actually paid: R86 870

In terms of the Rules of the Pension Fund in force at the date of resignation, Messrs Hellawell and Marnitz were treated correctly and fairly upon their withdrawal from the Boart Longyear

Pension Fund."

After a further request from my investigator, Mr Tunstall subsequently furnished a copy of the first quotation mentioned above, being the email dated 5 January 1998. There does not appear to have been a second quotation; none was furnished to this office.

The response from Mr J Mulder, financial director of Boart Longyear, to my investigator's queries takes the matter a little further:

> "Boart Longyear has no discretion over the payment of pension amounts out of the Pension Fund. These issues are dealt with between the member and the Pension Fund Administrators. The company's personnel department merely acts as a facilitator between the two parties.
>
> The Pension Fund's rules are always strictly applied when it comes to benefits being paid and the Principal Officer has assured me that the Trustees do not have the power of discretion over benefit payment issues. All salaried employees are members of the pension Fund. At the time of employment all employees are issued with a Pension and Benefit Fund booklet. The booklet was re-issued during 1995. Mr Hellawell was employed on 16 January 1978 and Mr Marnitz on 5 December 1986. Both these gentlemen will therefore have had at least two copies of the booklet issued to them.
>
> The rules as written in the booklet, which is a summary of the rules, which are available upon request state the following:
>
>> "If you leave after completing 10 or more years' service, you may transfer the present value of your pension based on your salary and service with the Employer at date of withdrawal (as determined by the Actuary), to any approved retirement fund."
>
> Nothing other than the rules were ever communicated to any employee leaving the company by any member of management or Human Resources.

> AMG Instrumentation CC is a Closed Corporation. The members of AMG Instrumentation CC are Messrs M Hellawell, A Marnitz, B Searle, and D Taljaard. As can be seen from the above Anglo American Corporation Limited is not a member of this Closed Corporation and neither are any of Anglo American's subsidiary companies or associated companies or any director of an Anglo American company or associated company a member of AMG Instrumentation CC. AMG Instrumentation CC is therefore not an associate of Anglo American Corporation.
>
> It appears that Messrs Hellawell and Marnitz misunderstood the meaning of the words associated company."

My investigator telephonically interviewed Mr H J Pienaar, the Boart Longyear signatory to the contract, and put to him that it was the first complainant's testimony that he (Mr Pienaar) had informed the complainants prior to their resignation that they would receive their own and the company's contributions on exiting the pension fund.

Mr Pienaar stated that, in negotiating the contract, the complainants had indeed raised the question of their pensions and whether they they would receive their own and the company contributions; he had replied that that would depend on the rules of the pension fund and he could not give them an answer since such issues had to be handled by the personnel department. He then referred them to Ms Rita Stephens.

Analysis of the complaint

Before I deal with the substance of the complaint I wish briefly to examine the rule applied by the administrator in determining the transfer values payable to the complainants, since it bears a full interpretation. To restate the rule:

> "A Member who withdraws from Service after completing at least ten years' Pensionable

> Service and who elects to transfer part or the whole of his withdrawal benefit to an approved retirement fund shall be entitled to the value of his pension in terms of Rule 5.1 as determined by the Actuary based on his Final Average Salary and Pensionable Service at the date of his withdrawal."

Rule 5.1 concerning pension benefits reads as follows:

> "A Member who retires at Normal Retirement Date shall be paid an annual pension equal to 2 percent of Final Average Salary for each year (months pro rata) of Pensionable Service."

"Final average salary" is defined in the rules to mean:

> "the average of a Member's Pensionable Salaries over the last 12 months of his Pensionable Service prior to retirement or leaving Service."

and "pensionable service" is defined as:

> "the period of a Member's continuous Membership of the Fund ... ending on the earlier of his Normal Retirement Date or termination of Service."

Mr Tunstall of Alexander Forbes neatly summarises the benefit payable as "present value of accrued pension" as determined by the actuary. At first sight this may well appear to correspond to the notion of actuarial reserve value (which, it is common cause, was the value mistakenly quoted to the complainants before they resigned). However, on closer examination, it is clear that the method used to calculate the actuarial value on termination of service (prior to retirement), as indicated by the wording of the rule, is distinguished from the method used to calculate "reserve value", as indicated by the definition of "reserve value" in the fund's rules.

The definition of "reserve value" reads (with my emphasis):

> **"the amount determined by the Actuary as the value of future benefits that can become payable by the Fund to a Member for Pensionable Service to the date of determination on a basis normally used to value the Fund for statutory purposes or on a basis which the Actuary considers suitable, allowing for future increases in Pensionable Salaries and pensions if that would normally be done, and reduced if necessary to allow for a proportionate share of any shortfall."**

This method (the basis indicated by the emphasised words above) is the statutorily required prudential method of funding used in a defined benefit scheme whereby, in order to ensure the security of the benefits defined in advance (and promised) to its members, the actuary can assess the solvency of the fund at any particular date and then adjust the employer's contribution rate to bring the fund into balance i.e. to eliminate, over time, any surplus or deficit identified. To assess the adequacy of the fund's assets the actuary calculates the fund's accrued liabilities with reference to projected future salaries, and then compares this figure with the actual value of the fund's assets. This has been called the "projected unit method".

In a situation where a transfer value is to be actuarially determined, if this same type of method is used (often referred to in this context as the "past service reserve method"), a value will be placed on benefits accrued up to the date of termination of service but instead of using final (current) salary as the basis of valuation, regard will be had to the individual's projected salary, allowing for increases, payable at his/her normal retirement date (since this is the basis on which the employer contributed to the fund), adjusted back to date of termination with a factor based on certain assumptions.

However, another method for funding (known as the "current unit credit method") assesses the adequacy of the fund's assets without allowance for future salary

increases; in the calculation of a transfer value using this method, the actuary need only have regard to benefits accruing through service up to the termination (transfer) date, and calculates those benefits with reference to the salary being paid at the date of termination (transfer). This then is the method for calculating transfer value on withdrawal stipulated by the Boart Longyear Pension Fund rule 7.1.4., as amended and applicable at the date of the complainants' resignation, viz 31 January 1998.

It is interesting to note that, in terms of an amendment to rule 7.1.4, operative with effect from 1 May 1998, (some three months too late to benefit the complainants), a member withdrawing after at least ten years of service and electing to transfer his withdrawal benefit to an approved retirement annuity fund,

> "shall be entitled to the greater of his Reserve Value or twice his Accumulated Contributions"

the reason for the amendment being stated in the resolution effecting it as "to enhance the benefit payable to members upon withdrawal from Service."

I turn now to an analysis of the complaint. The complainants have alleged two instances of maladminstration, in the alternative: that they were induced to act to their detriment through the misrepresentation of the administrator; and alternatively, that they were not paid a transfer value in terms of the rules commensurate with the fact that they had, in their interpretation of the relevant rule, transferred to an "associated company".

The "associated company" argument

I propose to deal with this latter allegation first. The matter turns on a proper interpretation of rule 7.2 and also of the definition of "Anglo Associated Company", both of which I set out again hereunder:

7.2 Transfer to an associated company

> **If a Member is transferred to an associated company, a transfer value as determined by the Employer in consultation with the Actuary shall be paid for the Member's benefit to the pension fund operated by such associated company provided that if the Member does not join such fund the transfer value shall be paid to any approved retirement fund of the Member's choice.**

Definition of "Anglo Associated Company":

> **"any company which constitutes or is a subsidiary or associate of Anglo American Corporation of South Africa Limited."**

The term "subsidiary" is fully defined in section 1(3) of the Companies Act 61 of 1973, and leaves no doubt that the close corporation established by the complainants is not a subsidiary. The definition of a subsidiary is based on control by a holding company, through membership of the subsidiary, control of the composition of its board of directors, and a holding of more than half of the subsidiary's issued equity share capital, none of which is applicable in this instance, nor could it possibly be applicable, since there is a general restriction (in section 29 of the Close Corporations Act. 69 of 1984) of membership of a close corporation to natural persons, the effect of which is that a close corporation can never become a subsidiary of a company.

The term "associate" is not defined in the Companies Act itself, although it is defined in schedule 4 thereto, dealing with the statutory requirements for financial statements (and *inter alia*, the method of accounting for investments in associates). The definition reads:

> "an "associated company" is an investee that is neither a subsidiary nor a joint venture of the investor, is held as a long term investment and provides the investor with the ability to exercise significant influence."

There is no investment by any member of the AMIC group of companies in the close corporation established by the complainants and hence it is not an investee and the respondent has no ability to exercise significant influence.

Furthermore the wording of rule 7.2 above, in its use of the passive form of the verb, viz "is transferred", would seem to indicate that the intention of the rule is to provide that employees transferred at the company's volition (and not those who voluntarily resign and join another company) be treated differently on leaving the pension fund. This interpretation is borne out by the fact that rule 7.2 is the only rule under the umbrella of rule 7 on withdrawal benefits that does not employ the phrase or convey the notion of "withdrawal from service".

The close corporation established by the complainants is clearly contractually bound to Boart Longyear but, despite the complainant's assertion that this constitutes an "association", presumably in terms of the ordinary English meaning of the word, I am satisfied that it was not the purpose of the rule to employ such ordinary meaning. It is clear from the context of the rule and the juxtaposition in the definition of the word "associate" with the word "subsidiary", which bears a specific meaning clearly understood in company law, that the word "associate" bears the specific meaning outlined above. There is no question of control, ownership or investment by AMIC in the close corporation, and the conclusion must be drawn that the complainants do not fall within the ambit of rule 7.2.

The delict of negligent misstatement

The remaining issue for determination therefore is the question whether the misstatement/s made to the complainants concerning their transfer values constitute maladministration.

The maladministration alleged by the complainants, if proved, would be akin to a delict, attracting Aquilian liability. Jonathan Burchell, in his book *Principles of Delict* (Juta & Co, Ltd 1993), defines a delict as:

> **"an unlawful, blameworthy (i.e. intentional or negligent) act or omission which causes another person damage to person or property or injury to personality and for which a civil remedy for recovery of damages is available."**

He summarises the essence of the enquiry to establish whether there is Aquilian liability thus:

> **"The modern Aquilian action has six elements:**
>
> **(1) Voluntary conduct which is**
> **(2) Unlawful (or wrongful);**
> **(3) Capacity;**
> **(4) Fault (intention or negligence);**
> **(5) Causation; and**
> **(6) Loss.**
>
> **In order to succeed in recovering damages under the Aquilian action a plaintiff has to prove the facts necessary for a court to decide, on a preponderance of probabilities, that the defendant's conduct satisfies each of these elements."**

In terms of the important decision in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), a delictual claim for damages based on negligent misstatement is available to a plaintiff who can establish (i) that the defendant made

a misstatement to the plaintiff; (ii) that in making this misstatement the person acted (a) negligently and (b) unlawfully; (iii) that the misstatement caused the plaintiff to sustain loss; and (iv) that the damages claimed represent proper compensation for such loss. The *Trust Bank* case confirmed again that, while the Aquilian action formerly envisaged a concept of patrimonial loss restricted to injury to person and tangible property, it is now settled law that the range of application has been extended to include the possibility of claiming damages for a negligent misstatement causing pure economic loss, that is, pecuniary loss where there is no physical injury to person or property.

The learned judge in the *Trust Bank* case, referring to the fear of the so-called "limitless liability" that might result from extending liability for negligence to the recovery of pure economic loss, formulated the bounds of such liability thus:

> **"In every given case it is the task of the court to decide whether in the particular circumstances there was a legal duty resting on the defendant not to make a misstatement to the plaintiff, and also whether the defendant, in the light of all the circumstances, exercised reasonable care, inter alia, in determining the correctness of his representation. In the absence of a legal duty there is no unlawfulness. The court will also keep the ground of action within reasonable limits by giving proper attention to the nature of the misstatement and the interpretation thereof and also by giving proper attention to the problem of causation." (at 833; in translation)**

In the case of *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A), Corbett CJ held that

> **"In principle I can see "no good reason why in the recognition of such an action based upon a negligent misstatement any distinction should be drawn between a misstatement made which induces a contract and one made outside the contractual sphere...Indeed in many instances**

> **the contractual negotiations between the parties and the subsequent conclusion of the contract will in themselves provide the circumstantial matrix for a finding that there existed a legal duty upon the party concerned not to make a misstatement to the other." (at 568 F-H)**

The principles delineated in these judgements are helpful in directing the enquiry in this matter.

Usually such an enquiry would commence by establishing whether there was the requisite act or omission. However in this case I wish to "work backwards" as it were, by first establishing whether the complainants have experienced patrimonial loss or harm, (in the form of pure economic loss) and if so, what the nature and extent of that loss is, (whether the damages claimed represent proper compensation for such loss), bearing in mind that the basic criterion for assessing damages under the Aquilian action is that of placing the plaintiff in the position he would have occupied if the wrong had not been committed. I believe that clarification of this aspect will enlighten the rest of the enquiry.

Assuming then, for the present purposes, that all the other elements of the delict of negligent misstatement were present, did the complainants suffer patrimonial loss?

P J Visser and J M Potgieter, in their book *Law of Damages* (Juta & Co. Ltd, 1993), define patrimonial loss as follows (at page 42):

> **"Patrimonial loss (as a subdivision of damage) is the diminution in the utility of a patrimonial interest in satisfying the recognised needs of the person entitled to such interest. It may also be defined as the loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of his patrimony (a patrimonial debt)"**

The juridical concept of patrimony includes, in the positive elements (assets) of

someone's patrimony (estate), patrimonial rights (for example, real rights such as ownership) as well as expectations of benefits. Visser and Potgieter (supra, p 48) define the latter as

> "the legally recognized expectation of a person to acquire patrimonial rights or benefits in future (through which his patrimony will be enhanced) or the recognized expectation that his patrimony will not diminish."

One is therefore dealing with a possibility or chance which can be given a market value (in the present case this is achieved by the calculation of actuarial reserve value, calculated on a prospective basis); the expectation normally has a present element (some factual basis, such as, in this case, membership of the pension fund) and a future element (the probabilities in connection with the full realisation of the spes, catered for in this case by the actuarial assumptions incorporated in the calculation used to discount the retirement date value (the full realisation of the spes) back to the date of termination.

Clearly there has been some loss to the complainants of their expectation of benefit. The question then is how to quantify that loss.

The value of an expectation, according to Visser and Potgieter (supra, p 50) is, as mentioned above, generally determined by

> "taking into account the degree of probability of its fulfilment (or realisation) - this means that, from the face value of the patrimonial right it envisages, an amount must be deducted to discount for the possibility that the expectation may not be fulfilled."

As mentioned above, there has already been some deduction from the face value (the value of the expectation at retirement date) in this case in order to discount the

value back to the date of termination. I would argue that a further contingency needs to be taken account of: the possibility that the complainants would have resigned and left the fund even if they had known their correct transfer values beforehand. As Visser and Potgieter express it, the concept of "contingencies" (being any possible relevant future events which might have caused the damage or a part thereof or which may influence the extent of a plaintiff's damage, the ordinary vicissitudes of life) may

> **"imply that provision is made for the fact that the prospective loss which is possible at the time of assessment of damage, might in any event possibly have occurred independently of the delict or breach of contract in question."**

Herein lies the crux of the matter. If the negligent misstatement had not been made (and the following discussion is in many ways inextricably linked to the question of causation, that is, did the misstatement *cause* the harm or loss?) and instead the correct information had been given, then the complainants would have been faced, prior to finalising any decision to resign and form a close corporation, with the situation where they now knew that their pension transfer values were, respectively, R86 870 and R59 229. Only if this knowledge deterred them absolutely from resigning would their loss, in the circumstances of this case, have been the difference between these figures and the figures quoted, viz R214 734 and R133 938 respectively.

It is clear that knowledge of the correct figures would have given the complainants pause, before they signed the contract ending their employment relationship and membership of the pension fund. They would have had to weigh up more carefully the benefits they anticipated in moving to the close corporation as against the fact that the transfer value of their pension was not as substantial as they might have

hoped. They would have had to consider whether they were ready to lose the future value of the pensions they could expect to enjoy if they stayed in their employment. And they would in all likelihood have tried to negotiate improved terms in the contract with the company, to offset what they might judge themselves to be losing in terms of their investment in retirement funding, since, if they could achieve such a better deal, the benefits of moving across to the close corporation might then have outweighed staying in their employment. If they could not achieve a better deal they may then have decided to stay where they were.

If one reconstructs the situation thus and assesses what might have happened between the point in time when the complainants were hypothetically informed of their correct values and the point in time thereafter when they would make their decision whether to resign or to take their chances in their new venture, one is basically dealing with an assessment of a contingency not yet taken account of , incorporating a further probability that the complainants' expectation of their pension benefit might not be fulfilled.

In my view there is a sufficient degree of probability that the complainants would have stayed in their employment to protect their retirement funding for one to be able to say that their expectation is worthy of protection by the law. I would argue that the probability is higher (at least 51%) that they would have stayed than that they would have left. However there is also some degree of probability that the complainants would have left the fund even if they knew their correct transfer values - and this degree of probability, whatever it is, constitutes an amount that must be deducted to discount for the possibility that the expectation would not be fulfilled.

Determining the degree of probability is not a precise matter. Provision for contingencies falls squarely within the subjective discretion of the court on what is

reasonable and fair: as stated in *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) (at 116-7)

> **"The rate of the discount cannot of course be judged on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case."**

The usual effect of an adjustment based on contingencies is that the amount of damages is reduced by a percentage which may vary between 10% and 50% (see *Van der Plaats v SA Mutual and Fire General Ins* 1980 (3) SA 105 (A) at 114-5)).

The face value of the expectation in this case is easily assessable in money terms (it is equivalent to the full actuarial value) but what would be a fair percentage to deduct to discount for the degree of possibility that the expectation would not be fulfilled (through the complainants deciding on balance to leave the fund) is not easily assessable.

In my view, justice is served by deducting a differential amount, taking into account the differing circumstances of the two complainants.

The first complainant is forty years old and has contributed to the pension fund for twenty years. I am of the opinion that it would be fair and reasonable to deduct an amount of 25% from his expectation; this takes account of the higher likelihood that he would not have moved out of the fund than the other complainant, and also of his greater age and longer period of contribution to the fund (he had more to lose in terms of his investment in retirement funding and less time to recover his position in terms of provision for his retirement), but also of the possibility that he would nevertheless have decided to leave the fund even knowing his true transfer value.

The second complainant is thirty-one years old and has contributed to the pension fund for twelve years. The likelihood is proportionally higher that he might have moved out of the fund even knowing his true transfer value; furthermore, he is younger, has less to lose and more time to recover his position. In my view, it would be fair and reasonable to discount his expectation of benefit in the circumstances by an amount of 49%.

The quantum of the loss, following this line of reasoning, is as follows:

First complainant:	Reserve value	214 734	
	Less withdrawal value paid	86 870	
		127	864
	Less 25% of 127 864	31 966	
		R95 898	

Second complainant:	Reserve value	133 938
	Less withdrawal value paid	59 229
		74 709
	Less 49% of 74 709	36 607
		R38 102

Having established the existence and extent of patrimonial loss I propose, in enquiring into the presence of the other elements of the delict, to address firstly the question of whether there was any misrepresentation or misstatement by any representative of the employer.

In determining, as a first step in the enquiry, whether there was a misstatement made by Mr Pienaar, on behalf of either the first or third respondent,I find on the evidence

that he made no such misstatement. His evidence, that he could not answer the complainant's questions about their pensions and that he referred them to the personnel department, is corroborated by the evidence of the second complainant, who played a leading role in the negotiations. In my view, it is likely that the first complainant's memory that Mr Pienaar said otherwise is deficient. Since I find that the required conduct did not occur, it follows that it is unnecessary to enquire into the other elements of the delict; a finding of negligent misstatement inducing a contract cannot be made.

The handing of a printout of the email setting out the complainants' transfer values to the complainants by Ms Rita Stephens does constitute a misstatement, but in my view Ms Stephens did not act negligently or unlawfully in making the misstatement. She was merely the conduit for the incorrect information, which originated from the administrators of the pension fund, and one could not argue that there was a legal duty resting on her not to make a misstatement to the complainants.

This narrows the enquiry to the second respondent, the administrator of the fund.

The existence of the misstatement by an employee of the second respondent, acting in the course and scope of his employment, is not in issue: it is common cause that the administrator's Mr Cassamsha set out in writing the incorrect transfer values and sent same to Ms Rita Stephens for forwarding to the complainants; he also provided the same figures to the second complainant over the telephone.

In assessing whether this misstatement was unlawful (or wrongful), following Rumpff CJ in the *Trust Bank* case mentioned above, it must be determined whether there was "a legal duty resting on the defendant not to make a misstatement to the plaintiff" for "in the absence of a legal duty there is no unlawfulness".

Delegated to the administrator of a pension fund, appointed by the board of a fund to act on its behalf, are, one may argue, the fund's duties in terms of the Pension Funds Act to:

> **"act with due care, diligence and good faith (section 7C (2) (b))"**

and 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 (section 7D (1) (c))**

The complainants sought accurate information relating to their transfer value from the only source in a position to give it to them. (On this basis, too, I would reject any suggestion that there was any contributory negligence by the complainants; they were not in a position to verify actuarial calculations and had, of necessity, to rely on the figures provided by the administrator, as the actuarial source.) I find no difficulty in concluding that there was a legal duty on the administrator not to make a misstatement to the complainants, and that the misstatement made was on this basis unlawful.

The next step is to establish whether there was negligence on the part of the person making the misstatement. The test for determining negligence, as formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A), is as follows:

> **(1) would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;**
>
> **(2) would a reasonable person have taken steps to guard against that possibility;**

(3) did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?"

With regard to the foreseeability of harm, our courts have held that it is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring were reasonably foreseeable; the precise nature or exact extent of the loss suffered need not be reasonably foreseeable nor need the precise manner of the harm occurring be reasonably foreseeable for liability to result (*Botes v Van Deventer* 1966 (3) SA 182 (A); *Bester v Commercial Union* 1973 (1) SA 769 (A); *Murray v Union and South West Africa Insurance Co Ltd* 1979 (2) SA 825 (D).

In my view a reasonable person working in the office of an administrator of a pension fund would certainly have foreseen the possibility of harm to the complainants if he provided them with incorrectly inflated figures regarding their transfer values at a time prior to their exiting the fund. Even if such a reasonable person was not in possession of the knowledge that the complainants were in the process of making a decision as to whether to leave the service of their employer and hence of the fund, it would be a reasonably foreseeable eventuality in general terms that the persons to whom the information was provided might be depending on the accuracy of the information to make certain significant decisions.

Factors such as the probability of the harm materialising and the seriousness of the harm if it does materialise, as well as the cost or difficulty of avoiding the harm (or the burden or eliminating the risk of harm) have been held by our courts to be influential in deciding whether a reasonable person would have taken steps to guard against reasonably foreseeable harm (*Ngubane v South African Transport Services* 1991 (1) SA 756 (A)).

While it may have been difficult for a reasonable person to judge in the

circumstances of this case whether the chances of the harm occurring were great or slight, the possibility of harm or loss occurring was, as I have argued above, certainly present in this case and easily appreciated by a reasonable person. Moreover it would not have been difficult for a reasonable person in the position of Mr Cassamsha to have taken steps to guard against the possibility of harm; all that would be involved would be verifying the correctness of the information by careful reference to the rule and by checking with a superior, who would be readily available in the office of the administrator.

Generally speaking it is for the plaintiff to establish facts which prove that the defendant has been negligent. However, the plaintiff may be obliged to rely on the drawing of inferences. One such inference of negligence is *res ipsa loquitor* - the facts speak for themselves. If it can be shown that the harm was caused by a thing which was under the control of the defendant and that the nature of the occurrence itself leads to an inference of negligence on the part of the defendant or his servants because it is something which usually does not happen without negligence, one is entitled to draw an inference of negligence. In my view these requirements are met in the present case. There is no evidence refuting an inference that Mr Cassamsha failed to take steps which he should reasonably have taken to guard against the harm, so I must come to the conclusion that he was negligent.

The remaining delictual element which must be addressed is causation. As I mentioned earlier, the question of causation is inextricably bound up with loss or damage: factual causation can exist only in respect of damage, and damage is a phenomenon which can only be caused by a particular (damage-causing) event. To some extent I have therefore covered certain aspects of causation, but since causation is a separate requirement for a delictual claim for compensation it must be fully canvassed in its own right.

The generally accepted test of factual causation adopted by legal practice is the *sine qua non* or 'but for' test, which Burchell characterises thus:

> **"If the harm would not have occurred but for the defendant's conduct, then the defendant's conduct is a factual cause of the harm. If the harm would have occurred even without the defendant's conduct then the defendant's conduct is not the cause of the harm."**

The overlap between this test and the test of damage which compares the plaintiff's patrimony after a damage-causing event and the hypothetical patrimony but for such an event is apparent.

As I have shown, an assessment of the contingency that the complainants would have decided to leave the pension fund in any event, even if they had known their correct transfer values, is a relevant consideration. There is some probability that the complainant's loss may have occurred even without the misstatement, but there is, in my view, and as I have argued earlier, a greater probability that the harm (the loss) would not have occurred without (but for) the misstatement. On this basis I regard the factual causation as established. The hypothetical occurrence of the contingency of the complainants leaving the fund in any event is then properly regarded as a factor to be taken into account in reducing the complainants' damages, as I have already done.

This reduction of damages also serves the purpose envisaged by the legal policy considerations involved in limiting liability in cases of pure economic loss, referred to in the *Trust Bank* case (supra). Policy limits are drawn to liability where some of the harm or loss is said to be too remote, or not sufficiently or closely linked to the wrongful act. It is said that factual causation on its own is not sufficient; legal

causation must also be determined. Certain tests have been recognised as assisting in this process.

The direct consequences test holds a wrongdoer liable for all the "direct consequences" of his negligent conduct. A similar test, the adequate cause test, is defined by Visser and Potgieter as follows (at page 240):

> **"...a consequence which has in fact been caused by the wrongdoer, is imputed to him if the consequence is "adequately" connected to the conduct. The connection is termed "adequate" if, according to human experience, in the normal course of events the act has the tendency to bring about that type of consequence."**

The foreseeability test holds a defendant liable only for the direct consequences of his conduct that are of such a kind as a reasonable person should have foreseen.

Our courts have in recent years approved a composite test, which allows a court to weigh numerous factors, including the traditional tests, in the balance to determine whether there was legal causation, that is, a sufficiently close connection between the defendant's conduct and the harm (see *International Shipping Co Ltd v Bentley* 1990 (1) SA 680 (A)).

In my view, on the facts of the present case, the loss (reduced as outlined above) suffered by the complainants is adequately connected to the conduct (the misstatement) of the wrongdoer, in that, in the normal course of events, if someone contemplating resigning from their employment were to learn that they could exit the pension fund with full reserve value, this would tend to clinch any decision they had been trying to make about whether or not to resign. Their resignation (and resultant loss in the circumstances of the misstatement having been made) would therefore be a direct consequence of the wrongdoer's conduct.

While such a specific consequence may not have been reasonably foreseeable, I

would agree with Burchell (at page 121-122) that the proper home for the foreseeability enquiry is the negligence test, and that if, as in this case, the criterion of relative negligence is satisfied (if the general nature of the harm and the general manner of the harm occurring were reasonably foreseeable), then the other factors (direct consequences, adequate cause and any other relevant factor), can be used to determine legal causation or remoteness of damage.

I am satisfied that both factual and legal causation are established with regard to the loss suffered by the complainants that I have quantified above.

All the elements of the delict of negligent misstatement having been established, I accordingly find that the second respondent is liable therefor, the delict being an instance of maladministration. The payment of damages in compensation is awardable to the complainants.

Relief

The order of this tribunal is as follows:

The second respondent is directed to make payment of the following amounts within six weeks of the date of this determination:

To the first complainant R95 898

To the second complainant R38 102

DATED AT CAPE TOWN ON 28th JULY 1999

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR