IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/23/98

In the complaint between:

Hilton Hotel Employees — Complainant

and

The Trustees of the Liquor & Catering
Trade (Pietermaritzburg) Provident Fund — First Respondent
Fedsure Life Assurance Limited — Second Respondent

RULING IN TERMS OF SECTION 30D OF THE PENSION FUNDS ACT OF 1956

Introduction

The complainants seek an order requiring the respondents to furnish them with certain information.

The complainants are 40 members of the first respondent. They are all employed at the Hilton Hotel in Pietermaritzburg and were paid up members of the first respondent who ceased contributing to it in December 1995 when they joined the Hospitality Industry Pension Provident Fund with effect 1 January 1996. The complainants wish to transfer their reasonable and equitable share in the first respondent to their new pension fund.

The first respondent is a pension fund originally established in terms of an Industrial Council agreement, published under Government Notice R1519 dated 2 October 1964. In terms of the Industrial Council agreement it was compulsory that each employee in the service of an employer engaged in a business which fell within the jurisdiction of the Council be joined as a member of the fund. The Industrial Council was wound up and its registration was cancelled on 3 November 1995. On the winding up of the Industrial Council, the rules of the fund were amended and provision was made for trustees to

manage the fund in the same manner as the Industrial Council. The fund is a defined contribution fund.

The second respondent is the assurer and co-administrator of the fund. Since the complaint relates to the administration of the fund, the relief sought by the complainants is against both parties.

The complainants were represented by Ms N. Howard of Cheadle Thompson & Haysom, Johannesburg. The respondents were represented by Mr J. Bortz of Werksmans, Johannesburg.

A hearing was held at the Hilton Hotel in Pietermaritzburg on 30 April 1998 and at the respondents' attorneys offices in Johannesburg on 2 May 1998.

Having considered the written and oral submissions of the parties, I have determined the complaint as follows.

Survey of the evidence and issues

The complaint as lodged challenges three aspects of the respondents' conduct. Firstly, the complainants allege that the respondents' decision to withhold information from the complainants concerning their rights and benefits is an improper exercise of their powers, amounts to maladministration and concerns a dispute of law between the two parties. Secondly they challenge the respondent's failure to allocate a share of certain reserves for their benefit. Thirdly, they allege that the respondents have failed to keep proper records.

By agreement between the parties, this ruling shall deal only with the refusal of the respondents to disclose certain information. The complainants may reapproach this tribunal for further relief at a later stage in relation to the other complaints.

The first respondent has a total of approximately 1708 members. 172 of these members are active and the balance are dormant members. The complainants use these terms to

distinguish between members who are currently contributing to the fund and persons who are reflected in the fund's records as members of the fund but who are not currently contributing to it.

The complainants contend that the dormant members include the following categories of persons:

- persons who are paid up in the fund who have left the fund and who have elected to keep their assets in the fund until retirement and in respect of whom the fund has proper details including an address to which annual benefits statements are sent.

- persons in respect of whom the fund has certain details, including an identity number, but no details of their whereabouts and consequently to whom benefit statements are not sent.

- persons in respect of whom the fund has no proper records, including no identity number, and in respect of whom the fund is unable to determine, inter alia, the age of the member.

- persons in respect of whom the fund has no proper records, and in respect of whom the fund holds one or more other accounts with different account numbers.

90% of the fund's membership fall into one of the above 4 categories, meaning that only 10% of the fund's membership is active and contributing to the fund.

The history of the problem of dormancy in the hospitality industry, and the reasons for it, are spelt out in *Tatiya v The Liquor and Catering Trade (Cape) Pension Scheme and others* (PFA/WE/17/98), a matter involving similar issues in which the second respondent was a party, and where the parties were represented by the same legal representatives. However, the complainants and the respondent pension fund in the present matter are different.

The complainants want the following information:

i) the fund's liability in respect of the active members of the fund;

ii) the names and personal details of the dormant members of the fund who are recorded as last having worked at the Hilton Hotel and the values of these members' share of the fund;

iii) the names and personal details, including the last recorded employer, of all the dormant members of the fund and the fund's liabilities in respect of those members;

iv) a list of the members to whom annual benefit statements are sent;

v) the steps the fund has taken in order to communicate with dormant members;

vi) the steps the fund has taken to establish whether, in certain cases, there are two separate fund numbers and accounts in respect of the same person and whether there are any cases in which the fund has merged the accounts of such members;

vii) a calculation of the number of expected deaths over the next 7 years and the number of actual deaths of members over the last 7 years;

viii) the number of dormant members who have claimed benefits in the last 7 years;

ix) the number of dormant members who have reached the age of 60 during last 7 years, and of those members, the number who have claimed their benefits from the fund;

x) the number of dormant members over the age of 60 years.

The information is required, in the view of the complainants, to allow for a proper assessment of the fund's liability to dormant members. Only then will the fund be in a position to accurately calculate the surplus of assets over the liabilities. Without a determination of the surplus in the fund, the complainants allege that they are unable to assess whether the respondents have accorded full recognition of their rights and reasonable benefit expectations in the calculation of their share of the fund on transfer.

In order to understand the complainant's request for information, regard should be had to rule 17 of the fund's rules. The rule reads as follows:

REVERSION OF BENEFITS UNCLAIMED

Payment of any benefit due under the Fund shall only be made on application to Fedlife. Monies remaining unclaimed for 5 years as from the date on which payment of such monies became due, shall revert to the Fund 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 in respect thereof shall rest against the Fund, provided that the Trustees shall always have the discretion to direct Fedlife to pay such unclaimed monies to any person entitled thereto under the Rules, should such a person claim the benefit after the expiry of the said five-year period. Provided further that unclaimed Death Benefits shall be dealt with in terms of Rule 4.

Rule 4 deals with death benefits and is not strictly speaking relevant to the present complaint. With rule 17 in mind, the complainants' representatives have persistently argued, throughout a lengthy correspondence, that the information sought is imperative for a proper assessment of the fund's liability in respect of dormant members and in order to calculate the liability in respect of all the members.

The complainants contend that they are entitled to a fair share of the mortality reserve and a fair share of the reserve held for dormant members which reverts to the fund in terms of rule 17 and which must be applied for the benefit of the remaining members in such a manner as the actuary deems expedient. However,

they recognize that they shall not be able to determine their fair share until such time as they have adequate and appropriate information.

Initially, the second respondent took the view that the complainants were not entitled to a share of the surplus in the fund. The rules of the fund define the members' share of the fund as an accumulation of nett contributions plus declared bonuses and do not provide for an automatic entitlement to the accrued surplus. Nevertheless, in correspondence the second respondent recognized that the surplus can be distributed at the trustees' discretion.

In a letter to the manager of the Hilton Hotel, dated 23 August 1996, Mr Gary Velcich, an actuary in the employ of the second respondent, observed that the rules of the fund do not deal with the situation where an employer wishes to transfer members from the fund and that the appropriate route to follow would be the voluntary election of transferring members to withdraw from fund. Yet he acknowledges that the benefit can be increased at the trustee's discretion. In this regard he states:

> **In following this rule, however, the benefit determined is not paid to the member but rather forms the member's transfer value to the transferee fund. Note also that the benefit granted (the member's share of the fund) is greater that the normal withdrawal benefit (refund of member's contributions plus compound interest); this concession was granted in order not to prejudice members as a result of the transfer.**

In a letter dated 19 September 1996, the complainants contended that because the fund is a provident fund, there is no rational or equitable basis to refuse members a share of the accrued surplus.

In a letter dated 10 October 1996, the second respondent eventually agreed to allocate the transferring members a fair share of the surplus. The relevant portion of the letter reads:

> **We do not agree that the transferring members should automatically be entitled to receive a**

share of the accrued surpluses. The intention of the fund has always been to distribute these surpluses to retiring members, thereby rewarding those members with longer service in the fund. This, we felt, was particularly necessary as the rate of contribution has historically been very low (until recently 5% of wages). However, in order to expedite the transfer we will allocate the transferees their fair share of the surpluses, and will arrange for a recalculation of their shares of the fund to reflect this.

Despite this concession and agreement, the second respondent refused to furnish information concerning the fund's liability in respect of the dormant members.

In a telefax dated 12 November 1996, the second respondent finally confirmed that the trustees had exercised their discretion in terms of rule 19 and had agreed that the members could transfer to the HIPPF and that a portion of the surplus in the fund would be distributed to them. The reason the respondents had to rely on rule 19 was because the rules of the fund make no express provision for the transfer of members to another fund. Rule 19 provides that in the event of a contingency arising out of the fund which had not been provided for in the rules, action to be taken shall be determined jointly by the trustees and the second respondent.

In this letter the respondents proposed a revised basis on which the complainants equitable share of the fund would be calculated. In summary this was as follows:

- **The value of the fund at 1 January 1996 was R2 125 901,00 and the members (active and dormant) accrued benefits were R1 283 555,00. The surplus was therefore R842 346,00.**

- **The fund calculated the reserve cost for the insured benefits over the next 10 years to be R346 279,00 which was deducted from the total surplus in the fund. There is no explanation as to why these costs could not be covered by future contributions.**

- **The balance of R496 067,00 was then to be distributed amongst all existing members of the fund (active and dormant).**

The complainants have persisted with their view that because there are an exceptionally high number of dormant members of the fund a proper calculation needs to be done of the true liability in respect of the dormant members and the extent to which benefits have reverted under rule17. Without adequate and appropriate information, they argue, it is impossible to determine whether a greater share of the reserve held on behalf of the dormant members should be allocated to the active members.

Subsequent correspondence between the attorneys and the second respondent resulted in the second respondent calculating the amount of potential unclaimed benefits available as being an amount of R50 912,00. The complainants in response sought an actuarial opinion from Prof Anthony Asher. In his view, the calculation of the amount of the potential unclaimed benefits available for distribution at R50 912,00 was conservative. On the basis of the limited information available to him, Prof Asher calculated that the active members account for approximately R750 000,00 of the liabilities of the fund. He estimates the liability in respect of the dormant members to be approximately R533 000,00.

Subsequent negotiations between the parties, their actuaries and the then chief actuary, Mr Milburn-Pyle, resulted in the second respondent reviewing the basis of its calculations of the transfer values and making a without prejudice offer to the complainants. Nevertheless, the second respondent persisted with its attitude that it was not prepared to furnish the information requested because the information was confidential and could not be divulged to a competing fund.

While the complainants welcomed the increase in the transfer values, they are still not in a position to assess whether the proposed share in fact correctly reflects their fair share of the surplus.

It is this deadlock which forms the basis of the complaint.

The arguments

It is not my intention to deal with each and every argument raised by the parties' legal representatives in this matter. In the interests of expedition, and with due regard to the lack of resources available to my office, I prefer to deal briefly with the key arguments. In the event of the parties approaching the High Court in terms of section 30P of the Act, I shall supplement my reasons further.

Despite the second respondents' submission that it has not assumed any direct contractual obligations towards the individual members of the fund and that it has no obligation to provide members of the fund directly with the information requested, I am satisfied that the rules of the fund confer upon the second respondent various powers, discretions and duties. These place it in a fiduciary position towards the members of the fund requiring it to act with due care and in good faith.

Before the complainants are entitled to information beyond that allowed in terms of section 35 of the Pension Funds Act, they have to show that it is reasonably required to exercise or protect their rights. (See the *Tatiya* matter).

The rights at issue are either the right to share in the surplus or the right to have the trustees exercise a proper discretion regarding the distribution of the surplus.

The transfer of the complainants in this matter will constitute a scheme involving the transfer "of any business from a registered fund to any other person" as contemplated in section 14 of the Pension Funds Act. From the correspondence submitted as evidence, it is clear that the respondents accept that section 14 certificates will be required in order to effect the transfer of the complainants' share of the fund to the HIPPF. In terms of section 14(1)(c) the Registrar will have to satisfied that the scheme is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the transferring members.

Hence, the trustees have a duty to satisfy the Registrar accordingly, while the complainants have a right to be transferred on a reasonable and equitable basis and to full recognition of their rights and reasonable benefit expectations. In *Lorentz v Tek Corporation Provident Fund and Others* 1998 (1) SA 192 (W), Navsa J accepted counsel's argument that on its ordinary meaning, the expression "reasonable benefit expectation" must relate to expectations of benefits above and beyond the defined benefits or rights of the members in terms of the rules. Accordingly, there is a positive obligation on trustees to take the surplus into account in determining what amount should be transferred from one pension fund to another. And, the complainants have a right to have the surplus dealt with reasonably and equitably.

Even if one were to accept that the complainants do not have a statutory right to share in the surplus, they acquired a contractual right to do so by virtue of the second respondent's letter of 10 October 1996, as reinforced by the letter of 12 November 1996, in which the trustees made it evident that they had exercised their discretion in terms of rule 19 and had agreed that a portion of surplus in the fund would be distributed to the transferring members.

These rights, together with the statutory rights in Chapter VA of the Act obliging the respondents to exercise their powers in terms of the rules properly, and not to maladminister the fund, form the antecedent rights to the complainants' rights to information.

In the *Tatiya* matter mentioned above, I held that boards of management of pension funds, in terms of their duty to act in good faith, can 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 an appropriate justification, will constitute an improper exercise of a 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.

The complainants submit that they reasonably require the information sought in the complaint because without it they will not be in a position to assess the final decision of the respondents regarding the calculation of their fair share of the surplus. They do not rely on a right to transfer, or on a right to a particular amount as their share of the fund on transfer. Rather they rely on their right to ensure that the respondents, having made a decision to grant the members their fair share of the surplus, act in accordance with their fiduciary duties when calculating it.

The respondents' objection to disclosing the information is twofold. Firstly, it is argued that the complainants, before they would be entitled to any information, need to show that the trustees acted improperly in some manner. Secondly, it is argued that the complainants have failed to make out a case that the information is reasonably required to exercise or protect the antecedent rights in issue.

I reject the first argument for the same reasons I rejected it in the *Tatiya* matter. In this respect, I relied on the *dictum* of Traverso J in *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 @ 618 where she recognized that in cases such as these the right which one seeks to protect is not the right to have the decision of the board reviewed with a view to eventually being awarded a specific amount of the surplus. It is rather the right to obtain such information as will enable the complainants to determine whether or not a proper discretion has been exercised. The board of management has an extensive discretion to distribute benefits to the complainants which will have an ongoing impact on their livelihood for the remainder of their lives. They need clarity about their entitlements Thus, there is no need for the complainants to demonstrate some manner in which the decision of the respondents regarding the surplus might be incorrect. Before they could do so, they need the information which they seek in this complaint.

The respondents have also contended that the complainants failed to ask the respondent to furnish reasons for their decision in regard to the allocation or application of unclaimed monies or to disclose the basis of it. They maintain that in none of the correspondence was the specific question asked as to how the

respondents had determined the basis on which surplus monies were to be allocated for the benefit of members of the funds or on what assumptions such determination had been made. Nor, they argue, was there anything in the correspondence which indicated how the information sought by the complainants would assist them in assessing whether the respondents, in making such determination, had exercised their discretion properly.

Again, this argument reveals confusion about the right which the complainants seek to enforce. It essentially suggests that there should be evidence of some improper exercise of discretion by the respondents. In any event, the complainants state their case quite clearly in a letter dated 20 June 1997 when they say:

> **At the meeting we advised you that our clients objected to the approach you intended adopting in calculating the benefit to be transferred as set out in your letter dated 28 February 1997. Firstly, our clients are unable to properly assess whether the basis of the calculation is fair because they are not in possession of the necessary information.**

They go on further in the letter to restate their concern as follows:

> **Without the above information our clients are not in a position to properly assess the calculation of their fair share of the surplus and whether their reasonable benefit expectations will be protected on transfer.**

Subsequent to further correspondence negotiating various adjustments, the complainants responded again on 19 September 1997, by stating the following:

> **Our clients welcomes the increase of the surplus factor to 46.1%. We are instructed nonetheless to point out that as you have not provided the information our clients have requested they are unable to assess whether this figure in fact correctly reflects their fair share of the surplus. You state in your letter that the information requested cannot be made available as it is confidential and cannot be given to a competing fund. However, our clients are members of the fund and are of the view that they are therefore entitled to such information.**

In a letter dated 25 September 1997, the second respondent replied as follows:

> **In any event our records indicate that your clients in this matter are not members of the fund, but in fact the Hospitality Industry Pension and Provident Fund ... we, therefore, stand by our comments that the information requested cannot be made available as it is confidential and cannot be given to a competing fund.**

In a letter dated 2 December 1997, the complainants replied to this comment in the following terms:

> **As we explained, our clients require this information in order to assess whether your proposal regarding the transfer value of their share of the fund, is reasonable and equitable and accords full recognition to their rights and reasonable benefit expectations.**

Accordingly, it is more than evident that the complainants have requested such information as would enable them to understand the basis of the allocation and application of the unclaimed benefits surplus.

Moreover, I am satisfied that the information is reasonably required to protect and exercise the complainants' rights. The information sought is aimed at acquiring a full profile of the membership of the scheme for the purposes of determining the amounts of unclaimed benefits. Only once such information has been provided will the complainants be in a position to decide whether the trustees in exercising their discretion in terms of rule 19 have allocated a fair share of the surplus to the complainants.

Ms Howard in her heads of argument makes out a compelling case in this regard. In terms of rule 17, monies remaining unclaimed for 5 years, as from the date on which payment of such monies became due, shall revert to the fund to be applied for the benefit of the remaining members in such manner as the actuary deems expedient. In order for the respondents to determine whether monies have remained unclaimed for 5 years from the date on which the payment became due, they must be in a position to determine the date on which the payment of the

monies was due. In terms of the rules, it is possible for a member's full share to become due at different times. The respondents and the complainants need to be in a position to establish whether a person has reached the age of 60, was retired between the age of 55 and 60, or retired between 60 and 70, having deferred the benefit, in order to know whether the monies have remained unclaimed for 5 years from the date on which the payment became due and therefore have reverted to the fund to be applied for the benefit of the members. In order to determine whether members have reached the ages referred to, it is necessary to have records of each member's date of birth or identity number, reflecting the date of birth.
Furthermore, in deciding what amount needs to be kept in reserve for the possibility that members may claim benefits outside the 5 year period, the respondent would need to have accurate records of all members. If it did not have accurate records, it would have to take steps to trace members to assess the prospects of members returning to claim benefits. In order to make such a decision the respondents would have to take into account a range of factors relating to its records of dormant members and the calculation of the liability in respect of those members. Such a decision would require a proper calculation of the true liability of the fund in respect of the dormant members.

Thus, the complainants see it as essential to have the information requested in order to properly calculate the likelihood of the members referred to in the various categories claiming their benefits from the fund at some stage.

In summary, the information requested would enable the complainants to assess whether the respondents were in a position to properly assess the prospect of dormant members returning to claim benefits and to assess whether the assumptions and basis of the calculation of the liability of the fund are legitimate. Additionally, the complainants need to assess whether the respondents have properly calculated the true liability of the fund in respect of the dormant members.

In its response, the respondent raised questions of practicability and prejudice related to the cost of obtaining the information, as well as an argument to the effect

that the respondents' decisions are final and binding in terms of the rules. In its written submissions, the respondents abandon the point related to the final and binding nature of their decisions, and have asked me to hold over the question of the cost of obtaining the information until the second complaint is dealt with. Concerning the practical problems associated with the delivery of the information, much the same issues were raised in the *Tatiya* matter and I discount them for the same reasons set out in that determination.

Relief

For the aforegoing reasons, I am satisfied that the complainants are entitled to the disclosure of the information sought in their complaint.

An order directing the respondents to furnish information is of an interlocutory nature. Accordingly, the proceedings in relation to the other complaints of the complainant are suspended temporarily and the complainants will be afforded an opportunity to seek the additional relief on the papers before me as supplemented by them, and responded to by the respondents, once they have obtained the information in terms of this determination.

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 42.1 of the complainants' complaint within 30 days of the date of this determination.

2. The respondents' attorneys are directed to file with this tribunal immediately upon expiry of the 30 day 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.

3. 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 24TH DAY OF FEBRUARY 1999.

.....
John Murphy
PENSION FUNDS ADJUDICATOR