IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/244/98/JM

In the complaint between:

JAMES GUY PATERSON **Complainant**

and

RTZ (SOUTH AFRICA) PENSION FUND **First Respondent**

RIO TINTO MANAGEMENT SERVICES (PTY) LTD **Second 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.

The complainant seeks an order

(1) declaring the decision of the committee of management of the first respondent not to terminate the fund to be contrary to the fund's rules and in breach of certain of it statutory or common law obligations;

(2) declaring that the second respondent has ceased to carry on business as contemplated in terms of rule 44(a); and

(3) directing that the fund be terminated and its assets be realised and apportioned accordingly.

The complainant is a member of the first respondent and is also the elected pensioners' representative on the first respondent's committee of management ("the committee").

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

The second respondent ("the company") is a company duly incorporated with limited liability according to the company laws of the Republic of South Africa, and is the principal participating employer in the fund.

The complainant lodged a complaint with my office on 7 October 1998. The respondent has responded to the complaint and the parties have submitted various written submissions supported by extensive documentation. A hearing was held at my offices on 24 June 1999. The complainant was represented by Adv. R Goodman, instructed by Findlay & Tait Inc, attorneys of Cape Town. The respondents were represented by Adv. P Pauw, instructed by Brink, Cohen, Le Roux & Roodt Inc, attorneys of Johannesburg.
Neither party adduced oral evidence under oath and in determining this matter, therefore, I have relied exclusively on documentary evidence and arguments put to me in writing and orally.

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

The complaint

The complaint relates to the interpretation and the application of the fund's rules and alleges that the committee has not exercised it's powers properly, that it is guilty of maladministration resulting in

prejudice to the complainant and alleges that there is a dispute of fact in relation to the fund. Additionally, it is alleged that the employer ("the company") has not fulfilled its duties in terms of the rules of the fund.

In particular it is alleged by the complainant that:

- the decision of the committee, purportedly taken in terms of the fund's rules, that the company did not cease to carry on business as envisaged in terms of rule 44(a) of the rules, and to not terminate the fund in terms of that rule was improper and beyond the powers of the committee;

- the complainant and other fund members may sustain prejudice as a consequence of the decision not to terminate the fund in terms of rule 44(a);

- a dispute of fact has arisen in relation to the fund between the complainant on the one hand and the company and its representatives on the committee on the other, in particular with regard to the question whether the company ceased to carry on business in terms of rule 44(a); and

- the company and its representative on the committee have not fulfilled their duties in terms of the rules of the fund by failing to terminate the fund in circumstances where such termination was appropriate and indeed required in terms of rule 44(a) and to act in accordance with that rule.

On this basis, it is common cause between the parties that the complaint falls within the definition of a complaint in section 1 of the Pension Funds Act and that I have jurisdiction to determine it.

Rule 44

As already stated, the complaint relates to the interpretation and application of rule 44 of the fund's rules. The rule deals with the termination or dissolution of the fund and the relevant part reads as follows:

(1) If the company ceases to carry on business or is wound up (whether voluntarily or not), the fund shall, subject to the provisions of the act, terminate as from the date on which the company decides to cease business or to liquidate or from the date of the provisional winding up order of court, whichever is applicable and the committee shall appoint a person recommended by the Fund's Auditors, not being a member of the committee, or any other suitable person to act as liquidator of the fund. The liquidator shall realise the assets of the fund, and subject to the provisions of rules 43 and 50, apportion the proceeds amongst the members, pensioners and beneficiaries on an equitable basis recommended by the actuary and approved by the committee and the company and use the amount available for each member to purchase an annuity for each such member from a life insurance company where an annuity of at least R1800 can be purchased from retirement age, and to pay out to each such member his portion of this is not sufficient to purchase an annuity of R1800; provided that all employees who left the service of the employer during the immediately preceding twelve months either voluntarily or due to a reduction in or reorganisation of staff shall, for the purpose of this rule, be regarded as if they were members on the date of termination of the fund, but the benefits already paid out to them shall be taken into consideration in determining the proportions payable to them. Provided further that, if the business of the company is wound up for the purpose of reconstruction in a similar or amended form, the reconstructed business shall have the right of taking the place of the company and, if it exercises such right, the fund shall not be affected except that "company" shall then mean the company as reconstructed.

(2) If the whole of the business of the company is transferred to or amalgamated with

any other business, company or organisation, the company may elect to:

(1) withdraw wholly from the fund and terminate its contributions to the fund as from the date of such transfer or amalgamation, in which event the fund shall be determined in accordance with rule 44(a); or

(2) cede its rights and delegate its obligations under these rules to the other business, company or organisation, in which event the fund shall not be affected except that "company" in these rules shall then mean such business, company or organisation.

The evidence and arguments

The complainant contends that the company has ceased to carry on business, with the consequence that the committee is obliged to appoint a person recommended by the fund's auditors to act as a liquidator of the fund. In terms of the rule, a liquidator would be obliged to realise the assets of the fund and to apportion the proceeds amongst the members, pensioners and beneficiaries on an equitable basis recommended by the actuary and approved by the committee and the company and to use the amount available for each member to purchase an annuity from a life assurance company.

Given that the fund is substantially over funded, such an order would have a significantly beneficial effect for the members in that it would result in an equitable distribution of the surplus on a share of the fund basis. According to the valuation report of 28 February 1997 the actuarial value of the assets stood at approximately R72 million and the accrued service liabilities at R44 million, reflecting a 163% funding level and leaving an actuarial surplus of R28 million. The market value of the assets was R89 million, giving a market value surplus of R45 million. The actuarial value of the complainant's benefit of the fund stands at approximately

R853,000.00. Should the fund be dissolved in accordance with rule 44(a), he will gain a further amount of approximately R870,000.00.

It is common cause between the parties that the company has not been wound up nor is it about to be so. The issue for determination is whether the company has ceased to carry on business within the meaning of that expression in rule 44(a). The company is a wholly owned subsidiary of another company in the Rio Tinto group of companies, namely, Rio Tinto Holdings Limited. Its function has always been to render management services to Palabora Mining Company ("PMC"). The memorandum of incorporation of the company, and particularly its objects clause, contains wide powers which are not limited to the rendering of management services. Rio Tinto Holdings Limited also has an approximately 45% effective interest in PMC.

The management services rendered by the company to PMC included acting as administrative and technical advisors as well as company secretary. Four of the directors of PMC are also directors of the company. The services rendered included financial accounting, management reporting, preparation of annual business plans, long range corporate planning, preparation of tax returns, treasury and cash management, payment of dividends, preparation of board meeting minutes, pension fund administration on behalf of the fund and the Palabora Mining Pension Fund, medical aid administration, corporate legal matters, sales marketing and shipping, government and public affairs, co-ordination of the Palabora Foundation and various other personnel activities.

In return for performing these functions, the company received administration fees, a marketing fee and a project management fee.

During or about October 1996, it was in principle decided to terminate the

management services arrangement, and effectively cease the provision of management assistance. All company employees (with the exception of staff seconded to exploration and the laboratory) were offered the opportunity of relocating to Phalaborwa and to become employees of PMC. No compulsory retrenchments were envisaged. However, those who did not want to relocate to Phalaborwa were given the opportunity of being retrenched and receiving retrenchment benefits. Approximately 40 employees elected to accept the retrenchment benefits.

On 8 November 1996 the company produced and circulated an announcement to all employees. The document spells out the intention of the company to transfer activities supporting PMC. The rationale for the restructuring is explained in the opening paragraphs of the announcement which read as follows:

> **The restructuring of RTZ-CRA earlier this year resulted in the reorganisation of many group companies and a stronger focus on core activities throughout the group. For some time now Rio Tinto South Africa has recognised the need to reposition the company by concentrating on core business and this has resulted in our disposing of a number of non-core businesses such as Mafikeng Diamonds, Mandoval SA and Rio-Carb. At the beginning of this year the exploration activities of Rio Tinto Exploration were also reorganised to place them under the control of RTZM&E and the future of the Rio Tinto Laboratory is currently under review.**
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> **The successful transition from an open pit to an underground mine will be enhanced by close interaction between the current mining operations, the underground mining project and RTMS technical, financial, commercial and human resource activities after lengthy and comprehensive evaluation, it has been established that this can best be achieved by transferring activities supporting Palabora , presently being carried out at the Rio Tinto offices in Johannesburg, other than exploration and the laboratory, to Phalaborwa where a combined Palabora/Rio Tinto management structure will be established with an employees based in Phalaborwa.**

At the same time letters were addressed to all the employees of the company. The

employees received three documents in addition to the general announcement dated 8 November 1996. These contained an offer of employment with PMC and advised of various conditions that would be applied. In the first letter the following observations are relevant:

- **As a result of the decision to rationalise company activities we have pleasure in enclosing an offer of employment with Palabora Mining Company.....**
- **The transfer of operations to Phalaborwa will commence on 1 March 1997 and will be completed by the end of May 1997.**
- **Employees not transferring to Phalaborwa will be encouraged to remain in the service of the company until the activities of their departments are being conducted from Phalaborwa.**

The offer of employment commences as follows:

> **Following the decision to close the offices of Rio Tinto Management Services (Pty) Ltd ("the company") in Johannesburg we are pleased to offer you a position with Palabora Mining Company.**

The document dealing with the alternative retrenchment and the benefits applicable commences as follows:

> **Following the announcement that Rio Tinto South Africa will be closing you have been offered the opportunity of accepting a position with Palabora Mining Company in Phalaborwa or accepting a retrenchment package.**

On 22 November 1996 Mr G Strauss, an elected representative of the fund members on the committee, addressed a letter to the company requesting an explanation why the company was not prepared to pay part of the actuarial surplus to those members who were being retrenched.

On 29 November 1996 a number of identical letters were addressed by the members of the fund to the fund. In the letter the members refer to the company's "decision to cease business" and the offer of some form of employment with PMC. The writer goes on to request advice on, inter alia, "what the intention of the trustees are (sic) in regards to the existence of this fund once RTMS (the company) ceases to continued (sic) business or to exist".

The letter concludes with the following submission.

> **I also feel that the fund exists due to the members contributing and being employees of RTMS, for the benefit of the employees. Now that RTMS will be ceasing business and closing their Sandton offices, the link to the resulting fund no longer will exist between RTMS and the fund. Therefore the fund should remain for the employees benefit in the form of a dissolution transfer so that the proper and sufficient annuity type funds can be now individually secured for retrenched employees and existing/remaining members.**

On 2 December 1996 a meeting of the committee was held. At this meeting, the queries raised by Mr Strauss in his letter to the fund were discussed and views were expressed by various members of the committee. The following extracts from the minutes are revealing.

> **Mr Rix reported that membership of the fund was approximately 250 people, of which 40 to 50 would most probably not accept transfer to Phalaborwa. This would leave 170 people remaining in the fund. Consequently it was not the intention to close down the fund. In all previous cases involving retrenchment (such as the transfer from Unicorn House to Rio Tinto House and the divestment of Mandoval, Mafikeng Diamonds and Rio-Carb), the benefits had been restricted to those provided in rule 38.**
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> **In reply to a query from Mr Paterson, Mr Rix confirmed that new members would be admitted to the fund in the future, for example when the Palabora Foundation employed new staff members.**

Continuing, Mr Paterson mentioned that members who were employees of RTMS had longer pensionable service and had contributed larger monetary amounts to the fund than employees of the Palabora Foundation who had comparatively shorter service with only approximately five years' membership of the fund RTMS employees had therefore contributed more to the surplus of the fund than Foundation employees.

Mr Letten also confirmed that, apart from the Palabora Foundation, new staff members recruited by any company in the Rio Tinto South Africa group or in the RTZ-CRA group, including Rio Tinto Exploration and Rio Tinto Mining and Exploration, could be nominated to become members of the RTZ (South Africa) Pension Fund.

Later in the meeting the members of the committee turned their attention to the application of rule 44. The discussion merits reporting in full. The extract from the minutes reads as follows:

Mr Paterson stated that his concern revolved around rule 44 and referred to Mr Letten's earlier statement that "essentially what was happening was that the activities of RTMS were being transferred to PMC and everyone on the staff of RTMS had been offered employment by PMC in Phalaborwa. This situation was specifically covered by rule 44(b)(ii) of the fund". Mr Paterson continues by stating that Rule 44(b)(ii) implied that PMC, by taking over RTMS's rights and obligations, would become the "company" in terms of the definitions as laid down in rule 3. In reply Mr Letten stated that there were two options namely for RTMS to nominate PMC as an employer or, alternatively, for RTMS to move to rule 44(b)(ii). Legal opinion needed to be sought on this issue. No decision had as yet been taken as to what option should be adopted.

Mr Paterson stated that rule 44(b)(ii) stated specifically that when a business, company or organisation took over the rights and obligations of the "company" then such business, company or organisation became the "company" in terms of the rules. This implied that PMC would become the "company" as it was taking over the rights and obligations of RTMS which was becoming dormant.

Mr Letten stated that this was not obligatory as Rule 44 (b) was optional as it referred to "the

company may elect to".

Mr Paterson stated that if his interpretation of rule 44(b)(ii) was correct, PMC would become the company and in so doing would take over the surplus in the fund and would be enriching itself at the expense of RTMS.

Continuing, Mr Paterson referred to rule 44(a) and stated that in reality RTMS as the "company" was ceasing to carry on business in the manner it was so doing. This was somewhat different to what had taken place earlier with the divestment of Rio-Carb, Mandoval and Mafikeng Diamonds as these companies were employers in terms of the rules and were not the "company" and, as employers, they had no right to any of the surplus in terms of the rules.

Mr Paterson stated that he read further into the rules that if there was a dissolution of the fund, the rules recognised that the members and pensioners have an equitable share of the proceeds with the company. If that was the case, Mr Paterson stated that he would then accept that, in terms of the rules, the intention at the time was that, when there was a surplus in the fund, the surplus was generated to some extent by the members' contributions. Rule 44(a) suggested that there would be a surplus and that this would be split on an equitable basis. If rule 44(a) was not invoked it would imply that rule 44(b) would apply which meant that PMC would become the company and Mr Paterson felt that it was not correct for PMC to enrich itself at the expense of RTMS which had generated the surplus in the fund.

Mr Ntuli stated that one thing that should be accepted was the fact that moneys in the fund belonged to the fund itself and one of the parties to the fund, RTMS, as the "company", was not being dissolved and remained in existence. Any concern as to RTMS fulfilling its obligations in terms of the rules of the fund was unfounded as RTMS would fulfill its obligations.

Mr Letten stated that there was nothing to prevent an element of business being put through RTMS to keep it active. This would mean that rule 44 (a) would not then apply.

Mr Paterson stated that PMC and RTMS were separate legal entities and if RTMS carried on as a separate legal entity then Rule 44(a) would not apply. However, based on information with which he had been supplied this was not the case.

> **Mr Ntuli stated that there was no intention of dissolving the RTZ (South Africa) Pension fund. If that meant that RTMS had to be active, then steps would be taken to keep RTMS active.**
>
> **Mr Letten stated that a very legalistic view has been adopted. He mentioned that subsequent to the adjourned meeting he had received a letter from Mr Paterson requesting authority to obtain legal advice on the issue. This was a reasonable request but perhaps a cap could be placed on costs to avoid the situation similar to what had occurred at Rossing when the court found in favour of Rossing with costs. It was agreed that Mr Paterson could obtain legal advice with costs limited to R20 000 in the first instance. It was further agreed that Mr Strauss could obtain advice from an independent actuary with costs limited ro R20 000.**

A few days later, on 5 December 1996, the principal officer of the fund responded to the employees who had submitted written queries on 29 November 1996. In this letter the employees were informed that they held no right to the surplus of the fund and that it would not be appropriate for the fund to be dissolved at that stage. The following two paragraphs aptly summarise the fund's position:

> **Rio Tinto Management Services (RTMS) will probably request that Palabora Mining Company is admitted to participation as an employer in the fund as provided for in the rules. It is not the intention to de-register RTMS because the company may be needed in the event that RTZ-CRA elects to pursue new business opportunities in South Africa. Although Rule 44(b)(ii) provides for the company to cede its rights and delegate its obligations to any other organisation to which the business of the company is transferred, this step appears unnecessary at this stage as Palabora will most likely be an employer in terms of the rules.**
>
> **Your request for a dissolution of the fund or an enhancement of the benefits payable in respect of retrenched employees is noted. However this issue has been the subject of previous litigation as in the case *Sauls v Ford South Africa Pension Fund and Others* , Case no. 1878/87 SECLD, where it was ruled that members and beneficiaries have no legal right to the surplus of a fund, which is established and underwritten by the employer, and which confers defined benefits upon its beneficiaries.**

At this point, it is worth noting that the company is not the only participating

employer in the fund. In addition, the Palabora Foundation is also an employer. The Foundation operates from premises in Krugersdorp and in Phalaborwa where it provides vocational and ecological courses. It is a non-profit organisation and a separate legal entity managed by a board of trustees and funded by PMC. As at the end of September 1996 the Foundation had 159 staff. 106 junior staff were employed on Palabora Foundation contracts while the balance of 53 staff were formally employed by the company, but seconded to the Foundation for the sake of convenience and confidentiality. Both groups were required as part of their conditions of employment to be members of the fund. Following the 8 November 1996 reorganisation the 53 seconded staff were transferred to regular Foundation employment contracts and remained members of the fund.

At a meeting of the committee on 22 August 1997, some months after the reorganisation, the committee admitted PMC as a participating employer in the fund. Despite the fact that the complainant and Mr Strauss were present at the meeting, there appears to have been no objection to PMC becoming a participating employer. Some months later on 20 April 1998, all the participating employers were given the benefit of a contribution holiday (0% contribution rate) until the next statutory valuation as at 28 February 2000, when the situation would be reviewed. The complainant noted his opposition to this decision.
In July 1998 the Hans Berenski Club was also admitted as a participating employer. This club, at Phalaborwa, is a 100% subsidiary of PMC. It too enjoys the benefit of the contribution holiday.

The grant of a contribution holiday to PMC and the Hans Berenski Club, despite the fact that they have not made any direct contribution to the surplus, does not form the basis of any complaint before me. As stated, the new employers appear to have been admitted without objection, and of all the trustees only the complainant noted his opposition to the contribution holiday. No trustee or member has claimed that such decisions were improper or amounted to maladministration. And no

complaint has been lodged with the fund or my office in that regard.

In a letter dated 11 December 1996 addressed by PMC to the RTZ group the following was stated.

- **with effect from 1 January 1997 the company would no longer be paid a service/management fee by PMC and that such monies would henceforth be remitted straight to RTZ.**

- **the 45% share of the total technical service fee payable by the company to RTZ, representing the reimbursement of RTZ salaries for the managing director and chairman, would terminate and that these costs would be absorbed directly by RTZ in future;**

- **the administration fee, marketing fee and project management fee payable by PMC to the company would terminate outright; and**

- **fees previously charged by the company in respect of administration services to Palabora Foundation, Palabora Mining Pension Fund and the fund would henceforth be charged by PMC.**

On 25 February 1997 a petition was delivered to the company signed by the company staff stating that due to the fact that the company was ceasing operations, the fund should be dissolved according to the rules of the fund.

On 24 March 1997 the committee held a further meeting. At this meeting, there was further discussion on the interpretation and application of rule 44(a). No consensus was reached.

Around about the same time, PMC published its 1996 annual report. On page 34 of the report the following is stated.

> **During the course of 1997 the services of RTMS as administrative and technical advisors to the company will be terminated and the company itself will assume these responsibilities.**

In a letter dated 4 July 1997, Mr Letten, a director of the company, and the chairman of the committee, addressed a letter to Mr Peter Milburn-Pyle of the Financial Services Board under the company's letterhead requesting Mr Milburn-Pyle's view on the dispute. After setting out the history, Mr Letten noted that between the committee meeting on 24 March 1997 and the date of the letter there had been a change of tack. He comments:

> **In the meantime we have slightly amended our original plans to move all RTMS activities supporting Palabora to the mine. We have decided to leave the company secretary (Keith Lendrum), registered offices and pension fund administration in Rio Tinto House for two principal reasons:**
>
> - **The cost of out-sourcing the pension fund administration is high: the Alexander Forbes quotation is R514,000 compared with a previous quote received on 25 July 1995 of only R300,000.**
> - **Keith Lendrum indicated that he was unable for family reasons to relocate to Phalaborwa for the next couple of years and the company was very reluctant to lose the benefit of his 28 years experience in the group.**
>
> **RTMS will receive a management fee for company secretary and pension fund administration from Palabora and the two pension funds respectively as previously.**

At the meeting of the committee on 22 August 1997 the members discussed the draft legislation providing for the repatriation of excess assets to sponsoring employers. The employer representatives at the meeting suggested that the issue of the dissolution of the fund be held in abeyance until the draft legislation had been enacted and the company had come up with a proposal for discussion with the committee. Unfortunately, this legislation has been held in abeyance making it difficult for the parties to resolve the complaint on the basis of the principles and

policy contained in the legislation.

On 9 December 1997 the complainant addressed a letter to the company drawing its attention to the various indications that the company had ceased to carry on business. He requested additional information to enable him to properly consider the position of the members of the fund.

On 12 January 1998, the company responded to the letter and made the following observations:

- **The services of the company as administrative and technical advisors and secretaries to PMC were not terminated entirely.**

- **The company has been and is still carrying on a variety of functions for PMC and other companies in the Rio Tinto South Africa group. The scale of these had declined since March 1997 as a result of the transfer of certain responsibilities to PMC and certain other companies. However, the company remains as the registered secretary to PMC and administers the pension funds.**

Subsequent to this, the complainant lodged his complaint.

On the basis of these facts the complainant submits that by the end of 1996 the business of the company had ceased and it was no longer continuing its operations and, accordingly, the liquidation mechanism provided for in rule 44 should be implemented.

The respondents argued that there was no obligation on the part of the committee to dissolve the fund. The company is still doing business and the fund has members.

Analysis of the arguments

The complainant points to the choice of terminology in a number of documents issued by the various stakeholders in the period between November 1996 and May 1997 as a clear indication that the company had ceased carrying on business. Thus, Mr Goodman made much of the documents and some of the correspondence in which the employees were advised of *"the decision to close the offices"* of the company.

Much emphasis was also placed upon the discussion at the committee meeting of 2 December 1996. The statements of Mr Ntuli at the meeting point to an original intention for the company to cease business. But when the pension fund consequences in terms of rule 44(a) were realised, he openly stated that steps would be taken to keep the company active. Mr Goodman submitted that from this point onwards steps were taken by the company to avoid ceasing business and a sham was embarked upon only to avoid the consequences of rule 44(a). This, according to his argument, reflected a lack of appreciation on the part of the trustees that they were compelled to act in the interest of the members. Their duty in such circumstances, in his view, was to objectively determine whether the company had ceased business and if so to take steps to liquidate the fund and distribute its assets. In this instance, it was argued, the trustees, as evident from the statements of Mr Ntuli, simply sought to protect the employer's interests by putting up a sham.

Reliance was also placed on the 1996 annual report of PMC and the statement that the services of the company were to be terminated and that PMC would assume the company's responsibilities.

Furthermore, the company as an entity has no funds of its own, it has no assets and

does not operate with a profit incentive or motivation. It effectively has a single fully active employee on its payroll, being its secretary who was unable or unwilling to relocate to Phalaborwa to take up employment with PMC. Apart from the company secretary, the company staff consists of a mailman/chauffer, tea waiter and two ill-health retirees who do not perform any company related tasks and do not in any way contribute to the company's welfare. The company has no executive officer. The payroll emanates directly from PMC by way a book entry charged to the company together with all expenses and costs incurred by it and then reimbursed in full by PMC.

The complainant relies on these facts to indicate that the company decided to cease business with the resultant retrenchment of some of its employees. Thereafter, the decision-makers of the company (all but one of whom are directors of PMC) decided to keep the company alive, with most of its functions and services having been absorbed by PMC, merely for the purpose of avoiding rule 44(a).

There is much to support these contentions. However, it need not necessarily follow that the company has ceased to do business within the meaning of that expression in rule 44(a).

The respondents have consistently argued that there was no obligation on the part of the committee to dissolve the fund. As far as the respondents are concerned, the company is still doing business and the fund has members. The company concedes that there was an initial intention to cease business but that this intention changed, presumably when it became apparent that the company's interests would be negatively affected by the operation of rule 44(a). It argues that once a company has taken a decision it is not irrevocably bound to comply with that decision. A company can change its decisions as it likes provided that they are lawful. This, according to the respondents, is precisely what happened in this case.

Moreover, besides seeking to protect the company's interest in the surplus in the pension fund, there were other legitimate reasons for the company continuing to do business. When planning the restructuring of PMC and the company, and in the lead up to the announcement of 8 November 1996, consideration was given to the outsourcing of the fund's administration function performed by the company. A quotation was obtained from Alexander Forbes Consultants and Actuaries for outsourcing the pension fund administration in 1995. The cost at that time was approximately R300,000.00 to administer 3279 active members and 1651 pensioners in fund and the Palabora Mining Pension Fund. Between November 1996 and March 1997 further quotes were obtained from various consultants for the outsourcing. All three quotations received were, however, substantially higher than what had been anticipated. Shortly thereafter, on 5 March 1997, Mr Lendrum, the company secretary, who was in control of the fund administration at the company advised that he was unable for personal reasons to transfer to PMC.

At various meetings during the first half of 1997 consideration was given to the continued role of the company. Eventually, in its annual report of 1997, PMC advised its shareholders that contrary to the intention expressed in the 1996 annual report, the services of the company had been retained as advisors and secretary to the company and as administrators of the two pension funds. As stated, the decision was prompted by continuity considerations and by the quotations received being substantially higher than anticipated.

Mr Lendrum, the company secretary, is still employed by the company and provides secretarial services to PMC which include preparation for board meetings, attending board meetings, providing minutes of the meetings, attending to the statutory requirements in terms of the Companies Act and Stock Exchange Regulations. Together with the staff of three, he administers both the Palabora Mining Pension Fund and the fund. He also serves on the committees of the pension funds and represents both PMC and Rio Tinto at medical aid meetings. The salaries of Mr

Lendrum and his staff are borne by the company, as are sundry costs such as office rental, maintenance, telecommunications, information services, printing and stationery, insurance, airfares and accommodations and legal and audit fees. All such costs are periodically charged in the form of a service and administration fee to PMC on a straightforward cost reimbursement basis. In other words, the company does not make any profit. These facts, according to the respondents, support the contention that the company has not ceased to do business and is still carrying on a significant part of its business in its Sandton offices.

Determination

Rule 44 deals with the circumstances and method of the dissolution of the fund. It takes effect where the company ceases to do business or is wound up. It is common cause that the company has not been wound up. The question is whether it still does business.

Claassen *Dictionary of Legal Words and Phrases*, defines *business* to mean:

> **"Business" is a much wider concept than "trading", even if it is confined to transactions relating to proprietary rights.... "Business" is anything which occupies the time of a man for the purpose of profit... Generally, the word "business" is capable of a very wide meaning. It may be a charitable business.**

In *Salisbury City Council v Donner & Another*, 1958 (2) AS 368 (R), @ 369 H it was stated:

> **The word "business" is of a wide connotation - it signifies any activity which occupies a man's time and attention for the object of making profit....**

Stroud's Judicial Dictionary of Words and Phrases **(5th Ed) states:**

> **It is indeed clear law that there may be a business offending against a prohibitory covenant, a without pecuniary profit being at all contemplated. In such a connection, especially, "business" is very much larger word than "trade"; and the word "business" is employed in order to include occupations which would not specifically come within the meaning of the word "trade" - the larger word not being limited by association with a lesser.**

The term has a wide and general connotation and I see no reason to restrict its meaning.

The complainant has pointed to various decisions, announcements, correspondence and behaviour of the company and its directors in support of his contention that the company has ceased business. I do not propose to deal with each and every instance raised by the complainant. Suffice it to say that for the following reasons I am satisfied that the company has not ceased to carry on business.

The company is at present providing services to PMC and has never ceased doing so. It continues to render services to PMC for reward, even though not for profit. It renders a service which would otherwise have been outsourced. The services rendered are actual, administrative and secretarial services. It does not matter that they are rendered solely to PMC. In the past a larger range of services was rendered to PMC and other companies in the group exclusively. The rendering of services by the company to PMC is seen as more cost effective than outsourcing such of its services.

As discussed, the complainant has placed considerable reliance on what it alleges to have been misdirections by Messrs Letten and Ntuli at the meeting of the committee on 3 December 1996 where they stated that there was nothing to prevent an element of business being put through the company to keep it active. The

argument is that these two gentlemen failed properly to separate their duties as members of the committee from their responsibilities as directors of the company. Not only do their comments reveal the original and prevailing intention not to keep the company active, but also that the subsequent continuation of business was a device simply for the purpose of obviating rule 44(a). The appropriate course of conduct, according to the complainants, would have been for the committee to have objectively determined whether or not the company had ceased business and if it had done so then to have taken steps to dissolve the fund.

In pursuing its object to direct, control and oversee the operations of a fund, as required by section 7C of the Act, the committee has a duty to act with due care, diligence and good faith. Members of the fund are not the only beneficiaries of that duty and the fund has an equal duty to act in good faith towards the employer. In South Africa, by virtue of the provisions of section 7A of the Act, the model of fund governance requires every fund to have a board of at least 50% elected by the members. In practice, the additional members of the board are appointed by the participating employers. This co-determinative model is predicated upon the idea that the employer's interests in the fund should be recognised and catered for. It is a generally accepted principle of pensions law that a participating employer owes a duty of good faith to the members of a fund. Good faith surely involves an element of reciprocity. And, hence, by the same token, the employer is owed a duty of good faith by the members and by the board of management of a fund. What appears to have happened at the meeting of 2 December 1996 was that the employer-appointed members of the committee recognised the dangers of the company ceasing business. It seems to have dawned for the first time that if the company ceased business the employer would lose its beneficial interest in the surplus. As members of the committee they owed a duty of good faith to the company to inform it of the potentially harmful financial consequences of ceasing business. Messrs Ntuli and Letten did no more than that.

Furthermore, while the board can be expected to protect and even advance member interests to the point of aiming for the highest level of benefits, the overall duty of the board to "direct, control and oversee the operations of a fund" includes a duty to conserve and preserve the fund's assets free from burdens. In short, trustees should not hasten to dissolve pension funds without giving full and due consideration to the interests of all the members and the participating employers, as well as to the social value of the fund's continued existence.

The complainant further relies on the correspondence and documentation referred to above as an indication that a decision had been taken to cease business, and that the employees had relied on these statements to their prejudice. On this basis it is contended that estoppel applies.

There are two problems with this argument. Firstly, it is doubtful that the statements in the documentation convey the impression that the company was ceasing business. The communication to the employees speaks of a decision "to close the offices" of the company, but at the same time talks of a "transfer of operations to Phalaborwa". It also states that employees not transferring to Phalaborwa "will be encouraged to remain in the service of the company until the activities of their department are being conducted in Phalaborwa". Closing the Johannesburg offices is not the same as ceasing business. Indeed there is an intimition of a continuation of business for the foreseeable future. Moreover, the statements in the PMC annual report that PMC intended to terminate the company's service also does not mean that the company ceased business.

Secondly, the issue of estoppel can only arise between the retrenchees (who may or may not have relied on any alleged misstatement) and their former employer. This has nothing to do with the present complaint. The retrenchees are not party to this complaint. The complaint here concerns a dispute of fact, being whether the company has ceased business and the legal consequences attached to a finding to

that effect.

While some of the decisions of the committee may raise questions of propriety, the issue for determination is not whether there was a wrong decision or whether any discretion was exercised improperly. The question at issue is a factual one. It is not the decision of the committee which determines whether the company has ceased business. It is a matter of fact. If the company, for whatever reason, decides that it will continue to do business, the committee members cannot apply rule 44(a). As a matter of fact, the business of the company did not cease. The business of the company did not come to an end at the end of 1996, nor was it thereafter resuscitated during 1997. There was a continuation, although the size of the business has been reduced. The fact that continuation may have been motivated by a need to obviate the operation of rule 44(a) is neither here nor there. The company moved to protect its legitimate interests and the interests of the companies with which it was associated. It cannot be said to have acted improperly or in bad faith in that regard. It's decision was motivated by a legitimate, commercial rationale to protect its financial interests. Nor has it failed to fulfil any of its duties in terms of the rules of the fund. There can hardly be a duty upon it to cease business in order to enrich the members of the fund.

Admittedly, there may be some concern with the fact that employers in the group have been admitted as participating employers in the fund in order to obtain the benefit of an accumulated surplus to which they had not directly contributed. This was accomplished by admitting PMC and the Hans Berenski Club to the fund and then immediately affording them a contribution holiday. There is no complaint before me that in so acting the committee are guilty of maladministration or an improper exercise of their powers. However, in his reply to the respondents' response, the complainant does raise an argument that the failure by the committee to take an equitable decision with regard to the distribution of the surplus between the company and the members of the fund conflicts with its obligations in terms of

the rules and is therefore assailable. In this regard, I am requested to make an adjudication effecting an equitable distribution as a form of alternative relief sought in the complaint.

The complainant basis his argument in this regard on rule 52 which provides as follows:

> **In the event of a contingency arising which has not been provided for in these rules, the decision of the committee thereon, if not inconsistent with the provisions of these rules, shall be final and conclusive.**

The submission based on this rule is that it does not appear from the minutes of the meetings of the committee that the committee applied its mind, or considered the implications of the change of decision taken by PMC. There was neither an appreciation of the fact that there had been a distinct change in tack nor that such a situation amounted to an unforeseen circumstance or contingency which had not been provided for in the rules.

My first difficulty with such an argument is that it introduces a new cause of action in reply, and accordingly it is doubtful whether the jurisdictional requirements for lodging a complaint in terms of the Act have been complied with. Hence, I lack jurisdiction to determine the complaint.

Secondly, it does not appear to me that there is a contingency arising which is not provided for in the rules. The rules clearly define the benefits payable to beneficiaries and provide the committee with general powers of amendment which include a power to increase benefits and in appropriate circumstances to distribute the surplus. I can find no convincing basis, nor has any been advanced, on which I can compel the committee to take a decision to distribute the surplus. The fund continues in existence with 200 members. It would be highly inappropriate for an

adjudicator to usurp the functions of the committee by ordering it to distribute an actuarial surplus in an ongoing defined benefit fund because certain members of the fund believe it would be equitable to do so.

There are two decisions of the committee bearing upon the distribution of the surplus, namely, the decision to admit additional participating employers and the decision to grant them a contribution holiday and thus a benefit in the surplus. Unfortunately, as already mentioned, no complaint has been made regarding either of these and I consequently lack jurisdiction to determine them.

It needs also to be borne in mind that apart from the former employees of the company, some of whom transferred to PMC and remained members of the fund, there are also members of the fund employed by the other participating employers. In September 1996 there were 244 members of the fund. Approximately 190 of the 206 members remaining at 28 February 1998 had been members at the time of restructuring. The comments of Millet J in *Re Courage Group Pension Schemes, Ryan and Others v Imperial Brewing and Leisure Limited and Others* (1987) 1 All ER 528 (Ch) @ 541 are instructive in this regard:

> **A pension scheme is established not for the benefit of a particular company, but for the benefit of those employed in a commercial undertaking; and provision can properly be made for the scheme to continue for the benefit, if, on reconstruction of the group, the undertaking is transferred from one company to another within the group, and remains identifiably the same... Where on a reconstruction or amalgamation, substantially the same persons are continued to be employed in their undertaking, then the substitution of a reconstructed or amalgamated company for the original principal company for the purpose of a group pension scheme is not only necessary and desirable, but can probably be said to promote the main purposes of the scheme and not to alter it.**

Finally, the parties have presented arguments related to the application of the second proviso to rule 44(a) and the application of rule 44(b). These arguments have been advanced as alternatives in the event that I should find the company had

indeed ceased business. In view of my finding there is no need to deal with them.

I find that the company has not ceased business and hence there was no obligation on the committee to terminate and liquidate the fund. For that reason, the complaint is dismissed.

Dated at CAPE TOWN this 1st day of JULY 1999.

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John Murphy
Pension Funds Adjudicator