1. This is a complaint in terms of Section 30A (3) of the Pension Funds Act of 1956 ("the Act"), which is based, firstly, on an alleged infringement of a member’s constitutional right to freedom of association, through the fund’s refusal to allow the member to transfer his membership to another fund to which his employer is not a contributor, and secondly, on the member’s dissatisfaction with the alleged low growth rate of the fund and the administration costs charged by the fund. The first leg of the complaint essentially alleges that the board’s exercise of a discretionary power vested in it by the rules of the fund to allow such a transfer under special circumstances, is unreasonable and improper, and thus falls to be set aside. The essence of the second leg of the complaint is that the complainant may sustain prejudice in consequence of the maladministration of the fund by the fund, through its failure to invest its assets in portfolios which yield better investment earnings.
2. No hearing has been held; thus in coming to my decision I have relied on the documentary evidence compiled in the course of the investigation conducted by my Assistant Adjudicator, Cikizwa Nkuhlu, and the submissions of the parties to the complaint. However, as explained more fully below, on 30 October 2001, I met with Mr. Hein Herbst, the Principal Officer of the Cape Joint Retirement Fund, for the purpose of discussing the background to the moratorium issued by the South African Local Government Bargaining Council, and its impact on funds affected by it.

3. The complainant is Allan Richard van den Heever, an adult male residing at Jeffreys Bay in the Eastern Cape. The complainant is not represented in this matter.

4. The first respondent is the Cape Joint Retirement Fund (“the fund”), a pension fund duly registered in terms of the Act. The fund is one of the funds falling under the umbrella of the South African Local Government Bargaining Council (“SALGBC”).

5. The second respondent is the Jeffreys Bay Transitional Council (“the Council”), a local authority established in terms of the Local Government Transition Act 209 of 1993. No relief is claimed against the Council, it being cited merely as a party having a sufficient interest in these proceedings.

6. The complainant is an employee of the council, which is a participating employer in the fund. By virtue of his employment, he also became a member of the fund on 1 February 1996.

7. The rules of the fund which govern a member’s eligibility for, and admission to, membership, the termination of membership, and the special transferability thereof are rules 3 and 9.7(3).

8. Rule 3 makes all employees eligible for membership, as from the first day of the
month coinciding with or following their becoming employees, provided that the trustees shall require such members to produce evidence as to the state of their health. The members can elect to be placed in different categories, which have separate and distinct contribution rates and levels of benefits.

9. Rule 3.2 provides as follows:

**TERMINATION**

No member may terminate his membership of the fund while he remains in service; and his membership shall cease upon termination of his service, unless otherwise provided for in these rules (my underlining).

10. Rule 9.7(3) provides for the transferability of membership, under certain special circumstances, as follows:

**Special transferability in terms of “freedom of association”**

(a) The fund may allow members to transfer to and from other local authority funds recognized by the South African Local Government Bargaining Forum (SALGBC), subject to the following:

* Transfer agreements concluded with such funds;
* The principles of freedom of association agreed to by the SALGBC;
* Approval by the trustees, subject to such further conditions as they may specify;
* The provisions of any relevant legislation, including Provincial Proclamations.

(b) The amount transferred to the fund shall be deemed to form part of the member’s share.

Such special arrangements and the conditions determined in respect thereof shall have the effect of amending any provision of the rules not compatible therewith in respect of such person.

11. During June 1999, the South African Local Government Association distributed a
circular to all Chief Executive Officers of local authorities which fall under the umbrella of the SALGBC, wherein it reported on the resolution of the Central Council of the SALGBC, taken on 5 December 1998. The circular reads as follows:

TO: ALL CHIEF EXECUTIVE OFFICERS/ TOWN CLERKS
MEDICAL AID SCHEMES & PENSION FUNDS: FREEDOM OF ASSOCIATION

On 5 December 1998 the Central Council of the South African Local Government Bargaining Council (SALGBC) resolved:

“That the freedom of association/freedom of choice in relation to retirement funds and/or medical aid schemes, be accepted subject to:

The number of retirement funds and/or medical aid schemes being limited to those Local Government retirement funds and/or medical aid schemes that are agreed to, by collective bargaining, in the relevant division of the South African Local Government Bargaining Council.”

It is noteworthy that freedom of association/freedom of choice has been curtailed by the aforementioned decision which constitutes a collective agreement. Therefore, the right to transfer will only come into effect upon the finalization of the accreditation of retirement funds and/or medical aid schemes. It is envisaged that this process will be completed by the end of August. There are reported cases of both retirement fund and medical aid schemes seeking to broaden the scope of operation of their funds or schemes on the basis that their members have the right to opt for their retirement funds or medical aid schemes. There have equally been similar reports of employees demanding the right to exercise freedom of association by resigning from their current funds or schemes to join new ones. This practice must be discouraged as it is contravention of the decisions of the SALGBC. Therefore, a moratorium on the right to exercise freedom of association has been imposed until the finalization of the accreditation of retirement funds and medical aid schemes.

Therefore, existing employees within a municipality cannot change from one fund or scheme to another at this stage. The only exception is new employees subject to their choice being confined to funds or schemes already operating in the respective local authority. This decision was taken by the SALGBC on 11/12 March 1999 (Item 10.5.1(e)) and reads as follows:

That all new employees in local government be afforded the choice of which medical aid
schemes and/or retirement funds they want to belong to on their joining the local
government body. The schemes/funds being limited to those schemes/funds in operation at
the specific local authority currently.

12. Due to his dissatisfaction with the “percentage growth of the fund” and its
administration costs, the complainant wants to transfer his membership from the fund
to the Independent Municipal Trade Unions Pension Fund (“IMATU pension fund”).

13. He contends that the SALGBC’s moratorium on transfers infringes upon his
constitutionally-guaranteed right of freedom of association, and also deprives him of
an opportunity to transfer his membership to a fund offering better benefits. He
concludes, therefore, that the moratorium is invalid and should be set aside.

14. The fund has given the following reasons for its refusal to accede to the
complainant’s request for transfer of his membership:

15.1 The reason for his intended transfer does not fall within the situations
covered by section 14 of the Pension Funds Act, and the procedure laid
down in section 14 has not been followed. The Act does not permit any
transfers unless that procedure is followed;

15.2 The Income Tax Act compels funds to adhere to the conditions laid down
by the Act in respect of membership and non-compliance therewith results
in a fund’s losing its registration and tax approval;

15.3 Current legislation obliges members to remain in a fund until they leave
the service of the participating employer. Members do not have the option
of leaving one fund to join another unless the transfer is by way of freedom of association or by negotiated agreement.

15.4 The moratorium imposed by SALGA on transfers is binding on the fund. However, the complainant is free to negotiate with SALGA to give him a special dispensation to transfer.

15. The issue that has to be decided is whether the trustees, who are vested by rule 9.7(3) with a discretion to allow transfers of membership from the fund to other funds, under certain specified circumstances, have exercised that discretion properly in turning down the complainant’s request to transfer his membership to the IMATU Retirement Fund.

16. Section 14 of the Pension Funds Act, on which the fund relies as a ground for refusal covers situations of amalgamations of any business carried out by a registered fund with any business carried out by any person, and the transfer of the business from a registered fund to any other person, and vice versa.

17. The procedure prescribed is that the scheme of the proposed transaction, including copies of actuarial reports or other statements taken into account for the purposes of the scheme, together with any additional particulars and/or valuation reports, as well as proof that the provisions of the scheme and the rules of every registered fund which is a party to the transaction have been complied with, have to be submitted to the registrar. The registrar has to be satisfied that the scheme is reasonable and equitable, and that it accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of that fund’s rules, and to any additional established benefits.

He also has to be satisfied that the proposed amalgamation or transfer will not result in any fund which is a party thereto being unable to meet the requirements of the Act,
or becoming financially unsound, or in a financially unsound fund being unable to improve its financial condition within a satisfactory time.

18. The registrar then forwards a certificate to the principal officer of every fund involved in the transaction, to the effect that all the requirements of section 14(1) have been complied with.

19. The procedure set out in Section 14 is not relevant to the complainant’s request for the transfer of his membership to the IMATU Retirement Fund because his transfer is neither the transfer, nor the amalgamation of the business of the fund to another fund or person. Section 14 envisages the *en masse* transfer of membership of a fund, which occurs in situations of corporate restructuring like amalgamations or transfers of business, rather than the transfer of the membership of an individual member from one fund to another. Strictly speaking, what the complainant wants is the termination or withdrawal of his membership of the fund so that he can join a different fund. Accordingly, if such termination or withdrawal whilst the complainant is still in employment is permitted, the procedure set out in section 14 would not have to be followed.

20. The second and third reasons given by the fund for its refusal are so vague and lacking in detail that they fall to be rejected out of hand.

21. Regarding the fourth reason, it is alleged by the board that because the SALGBC, which is the bargaining forum under whose umbrella the fund falls, has placed a moratorium on freedom of association, the fund is bound by that moratorium, and accordingly may not allow the complainant to transfer his membership until the moratorium has been lifted.

22. Save for furnishing this Tribunal with a copy of the circular from the South African Local Government Association ("SALGA"), the fund has not furnished me with a copy
of the document containing the moratorium itself. From what I can gather from the circular, it appears as if the SALGBC, while recognizing the rights of members to transfer their membership from one retirement fund or medical aid scheme, to another, had resolved to limit the number of such medical aid schemes and funds to those agreed to by collective bargaining. The funds agreed to would have to be accredited. However, because the accreditation process had not yet been finalized during December 1998, the SALGBC resolved to place a moratorium on members’ exercise of their right to transfer their membership, pending the finalization of that process. According to the circular, the accreditation process was expected to be finalized by the end of August 1999; however, it seems as if it still has not been finalized to date.

23. As I have not been furnished with the document containing the moratorium so as to enable me to decide on its validity, I am not in a position to give a considered ruling thereon, save for stating that because the decision was taken by means of a resolution of the Bargaining Council, it seems, *prima facie*, to be valid.

24. Insofar as the challenge to its constitutional validity is concerned, it is true that the moratorium infringes the complainant’s constitutionally-protected right to freedom of association. However, it is trite law that in terms of section 36 of the Constitution, certain rights in the Bill of Rights may be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

25. If the trustees’ basing of their refusal on the SALGBC’s moratorium is justified by the rules of the fund, there can be no valid challenge to their exercise of their discretion. Rule 9.7(3) of the fund’s rules, which makes special transferability subject, *inter alia*, to “the principles of freedom of association agreed to by the SALGBC”, is binding on the fund, and hence on the trustees. Section 13 of the Pension Funds Act provides that the rules of a registered fund shall be binding on the fund and the members,
shareholders and officers thereof, and on any person who claims under the rules, or whose claim is derived from a person so claiming. Arguably, the placing of the moratorium is one of the principles of freedom of association agreed to by the SALGBC, as provided for by rule 9.7(3). Accordingly, I find that the trustees’ belief that they are bound by the moratorium is a reasonable belief, and that it accords with the conditions laid down in rule 9.7(3).

26. Even if it were to be found that the moratorium is invalid, and thus not binding on the fund, rule 9.7(3) lays down a further condition precedent to the exercise of discretion to allow a transfer, namely, the existence of a transfer agreement between the relevant funds at the time of the intended transfer.

27. At a meeting held at the offices of the Adjudicator on 30 October 2001, whereat the general issues relating to the SALGBC’s moratorium were discussed, the Principal Officer of the fund, Mr. Hein Herbst, informed me that there have, in the past, been quite a few transfer agreements of limited duration entered into between the fund and the IMATU Retirement Fund. The most recent of those was signed on 30 October 1997, and was effective from 1 September 1997 to 31 August 1998. I need just add that the meeting was requested by Mr. Herbst for the purpose of giving a background to the moratorium, and giving me an insight into its general effect on funds affected thereby. No specific discussion of the present complaint took place.

28. Subsequent to that meeting, I have been furnished with a copy of the transfer agreement dated 30 October 1997, the relevant portions of which read as follows:

1. The parties hereto are:

IMATU Retirement Fund, hereinafter referred to as “IMATU”, being a provident fund established in accordance with a collective agreement concluded by a Council in terms of the Labour Relations Act, and as such exempt from the provisions of the Pension Funds Act.
The parties hereby agree that a transfer of members may take place between IMATU and the CJRF.

Members belonging to IMATU may elect to transfer their membership to the CJRF and vice versa. Options to transfer shall be submitted to IMATU and the CJRF between 1 September 1997 and 31 August 1998. Should any unforeseen circumstances arise which prevent a specific local authority from granting its employees the opportunity to exercise their options before 31 August 1998, an extension of the transfer process beyond 31 August 1998 may be agreed to between the parties.

The complainant was already a member of the fund when the above transfer agreement was entered into, and must have known of its existence. He, however, chose not to exercise his option to transfer until the agreement had lapsed. In fact it took him almost two years from the date of the lapsing of the agreement for him to decide that he wanted to transfer his membership to the IMATU fund. I am satisfied that in the absence of a transfer agreement between the two funds during June 2000, the trustees were justified in refusing to accede to the complainant's request to transfer. The trustees' conduct, accordingly, was in full compliance with the conditions set out in rule 9.7(3), and can thus not be faulted.

By reason of the foregoing, the first leg of the complaint is dismissed.

The second leg of the complaint goes as follows:

I am not satisfied with the percentage growth of the fund, the administration costs, that at my age of 50 years, I need a fund that offers better benefits. In my opinion, after comparing my statement with statements of members of the Imatu Pension Fund that I am not obtaining the best growth, lowest administration costs and benefits equal to the Imatu Pension Fund.
32. In response thereto, the fund stated as follows:

As per the attached copy of your Annual Benefit Statement as at 30 June 1999 (Annexure A), member contributions are 9% of pensionable salary and council contributions are 18% of pensionable salary. As you rightly state, council contributions are twice that of members. The note on the benefit statement states: “The council contributes the gross amount of 18%, which covers the cost of the Insured Benefits (Risk Benefits) and the cost of administering the fund. The nett amount is credited to your Member’s Share Account for Retirement Benefits”.

The Annual Benefit Statement shows a breakdown of your Member Share and Retirement Benefit. This shows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Member share as at 30 June 1998</td>
<td>R30 014-17</td>
</tr>
<tr>
<td>Member contributions 1 July 1998-30 June 1999</td>
<td>R 6 338-28</td>
</tr>
<tr>
<td>Employer (council) contributions into member retirement funding</td>
<td>R 6 960-40</td>
</tr>
<tr>
<td>Total interest accrued</td>
<td>R 3 571-91</td>
</tr>
<tr>
<td>Total member share as at 30 June 1999</td>
<td>R46 884-77</td>
</tr>
</tbody>
</table>

The average employer (council) contributions in respect of member retirement funding for the year 1 July 1998-30 June 1999 amounted to 9.88%. The difference of 8.12% went towards the administration costs and the death benefit, funeral cover and disability benefit shown on your Annual Benefit Statement.

Attached, as Annexure B, is a document on insured benefit options sent to each member of the fund early in 1999. This sets out how the member and council contributions were allocated:

- 18.00% to member’s account (9% member plus 9% council i.e. ½ of the council’s 18%).
- 7.45% to risk benefit insurance and reserve account.
- 1.00% funeral insurance cost.
- 0.55% administration cost.
- 27% total member and council contribution.

Each member was given one of four options in respect of their death and disability cover. This would affect the amount of cover and the cost thereof, the lower the level of cover, the lower the cost and a higher portion of council’s contributions towards retirement benefits. Members had to
make a decision by 12h00 on 19 March 1999. All the options were implemented on 1 May 1999, as stated in the option document.

You elected Option C as per the attached copy of your option form completed by yourself on 24 February 1999. This means that for the months of May and June 1999, a higher percentage of council's contributions were allocated to retirement benefits in your account, as reflected in your Annual Benefit Statement.

33. Regarding the complaint about the growth rate of the fund, the fund responded as follows:

The growth in the fund, specifically your member share, is declared as bonuses, by the trustees, on the advice of the actuary. The bonuses follow the actual investment earnings of the fund. Bonuses from 1 July 1995 are set out in the table below and compare favourably with those declared by similar defined contribution funds.

<table>
<thead>
<tr>
<th>Period</th>
<th>Bonus declared</th>
<th>Interim Rate</th>
<th>Inflation Rate as at 30/06 (end of period)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/07/99-31/12/99</td>
<td>18% per annum</td>
<td>10%</td>
<td>N/A</td>
</tr>
<tr>
<td>1/7/98-30/6/99</td>
<td>10%</td>
<td>6%</td>
<td>7.25%</td>
</tr>
<tr>
<td>1/7/97-30/6/98</td>
<td>8%</td>
<td>4%</td>
<td>5.15%</td>
</tr>
<tr>
<td>1/7/96-30/6/97</td>
<td>17%</td>
<td>10%</td>
<td>8.79%</td>
</tr>
<tr>
<td>1/7/95-30/6/96</td>
<td>17%</td>
<td>10%</td>
<td>6.86%</td>
</tr>
</tbody>
</table>

Average Bonus Rate: 13.0%
Average Inflation Rate: 7.01%

The bonus for the financial year ending 30 June 2000 will be declared when the actuary has finished assessing the financial position of the fund. The current interim bonus rate is 10%. The administration cost of 0.55% of salary has been discussed above and is very competitive compared to other Local Authority (Municipal) funds.

34. The issue to be decided here is whether there is substance to his allegation that compared to the members of the IMATU Retirement Fund; he has not received the
best growth rate, and whether the fund is, by reason of that fact, being mal-administered.

35. A perusal of the fund’s response shows that over a period of five years from 1995 to 1999, the average bonus rate has been almost six percent above the average inflation rate. In fact, throughout those years, the bonus rate has consistently been higher than the inflation rate. I, therefore, cannot find any evidence of an unreasonably low growth rate. The complainant has, unfortunately, not adduced any evidence to support his contention that the benefits provided by the Retirement Fund are better than those provided by the fund. In any case, even if he had done so, the mere fact that the other fund offers better benefits will not, by itself, necessarily mean that the respondent fund is being mal-administered.

36. Having made the above findings, I cannot uphold the second leg of the complaint, either. Consequently, the complaint is dismissed.

DATED AT CAPE TOWN ON THIS 19TH DAY OF NOVEMBER 2001.

_________________________________
JOHN MURPHY
PENSION FUNDS ADJUDICATOR