1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

2. The complaint has been lodged on behalf of 62 complainants by Clifford Levin attorneys, Johannesburg.

3. The first respondent is Gauteng Building Industry Pension Fund, a fund registered under the Pension Funds Act of 1956. The second respondent is Grinaker Building Transvaal (Pty) Ltd, a company with limited liability having its registered office at Sandton. The respondents have been represented herein by Fedsure Group Benefits, a section of Fedsure Life Assurance Limited.

4. The conceptualization, formulation and argument of the complaint by the complainants’ legal representative leaves much to be desired. The alleged cause of action is set out in paragraph 7 and 8 of the complaint in the following terms:
7. The facts of the matter are as follows:

7.1 The rules of the Gauteng Building Industry Pension Fund provide for a benefit on withdrawal equal to the following:

- if the member elects to take cash, the member’s own contributions plus a proportion of the employer’s net contributions plus interest at a rate of 3% per annum compound interest up to 31 October 1990 and at 7% per annum compound interest thereafter. The proportion of the employer’s contributions given ranges from nil on entry to the scheme to 100% after ten years of service. The nett employer contribution is a gross amount less administration expenses and premiums for death and disability.

- If the member elects to preserve his benefit within the fund (as paid up benefit), the member gets the full contributions paid, nett of expenses, plus investment return accumulated to retirement date. Retirement can be taken any time after age 55.

7.2 The low rates of interest, particularly those prior to 31 October 1990, cause the cash benefit on withdrawal to be significantly lower than the preserved benefit.

7.3 The complainants were retrenched from the Second Respondent as a result of the poor economic climate. The complainants do not dispute that they were paid the benefits in terms of the abovementioned rules.

7.4 The crux of the issue is that if the complainants had not been retrenched, they would have received a more substantial benefit on retirement a few years later. The complainants were forced by circumstances to withdraw from the fund because of their retrenchment and they could not wait the remaining years to receive their full benefits.

7.5 The complainants received interest on their contributions at the rate of 3% per annum. This is grossly unfair as the fund generated income in the amount of approximately 17%.

7.6 It has also come to the complainants attention that Fedsure Group Benefits have implemented a new scheme that as from January 2000, retrenched employees will
receive greater benefits than those they received.

7.7 Attempts at rectifying this unjust situation have proved fruitless.

8. The complainants contend further that since they have been long term contributees to the Fund, they are entitled according to the dictates of fairness to greater benefits. The complainants should not be penalized because of factors beyond their control.

5. On the basis of these submissions the complainants, through their representative, request me to grant them the same benefits as those employees who withdrew from the fund after January 2000. No details are provided in this regard.

6. The respondent’s response through Fedsure Group Benefits is even more cryptic. It argues that section 2 of the Pension Funds Act of 1956 excludes my jurisdiction to determine the complaint on the grounds that the Gauteng Building Industry Pension Scheme was established by an industrial council agreement under the Labour Relations Act of 1956.

7. In response, I addressed a letter to the complainants’ attorneys dated 9 February 2001 requesting them to deal with the question of jurisdiction and to enlarge upon the cause of action. The letter read as follows:

1. I refer to the complaint lodged on behalf of your client by yourself on 27 March 2000 and to your letter of 19 January 2001.

2. Please accept our sincere apologies for the delay in processing your client’s complaint. This office has been inundated with a vast number of complaints and lacks the resources to resolve them expeditiously. The current backlog is approximately 18 months and thus it is not unusual for complainants to have to wait for a year or more before their complaints are resolved. This is a regrettable situation but it is beyond our control.

3. I have received a reply to the complaint from Fedsure Benefits which is less than satisfactory. I note also that it does not appear to have been sent to yourselves. I enclose a copy herewith. I propose to write to Ms Janssen to request her to deal more fully with your complaint and to
furnish us with a copy of the rules of the fund.

4. However, before I do so, it may be convenient for you to deal with the question of jurisdiction which she has raised. I enclose herewith a copy of a memorandum prepared by this office on the question of jurisdiction in respect of Industrial Council or Bargaining Council pension funds.

5. Finally, I am somewhat concerned that the substantive claim of the complaint discloses no cause of action. You concede that the complainants have received the benefits to which they are entitled in terms of the rules, but make out a case that they are entitled to more than that in accordance with the dictates of fairness.

6. The question of whether or not this office has an equitable jurisdiction is a controversial one. Our prima facie view is that we do not. However, I refer you to the various provisions of the Pension Funds Act setting up our jurisdiction as well as to the Constitution and encourage you to make a well founded and appropriate argument specifying the basis upon which you feel we are able to grant the relief. To assist you in this regard, I include two pages extracted from our recent annual report referring to four reported cases dealing with the question of unfair withdrawal benefits.

7. Once you have prepared your additional submissions, please serve a copy on Ms Janssen and I shall afford her 14 days within which to respond. Thereafter I shall determine the matter. Should you wish to have the opportunity of a hearing to make oral representations, please indicate that in your reply.

8. Again, please accept our apologies for the delays, but as I have explained they are beyond our control. Once we have your additional submissions and we are persuaded they are of merit, we shall expedite the matter with the aim of bringing it to finality within the next month or so.

9. Should you have any queries, please do not hesitate to contact us telephonically.

8. The complainants’ attorney responded by way of a letter dated 15 March 2001 purporting to address the issues of my letter of 9 February 2001. The letter reads as follows:

1. We refer to your letter dated 9th February 2001.

2. With reference to paragraph 6 of your letter dealing with the issue of jurisdiction, we submit
that the Pension Funds Adjudicator may indeed have jurisdiction to entertain the complaint since at the time the complainant’s were retrenched on the 26\textsuperscript{th} June 1996, the old Labour Relations Act of 1956 was applicable.

3. Kindly advise if this alters the position of jurisdiction in any way.

4. In respect of the cause of action, we submit that the applicant’s (sic) were not correctly advised of the consequences of transferring from the Pension to the Provident Fund. In this regard, we annex hereto marked “A” a booklet which was handed to the applicant’s to assist them in making a choice. We submit that the booklet was wholly inadequate and was not formulated with the degree of particularity that was required in order to enable the applicant’s to make an informed choice. Furthermore, the applicant’s are not well educated people and no further assistance was rendered to them in making the choice.

5. A case in point is that of Mr Eddie Mathebula. He joined the Fund in 1969 and after making contributions up until his retrenchment in 1996, received a withdrawal benefit of a mere R23,435.75. If Mr Eddie Mathebula had been properly advised of the consequences of transferring from the Pension to the Provident Fund, his withdrawal benefit would have been considerably more than the amount that he received. We enclose herein marked Annexure “B”, the contribution record relating to the above member to illustrate the abovementioned point.

6. Furthermore, it was also discovered after conducting investigations into the fund, that certain members received withdrawal benefits that had been incorrectly calculated. Two cases in point are that of Mr Majola and Mr R A Manyama who both initially received incorrect withdrawal benefits. After investigations were conducted, the error calculi were discovered and the situation was rectified. The point we wish to emphasise is that had these errors not been discovered, the members withdrawal payouts would have been substantially less than what they eventually received once the errors were rectified. We annex hereto marked “C” and “D” the details of the above two members in support of the abovementioned point.

7. Based on all of the above, kindly reconsider your view that no cause of action exists since clearly our client’s should be afforded some relief for the inequitable situation that prevailed at the time of their retrenchment in 1996.

9. Besides the fact that the complainant’s legal representative does not adequately
explore the question of jurisdiction as set out in the memorandum sent to him, his submissions on the cause of action are below standard and fail to address the issues raised in the case law to which he was specifically referred.

10. Assuming for the purposes of argument that this office does have jurisdiction over the respondent pension fund, I remain of the view, as stated in my letter of 9 February 2001, that the complaint essentially discloses no cause of action. Insofar as paragraph 4 of Mr Levin’s letter of 15 March 2001 appears to introduce a new cause of action, no factual basis has been set out for the issues raised therein; nor does this complaint appear to have been referred initially to the employer or the fund as required by section 30A(1). I thus lack jurisdiction to determine it. It is also entirely lacking in particularity and thus I am unable to deal with it for that reason alone. Likewise, the submissions made in paragraph 6 of Mr Levin’s letter of 15 March 2001 related to alleged errors of calculation are not relevant to the original cause of action in the initial complaint and hence also cannot form the basis of any relief.

11. Regarding the original cause of action, no case has been made out by Mr Levin to support his contentions that I have the necessary authority in law to award the complainants benefits in addition to those awarded in terms of the rules. Tek Corporation Provident Fund & Others v Lorentz [2000] 3 BPLR 227 (SCA) restricts trustees to awarding benefits in terms of the rules. In this regard Marais JA stated:

What the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund. It may seem odd to speak of powers being beyond the reach of the trustees and the employer when the rules empower them to amend the rules but the contradiction is more apparent than real. First, their substantive powers at any given moment are circumscribed by the rules as they are at that moment. The fact that power
to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was *intra or ultra vires*. Secondly, there are a number of qualifications in both the rules and the Pension Funds Act to the exercise of the rule amending power conferred by rule 21. It is unnecessary to spell them out; it is sufficient to say that the trustees and the employer do not enjoy absolute autonomy in that regard (emphasis added).

12. The complainants concede that they have received the benefits due to them in terms of the rules and in the absence of any exceptional circumstances justifying an award of an additional amount, I regrettably am unable to grant further relief. For that reason the complaint is dismissed.

DATED at Cape Town this 17th day of April 2001.

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John Murphy
Pension Funds Adjudicator