REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 7678/2001

Being a consolidation of:

CASE NO: 1975/2001

In the matter between:
ORION MONEY PURCHASE PENSION FUND (SA) Applicant

and

THE PENSION FUNDS ADJUDICATOR 1ST Respondent

SEALOGA EVELYN SEKELE 2ND Respondent

BAHWADUBA BUS SERVICES (PTY) LTD 3RD Respondent

and

CASE NO: 1991/2001

The matter between:

ORION MONEY PURCHASE PENSION FUND (SA) Applicant

and

THE PENSION FUNDS ADJUDICATOR 1ST Respondent

LESETJA ANDRIES GAFANE 2ND Respondent

BAHWADUBA BUS SERVICES (PTY) LTD 3RD Respondent

JUDGMENT: 23 JULY 2002

NEL, J:

The applicant, the Orion Money Purchase Pension Fund (SA) ("*the Fund*") seeks to set aside determinations made by the Pension Funds Adjudicator ("*the Adjudicator*") against it and in favour of Ms Sealoga Evelyne Sekele ("*Sekele"*) and Mr Lesetja Andries Gafane ("*Gafane"*) on 6 February 2001. The determinations were made pursuant to complaints lodged with the Adjudicator after the retrenchment of Sekele and Gafane by the Bahwaduba Bus Services (Pty) Limited ("*the Bus Services*) when it transpired that the Bus Services had not notified the Fund of their status as employees and had not paid any pension fund contributions on their behalf.

Although

- the Fund had been unaware of the existence of Sekele and Gafane;
- no pension fund contributions had been paid on their behalf to the Fund;
- their withdrawal benefits were 'nil' in terms of the relevant rules,

the Adjudicator was of the view that the Fund should have collected the contributions from the Bus Services and thus remained liable for the payment of withdrawal benefits.

He made the following determinations:

> *"10.1 The first Respondent (the Fund) is directed to pay the complainant (Sekele) R7 549,90, together with interest thereon at the rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 1 January 1999 to the date of payment, within six weeks of the date of this ruling.*
>
> *10.2 The first respondent (the Fund) is further directed to pay the complainant*

(Sekele) R845,36 as a demutualisation benefit, together with interest theron at the rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from the due date of this benefit to the date of payment, within six weeks of the date of this ruling.

10.3 The second respondent (the Bus Services) is directed to pay the first respondent the amounts calculated in paragraph 10.1 and 10.2 within two weeks of the date on which the first respondent complies with this ruling."

and

"22.1 The first respondent (the Fund) is directed to compute the complainant's (Gafane) benefit in terms of rule A5.1.1 (master rules) read together with the special rules. In calculating the benefit, the fund shall deem the complainant's (Gafane) membership to be from 6 October 1997 to 31 October 1998.

22.2 The first respondent (the Fund) is directed to pay the amount calculated in paragraph 22.1 together with interest thereon at the rate prescribed at the Prescribed Rate of Interest Act for a judgement debt from 1 January 1999 to the date of payment, within 6 weeks of the date of this ruling.

22.3 The second respondent (the Bus Services) is directed to pay the first respondent (the Fund) the amount calculated in paragraph 22.1, within 2 weeks of the date on which the first respondent (the Fund) complies with the ruling in 22.2."

In addition to the applications to set aside the determinations, the Fund also applies for the following orders in substitution thereof, namely –

a) Dismissing the complaint filed by Sekele against the Fund, alternatively, substituting therefore an order directing the Bus Services to pay her an amount of R7 549,90 plus a demutualisation benefit of R845,36 together with interest thereon at the prescribed rate of interest from 1 January 1999 to date of payment: (The amount she would have been entitled to receive from the Fund if she had been registered as an employee from 1984 and if pension fund contributions had been made on her *behalf.)*

b) *Dismissing the complaint filed by Gafane against the Fund, alternatively, substituting thereupon an order directing the Bus Services to pay Gafane an amount that Gafane would have received from the Fund had Gafane been a member of the Fund from 6 October 1997 to 31 October 1998, together with interest thereon at the prescribed rate of interest from 1 January 1999 to date of payment.*

The adjudicator opposed the applications by the Fund, filed opposing affidavits and was represented by counsel. That is not the function of the Adjudicator. As pointed out above, his function is to dispose of complaints lodged in terms of sec. 30 A (3) in a procedurally fair, economical and expeditious manner and in doing so he may make an order which any court of law may make. After completion of his investigation a statement containing his determination and the reasons therefore are sent to all the parties concerned and to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court. The Adjudicator has no further function to fulfil. If a party is dissatisfied and approaches the High Court, a *de novo* hearing is initiated which, as pointed out, is neither an appeal nor a review.

The remarks made by *Schutz JA* in *Pretoria Portland Cement Company Limited v The Competitions Commission and Others* (unreported judgment of the Supreme Court of Appeal delivered on 31 May 2002) is certainly apposite (par.38).

'It is not for judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. …. The place to explain a decision is in a judgment.

Once given it is given. … Thirdly, and most importantly, it is not in the public interest that judges should become embroiled in disputes between parties who have appeared before them. It is a *matter of the utmost importance that judges should be seen as impartial and, in the kinder sense, aloof".*

BACKGROUND

a) Ms Sekele was

- employed by the Bus Services from 1984 to 1990, when she was dismissed, and she was not a member of the Fund during this period;
- again employed from 10 February, 1990 until 31 October 1998 when she was retrenched (due to a restructuring process);
- not registered or recorded as a member by the Fund because it had not been notified of her status as an employee of the Bus Services and no pension fund contributions had been paid on her behalf, because she

  'was employed as a builder's assistant and since building was not an integral part of the operations of the company she could have been dismissed at any time'

It is not in dispute that, if the Fund had been notified of Sekele's employment from February 1990 and if the requisite payments had been made by the Bus Services, she would have been entitled to a withdrawal benefit of R7,549-90 and to R845-36 as a demutualisation benefit.

b) Mr Gafane was

- employed by the Bus Services as a tyre attendant from the mid-1980's until 13 August, 1997, when he was dismissed (apparently for absenteeism);
- registered as a member of the Fund during this period and pension

fund contributions were paid on his behalf.

- withdrawn from the Fund on 13 August 1997 consequent upon a notification of withdrawal sent by the Bus Services to the Fund. No withdrawal benefit was paid because the relevant rule provided that no benefit would be payable where a member is dismissed;
- re-employed from 6 October 1997 'on the same terms and conditions' as a result of an agreement reached after challenging the fairness of his dismissal;
- in employment until 31 October 1998 when he was retrenched;
- not re-registered or recorded as a member by the Fund because it had not been notified of his re-employment and no pension fund contributions had been paid on his behalf, because

"*Mr Gafane was re-employed on 8/10/97. All new employees qualify to become a member of the pension fund only after 12 months service. Mr Gafane was retrenched on 31/10/98. For that reason he was not put on the pension fund. Mr Gafane can thus lay no claim towards any pension being paid to him."*

Complaints lodged with the Adjudicator on behalf of Sekele and Gafane by their trade union, read as follows:

"Mrs Sealoga Evelyne Sekele started to work in the Company in Plus minus 1984 and was dismissed in 1990, and was re-employed at 10 February 1990. When she was dismissed she was not given the Pension money. From the 10*th February 1990 she worked until the 31 October 1998, when she was retrenched. She did not receive any Pension money.*

All the employees were not contributing towards the fund, only the employer was contributing on their behalf.

Normally the employer used to register the employee to the fund after one year of service. Evelyne had in her first part of employment 6 years continuous service. After *her re-employment she worked for 8 years until she was allegedly retrenched.*

Since majority of the respondent's ex-employees got the Pension/Provident Fund money, Evelyne was not supposed to be discriminated. Failure of management to contribute on her behalf is unfair and unacceptable.

The Adjudicator is therefore requested to direct the employer to pay contributions to the fund for 11 February 1991 to 31 October 1999 and after that he must make a claim on Evelyne's behalf." (sic)

"Mr Lesetja Andries Gafane was employed by the 1st *respondent on the 17 September 1984 as a tyre attendant. He was unfairly dismissed on or about 22nd August 1997. The dispute was resolved to his favour at the CCMA on the 3rd October 1997. The Complainant did not receive any money during this period of his dismissal. Also after the re-instatement, he worked until the 31 October 1998 when he was retrenched with the other employees. The complainant did not receive his pension money.*

All employees did not contribute towards the fund. The employer was contributing on their behalf. We were informed by the employer that they register an employee in the fund after one year of service. The complainant (Andries Gafane) did not receive his pension fund for about 13 years of service.

Most of the respondents' employees did receive their pension money when the said retrenchment took place, but Andries is one of those who did not receive the money.

Failure of the Company to claim and or contribute on behalf of Mr L.A. Gafane amount to unfair discrimination and it is unacceptable
The adjudicator is therefore requested to instruct the Company to contribute and or claim from the Fund all monies due to Mr Andrief Gafane just like any other employee who have received their portion of the fund." (sic)

The Fund and it's Rules

The Fund is described as an 'umbrella' fund consisting of a number of participating employer funds and is administered by Old Mutual Employer Benefits, a division of OMLACSA, the underwriter of the Fund. The relationships between participating employers, employees and the Fund are described as follows:

"(8) Each participating employer has its own account with the Fund, which may be

likened to a sub-fund within the Fund. Employers' accounts are kept distinct. Any surplus in an employer's account is consequently only for the benefit of that particular employer's account; while any expense of the employer's account is solely for that account and may not be set off against any other employer's account.

9) *The eligible employees of the participating employers can become members of the employer's 'sub-fund- - and thus, too, members of the Fund – on the terms selected by their respective employers. Thus, the benefit structure that is available to employees on their retirement or withdrawal from the relevant sub-fund (and thereby the Fund) is dictated by the provisions agreed by their employers.*

10) *The benefit structures chosen by the various participating employers are contained in the Special Rules applicable to those employers. Each employer has its own set of Special Rules. All participating employers are also bound by the Master Rules of the Fund, which regulate the overall operation of the Fund and contain generally applicable provisions.*

11) *The Fund itself is a product offered by the Old Mutual group. There is no particular relationship between the fund and the participating employers and their employees other than as set out above. The Fund therefore relies on correspondence between itself and the employers in order to operate the account or sub-fund of each employer. The Fund has certain standard correspondence, for example Monthly Payment Reports (MPRs), in terms of which an employer is required, inter alia, to notify the Fund of any changes to the membership of its (employer's) account. It is incumbent on an employer to notify the Fund of additions to its employer's account (or sub-fund) and thus of any new (employee) members of the Fund."*

The Fund and its rules are registered in terms of the Pension Funds Act 24 of 1956 ("the Act"). The rules are binding on the Fund and its the members, shareholders and officers and on any person who claims under the rules (sec 13).

Chapter V(A) of the Act was introduced by Act 22 of 1996. It provided for the establishment of the Office of and for the appointment of a Pension Funds Adjudicator whose main object is to dispose of complaints lodged in terms of section 30A(3) in a procedurally fair, economical and expeditious manner (sec 30 B, C and D). In order to do so the Adjudicator has to investigate any complaint and may make an order which any court of law may make (sec. 30E).

The fund or person against whom allegations are made in the complaint has to be afforded the opportunity to comment on the allegations (sec 30 F). The parties to a complaint are (a) the complainant, (b) the fund or person against whom the complaint is directed (c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint and (d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint. (sec. 30 G).

The proceedings are initiated by the lodging of a written complaint with a fund or an employer who participates in a fund. The fund or employer has to properly consider the complaint and reply in writing within 30 days. In the event of a failure to reply or if the complainant is not satisfied with the reply, the complaint may be lodged with the Adjudicator (sec 30 A). After affording the fund or person against whom the allegations are made the opportunity to comment thereon, the Adjudicator investigates the complaint and may follow any procedure which is considered to be appropriate. After completion of the investigation a statement containing a determination and the reasons therefore are sent to all the parties concerned and to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court (sec. 30 F, H, J and M).

Any party who feels aggrieved by a determination may apply for relief to a division of the High Court which has jurisdiction, and must at the same time give written notice thereof to the other parties to the complaint. The Court has the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit. (sec. 30 P). It is not an appeal or a review. The Court's jurisdiction is analogous to original jurisdiction. See *Resa Pension Fund v Pension Fund Adjudicator* 2000(3) S.A. 313 (C) at 318 G-H.

Section 1 of the Act defines 'complainant', 'complaint', 'member', 'pension fund', 'pension fund organization' and 'rules' as follows:

*"**complainant**" means –*

a) any person who is, or who claims to be-

(i) a member or former member of a fund;

(ii) a beneficiary or former beneficiary of a fund;

(iii) an employer who participates in a fund;

b) any group of persons referred to in paragraph (a) (i), (ii) or (iii);

c) a board of a fund or member thereof; or

d) any person who has an interest in a complaint;

"complaint" *means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-*

a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;

"member" *means, in relation to –*

a) a fund referred to in paragraph (a) of the definition of 'pension fund organization', any member or former member of the association by which such fund has been established;

b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund;

"pension fund" *means a pension fund organization;*

"pension fund organization" *means –*

a) *any association of persons established with the object of providing annuities or lump sum payments for former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or*

b) *any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons,*

and included any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a) or (b) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members;

"rules" *means the rules of a fund, and includes –*

a) *the act, charter, deed of settlement, memorandum of association, or other document by which the fund is constituted;*

b) *the articles of association or other rules for the conduct of the business of the fund; and*

c) *the provisions relating to the benefits which may be granted by the contributions which may become payable to the fund;"*

The rules of the Fund consist of the 'Master Rules' which apply to all participating employers and the 'Special Rules', applicable to a particular participating employer such as the Bus Services.

The relevant 'Master Rules' are the following:

"*RULE 1: DEFINITIONS*

1.10 BENEFICIARY: Any person (including the MEMBER if applicable) who is or becomes entitled to the payment of a benefit in terms of these Rules.

1.15 ELIGIBLE EMPLOYEE: A person in the employ of the PARTICIPATING EMPLOYER who satisfies any one of the category descriptions outlined in the Special Rules. ***(Special Rules, Category 1: 'All members')***

1.21 MEMBER: An ELIGIBLE EMPLOYEE who participates in the FUND.

1.23 MEMBER'S CURRENT GUARANTEED CREDITS: Any portion of the MEMBER'S current contributions in terms of Rule 3.1.1.1. and Rule 3.4.1.1. that has been invested in the Guaranteed fund.

1.24 MEMBER'S CURRENT MARKET LINKED CREDITS: The value (as determined by the UNDERWRITER) of the Orion market linked units purchased by any portion of the MEMBER'S current contributions in terms of Rule 3.1.1.1. and Rule 3.4.1.1.

1.29 PARTICIPATION DATE: The earliest date on which ELIGIBLE EMPLOYEES in the service of the PARTICIPATING EMPLOYER may commence participating in the FUND. This date will be recorded in the Special Rules. ***(Recorded in the Special Rules as 1 November 1988)***

1.30 PARTICIPATING EMPLOYER: A FIRM whose ELIGIBLE EMPLOYEES may participate in the FUND.

1.31PARTICIPATING EMPLOYER'S CURRENT GUARANTEED CREDITS: Any portion of the PARTICIPATING EMPLOYER'S nett current contributions made in respect of the MEMBER in terms of Rule 3.1.2.1. and Rule 3.4.1.1. that has been invested in the Guaranteed fund.

1.32PARTICIPATING EMPLOYER'S CURRENT MARKET LINKED CREDITS: The value (as determined by the UNDERWRITER) of the Orion market linked units purchased by any portion of the PARTICIPATING EMPLOYER'S nett current *contributions made in respect of the MEMBER in terms of Rule 3.1.2.1. and Rule 3.4.1.1.*

'Rule 2: Eligibility and Participation of Eligible Employees

2.1 ELIGIBILITY

ALL ELIGIBLE EMPLOYEES may join the FUND provided that they are under the NORMAL RETIREMENT AGE.

2.2 PARTICIPATION

2.2.1 OPTIONAL PARTICIPATION

Any person who is an ELIGIBLE EMPLOYEE on the PARTICIPATION DATE, may choose to participate in the FUND. If he does not begin participating within three months of the PARTICIPATION DATE, his participation will be at the underwriter's discretion and will also be on condition that he still meets the requirements of the definition of ELIGIBLE EMPLOYEE, that evidence of his good health (at his expense) is accepted by the UNDERWRITER in respect of participation in any insured benefits and that the approval of the TAX AUTHORITIES has been obtained.

2.2.2 COMPULSORY PARTICIPATION

All persons who become ELIGIBLE EMPLOYEES after the PARTICIPATION DATE are obligated to participate in the FUND.

2.2.3 COMMENCEMENT OF PARTICIPATION

Save for the provisions of Rule 2.2.1, ELIGIBLE EMPLOYEES will begin participating in the FUND on the later of

2.2.3.1 the PARTICIPATION DATE, or

2.2.3.2 the date on which they become ELIGIBLE EMPLOYEES.

2.2.5 CONTINUATION OF PARTICIPATION

Save for the provisions of Rule 2.2.4, all MEMBERS are obligated to remain MEMBERS until their retirement, retrenchment, withdrawal from service or death, as the case may be.

"RULE A.5.: RETRENCHMENT

A.5.1 AMOUNT PAYABLE

If the MEMBER is obliged to leave the PARTICIPATING EMPLOYER'S service as a result of retrenchment or a reduction in, or reorganization of staff, all contributions due in respect of him in terms of Rule 3.1. will cease. The MEMBER will receive

A.5.1.1. his ACCUMULATED GUARANTEED CREDITS

OR

A.5.1.2. the benefit that would have been payable in terms of Rule A.6., had he withdrawn from the PARTICIPATING EMPLOYER'S service.

The Special Rules will stipulate whether A.5.1.1. or Rule A.5.1.2. applies."
(Benefit Section A(5) of the Special Rules stipulated that A.5.1.1. applied)

Summarized, the rules (Master and Special) provided as follows:

- All employees of the Bus Services were 'eligible employees' (master rule 2 and special rule definition).

- All employees who became 'eligible employees' after the 'participation date' (1 November 1988) were obliged to participate in the Fund (rule 2.2.2).

- The Bus Services had to make monthly pension fund contributions in respect of each member (employee) in its service who participated in the Fund (rule 3.2.2.1).

- After deduction of costs, the balance of the contributions are invested in the guaranteed fund (rule 1.31) known as the Member's current guaranteed credits. (Rule 2.23 and 1.25).

- On cessation of participation due to retrenchment, members become entitled to payment in cash of their accumulated guaranteed credits and accumulated market linked credits. (rule 2.2.4).

Applying these rules to the situation of the two complainants the following emerge

a) Sekele

- During the period 1984 until her dismissal in 1990, she had not been a member of the Fund;
- When re-employed on 10 February, 1990 and as a consequence of the compulsory participation rule, she became a member of the Fund;
- Although obliged to do so, the Bus Services failed to pay pension fund contributions on her behalf;
- When retrenched on 31 October 1988 she had no accumulated guaranteed credits and her withdrawal benefit was 'nil'.

a) Gafane

- was a participating member of the Fund from the mid 1980's until his dismissal on 13 August 1997;
- during this period pension fund contributions had been paid on his behalf by the Bus Services;
- he was re-employed from 6 October 1997 'on the same terms and conditions";
- he should have been re-registered as a member of the Fund either as a result of his re-employment 'on the same terms and conditions' or as a consequence of the compulsory participation rule;
- although obliged to do so from the date of re-employment, the Bus Services failed to pay pension fund contributions on his behalf;
- when he was retrenched on 31 October 1998 he had no accumulated guaranteed credits and his withdrawal benefit was 'nil'.

Mr *Farlam* who appeared on behalf of the Fund referred to *Tek Corporation Provident Fund & Others v Lorentz* 1999 (4) SA 884 (SCA) at 898 G as follows.

> *'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.'*

He submitted that the Rules do not permit the Fund to deem contributions to have been paid and then to pay out withdrawal benefits on the basis of such notional contributions as the withdrawal benefits are confined to the amounts that have accrued in respect of contributions which had actually been paid. In this regard he referred to Rule A.5.1.1. which provides that a member is entitled on retrenchment to receive his "Accumulated Guaranteed Credits' defined in Rule 1.1. as being the sum of the member's and the participating employer's current guaranteed credits plus fund interest. The 'participating employer's current guaranteed credits' is defined in Rule 1.31 as meaning 'any portion of the Participating Employer's nett current contributions made in respect of the Member in terms of Rule 3.1.2.1 and Rule 3.4.1.1 that has been invested in the Guaranteed Fund.'

Mr *Bozalek*, who appeared on behalf of the Adjudicator, submitted that the fact that no contributions had been paid on behalf of a particular member does not mean that the Fund has no liability in respect of the payment of benefits to the member. He pointed out that the failure to make such payments could arise for a number of reasons, including negligence on the part of the trustees or the negligence of the administrator of the Fund and that in terms of Master Rule 4.7 the duties of the Board of Trustees include the following:

> *"4.7.2. ensuring that proper control systems are employed by or on behalf of the trustees.*

4.7.4. ensuring that contributions are paid timeously to the Fund in accordance with the provisions of the Act."

About 5000 employers participate in funds administered by the 'OMEB' with an overall membership of approximately 150,000. Even if, in these circumstances, negligence could be ascribed to the Trustees in not policing the employers on a virtual daily basis, the negligence would not be that of the Fund, the party to the complaint.

Mr *Bozalek* also submitted that the Fund would at all material times, have been able to recover from the Bus Services the contributions which should have been made on behalf of Sekele and Gafane and

> *'Recognising this the Adjudicator ruled that the Company was to make payment of the stipulated withdrawal benefits to the Fund within two weeks of the Fund paying such amounts tot the complainants.'*

This he submitted, fell within the power of the Adjudicator to order as both the Fund and the Bus Services were parties to the complaint and in terms of section 30E of the Act the Adjudicator was entitled to make 'the order which any court of law may make. '

I do not agree. As pointed out by Mr. *Farlam* the Fund may only act within the powers conferred upon it by it's Rules, and its Rules do not provide for the payment of non-existent benefits.

It follows that the determination made by the Adjudicator should be set aside. The Complainants, Sekele and Gafane lost their pension benefits because the Bus Services failed to pay pension fund contributions on their behalf. They are entitled to claim the loss of these benefits from the Bus Services. This would be in accordance with the alternative order sought by the Fund and was not opposed by the Bus Services.

The Fund seeks an order for costs against the Adjudicator. Although the opposition of the Adjudicator has undoubtedly added to the costs involved in this matter and although, as pointed out, it is not his function to actively participate in proceedings of this nature, I am of the view that costs should not be awarded against him. As submitted, he is a public authority performing a valuable social function within a limited budget. In addition the amounts which were awarded to Sekele and Gafane are negligible and the application was brought by the Fund because the issues involved are of great importance to it. It was submitted that

"It is imperative that the Fund – which is an umbrella fund consisting of various participating employees from throughout South Africa, whose employees participate in, and are members of, the Fund – knows exactly who its members are and what its liabilities are in respect of benefits owed to such members. The Adjudicator's aforesaid determinations have deprived the Fund of that possibility. Accordingly, despite the relatively small amount of money at issue and the plight of Ms Sekele and Mr Gafane, the Fund has been obliged to challenge the Adjudicator's determinations."

In the result, the following orders are made:

(1) The determinations made by the Adjudicator dated 6 February

2001 are set aside;

(2) The Bus Services is ordered to pay Sealoga Evelyn Sekele an amount of R7 549-90 plus an amount of R845-36 as a demutualisation benefit together with interest on these amounts at the prescribed rate of interest from 1 January 1999 to date of payment;

(3) The Bus Services is ordered to pay Lesetja Andries Gafane an amount that he would have received from the Fund had he been a member of the Fund from 6 October 1997 to 31 October 1998, together with interest thereon at the prescribed rate of interest from 1 January 1999 to date of payment;

(4) Each party to pay it's own costs.

NEL, J

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 7678/01
1975/01

Coram: Nel, J

REPORTABLE

In the matter between:

ORION MONEY PURCHASE PENSION FUND (SA) **Applicant**

and

THE PENSION FUNDS ADJUDICATOR **1ST**
Respondent

SEALOGA EVELYN SEKELE **2nd**

Respondent

BAHWADUBA BUS SERVICES (PTY) LIMITED **3RD Respondent**

and

THE PENDION FUNDS ADJUDICATOR **1ST Respondent**

LESETJA ANDRIES GAFANE **2ND Respondent**

BAHWADUBA BUS SERVICES (PTY) LIMITED **3RD Respondent**

JUDGMENT	**:**	**NEL, J**
FOR THE APPLICANT	**:**	**Adv. P B J FARLAM**
Instructed by	**:**	**WALKERS INC**
FOR THE 1 ST RESPONDENT	**:**	**Adv. L BOZALEK**
Instructed by	**:**	**HEROLD GIE AND BROADHEAD INC**
Date of Hearing	**:**	**10 & 11 APRIL 2002**
Judgment delivered on	**:**	**23 JULY 2002**