

**ADDRESS TO PENSION LAWYERS ASSOCIATION ANNUAL
CONFERENCE
8 MARCH 2005**

Introduction

1. Manene namanenekazi, thank you for this opportunity to address you on what we've been up to this past year. It is hard to believe that in less than 10 days from today I shall have been in this office for precisely one year. I say it's hard to believe because of the many policies and processes we have managed to put in place, as well as the significant goals we have achieved. That this has been at all fathomable (let alone achievable) is due in considerable measure to the enthusiasm, industry, unwavering focus and brute dedication of the youthful team that I would like to introduce to you this morning. They are, in no particular order,
 - 1.1 Laureen Manuel (office manager) without whom the general running of the office would have been chaotic and the formulation and implementation of policies and processes virtually still-born;
 - 1.2 Naleen Jeram (deputy pension funds adjudicator) who has recently completed his Master of Laws degree at the University of Cape Town. Laureen, Naleen and I make up the management committee in the office;
 - 1.3 Zareena Camroedien (senior assistant adjudicator) a labour specialist I stole from the Johannesburg Bar;
 - 1.4 Fezile Mtayi (senior assistant adjudicator) with whom I worked at what was then Southern Life way back in 1995/6 in a small team

called the Employee Benefits Legal Advisory Services. I also stole him from the Bar;

- 1.5 Lisa Shrosbree (senior assistant adjudicator). Industrious and dedicated to her task;
- 1.6 Karin McKenzie (senior assistant adjudicator) also wooed from the Cape Bar. Karin had previously been with the office before my time, left for personal reasons and we are blessed to have a person of her resourcefulness on board.
- 1.7 Cikizwa Nkuhlu (senior assistant adjudicator) who, with her single-minded target-orientated focus, is in charge of the team that makes sure complaints lodged after 1 May 2004 are resolved (one way or the other) within 6 months of reaching the office. She has now prevailed upon us to make the target more challenging by reducing the turn-around time to 4 months;
- 1.8 Radesh Maharaj (assistant adjudicator) with a passion for investment issues. So all those actuaries and asset managers who think they can mystify or bamboozle us with seemingly esoteric calculations and assumptions had better work on a different strategy;
- 1.9 Lungile Mbalo (assistant adjudicator) who honed his skills at, among others, Alexander Forbes, is adept at retirement fund administration processes;
- 1.10 Virgo Abrahams (assistant adjudicator) was wooed from academic life at the University of the Western Cape and has a particular

penchant for labour law related complaints. He also makes sure that we understand the nuances of complaints lodged in Afrikaans;

- 1.11 Jessie Mabuza (assistant adjudicator) the youngest member in the office with loads of potential and resourcefulness to boot;
 - 1.12 Solomzi Gcelu (assistant adjudicator) who was wooed from the Asset Forfeiture Unit is a quick learner with a methodical style and surgical mind;
 - 1.13 Makhado Ramabulana (assistant adjudicator) was persuaded to leave the comfortable clutches of a successful practice at the Cape Bar. The line we used was “Do something for your country”. It worked;
 - 1.14 Nuku van Coller (assistant adjudicator) is caring and compassionate. She is the ubiquitous conscience every time we consider taking a hard line with unco-operative respondents.
2. There are also 11 members of this team, the administrative staff, who could not be here because your clients’ complaints need processing, not so? Please join me in thanking this team, including the 11 who are currently hard at work processing complaints, for the sterling work done in the past year.

Backlog

3. “So what precisely are we thanking these people for”, you may be wondering. Well, I shall tell you.

4. In my last address to the PLA on 18 and 19 May 2004 I said we had a backlog of 861 cases. For those who were not in attendance, our definition of backlog are complaints received by us before 1 May 2004. After disbanding the B-unit (which gave a mediation-type service) that number increased to over a thousand. As at 1 June 2004 we had 956 backlog cases to clear and we had set ourselves publicly a target date of 31 March 2005. As at 10 January 2005 (when we came back from the December break), we had reduced that number to 427. By 1 February 2005, it had reduced further to 374. Today the number of backlog cases in the office is exactly 100 and we have 24 days in which to clear them. And that includes today. So I trust you'll forgive me for dashing immediately after this address. There is work to be done.
5. Menene namanenekazi, I am confident that with this team the backlog will be something of the past by 1 April 2005. There are 3 cases that have been taken on appeal to the High Court but the issues are such that if they succeed (and I can't imagine they will) we should not be called upon to entertain them again.

Current cases

6. So, what about those cases lodged after 1 May 2004 (the current cases or, as we call them, the Z-unit cases)? In our strategic planning workshop last year we committed ourselves to a 6 month turn-around time. At our strategic review workshop we discovered that we had met 90% of that target. So I admit we did not meet the target there. Reason? The first is Complainants asking us to hold back on a determination *sine die* as they are talking settlement and they'll come back to us if the settlement does not materialize; the second is complainants lodging complaints and in reply raise new issues that require further investigation; thirdly, complainants lodging complaints that are lacking in material detail so that

we end up giving them time (typically a month) to reformulate their complaint and enclosing our specimen complaint form to help; the fourth is respondents not co-operating in circumstances that make it impossible to make a determination without a response from the respondent (for example, where no *prima facie* case is made out); fifthly, respondents seeking an extension of time on the very day that their answer is due and, when granted, repeat the exercise; and the sixth are perpetual back and forth “pleadings” between the parties which require consideration on the pain of being taken on review for having failed to consider a point that was raised in the fifth set of pleadings. It’s all terribly frustrating. But we have resolved, in our strategic planning workshop held on 14 and 15 January this year, that our work will not be compromised by these delays and to emphasise that point we have reduced our turn-around time to 4 months.

7. So, how are we going to achieve this?

7.1 Firstly, no more *sine die* postponements. We give a complainant a specific period within which to find common ground with the respondent. The period we give will depend on the nature of the complaint. If no common ground is reached within that period, we close the file and the complainant will have to come back on a new complaint and the 4 month turn-around time starts again.

7.2 Second, no longer are we going to entertain new issues raised for the first time in reply. Those will have to be the subject of a separate complaint in respect of which the 4 month turn-around time will apply separately.

7.3 Third, if a complaint is lacking in material detail, we shall tell the complainant so in writing, close the file, and ask him to lodge a properly motivated complaint in respect of which the 4 month turn-

around time will commence upon receipt of the reformulated complaint. We shall enclose our specimen complaint form to help and also refer him to his nearest legal aid clinic or advice centre or justice centre with whom we have done and continue to do extensive training.

- 7.4 Fourth, no more extensions for answers regardless of reasons therefor. When we give respondents a period within which to file an answer we have applied our minds to the issue of a reasonable period. And this, by the way, will now no longer be 30 days but 20 ordinary days. It's not a thumbsuck. I urge you, for the sake of your clients, not to even consider applying for an extension because chances are you won't get it.
- 7.5 Fifth, no more unending set of "pleadings". There will be a complaint, an answer within 20 days and a reply within 10. Thereafter, pleadings close. No further letters or facsimiles or e-mails will be entertained. The only further communication will be an answer to the office on specific questions raised by the office. And please, I urge you, when a respondent submits an answer to a complaint, do copy the complainant with the answer. It's amazing how many complaints go away after a genuine explanation. People don't communicate.
- 7.6 Finally, there is nothing my office can really do about respondents who just simply *swyg* and say nothing in the face of a complaint, except perhaps to invoke the contempt provisions in section 30V of the Act. This makes it difficult for us to resolve the complaint, especially where no *prima facie* case has been made out by the complainant. We could report the matter to the regulator but then

the complainant is left with no expeditious service that the Pension Funds Act promises him.

8. We have already started implementing some of these measures and they are working.
9. Earlier I talked about policies and processes we have put together. Without these, we would not be on the verge of celebrating victory over backlog files. But before I get there, I just want to touch on a very crucial aspect that we have discovered is the only way to make the alternative dispute resolution process of Chapter VA of the Pension Funds Act work well. And that, manene namanenekazi, is training people who can advise others on the processes of this office. I can tell you that as a result of our public awareness campaign we receive increasingly less and less elliptic complaints or complaints which fall outside our jurisdiction. Training trainers and public advisors on your business works wonders, trust me.

Public Awareness Campaign

10. With effect from 1 September 2004, the office embarked on a major public awareness campaign. The need for this was precipitated by two factors. Firstly, many pension fund members and dependants of pension fund members were simply not aware of the existence of the office and the fact that the office provided a free service. The second factor was that many complainants who came to the office were not aware of the requirements of the office and how to lodge a complaint. This is borne out by the number of complaints sent back to complainants for reformulation. The gravity of the problem can perhaps be brought home by our discovery that many legal representatives who have lodged complaints with this office surprisingly display very little familiarity with the requirements of the Act

and the office. I have little doubt those are not members of this association.

11. With that challenge, we decided at our 2004 stratplan to embark on an education campaign over a two year period aimed at six different levels.

11.1 The first level are attorneys and advocates. With the assistance and co-operation of the Law Society of South Africa and in particular, their public awareness and education division known as LEAD (Legal Education and Development), it was agreed to run a specific one day training seminar on pensions law for attorneys and advocates in 8 different centres in South Africa. These sessions will be conducted by the office at the end of this month and the beginning of April in Johannesburg, Klerksdorp, Pretoria, Polokwane, Port Elizabeth, East London, Durban and Cape Town.

11.2 The second level are candidate attorneys currently attending the 6 month course at the various Schools for Legal Practice throughout the country. In this regard, the office has conducted half-day training seminars in pensions law at the following schools: Cape Town, Johannesburg, Polokwane, Pretoria and East London. Depending on the success of the training, a decision will shortly be made by the Law Society regards whether pensions law should form part of the curriculum and for examination purposes for all candidate attorneys.

11.3 The third level are final year law students at various universities. Owing to budgetary and logistical constraints, we have to date only delivered special guest lectures at Unisa, UWC and UCT.

- 11.4 The fourth level are the Legal Aid Board and in particular the Legal Aid Clinics and Justice Centres. To date, training sessions have been held in the Eastern Cape, Western Cape, Gauteng and Free State. It is our intention to significantly expand the training of legal aid clinics, as we believe that this would be the best route of assisting indigent complainants throughout South Africa. In the past the legal aid clinics have been reluctant to deal with pension related complaints on the basis that their advisors and in many instances professional assistants are not legally equipped to deal with this specialised area of law. However, they have undertaken to assist indigent complainants provided the necessary training of practitioners is provided by the office.
- 11.5 The fifth level are the various advice offices and para-legal institutions. In this regard, we held various training sessions throughout the country involving local advice offices, Legal Wise, Black Sash and other similar institutions.
- 11.6 The sixth level involves the publication of important cases via the media, which includes the radio and print media. Over the past year, many of the important cases coming out of the office have appeared newspapers. We don't do this to embarrass anybody. We do it as part of our public awareness exercise. In addition, we have appeared on finance-orientated programmes on radio stations such as SAFM, Radio Tygerberg and Radio Sonder Grense to spread the knowledge of pensions law. We have also appeared on Umhlobo Wenene FM (Xhosa medium), Radio Phalaphala (Venda medium) and Mothswaledi (SeTswana medium) and will be appearing on the remaining 6 African language medium radio stations in the course of the year. This is bearing enormous fruits.

11.7 Finally, in January 2005, with a view to assisting practitioners in the formulation of complaints, we produced a manual titled “*An Introductory Guide to Pensions Law*”. The aim of this manual is essentially to focus on the more common disputes that come before us and provide a general framework/reference guide (on substantive law) to assist practitioners when formulating a complaint. I should add that we are toying with the idea of producing a comprehensive book which we hope will be the *locus classicus* of pension law. But that is a longer term thing which will probably be completed after my contract has expired.

The summary of training sessions held or to be held covering all six levels is as follows:

Attorneys training:

| | | |
|-------------|---|----------------|
| 14 March 05 | – | JHB |
| 15 March 05 | – | Klerksdorp |
| 16 March 05 | – | Pretoria |
| 17 March 05 | – | Polokwane |
| 29 March 05 | – | Durban |
| 31 March 05 | – | Port Elizabeth |
| 1 April 05 | – | East London |
| 8 April 05 | – | Cape Town |

School for Legal Practice:

| | | |
|----------------|---|--------------|
| 14 October 04 | – | Pretoria |
| 22 October 04 | – | Polokwane |
| 15 November 04 | – | Johannesburg |

24 January 05 – East London

Universities:

13 September 04 – UCT

6 October 04 – UWC

22 November 04 – UCT

21 July 04 – UNISA

Legal Aid Board/Justice Centre:

19 November 04 – Johannesburg

3 December 04 – Cape Town

28 January 05 – Port Elizabeth

Advice Offices:

9 November 04 – Western Cape

Legal Wise:

16 November 04 – Gauteng

17 November 04 – Florida (Northern Gauteng)

24 November 04 – Cape Town

25 January 05 – East London

Radio Interviews:

16 November 04 – SAFM

24 November 04 – Radio Tygerberg

15 December 04 – Radio Tygerberg

21 January 05 – Radio Sonder Grense

12. Finally, allow me to turn your focus to what is perhaps of greater interest to you as pension lawyers than the self-congratulatory tone that has characterized my address so far. My apologies if I went a little over the top. It's just that I firmly believe in acknowledging people's achievements (however small) as it gives those people a sense of civic purpose in life. After all, what greater sense of self-satisfaction can a human being have than the sense of knowing that he or she has made a small positive difference in someone's life somewhere.

Policy on legal issues

13. Two months in this office almost a year ago I discovered that our backlog was neither 450 (as I had told the press earlier) nor 861 (as I subsequently told you in May last year) but something of the order of a thousand. 450 was a number I had been given before our stratplan. 861 was a more accurate number until we disbanded the B-unit and earned ourselves an additional 95 cases for our trouble.
14. So, with a mountain of 957 cases to resolve within 10 months, a strategy was a definite must. I shant bore you with the other measures we implemented with a view to streamlining our processes as I have already done so in my previous address to you. Following a spark of brilliance (and this has become somewhat commonplace in the office these days) my team realized that if we could group complaints by subject-matter we could resolve them far more efficiently than if we took them as they came. So we got to work and came up, over time, with 8 policy positions on legal issues.

15. The first relates to a favourite preliminary point with respondents – section 30A. Gentlemen and ladies, a complainant will not be non-suited for failing first to lodge a written complaint with a fund or employer before doing so with this office. The section says a complainant has a “right” to lodge a complaint with the fund or employer. Now, to my mind a right, apart from those enshrined in the Bill of Rights, is something the person for whose benefit it has been introduced may elect to renounce. I won’t go into too much detail. The Supreme Court of Appeal pronounced on such rights as long ago as 1978 and again as recently as 1997. The arguments are in the determination of *Insurance Banking Staff Association v Old Mutual Staff Retirement Fund* handed down on 31 January 2005. I imagine it should be among the determinations that will appear in the next offering of the Butterworths Pension Law Reports.
16. The second policy is this. We do not investigate complaints relating to bargaining council funds for the simple reason that we do not have jurisdiction to do so. Section 2(1) of the Act, in its own convoluted way, ultimately is clear on this issue. Let me scare you off (hopefully) by saying we have obtained not one but two counsels’ opinion on this issue and what is more, we agree with them. I have given determinations on this issue in numerous matters and one of them is published as *Maputuka v Gauteng Building Industry Pension Scheme [2004] 11 BPLR 6233 (PFA)*. We shall not waiver from this position until a higher court tells us differently. And the fact that the bargaining council itself has disbanded does not suddenly clothe us with jurisdiction. All that results is that members of that fund are now left without a bargaining council to which to complain. They are then free to approach the labour courts.
17. The third policy relates to the application of the provisions of chapter 3 of the Prescription Act to proceedings before this office. The simple answer is that the Prescription Act does not trump provisions of the Pension

- Funds Act. You need only consider section 16(1) of the Prescription Act to arrive at that conclusion. A fuller answer is contained in *Nyanyeni v Illovo Sugar Pension Fund and Another [2004] 11 BPLR 6249 (PFA)* which also traces the slow gestation of this debate. Again, we obtained counsel's opinion on this issue and quite frankly I cannot imagine how section 30I of the Pension Funds Act can co-exist with chapter 3 of the Prescription Act in relation to proceedings before this office.
18. Fourthly, we do not investigate complaints against funds that are in liquidation. The appropriate procedure to follow is set out in section 28 of the Act. Where the liquidation process has been completed, there is no fund against which a complaint may be lodged and so there is no point in approaching this office with such complaint.
 19. The fifth policy is that we are not there to second-guess the registrar's judgment in deciding to approve a section 14 amalgamation or transfer. Where he has done so, that presupposes that he has satisfied himself that the transfer is reasonable and equitable and that it accords full recognition to the rights and reasonable benefit expectations of transferring members. If any member disagrees, then he must go to Judge Gerald Friedman of the FSB Appeal Board for a review and setting aside of the registrar's decision. Where we assume jurisdiction is where the attack is not on the registrar's decision (or the basis thereof) but on the trustees' exercise of their fiduciary duties in resolving to allow a prejudicial transfer or where the constitutionality of a rule allowing such transfer is under attack.
 20. The sixth policy is similar to the section 14 policy and relates to section 12 amendments. Once rules have been approved and registered by the registrar, they become binding. Section 13 of the Act and the SCA's Tek judgment says so. All the registrar needs satisfy himself with in approving a rule is that the rule is not inconsistent with the Act and that it will not

render the fund financially unsound. If you disagree with his finding on these two requirements, then Judge Friedman is your daddy. Not me. If, however, you wish to challenge the constitutionality of the rule, then I'm your daddy.

21. The seventh policy has to do with surplus apportionments. Very simply, we have no jurisdiction to hear complaints relating to decisions taken by funds after 7 December 2001 ***"in connection with"*** surplus apportionments. Now, the phrase ***"in connection with"***, I need hardly tell you, has received much judicial consideration and in 2000 the SCA interpreted it to mean ***"incidental to or connected with"***. Thus, any decision of the trustees (taken after 7 December 2001) incidental to or in any way connected with the apportionment of a surplus (including a decision to exclude you from sharing in it) is not a decision we can investigate. You would have to go to the registrar for that and prevail upon him to convene a meeting of the section 15K specialist tribunal and if he refuses, go to Judge Friedman to have him set aside.
22. If the apportionment relates to a decision taken before 7 December 2001, then you can come to me. The amendment Act does not have retrospective application and, in any event, you know about the presumption against retrospective application of legislation as pronounced by the then Appellate Division in the 1945 case of *Peterson v Cuthbert*.
23. The eighth policy relates to our jurisdiction over administrators. We most certainly do have such jurisdiction and you will find reasons on a careful reading of paragraph (b) to the definition of "complaint". If that doesn't satisfy you, then perhaps the judgment of the late Gerald Josman JA in the Denel case (otherwise known as the *Armaments* case) at [1999] 11 BPLR 227 (C) at 231C may sway you. If that's not enough, you'll be happy to know that we've added our voice on the matter in the determination of

Insurance Banking Staff Association v Old Mutual Staff Retirement Fund which should be out shortly.

24. Oh, and we do investigate charges of rules being unconstitutional or trustees acting in a manner that is perceived to be an infringement of a constitutional right.
25. So, there! Now you know where we stand.
26. Finally, I just wish to say a word on the impending amendment to the Act. I have read the discussion paper and there is at least one aspect of the Task Team recommendations which I do not think is in keeping with the general purpose of chapter VA. I have always believed section 30P does not belong in this Act and that people are in any event free to take a decision of a quasi-judicial body on review. Legislating a right of “appeal” in the wide sense has created a problem and it is this. A complainant comes to us on certain facts. The respondent answers on certain facts. The complainant replies on those facts. We call for a hearing on those facts and make a determination on those facts. The respondent is unhappy and goes to the High Court which hears the matter *de novo* on the merits. But now, the respondent (now applicant) introduces new facts that were never canvassed before me and the High Court sets the determination aside on a conspectus of all the facts (including the new facts) before it. Effectively the process before the adjudicator has been ambushed. Then, I ask, what is the point of the office if it will be thwarted in this fashion? Two of the 3 section 30P applications (at least those of which I am aware) introduce completely new facts and we are waiting to see how the High Court will deal with that.
27. I would rather there were a specialist appeal court dealing expertly with pension appeals (like the Labour Appeal Court deals with labour appeals

and the Competition Appeal Court deals with competition appeals). Such an appeal must be an appeal in the narrow sense so that an appellant cannot raise new issues or facts on appeal. I understand, however, that the SCA has recently heard an appeal where it has expressed reservations on the existence of these specialist appeal courts and jealously wishes to guard its constitutional appellate status under section 168 of the Constitution. I think pension law is too specialized to allow lawyers of general legal training to have the final say on issues appertaining to it.

28. One last thing, if I may, with effect from 1 May 2005 all complaints of persons resident in Gauteng, North-West, Limpopo and Mpumalanga must be lodged at the Johannesburg office. Details will appear in our website (not fsb website) which should go live soon.
 29. Enkosi bethu ngokundiboleka iindlebe. I was hoping to take a few clarificatory questions but I must rush to another engagement. Perhaps 5 to 6 questions won't hurt.
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