Pension Lawyers Association Conference 30 March 2010

In the High Court of South Africa

(Western Cape High Court)

Case No: 0001/2010

NOTSOFAST Union	Applicant
and	
THI Provident Fund	First Respondent
Bargaining Council for the Toothbrush Holesmanship Industry	Second Respondent
Tooth Fairy Employer's Association	Third Respondent
MEFURST Union	Fourth Respondent
The Registrar of Pension Funds	Fifth Respondent
The Registrar of Labour	Sixth Respondent

Before the Honourable Justice Dennis Davis

For the fund: Mr Craig Bosch

For the NOTSOFAST Union: Adv Norman Arendse SC

(Second to Sixth Respondents elected to abide the decision of the court)

The THI Provident Fund was established by the Bargaining Council for the Toothbrush Holesmanship Industry for the benefit of its employees, who have specialist skills in inserting the holes found at the top of toothbrushes.

The overall shape and form of the fund was eventually agreed on amidst much bickering and grandstanding from the two competing unions in the council, the NOTSOFAST Union and the MEFURST Union. (The latter union had a slender majority in terms of membership.) The Tooth Fairy Employers Association was somewhat abstentionist in the process, ignoring the squabbling unions until it came time to weigh in. This it did in the end, jumping into matrimonial bliss with the MEFURST Union. Together these parties agreed that there would be no more time wasted through deadlocks and point scoring, especially not in trustee board meetings of the new fund. They therefore ensured, when framing the rules of the fund, that the trustees elected by the fund members could only be sourced from the ranks of office bearers in the MEFURST union.

The fund and board of trustees was duly established, the employer association appointees to the board taking a passive role in the management of the fund. However, NOTSOFAST is not so sure all is well with the fund. The value of its assets has taken a spectacular dive, and the union is concerned. It has heard some disconcerting rumours about the lavish lifestyle enjoyed by the directors of the asset management company appointed by the board. A little research on the CIPRO website (when it was up and running) has revealed some interesting business connections between this company and MEFURST. Curiously enough, the investment which is mostly responsible for the fast-tanking fund values, a high risk joint venture speculating in beetroot and carrot futures, prominently features MEFURST on its letterhead as part of the consortium which established it. Finally, NOTSOFAST was not a little surprised to learn that the fund administrator, a recently formed BEE company, has on its board of directors no fewer than three members of the national executive of MEFURST.

In short, NOTSOFAST is not so happy. It has already approached the Registrar of Pension Funds who has served the fund with a notice in terms of section 26(2) of the Pension Funds Act (the PFA) requiring it to comply with section 7A, which provides that members have the right to elect 50% of the trustees. The notice fell on deaf ears, and NOTSOFAST has now approached the High Court for relief from this oppressive and irksome situation. In particular it is asking the Court for the following:

1. An order declaring that the rules restricting member-elected trustees to office bearers of MEFURST are contrary to the provisions in section 7A of the PFA regarding the election of trustees, or otherwise invalid to the extent that they discriminate against fund members who do not belong to MEFURST;

2. An order directing that proper elections be held within a specified time;

3. An order declaring that the contracts and transactions entered into by the trustees of the fund with the asset management company, the joint venture company, and the administrator are invalid;

4. An order preventing the trustees from effecting new appointments in respect of the above without the prior approval of NOTSOFAST.

The fund is vigorously defending the action. It claims that none of the relief is competent, and that, frankly, NOTSOFAST is just being a sore loser. Represented by its trustees (mostly members of MEFURST), the fund has raised the following points in defence:

1. The establishment of the fund and its benefit structure was the product of collective bargaining. The real dispute is therefore about the interpretation and implementation of a collective agreement. Where the terms of this agreement (such as who may be elected to the board of trustees) differ from the fund rules, or indeed do not comply with the requirements of the PFA, the terms of the collective agreement must prevail. (The fund relies on section 210 of the Labour Relations Act (the LRA) which states that in the event of a conflict between that Act and any other law, unless expressly stated, the provisions of the LRA will prevail.)

2. The Registrar's section 26(2) notice is consequently not binding on the fund and is of no force or effect.

3. The fund also contends that, since the matter clearly concerns a collective agreement, the High Court has no jurisdiction to entertain the dispute, as it should have been referred to the THI Bargaining Council for arbitration, and to the Labour Court for review if necessary.

4. Finally, in a last-ditch belts and braces approach, (and in the unlikely event that the honourable Judge remains unmoved by its eloquent arguments above) the fund contends that even if section 7A of the PFA applies to it, the rules providing for the election of trustees are not inconsistent with that section.