IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

[REPORTABLE]

CASE No: 2701/11

In the matter between:

WALTER HERMANN HEINRICH HOFFMANN	**Applicant**
And	
PENSION FUNDS ADJUDICATOR	**First Respondent**
DEL MONTE SAPCO PENSION FUND	**Second Respondent**
DEL MONTE SOUTH AFRICA (PTY) LIMITED	**Third Respondent**
LIBERTY GROUP LIMITED t/a LIBERTY LIFE	**Fourth Respondent**

Coram	:	**Henney, J**
Judgment by	:	**Henney, J**
For the Applicant	:	**Adv M W Janisch**
Instructed by	:	JONATHAN MORT INC
For the 2nd & 3rd Respondent	:	**Adv R Goodman SC**
Instructed by	:	FAIRBRIDGES ATTORNEYS
Date(s) of Hearing	:	**2 NOVEMBER 2011**
Judgment delivered on	:	**6 DECEMBER 2011**

Republic of South Africa

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LIBERTY GROUP LIMITED t/a LIBERTY LIFE	**Fourth Respondent**

JUDGMENT: 06 DECEMBER 2011

HENNEY, J:

INTRODUCTION

[1] This is an appeal against a determination made on 6 December 2010 by the Pension Funds Adjudicator (***"PFA"***) in terms of Section 30P of the Pension Funds Act 24 of 1956 (***"the Act"***).

[2] The Applicant seeks the following relief as set out in the Notice of Motion:

2.1 Setting aside the determination of the First Respondent, the Pension Funds Adjudicator, handed down in Case No. PFA/WE/10376/2006/VPM on 6 December 2010.

2.2 Substituting therefor an Order to the following effect:

2.2.1 Declaring that Applicant is entitled to the retirement pension benefits applicable to a Class 1 Executive in terms of the Rules of the Second Respondent;

2.2.2 Declaring further that the said retirement pension benefits be calculated in accordance with the Special Rules of the Second Respondent in respect of Class 1 Executives, as amended by Addendum No.1 thereto in respect of members with 4 or more years' service as at 1 October 1990;

2.2.3 To the extent necessary, ordering the Third Respondent forthwith to do whatever is required to confirm the Applicant's status as a Class 1 Executive and to communicate same to Second and Fourth Respondents;

2.3 Directing the Second Respondent:

2.3.1 within ten (10) days of the date of the Order, to pay to Applicant the difference between any amounts already paid to him arising from his retirement (including any lump sum amounts) and such amounts as should have been paid pursuant to his status as a Class 1 Executive;

2.3.2 to pay any further pension or related benefits in terms of the Rules of the Second Respondent as may become payable from time to time on the basis that the Applicant is classified a Class 1 Executive;

2.3.3 within ten (10) days of the date of the Order, to pay the Applicant interest at 15,5% per annum on all amounts paid under this Order from the date on which they would have been paid (had the Applicant's entitlement thereto not been disputed) to date of payment;

2.3.4 directing whomsoever of the Respondents that opposes the relief sought herein to pay the Applicant's costs in the proceedings before this Honourable Court, jointly and severally;

2.3.5 Condoning the Applicant's failure to lodge this appeal within six weeks from the date of the aforesaid determination.

[3] **BACKGROUND**

Applicant's Version

The Applicant had been employed by Donald Crookes (Pty) Ltd since 1975. The Third Respondent, Del Monte South Africa (Pty) Ltd ("Del Monte"), acquired the business of the Applicant's his previous employer, Donald Crookes, in August 1992. His employment contract was transferred to and taken over by Del Monte and he remained in their employment up to his retirement in July 2006. In January 1999, he was appointed to the position of Finance Director of Del Monte.

[4] At the time of his appointment, the then Managing Director of Del Monte, one Mr Fernando Lage, informed him that he would be elevated to a Class 1 Executive for pension fund purposes. In support of this contention Lage has filed two affidavits. As a Class 1 Executive, the applicant would be entitled to retire at the age of 55 years. The further benefit would be, that if a person had been employed for more than 4 years as at 1 October 1990, such a person would be entitled to a retirement benefit equal to 100% of his/her final salary.

[5] According to the Applicant's understanding, his normal retirement date at the age of 55 years would have been 1 July 2005. He was informed by the Fourth Respondent ("Liberty") in a print-out from Liberty's Computer System dated 20 January 2006 after he elected to stay on that he had reached the normal retirement age which was understood to be 55 years of age.

[6] Liberty also at that stage calculated his pension benefits ahead of his retirement, this being before the dispute arose as to whether the applicant should be categorized as a "Class 1 Executive". Although he had achieved his normal retirement age of 55 years, he advised Del Monte that he intended to continue working until he reached 60 years of age. He was asked by Del Monte to carry on working until the end of February 2006. The Applicant, however, confirmed that he had continued working for Del Monte until 30 June 2006.

[7] The Applicant further avers that on 27 June 2006 (just 3 days before he was due to leave on retirement), he received an e-mail from Del Monte which purported to reflect his retirement benefits as those of a "Class 2 Executive". The benefits were markedly less favourable. His annual pension was reduced from R599 960,00 to R347 844,62 (a 42% decrease), his one-third lump sum benefit was down from R3 063 158,79 to R1 690 541,62 (a 45% decrease). This down-grading meant that his pension's actuarial value was penalised in excess of R3 million. He was regarded as having taken early retirement given that Class 2 Executives retire normally at age 60.

[8] The Second Respondent, Del Monte SAPCO Pension Fund ("the Fund"), on the instructions of Del Monte, had unilaterally altered its records so as to reflect the Applicant as a Class 2 Executive.

[9] Before dealing with the question whether this is a complaint as defined in terms of the Act over which the PFA has jurisdiction, it would be appropriate to deal firstly with the Respondents' version and then make a proper assessment of

the facts.

THE RESPONDENT'S VERSION

The Respondents' version is based on the Answering Affidavit file by one Edwin Alexander Petrice, the former Managing Director of Del Monte. He was employed by Del Monte from January 2000 to September 2007. For the period September 2002 to September 2007 he was the Managing Director.

[10] The Respondents alleged that the Applicant could not provide any proof that he had been elevated to a Class 1 Executive by the then Managing Director, Lage. His letter of appointment makes no reference to any elevation of status as a Class 1 Executive. The Respondents further contend that the affidavit by Lage in this regard merely repeats the Applicant's allegations and has no independent probative value. The Respondents further aver that, Lage's claims in a further affidavit that a number of steps were taken in coming to a decision to elevate the Applicant to a Class 1 Executive, which included a decision by himself (Lage), one Zalberg, the principal officer of the Fund, and another director, Frages, cannot be sustained in the light of correspondence, involving the applicant which preceded the complaint. In such previous correspondence, the Applicant merely relied on the fact that upon his appointment as Financial Director in 1999 "it was communicated to him that he would be entitled to the same pension fund benefits as enjoyed by the Managing Director" and that of "the Pension Fund benefits of the then Managing Director not that of a Class 1 Executive".

[11] The Respondents further dispute Lage's version as contained in his later affidavit, and state that Lage fails to explain why the alleged decision to elevate him to a Class 1 Executive involved the participation of principal officer of the Fund, who had no role to play in the applicant's employment categorization, or indeed why the participation of another director in the decision was necessary. The Respondents further contend that the myriad number of documents upon which the Applicant relies, do not help the Applicant, because there are contradictions contained therein regarding what they reflect as the Applicant's Pension entitlement, and that none reflect the Applicant as a Class 1 Executive.

[12] According to the Respondents' fact that the Applicant relies on a Liberty document which refers to his reasons for retirement as "normal" does not advance his case any further. Most of the documents he relies on are from Liberty. There is no signed documentation emanating from Del Monte, let alone a company resolution or official document conveying to the applicant that he was elevated to Class 1 status.

[13] Furthermore, the evidence of one Attwood-Palm, who was an HR Manager of Del Monte from 1998 to 2006, does not assist the Applicant, because it goes no further than contending that the Applicant was reflected as a Class 1 Executive on the Executive payroll records. She was never party to any discussions regarding his appointment as a director or as a Class 1 Executive.

[14] Lastly, the Respondents contend that while the applicant has latched onto some documentation from Liberty Life in support of his Class 1 status, for every

such document there is one reflecting something contradictory. The documentary trail therefore does not serve as unequivocal support for the Applicant's case.

[15] **EVALUATION AND CONCLUSION OF FACTS**

The dispute turns on whether the Applicant was classified as a Class 1 or Class 2 Executive under the Fund's rules. This classification has a direct and material impact on the nature of his pension benefits to which he is entitled. It is not in dispute that in terms of the Rules of the Fund certain benefits would accrue to a member depending on the categorization of such employee.

[16] A Class 1 Executive would retire with a full pension at age 55, Class 2 Executives at age 60. On more than one occasion it was indicated to the applicant by Del Monte, the Fund and Liberty that his normal retirement age would be 55 years.

[17] In some instances his retirement age was not indicated but only that his retirement age would be his normal retirement age. In such a case his retirement date would be given as 1 July 2005 with his date of birth given as 16 June 1950 which would mean that his retirement age would be 55 years. This was indicated in a benefit statement dated March 2000[1] issued by the previous fund and administrators Fedsure Group Benefits, who administered the Fund on behalf of Del Monte.

[1] Exhibit WHH14

[18] In a further document [2] that was issued by the previous administrators dated 17 April 2001, the Applicant's retirement age is indicated as 55 years. This is a strong indication that the Applicant was regarded as a Class 1 Executive.

[19] The Applicant's version that he was appointed as a Class 1 Executive for the purposes of his pension is supported by Lage, the previous Managing Director of Del Monte, who was responsible for categorizing the applicant as a Class 1 Executive. He is further supported by the previous Human Resources Manager, Attwood-Palm, who dealt with the company's personnel related matters. Del Monte itself recognized the Applicant as a Class 1 Executive and only a few days before the applicant's retirement date, it for no apparent reason informed the Fund that the Applicant was a Class 2 Executive.

[20] The applicant's letter, dated 8 May 2005, addressed to Del Monte, in which he stated that he was due to retire on 30 June 2005 and that, subject to good health it was his intention to continue working until age 60[3], stands as the strongest indication that he was regarded as a Class 1 Executive.

Thereafter in an unsigned letter dated 22 November 2005, authored by Petrie, Attwood-Palm and which the Applicant sent to Liberty, it was indicated that the Applicant was a Class 1 Executive and had elected to retire at age 55 years[4]. In this letter it is indicated that it has been agreed that the Applicant should retire on 28 February 2006. Liberty thereafter in a document dated 10 February 2006, wherein they once again indicate that the Applicant is a Class 1 Executive,

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[2] Exhibit WHH15
[3] Exhibit WHH6

calculated his pension benefits[5] to be that of a Class 1 Executive. It is clear that the letter forwarded by Del Monte (Exhibit WHH7) dated 22 November 2005 was followed up by a response by Liberty (Exhibit WHH8).

[21] If Del Monte genuinely believed that the Applicant was not a Class 1 Executive, why then, when the Applicant informed them that although he had reached his normal retirement age of 55 he wished to stay on until age 60 (Exhibit WHH6), did they not indicate to him that his decision would not affect his position, because he was a Class 2 Executive and had to in any event retire at age 60.

[22] The Respondents' denial that the Applicant is a Class 1 Executive flies in the face of the overwhelming evidence that he was since his appointment as a Financial Director in 1999 regarded for the purposes of his pension categorization as a Class 1 Executive.

DISPUTE OF FACT

[23] The Respondents contend that there is a genuine "dispute of fact" whether the Applicant was a Class 1 or Class 2 Executive. There is nothing of substance in the perceived "dispute" raised by the Respondents which can convince this Court that there exists doubt whether on the facts that the Applicant has shown, that he is a Class 1 Executive. The Respondents' merely casts a suspicion over the strong evidence produced by the Applicant that he is a Class 1 Executive

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[4] See Exhibit WHH7
[5] See Exhibit WHH8

[24] The Affidavit of Petrie, who was not the Managing Director of Del Monte at the time of the appointment of the Applicant as a Financial Director and when he was categorized as a Class 1 Executive by Lage, is not sufficient to negate the positive evidence of Lage in this regard. It is only an attempt to place such evidence under a cloud of suspicion. Furthermore, it does not effectively deal with the allegations of Lage as supported by Attwood-Palm.

[25] The version of the Respondents that the Class 1 categorization could only have been affected by means of a company resolution, which the Applicant did not produce in evidence, cannot counter and place in dispute the positive evidence of the Applicant and Lage that at the time when the Applicant was elevated to a Class 1 Executive, the procedure followed was permissible.

[26] I was reminded by Mr Goodman SC for the Respondents that in dealing with facts in motion proceedings, the Respondents' version of the facts should hold sway, together with the Applicant's version to the extent that it is admitted, and the Respondents' version can only be rejected on the papers if it is so far-fetched or wholly untenable as to warrant such rejection.

[27] This is according to the well established rule as laid down in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**[6]. It is clear that in motion proceedings when facts are placed in dispute, they must be sufficiently and adequately substantiated in order for such dispute to be regarded as a real genuine and *bona fide* one. A party must do more than merely cast suspicion on

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[6] 1984 (3) SA 623 (A) at 634

the facts averred. I am not convinced that the Respondents had seriously and genuinely disputed the case of the Applicant on the evidence presented that he was not a Class 1 Executive. The version of the Respondents in my view is so untenable that it can be safely rejected. In **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) at 375 para [13] the following is said:

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment".*

[28] Davis J in the case of **Ripoll-Dausa v Middleton NO and Others 2005 (3) SA 141 CPD** after referring to various authorities and in particular the matter of **Stellenbosch Farmers' Winery (Pty) Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C)** says the following with regards to a dispute of fact where a real genuine or *bona fide* dispute of fact has not arisen on **page 151 H – 152 A:**

> *"In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions*

(Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D-H). If, in such a case, the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (compare Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428. Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E-H)".

Further at **153A – C** of the **Ripoll-Dausa** case, Davis J further on this point states:

"This is different to a case where respondent questions the truth of averments made by applicant in circumstances where he has no real knowledge of the facts. The second exception is designed to deal with a case in which respondent seeks to subvert the Stellenvale rule, namely, where a respondent makes certain bald allegations or far-fetched denials which are manifestly untenable, not supported by any evidence or reason and which have been designed simply to exploit the Stellenvale rule to the latter's advantage and to the detriment of applicant whose factual averments cannot be attacked on any plausible basis. See also South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) at 50 – 1".

CONCLUSION ON THE FACTS

In the light of the above therefore, I am of the view that the evidence as presented by Applicant showed that he was and should have been categorized as a Class 1 Executive and should have been entitled to the pension benefits as a Class 1 Executive according to the rules of the Fund.

[29] **DETERMINATION OF THE P.F.A**

I will now deal with the question whether the First Respondent, the P.F.A, was correct in dismissing the applicant's complaint for lack of jurisdiction due to the fact that the applicant's "complaint" did not amount to a "complaint within the meaning of the Act.

In terms of the Act a 'complaint' is defined as follows:

> *" **"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".*

[30] For the P.F.A to have jurisdiction, the complaint must either relate to the administration of the Fund, the investment of its funds or the interpretation and application of its rules. The definition contemplates that the complaint must further allege at least one of the four issues set out in paragraphs (a), (b), (c) and (d).

[31] In the matter of **Armaments Development & Production Corporation of SA v Murphy NO 1999 (4) SA 755 CPD**, to which both counsel referred in argument and upon which the P.F.A relied when she made her determination that she lacked jurisdiction, the Court held the following in relation to each paragraph of the definition of "Complaint":-

[32] Para (a) of the definition of "complaint" refers to a complaint against a decision of the Fund or a person, where the Fund or a person made a decision in excess of its powers or improperly exercised its powers. The "person" exercising such powers must have obtained such powers from the rules of the Fund or from the Act itself.

[33] Para (b) refers to a complaint against the Fund or any person where the complainant has sustained or may sustain prejudice in consequence of maladministration of the Fund by the Fund or any person. The "person" referred to must be a person administering the Fund or performing any of the functions prescribed in the Act or in terms of the rules for such person.

[34] The complaint referred to para (c) of the definition relates to a dispute of fact or law that has arisen in relation to a fund between the Fund or any person and the complainant. It was argued by counsel representing the complainant in that matter, that a dispute of fact or law referred to in (c) is wide enough to encompass a dispute between the employer and the employee if it had arisen in relation to the fund. The court however rejected such an interpretation, deeming it to be too broad, and stated such an interpretation would mean that:

> *"..... Any dispute between an employer and employee relating to a service contract, which has a pension component, could be said to have arisen in relation to a Fund. This would be so even if the pension aspect is only a minor or inconsequential feature of the disputes for example, if the real issue between employer and employee relates to direction of duty, by the employee, one of the consequences of which would be a forfeiture of some of the pension benefits, the adjudication would be clothed with jurisdiction to determine what is essentially a labour dispute, which should be raised before the Labour Courts".*

[35] The court adopted a narrow and restrictive approach in its interpretation of sub-paragraphs (a), (b) and (c) of the definition of "complaint" and appeared to come to the conclusion that sub-paragraphs (a), (b) and (c) had to be restricted to *"disputes between the fund or persons acting for and behalf of the fund on the one hand, and complainants such as employers and employees on the other."*

[36] As has been stated earlier, the P.F.A appeared to follow the Armaments Development decision in arriving at the conclusion that it had no jurisdiction to hear the matter. The P.F.A reasoned that the dispute about whether or not the applicant was a Class 1 Executive is *"a dispute between the employer and an employee regarding the terms and conditions of employment ... The classification of different classes of executives is not done in terms of the rules of the Fund. This is therefore a labour dispute matter."*

[37] I am however unable to agree with the approach adopted by the court in the Armaments Development matter. In my view, should a complaint (involve/allege) that a dispute of fact or law has arisen in relation to the fund between an employer and an employee, and such dispute has a substantial bearing on the pension benefits payable to a member of such fund, such complaint would indeed qualify as a "complaint" (in terms of sub paragraph (c) of the definition) for the purposes of the Act.

[38] If the dispute to be resolved in the employee/employer matter is also relevant to the pension dispute, I can see no reason why the P.F.A would not have jurisdiction to determine the dispute. A slavish and narrow interpretation that a complaint should be strictly compartmentalized, as favoured by the Court in the Armaments Development matter, could lead to an unfair, unjust and inequitable result, which the Act could not have intended. I therefore favour a broader and more measured interpretation.

[39] In **Central Retirement Annuity Fund v Adjudication of Pension Fund and Another**[7] (Financial Services Board Intervening), Davis J warns against a too formalistic approach in dealing with the complaints procedure in terms of this Act. Although that case dealt with the manner in which a complaint should be formulated, the principle that a too formalistic approach should not be followed is equally applicable here.

[40] On the other hand, if the nature of the dispute is such that the pension related matter cannot be resolved without the employer/employee dispute being resolved first then the P.F.A is not the appropriate forum to hear the matter. However, it should not be a general rule that the employer/employee dispute should first be resolved at all costs at another forum before any attention is given to a genuine pension related complaint. Where a pension related complaint exists simultaneously or parallel with an employer/employee related dispute, the pension related dispute, if at all possible, should be resolved by the P.F.A without having to deal with the employer/employee related dispute.

[41] In my view, the facts and circumstances of a case should dictate whether the P.F.A should be able to deal with it. I am therefore of the view that by giving a strict and literal meaning to the definition of complaint would offend against the very purpose of the Act.

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[7] [2006] 4 All SA 251 (C)

[42] On the facts of this case, the employer's conduct in altering the applicant's categorization, which resulted in the Applicant being afforded less favourable pension benefits, was less to do with a labour dispute but more to do with a pension dispute. His categorization as either Class 1 or Class 2 Executive did not affect the applicant's position in the company as an employee during the existence or duration of his term of employment, but it did affect his position as a member of the Pension Fund after termination of his employment.

His less favourable categorization or classification was effected with the sole purpose of affecting his pension benefits and nothing else. It did not alter his status as employee as a Financial Director with Del Monte.

[43] However, even if I were to accept that the approach adopted in Armaments Development is correct, based on the facts of the present matter, and on a plain reading of the statutory requirements, I must conclude that the applicant's complaints clearly falls within the definition of "complaint", giving the P.F.A jurisdiction.

[44] The power a High Court has in dealing with an appeal against a determination of the P.F.A is set out in Section 30P (2)[8] of the Act.

In **Meyer v Iscor Pension Fund 2003 (2) SA 715 at 725 F–J – 726A** the following was held:

[8] The division of the High Court contemplated in sub-section (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

"As was explained by Trollip J in Tikly and Others v Johannes NO and Others1963 (2) SA 588 (T) at 590F - 591A, an appeal usually falls into one of the following three categories:

- *'(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information . . .;*
- *(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;*

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly. . . .'

From the wording of s 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'.

2003 (2) SA p726

BRAND JA

The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. A Moreover, it must be substantially the same 'complaint' as the one determined by the adjudicator".

[45] This being a wide appeal, which empowers this court to have regard to all the facts of this matter there can be no doubt that the Applicant, if regard is to be had to the overwhelming evidence, had been categorized as a Class 1 Executive. On the facts the Fund, as well as Del Monte, was aware of this. The evidence was further clear that the Fund, and its predecessor, the Applicant was categorized as

a Class 1 Executive, had advised him from time to time about his pension benefits as such an executive. The Fund, after having been informed by Del Monte literally on the eve of the retirement of the Applicant that he was not to be regarded as a Class 1 Executive but as a Class 2 Executive, changed the status of the Applicant which adversely affected his pension benefits without any investigation or applying its own mind to the matter, and whilst it had evidence to the contrary,

[46] This, in my view, was an improper exercise of its powers by the Fund that falls squarely within the definition of paragraph (a) of the definition of a "complaint". The P.F.A therefore had jurisdiction to hear the complaint.

[47] Furthermore, it is my view, once again, based on the facts of the matter, and on a plain reading of the statutory requirements, that the conduct of the employer itself amounted to a failure to fulfil its duties in terms of the rules of the fund, and as such, the applicant's complaint fell within the ambit of paragraph (d) of the definition of "complaint". As I have already found, Del Monte had full knowledge of Applicant's categorization as a Class 1 Executive, yet it deliberately supplied the Fund with incorrect and inaccurate information that contradicted this knowledge, and thereby prejudiced the Applicant. This, in my view, constituted a failure to fulfil its duties in terms of the Fund.

[48] I therefore conclude that the Applicant had a valid complaint. I find that the P.F.A was wrong to dismiss the complaint for lack of jurisdiction and in the result the appeal succeeds.

[49] **CONDONATION**

The reasons afforded by the Applicant why the appeal had not been lodged in the 6 week period after the date of the determination by the P.F.A were not opposed. I also find the reasons afforded for this delay acceptable. The application for condonation is therefore granted. An Amendment of Notice of Motion was also sought, which was also not opposed. Such amendment is granted. In the result therefore I make the following order:

1. The determination of the First Respondent, the Pension Funds Adjudicator, handed down in Case No PFA/WE/10376/2006 VPM dated 6 December 2010 is set aside.

2. The following orders are granted:

   2.1 the Applicant is entitled to the retirement pension benefits applicable to a Class 1 Executive in terms of the Rules of the Second Respondent;

   2.2 declaring that the said retirement pension fund benefits be calculated in accordance with the special rules of the Second Respondent in respect of Class 1 Executives, as amended by Addendum No.1 thereto in respect of members with 4 or more years service as at 1 October 1990.

   2.3 the Third Respondent is ordered forthwith to do whatever is

necessary to confirm the Applicant's status as a Class 1 Executive and to communicate same to Second and Fourth Respondents.

2.4 the Second Respondent is directed to:

2.4.1 within 10 days of the date of the order, to pay to the Applicant the difference between any amounts already paid to him amounting from his retirement (including any lump sum amounts) and such amounts as should have been paid pursuant to his status as a Class 1 Executive;

2.4.2 within 10 days of the date of the order, to pay the Applicant interest at 15,5% per annum on all amounts paid under this order, from the date on which they would have been paid (had the Applicant's) retirement thereto not been disputed.

3. The Second and Third Respondents are to pay the costs jointly and severally.

R.C.A. HENNEY
Judge of the High Court