

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WITWATERSRAND LOCAL DIVISION)**

CASE NO: 06/24039

In the matter between:

**THE PPWAWU NATIONAL PROVIDENT FUND .....** Applicant

and

**THE CHEMICAL, ENERGY, PAPER, PRINTING,  
WOOD AND ALIED WORKERS UNION .....** Respondent

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**JUDGMENT**

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**FREUND AJ:**

**Introduction**

- 1       The applicant (“the fund”) is a fund registered in terms of section 4 of the Pension Funds Act No 24 of 1956 (“the PFA”). The respondent (“the union”) is a trade union. At its congress held in August 2002, the union adopted a “Resolution on the accountability of fund trustees established by CEPPWAWU” (“the resolution”). The resolution sought to impose obligations on trustees elected or appointed by the union or its members to manage benefit funds established by the union, such as the applicant. The issue raised by this application is whether the resolution is unenforceable, contrary to law and/or contrary to public policy.

2 The resolution provides as follows:

***“Resolution on the accountability of fund trustees established by CEPPWAWU***

***Noting:***

1. *That the union entered into negotiations with employers to establish Benefit Funds. The union has also established an Investment company for its members in terms of section 2(g) of its constitution.*
2. *That the members of these funds elect or appointed trustees to represent their interests and take care of their affairs at these funds.*
3. *On occasion, the NEC and other constitutional structures take decisions on benefit funds. Trustees are obliged to implement such decisions.*
4. *That these funds have boards of trustees that are made up of employer and employee trustees as per the Pension Fund Act.*
5. *That these trustees, when part of the board of trustees, have fiduciary rights and obligations in terms of the Pension Fund Act.*

***Believing:***

1. *That these funds were established for the benefit of union members and their dependants.*
2. *That employee trustees are accountable to CEPPWAWU and the members of these funds.*

***Resolves therefore:***

1. *That the shop steward Trustees are accountable to union members who elected them.*
2. *That the shop steward trustees must therefore take mandates from union members of the funds on all matters that affect them.*

3. *Plant Trustees should be shop stewards.*
4. *That the training of LACs in the plants be vigorously engaged in order to build the union's capacity.*
5. *That the NEC must give guidance on policy matters to the member trustees and the investment company.*
6. *That the Worker trustees are accountable to the union and the members of the funds who elected them.*
7. *Trustees must account to Local shop stewards Councils.*
8. *Regional Trustees should account to the REC with the Regional coordinators.*
9. *National Trustees and Principal Officer should be part of the NEC together with the National coordinator.*
10. *That the employee trustees therefore must take mandates from the union before and after they attend board of trustees meetings and the members of the funds on all matters that will affect them before they attend board of trustees meetings.*
11. *That all trustees who fail to adhere to these fundamental democratic principles (which form the basis of CEPPWAWU) must be disciplined in terms of the union's constitution and its policies.*
12. *The NEC should ensure that the two Benefit Funds be amalgamated as soon as possible.*
13. *The union must establish a coordinating structure where CINPF and PNPf trustees can discuss matters relating to the funds. NOBs must be responsible for coordinating and convening this structure.*
14. *The NEC should ensure that regular elections are held to renew the mandate of benefit fund trustees.*
15. *The NEC must develop a paper on the role of the funds in the context of the Pension Fund Act and the union's investment policy."*

- 3 The fund contends that this resolution is invalid and that it is unlawful for the union to pursue disciplinary charges founded on the resolution. It has accordingly applied to this Court for an order:

- “1. *Declaring that the “Resolution on the accountability of Fund Trustees established by CEPPWAWU” (“the 2002 resolution”) passed at the 2002 congress of the respondent (“CEPPWAWU”) is unenforceable, contrary to law and/or contrary to public policy, in that it purports unlawfully to interfere in the proper exercise of the lawful duties and obligations of the member elected trustees of the fund, who are also members of CEPPWAWU (“the trustees”);*
2. *Declaring that the 2002 resolution is in conflict with the trustees’ fiduciary duties owed to the fund;*
3. *Declaring that the 2002 resolution is in conflict with the trustees’ duties to uphold the rules of the fund and all applicable laws, statutory or otherwise;*
4. *Declaring the institution and prosecution of disciplinary charges against union employees, office bearers and members, which are wholly or in part founded on the 2002 resolution, to be unlawful;*
5. *Ordering CEPPWAWU to pay the costs of this application on the scale as between attorney and client;*
6. *Granting further or alternative relief.”*

### **The factual background**

- 4 The fund was established by a trade union which later merged with other trades unions to form the respondent.
- 5 Most, but not all, of the members of the fund are members of the union.
- 6 The fund has at all material times been managed by persons described in its rules as “the Trustees”. Rule 13.1.1 of the fund’s rules provides:

*“Subject to the provisions of the Act and of these Rules, the sole*

*management of the Fund will be vested in the Trustees."*

- 7 The rules provide for the appointment of "employers' trustees" and "members' trustees". Prior to an amendment introduced in March 2006, which will be referred to below, the rules provided that the participating employers in the fund would appoint three employers' trustees and that the fund's members would appoint from their number who sit on regional advisory committees six members' trustees. (It should be noted in this regard that the rules provide that the members' representatives on the regional advisory committees are to be appointed by the union's shop stewards' committee.) In addition, the union would appoint one of its officials as a seventh members' trustee. The members' trustees accordingly form the majority of the trustees.
- 8 In March 2002, the trustees decided to terminate the mandate of the fund's existing administrators and to appoint different administrators. This decision was not welcomed by the union. It is common cause that it was in direct response to this decision that the union passed the resolution which is the subject matter of this application.
- 9 The resolution does not appear to have given rise to significant difficulties until the fund's trustees, on 16 March 2006, unanimously resolved to amend certain aspects of the rules. The effect of the amendment would be to dilute the control which the union had over the appointment of members' trustees.
- 10 The amendment was considered by the trustees to be necessary so as to bring the rules of the fund into conformity with the requirements of section 7A(1) of the PFA, which requires every fund to have a board, at least 50% of whose members are to be elected by the members of the fund. The minutes of the meeting show that one of the trustees proposed that consideration of the rule amendment be postponed for further consultation with the union but that another trustee responded by saying "... *that there were companies wherein there was no representivity due to this problem and members in those companies were up in arms as a result. The board did not enjoy the luxury of further delays in consultations*". The minutes show that, after a brief

discussion, the trustees unanimously agreed that the rule amendment be approved.

- 11 In the founding affidavit to which he deposed on behalf of the fund, the fund's principal officer, Mr A Shabalala, explained the motivation for the amendment as follows:

*"I point out that in terms of the rules, prior to this proposed amendment, trustees were appointed by the RACs (rule 13.3.1), the members of which were in turn appointed by the CEPPWAWU through the various Shop Steward Committees (rule 13.10.1). This meant that non-union members of the fund had no direct or indirect right to participate in the election of 'member elected' trustees. As such, it is in contravention of the letter and spirit of section 7A of the PFA, which clearly contemplates that all members of a Fund have a right to elect trustees. Not only did it amount to discrimination against non-union members, it also meant that shop stewards, who need not be members of the Fund, had the right to appoint, rather than elect, trustees, to the detriment of union members' rights to elect member representatives on the board."*

- 12 The decision by the trustees to amend the rule was objected to by the union. In his answering affidavit on behalf of the union, Mr W Noling, the union's general secretary, states as follows:

*"Rule Amendment 9 has had the effect of removing CEPPWAWU's representation on the board without any consultation having been conducted with it prior thereto. This I submit is untenable, given that the large majority of the members of the Fund are CEPPWAWU members. The manner in which this amendment was effected was contrary to the spirit if not the letter of the Rules as they existed prior to the amendment. It was for these reasons that CEPPWAWU objected to the Rule Amendment."*

- 13 In October 2006, the union issued notices to appear before a disciplinary enquiry to several of its members or employees. Five of these persons were members' trustees of the fund; the sixth was the fund's principal officer and the seventh was an employee of the union, its regional secretary and regional retirement benefits coordinator. Three charges were formulated. The principal officer, regional secretary and one of the members' trustees were charged with all three of the charges. The others concerned were charged with the second and third charges. The charges were the following:

***“Charge 1***

*You are guilty of misconduct in that, on March 23-24, 2006, at the NEC, when the matter of amendments was raised, you failed to inform the NEC of such amendments to the rules of the PNPF, and went ahead to mislead the NEC by informing the meeting that the amendments to the PNPF rules were being discussed but not yet effected.*

*As a result of your misconduct, you contravened the CPPWAWU 1<sup>st</sup> National Congress resolution on the accountability of trustees of benefit funds established by the union, and the constitutional provisions of the union.*

***Charge 2***

*You are guilty of misconduct in that, on March 16, 2006, you participated in a meeting where the PNPF Rules were amended, without any mandate from the fund members and/or union constitutional structures.*

*As a result of your misconduct, you contravened the CEPPWAWU 1<sup>st</sup> National Congress resolution on the accountability of trustees of benefit funds established by the union, and the constitutional provisions of the union.*

***Charge 3***

*You are guilty of misconduct in that, after participating in the meeting of the March 16, 2006, where a resolution amending the rules of the PNPF was adopted, you failed to inform the union that the amendments had been affected.*

*As a result of your misconduct, you contravened the CEPPWAWU 1<sup>st</sup> National Congress resolution on the accountability of trustees of benefit funds established by the union, and the constitutional provisions of the union.”*

- 14 Attorneys representing the seven persons who were facing these disciplinary charges (the same attorneys now represent the fund) addressed a letter to the union on 18 October 2006, objecting to the charges and requesting an undertaking from the union. The objection was based on the assertion that the union misconstrued the member elected trustees’ duties and responsibilities. Amongst the points made in the letter were the following:

“ ...

9. *A fund trustee who complies with all union mandates in the exercise of his or her powers as trustee whether or not he or she believes that the mandated positions are in the best interests of the Fund and its members will be in breach of his or her duties to the Fund and its members.*

...

11. *Persons who have fiduciary duties to fulfil (and these include retirement fund trustees) are not the agents of those who appoint them, do not derive their powers from those persons (instead they derive their powers from the ‘trust instrument’ such as, in the case of a trustee of a retirement fund, from the Fund’s Rules) and cannot lawfully bind themselves to exercise their discretion in a particular way. ...”*

The letter requested the withdrawal of the charges and requested that the union sign an undertaking enclosed with the letter. Litigation was threatened if the requested undertaking was not given. The requested undertaking required the union to “*undertake to recognise*” the following:



*“1.1 the fiduciary duties that are required by common law and statute to exercise (sic) all persons occupying the position of a fund trustee;*

*1.2 that a trustee of the Fund is not permitted to comply with any mandates provide by CEPPWAWU in the exercise of his or her powers as trustee and by doing so the trustee will be in breach of his or her duties to the Fund and its members;*

*1.3 the importance of the exercise of independent judgment by the trustees of the Fund and that the trustees may not blindly follow the directions of the CEPPWAWU;*

*1.4 that the trustee must act positively to protect the interests of the Fund even if those interests are in conflict with those of the person or body who appointed him or her to that position;*

*1.5 that the trustees, however appointed or elected, are not the agents of those who appoint them, do not derive their powers from those persons but instead they derive their powers from the Fund's rules and that they cannot lawfully bind themselves to exercise their discretion in a particular way. Any undertaking that they will do so will be contrary to public policy and accordingly void and unenforceable.*

*1.6 that, once the trustees are appointed or elected they are required to exercise an independent discretion, even if this may result in a conflict between the trustees and those who elected or appointed them or with whom they enjoy a close relationship;*

*1.7 that they are not bound by any resolution taken by CEPPWAWU on the accountability of Fund trustees in the exercise of their duties in terms of the rules of the Fund, statutory law and the common law;*

*1.8that the Fund is a separate legal entity and it is required to be directed and controlled by its trustees without interference from CEPPWAWU.”*

15 The union's attorneys responded in a letter dated 20 October 2006 by stating that the union did not intend to proceed with charge 2 but was persisting with charges 1 and 3. In their letter, they stated (*inter alia*) as follows:

“ ...

3. *Charges 1 and 3 do not concern your clients' performance of their duties as trustees of the Fund. These charges relate to their conduct in their capacities as union members, shop stewards and/or officials, mainly their dishonest conduct in misleading the NEC and their failure to report to union structures that the amendments in question had been effected.*
4. *Our client has no intention of unlawfully interfering with your clients' exercise of their fiduciary duties.”*

The requested undertaking was not furnished.

- 16 The refusal to give the undertaking and the union's decision to persist with the disciplinary charges gave rise to the institution of the present application.
- 17 I was informed (without objection) from the Bar during argument of the application that the union has now, on the basis of charges 1 and 3, dismissed its affected employee and expelled the affected members' trustees and principal officer.

**Is the resolution unenforceable, contrary to law or contrary to public policy?**

- 18 Mr Watt-Pringle, who appeared on behalf of the fund, submitted that the resolution is contrary to law and/or to public policy and is accordingly invalid and unenforceable. In essence, his argument was that each trustee owes a fiduciary duty to the fund; that the resolution seeks to interfere with the proper exercise of that fiduciary duty in an unlawful manner; and that this renders the resolution illegal, contrary to public policy and unenforceable.
- 19 Mr van der Riet, who appeared on behalf of the union, did not dispute that the trustees owe a fiduciary duty to the fund and that the trustees are obliged to

apply their own independent judgment as to what is in the best interests of the fund. The thrust of his argument was that the resolution, properly construed, does not interfere with the proper exercise by the trustees of their fiduciary duties and that it is accordingly neither unlawful nor invalid.

20 In my view, it is clear that all the fund's trustees owe a fiduciary duty to the fund and to its members and other beneficiaries. The rules vest the management of the fund in the trustees and make it clear that the fund's primary object is the payment of benefits to its members and other beneficiaries. The trustees are entrusted with the control of property with which they are bound to deal for the benefit of others. This manifestly gives rise to fiduciary obligations. Estate Kemp and Others v McDonald's Trustees 1915 AD 491 at 499; Robinson v Randfontein Estates Gold Mining Co Limited 1921 AD 168 at 177-178; Lorentz v TEK Corporation Provident Fund and Others 1998 (1) SA 192 (W) at 221A-I; TEK Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA) at 894C-D.

21 Sections 7A to E of the PFA (introduced into the PFA by Act No 22 of 1996) created statutory duties which overlap with the pre-existing common law fiduciary duties of pension fund trustees. As referred to above, section 7A requires every fund to have a "board" consisting of at least four "board members", at least 50% of whom the members of the fund shall have the right to elect. (For convenience, and having regard to the terminology utilised in the rules of the fund, I shall refer to such "board members" as "trustees".)

22 Section 7C(1) of the PFA provides:

*"The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and rules of the fund."*

23 Section 7C(2) provides:

*"In pursuing its object the board shall –*

*(a) take all reasonable steps to ensure that the interests of the members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;*

*(b) act with due care, diligence and good faith;*

*(c) avoid conflicts of interests;*

*(d) act with impartiality in respect of all members and beneficiaries.”*

24 Section 7C(1) makes it clear that – by statute - it is the fund’s board, and not the union, which is entitled and required to “*direct, control and oversee*” the fund’s operations. The assertion in the resolution (“noting” clause 3) that, on occasion, the union’s NEC and other constitutional structures “*take decisions*” on benefit funds which the trustees “*are obliged to implement*” is incompatible with this statutory injunction. In my view, the union’s misconception in regard to this issue was fundamental and led it to adopt a resolution some of the terms of which are incompatible with the requirements of the PFA and the fiduciary duties of the fund’s trustees.

25 Each of the fund’s trustees is required to exercise an independent judgment as to what constitutes the best interests of the Fund. The applicable legal principles are the same as those which apply to directors of companies, as set out in the following passage from the judgment of Margo J in Fisheries Development Corporation of SA Limited v Jorgensen and Another; Fisheries

Development Corporation of SA Limited v AWJ Investments (Pty) Limited and Others 1980 (4) SA 156 (W) at 163D-G:

*“A director is in that capacity not the servant or agent of a shareholder who votes for or otherwise procures his appointment to the board (the position of ‘nominee’, though referred to in the plea, would not seem to have the legal consequences alleged by the defendants). The director’s duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company.”*

- 26 To similar effect is the following *dictum* by Lord Denning MR in Boulting v Association of Cinematograph Television & Allied Technicians [1963] 2 QB 606 at 626:

*“Or take a nominee director, that is, a director of a company who is nominated by a large shareholder to represent his interests. There is nothing wrong in it. It is done every day. Nothing wrong, that is, so long as the director is left free to exercise his best judgment in the interests of the company which he serves. But if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful. (See Kregor v Hollins [(1913) 109 L.T. 225, 228, C.A.] by Avory J.) ...”*

27 In my view, these principles apply *mutatis mutandis* to a trustee of a pension fund. The trustee's obligation to exercise an independent judgment, regardless of the views of the trade union (or employer) which appointed him is analogous to the director's obligation to exercise an independent judgment, regardless of the views of any party which may have procured his or her appointment as a director.

28 I respectfully agree with the following assertion by Nigel Inglis-Jones in "The Law of Occupational Pension Schemes" (Sweet & Maxwell, 1989, London):

*"It cannot be emphasised too strongly that the trustees of a pension scheme must be in a position to perform their duties wholly free from extraneous pressure, whether such pressure is applied by the other directors of the employers, or in the case of an employee-trustee by an employer or other members of the workforce."*

Whilst this assertion is made by the learned author in respect of pensions governed by English law, I believe it applies with equal force in our law.

29 In my view, the trustees cannot lawfully acquiesce in an attempt by a trade union or other interested party to fetter their discretion by the imposition of a "mandate". This principle emerges from Cowan and Others v Scargill and Others [1984] 2 All ER (Ch.D), a decision by Sir Robert Megarry V-C. That case concerned the legality of the stance adopted by the trustees of a pension fund appointed by a trade union that they would not approve a proposed investment plan unless it was amended to prohibit any increase in overseas investment, to provide for withdrawal from existing overseas investments at an opportune time, and to prohibit investment in energy industries which were in direct competition with coal. The union-appointed trustees required these amendments to be made so as to bring the pension fund's investment plan into conformity with policy decisions which had been taken by their union. The Court held as follows (at 760f-g):

*"The starting point is the duty of trustees to exercise their powers in*

*the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first."*

The Court held that, by following the union's policy, the union-appointed trustees had acted in breach of their fiduciary duties to do the best that they could for the beneficiaries.

- 30 The resolution with which the present case is concerned reflects a belief that the members' trustees' primary duty is to represent the union and its members when taking decisions regarding the fund. This is perhaps an understandable belief but it is a belief which, in my view, is wrong in law. Both the members' trustees and the employers' trustees share a common duty to act in the best interests of the fund, its members and beneficiaries. None of the trustees represent the party which appointed them when they take decisions regarding the fund's affairs, nor may they place the views or interests of such party above the interests of the fund or its members.
- 31 In my view, the union was wrong in believing that the members' trustees are "accountable to" it ("believing" clause 2) and had no right to require such trustees to be "accountable to" it and its members ("resolves" clauses 1, 6, 7 and 8). The union had no right to impose an obligation on the members' trustees to "take mandates" from the union before and after they attend board meetings ("resolves" clause 10) nor to oblige them to "take mandates from union members" ("resolves" clause 2).
- 32 The combination of the "resolves" clauses 10 and 11 is of particular concern. Clause 10 purports to impose an obligation on the members' trustees to "*take mandates from the union before and after they attend board of trustee meetings ...*". Clause 11 provides that all trustees "*who fail to adhere to these fundamental democratic principles ... must be disciplined ...*". As was pointed out by Mr Watt-Pringle, on behalf of the fund, the primary dictionary

meaning of “mandate” as a noun is “*an official order or commission to do something*” and, as a verb, to “*give (someone) authority to act in a certain way*” (Concise Oxford English dictionary, 11<sup>th</sup> edition 2004). The obligation in terms of clause 10 on members’ trustees, if given effect to, requires them not only to ascertain the views of the union but also to implement such views insofar as this lies within their power as trustees. The irresistible inference, in my view, is that the resolution purports to require employee trustees who belong to the union to execute instructions given to them by the union (in the form of “mandates”) and has the effect that, if they fail to do so, they are to be subjected to disciplinary processes. In my view, this is irreconcilable with the trustees’ fiduciary obligation to exercise independent judgment.

- 33 Mr van der Riet argued on behalf of the union that the fiduciary duties of trustees are recognised in the resolution and that, on a proper construction thereof, the resolution does not require trustees to act contrary to their independent judgment. He pointed out that “noting” clause 5 expressly notes that the trustees “... *have fiduciary rights and obligations in terms of the Pension Fund Act*” and submitted that this qualified all that was resolved. That clause made clear (so he submitted) that the obligation to “take mandates” does not imply an obligation to give effect thereto if this is considered by the affected trustees to be contrary to their fiduciary duty. I am not persuaded by this argument. Whilst it is true that the clause referred to does purport to “note” the existence of the “fiduciary rights and obligations”, the text of the balance of the resolution is in my view simply incompatible with a proper appreciation of the implications of the fiduciary duty. When the resolution provides that the employee trustees “*must take mandates from the union*” and “*must be disciplined*” if they “*fail to adhere to these fundamental democratic principles*”, the clear intention in my view is to bind the trustees to execute the mandates received, regardless of the independent views of the trustees concerned. That this is so is, in my view, also apparent from the “noting” clause 3, which (as referred to above) provides that the union’s NEC and other constitutional structures “*take decisions*” which “*(t)rustees are obliged to implement*”. Read as a whole, I believe that the resolution requires



employee trustees to implement decisions taken by the union and to execute mandates received from the union, insofar as this lies within their power.

- 34 As referred to above, it is common cause that the resolution was adopted in response to the decision by the board to change administrators, a decision objected to by the union. Construed against this background circumstance, it is in my view quite clear that the resolution was intended to bind employee trustees to give effect to decisions taken by the union on issues of this sort. It is precisely because that is so that, if effect were to be given by trustees to the resolution, they would act in breach of their fiduciary duties. The text of the resolution is in my view simply incompatible with the exercise by employee trustees of their obligation to exercise independent judgment.
- 35 In support of his argument that, properly construed, the resolution does not oblige trustees to act in conflict with their own independent judgment, Mr van der Riet referred me to John Crowther Group plc v Carpets International plc and Others [1990] BCLC 460 (ChD). In that case a contract, which at face value bound the directors of a company to support the passing of a shareholders resolution approving a share acquisition transaction, was construed not to impose such an obligation once the directors had formed the view that this was not in the best interests of the affected shareholders. I was referred, in particular, to the following passage from the judgment of Vinelott J (at 464f-g):

*“The terms of the agreement must clearly be read in the light of the fact known to all the parties that directors owe a fiduciary duty to act in the interests of their company and to make full and honest disclosure to shareholders before they vote on such a resolution. It seems to me that it must have been understood by all that if the understanding was to use reasonable endeavours to procure the passing of the resolution it was necessarily subject to anything which the directors had to do in pursuance of that fiduciary duty.”*

In my view, this passage does not point to the conclusion in the present case

that, on a proper construction of the resolution, the union did not intend or purport to oblige members' trustees simply to give effect to "mandates" obtained from the union. The language of the resolution in this regard is in my view so clear as to be capable of no other construction.

- 36 Do the features of the resolution to which I have referred above make it (in the language of the first declaratory order sought) "contrary to law" and therefore "unenforceable"? I believe that they do. I have already referred (in paragraph 26 above) to the judgment of Lord Denning MR in the Boulting case. Shortly after the passage quoted in that paragraph, Lord Denning continued as follows:

*"So, also, if a director of a company becomes a member of a trade union on the terms that he is to act in the company's affairs on the instructions of the trade union, or in accordance with the policy of the trade union (rather than according to what he thinks best in the interests of the company), such an agreement of membership is unlawful. It is contrary to public policy that any director should be made to deny his trust and throw over the interests of those whom he is bound to protect. Take the converse. Suppose the employee of a company is an officer of a trade union. Would it be lawful for his employers to approach him and – by promises of promotion or threat of dismissal – get him to promise that he would act in the union's affairs on the instructions of his employers? It would in my judgment be unlawful. An officer of a trade union, too, is in a fiduciary position towards the members, and no employer would be justified in seeking, by promises or threats, to induce him to act disloyally to them. In each of these cases the reason is simple: it is wrong to induce another to act inconsistently with the duty of fidelity which he has undertaken by contract or trust to perform: cf Bents Brewery Co Limited v Hogan [[1945] 2 All ER 570] and DC Thomson & Co Limited v Deakin [[1952] 2 All ER 361, C.A.]"*

- 37 I think that the above principles are compatible with our law and can properly

be applied in the present context. I accept that there is nothing unlawful or improper in the union expressing its views on issues to be decided by the fund's trustees or even in seeking to persuade the fund's trustees to accept its views. However, it is, in my view, unlawful for the union to seek to compel member trustees to "take mandates" which they are required to implement, failing which they risk disciplinary steps. It is unlawful for the union to threaten disciplinary steps against member trustees for refusing to accept that they are "accountable to" and union and its members, rather than to the fund and its members.

38 Whilst it is true that a union is entitled to require its employees to carry out its lawful instructions and is entitled to require its members to comply with its lawful resolutions, it is not entitled to compel them to do so where the instruction or resolution is contrary to public policy or otherwise unlawful. In my view, the resolution in this case is contrary to public policy and unlawful because it seeks to interfere with the rights of pension fund trustees to exercise their fiduciary duties in accordance with their own independent judgment.

39 I am satisfied that the present dispute is not academic and that the fund has a legal interest in the subject matter of this application. I do not accept the submission made on behalf of the union that the dispute is one between disgruntled union members (and a union employee associating with them) and their union, in respect of which the fund has no *locus standi*. The fund has a legal interest in resisting unlawful pressure being brought to bear on its trustees not to execute their fiduciary duties and not to apply their minds independently to the matters which, as trustees, they are called upon to decide.

40 The fact that the union has expelled members and dismissed an employee in relation to the present dispute shows that the dispute is far from academic. Moreover, the potential for further problems to flare up arising from the resolution is apparent. In the circumstances, I am satisfied that this is an appropriate case for the grant of declaratory relief. (Ex parte Nell 1963 (1) SA

754(A).)

- 41 The objectionable features of the resolution to which I have referred above are, in my view, fundamental to it. It was not suggested by the union that the objectionable features can and should be severed from the balance thereof. It follows, in my view, that the entire resolution must be regarded as unlawful and accordingly unenforceable.
- 42 For the reasons set out above, I am satisfied that the resolution is contrary to law and unenforceable. In my view, the appropriate relief in this regard is an order declaring this to be so. I am not persuaded that it is necessary or appropriate *in the declaratory order* to spell out the reasons why I consider this to be so, nor is it necessary to grant the relief in the format sought in paragraphs 1, 2 and 3 of the notice of motion.

### **Lawfulness of disciplinary charges**

- 43 The fourth order sought by the fund is an order:

*“declaring the institution and prosecution of disciplinary charges against union employees, office bearers and members, which are wholly or in part founded on the 2002 resolution, to be unlawful.”*

- 44 The background to this is the decision to institute charges 1, 2 and 3 in October 2006 against the seven persons referred to above. Although charge 2 was withdrawn, it was submitted in argument on behalf of the union that, properly advised, the union had been under no obligation to withdraw that charge. That view is disputed by the fund.
- 45 The declaratory order sought does not require me to make any ruling as to whether it would be unlawful for the union to pursue disciplinary proceedings against a member for failing to inform the NEC, or misleading the NEC, regarding amendments that had been made to the rules of the fund (cf

charges 1 and 3). I accordingly refrain from doing so.

- 46 What I am required to address is the lawfulness of instituting and prosecuting disciplinary charges against union employees, office bearers and members which are founded on the 2002 resolution. Inasmuch as I have found the resolution to be contrary to law and unenforceable, I hold that it is and would be unlawful to take any disciplinary steps against trustees of the fund for non-compliance with the resolution.
- 47 Whilst I accept that the fund has a legal interest in a dispute regarding disciplinary charges brought by the union against any of its trustees, I am not satisfied that it has been shown that it has any legal interest in the lawfulness of charges brought by the union against other employees, office bearers or members of the union. I therefore propose to limit the terms of the order which I grant to cover only the fund's members' trustees.

### **Costs**

- 48 This application was initially due to be argued on 18 April 2007. It was, however, postponed on that date, with the costs of the postponement held over for determination with the main application. The immediate cause of the postponement was the delivery by the fund of a brief affidavit deposed to on 17 April 2007 confirming that a minute of a resolution by the board of trustees of the fund of 16 March 2007, which had been served and filed some time after the filing of the replying affidavit, was indeed a resolution passed by the board. This was relevant to a dispute, which ultimately fell away, as to the authority of the deponent to the fund's founding affidavit. The union adopted the stance that it required an opportunity to investigate the facts referred to in the brief affidavit and to respond thereto if so advised. The fund made clear that it was not prepared to abandon reliance on the brief affidavit, filed the day before argument was due to take place. In my view, the postponement was attributable to the fund's delay in filing the affidavit. The union was entitled to an opportunity to investigate the issue which was the subject matter of that

affidavit. I do not accept the argument on behalf of the fund that the union should have investigated these facts and put up such further affidavit as it wished once the resolution (unaccompanied by a supporting affidavit) was filed. In my view, it would be just and equitable for the fund to bear the wasted costs occasioned by the postponement on 18 April 2007.

- 49 For the rest, the fund has achieved substantial success with this application and I see no reason why the costs should not follow the cause. I do not accept the fund's contention that this is an appropriate case in which to award costs against the union on an attorney-client scale.

### **Order**

- 50 For the reasons set out above, I make the following order:

1. It is declared that the "Resolution on the Accountability of Fund Trustees Established by CEPPWAWU" ("the 2002 resolution") passed at the 2002 congress of the respondent is contrary to law and unenforceable;
2. It is declared that the institution and prosecution by the respondent of disciplinary charges against the fund's members' trustees which are wholly or in part founded on the 2002 resolution are unlawful;
3. The applicant is directed to pay the wasted costs occasioned by the postponement of the application on 18 April 2007, such costs to include the costs of two counsel (insofar as two counsel were employed);
4. The respondent is directed to pay the remaining costs of the application, including the costs of two counsel (insofar as two counsel were utilised).

**AJ FREUND**

**Acting Judge of the High Court**

Date of argument: 20 June 2007  
Date of judgment: 14 August 2007

For the applicant: Adv CE Watt-Pringle SC  
Instructed by: Thyne Hunter Esterhuizen Inc

For the respondent: Adv JG van der Riet SC  
Instructed by: Cheadle Thompson & Haysom Inc