G CHIPARAUSHE AND 66 OTHERS
(as more fully appears on Annexure 'A')
versus
TRIANGE LIMITED
and
TRIANGLE SENIOR STAFF PENSION FUND

HIGH COURT OF ZIMBABWE
CHIGUMBA J
Harare, 27 January 2015, 18 February 2015

OPPOSED APPLICATION

Ms. *F. Mahere*, for applicants
A. Debourbon, for 1st respondent
In Default, 2nd respondent

CHIGUMBA J: One morning in February 2009, Zimbabweans woke up and found themselves subjected to a 'multicurrency system'. The Zimbabwean dollar was no longer accepted as legal tender. A basket of other currencies such as the United States dollar and the South African Rand, were introduced into our society. The truth of the matter is that these currencies had been circulating on what had been dubbed a 'parallel market' for quite some time. There are those who welcomed the formal adoption of those currencies as legal tender in this country, which had been ravaged by the knock on effects of super hyper inflation. Others bemoaned the symbolic annihilation of our currency, which they associated with a corresponding perception of the annihilation of our national sovereignty. The majority of the people were perturbed by the effect of the introduction of the multi-currency system on their pensions, insurance policies and life savings.

This case is about a group of workers who between them, gave more than twenty years of loyal service to their employer. In terms of the pension policy that was in operation at the outset, both employer and employees diligently contributed monthly to a pension fund. The issue that falls for determination, put simply, is whether all sixty seven employees are entitled to challenge the determination by the employer as to what constitutes their basic annual salary for

purposes of calculating their pension benefits. Depending on the answer to this question, the court will have to determine further, whether these employees are entitled to demand further payments by the employer towards their eventual pensions. At the heart of these issues lies the contentious issue of the effect of the introduction of the 'multicurrency' system on the calculation of pension contributions which had previously been based on our local currency, and were now set to be calculated on the basis of the United States dollars, the currency that the employees were now remunerated in. Some would say that the question ought to be holistically and definitively addressed by Parliament, as a matter of policy. Others feel that it is simply a question of implementing the provisions set out, in the relevant Pension Fund. We have been asked to issue an interdict and a *declaratur* as to the parties' rights and obligations in terms of the rules of their pension fund.

The application before the court was filed of record on 16 December 2013. The founding affidavit, was deposed to by G. Chiparaushe, in a personal capacity and as the duly authorized representative of sixty six other applicants, who attached supporting affidavits authorizing him to represent them. The first respondent is a sugar cane growing and processing company duly registered in accordance with the laws of this country, and the employer of the sixty seven applicants. To avoid confusion, the first respondent shall be referred to as TRIANGLE. The second respondent is the Triangle Senior Staff Pension Fund, (to be referred to as TSSPF), a properly constituted pension fund, duly registered with the Commissioner of Insurance, Pension and Provident Funds Act (IPEC), in terms of section 6 of the Pension and Provident Funds Act [*Chapter 24:09*]. The TSSPF is governed by its rules (the Fund Rules).

The first applicant averred that the application before the court was brought in accordance with Rule 9 of the Fund rules which provides that a member or any person whose claim is derived from a member shall have the right to refer a dispute to a court of law in this country for determination. The applicants had previously approached an arbitrator Honourable J.T Mawire in terms of the Labour Act [*Chapter 28:01*] to determine the dispute, and on or about the 5th of September 2013, the arbitrator found that he did not have the jurisdiction to determine the dispute between the parties. It was submitted on behalf of the applicants that they had a clear right to the interdict and *declaratur* that they sought. The 1st applicant averred that he became an employee of TRIANGLE on the 1st of April 1980, and a member of the TSSPF on the 1st of July

1996. As from the date of his membership to the TSSPF, TRIANGLE commenced deducting his share of pension contributions from his basic salary. The applicant remains a member of the TSSPF, to date.

First applicant averred further, that in terms of clause 11 of his contract of employment, membership to the TSSPF became compulsory on the date of his appointment, and his contribution of 7% of his basic monthly salary was automatically deducted and forwarded to the TSSPF, by TRIANGLE, every month. According to the Terms and conditions of the employment of C band staff (loss control manager), as at I July 1996 the basic salary was pegged at ZW$90 948-00. The pension contribution of 13 % came to ZW$ 11 823-00. Under the heading "remuneration" was a note to the effect that:

> "The basic salary is pensionable and the company currently contributes 13% to the Triangle Senior Staff Pension Fund."

After the basic salary was a list of benefits which were to be paid on behalf of the employee on a 50% contribution basis, such as CIMAS medical aid and a drug scheme. Further benefits included an education allowance which was expressly qualified as being taxable. First applicant averred that, currently, in terms of Rule 19 of the TSSPF Fund rules, TRIANGLE is obliged to make a corresponding monthly contribution to the TSSPF, of 13.5% of first applicant's basic monthly salary. On the basis of the aforesaid, 1st applicant averred that he and his fellow applicants have a clear right to have a deduction of 7% of his basic monthly salary made, and to have a corresponding 13.5% of his basic monthly salary contributed by TRIANGLE. Failure to match first applicant's contribution would be a failure by TRIANGLE, to abide by the TSSPF Fund rules. It was submitted that, in or about October 2000, the managing director of TRIANGLE, Mr. J. M. Cleasby, advised members of the TSSPF that it was closed to new entrants, on the basis that its existing members would be given an option to transfer to a different pension fund, the Triangle Pension Plan (hereinafter referred to as The Money Plan). In November 2000, Mr. Cleasby wrote a letter to the members of the TSSPF and advised them that the date of transfer to The Money Plan was the 1st of January 2001. Paragraph 3 of the letter stated that:

> "To assist you in making a decision please find enclosed
> - Comparison booklet
> - Illustration letter
> - Option form".

It was submitted on behalf of the applicants that, TRIANGLE caused a booklet called 'Defined Benefit Triangle Senior Staff Pension Fund or Defined Contribution The Money Plan', which compared the two schemes to be published. All sixty seven applicants opted to remain members of the TSSPF. First applicant averred that the applicants suffered an injury and or that, alternatively, an injury is reasonably apprehended by them. In support of this contention is the averment found in paragraph 18 of the first applicant's founding affidavit, that TRIANGLE has unilaterally decided to refuse to make its share of contributions to the TSSPF and or to deduct their 7 % contributions from their basic monthly salaries. The allegation against TRIANGLE is that, by refusing to recognize most of the earnings of members of the TSSF as 'pensionable', it has, by its conduct, breached the terms of the Fund rules and interfered with the accrual of pension benefits.

In support of this averments, the first applicant referred to a letter to the trustees of the TSSPF, dated 1 April 2009, written by the TRIANGLE managing director Mr. S. D. Mutsambiwa. The letter was entitled "Pensionability of US$ Salaries". It reads as follows:

> "Kindly note that the January 2009, February 2009 and March 2009 salaries have been paid in USD$ to employees who are members of the Triangle Senior Staff Pension Fund (TSSPF). ***These salaries were paid in USD$ without any confirmation by the employer whether or to what extent the salaries would constitute pensionable emoluments.*** A decision in this regard is still to be made pending a review of the 'dollarisation' of the Zimbabwean economy and the bearing this will have, amongst other things, on the functioning of the fund. The company will be arranging a meeting with the board of Trustees in the near future to consider the way forward both in relation to existing pensioners and active member. In the meantime, and until further notice, contributions will be remitted to the Fund administrators as an interim measure pending final decisions regarding the way forward in respect of the TSSPF. ***This interim arrangement should under no circumstances be regarded as an implied decision having been taken that current USD$ salaries are indeed classified as pensionable emoluments***." (my emphasis)

On 8 July 2009, TRIANGLE introduced the "guaranteed package" to employees in the executive grade, backdated to June 2009. See Annexure H1 to the founding affidavit. In paragraph 24 of his founding affidavit, first applicant avers that all the applicants were forced to sign the acceptance letter in unilateral variation of their conditions of employment. To prove this claim, he referred to an electronic mail communication dated 15 December 2009, addressed to Mr, Eston, in which Fred Nyangwe advised that Mr. Eston's failure to sign the letter which contained the new conditions of service, meant that, with effect from 1 December 2009, his salary as set out in the letter would be discontinued and he would go back to earning his old

salary as at 31 May 2009. He was also advised that the difference between the two salaries, which he had been paid, would be deducted from his old salary until it had been recovered in full.

On 7 October 2010, TRIANGLE announced that the TSSPF would be discontinued, and its active members moved to the Money Fund with effect from 1 November 2010. The TSSPF Trustees refused to sign a resolution to approve the disbanding of the Fund, on the basis that this violated the TSSPF Rules, and constituted a reversal of the undertakings made by TRIANGLE to the Fund members. The Trustees were of the view that the procedure set out by R 36 of the TSSPF Rules had not been followed. A meeting was held at which TRIANGLE announced the transfer of the Fund members to the Money Plan, and told the members that the transfer values would be based on January 2009 salaries and not on current salaries. Again, this was alleged to be in violation of the Fund rules. The applicants' contention is that the relevant rule equates pensionable emoluments to a member's basic salary or wage. Members' basic salaries had increased significantly since 2009, in some instances by 500%. TRIANGLE contended that following the TPSSF Fund rules would result in its bankruptcy.

On 19 October 2010, the TSSPF members delivered a petition to the trustees of the TSSPF to demonstrate that they did not wish or agree to transfer from the TSSPF to the Money Plan. On 15 February 2011 the trustees addressed a letter to the TRIANGLE Human Resources manager. Paragraph 3 of the letter reads as follows:

> "…Of concern by members is why the trustees are not being consulted on the future of the Fund in accordance with the Fund's rules. Member trustees are not being kept informed as to what is happening and are not being asked for input or direction…"

In February 2011, TRIANGLE announced a further annual salary review together with changes to the structure of employment benefits. Members were asked to agree to and sign for these changes by 7 March 2011. Part of a letter written to Mrs. Eston (one of the applicants) on 21 February 2011 by Human Resources reads as follows:

> "Dear Mrs Eston,
> The structure of your remuneration package has been reviewed in the context of the need to align the employee remuneration framework …. ***It is confirmed that your actuarily calculated benefit in the TSSPF is to be based on the USD$ salary that has been used to determine your Fund contributions since 1 January 2009…"***

In response to the petition by members of the TSSPF, IPEC called a meeting and advised that TRIANGLE was at liberty to disband the TSSPF, but only after fully funding it, and complying with the requisite termination procedures.

In para 38 of the founding affidavit, it is averred on behalf of the applicants that they have no other remedy. Various meetings with the trustees have not yielded any results. TRIANGLE has continued to refuse to recognize members' basic salary as the pensionable emolument. Repeated appeals to IPEC to intervene have not yielded any tangible solutions. Applicants reiterate that no other remedy other than a *declaratur* and an interdict can assist them to assert their pension rights. On 20 January 2014, TRIANGLE filed a notice of opposition. The opposing affidavit was deposed to by Fred Nyangwe, the Human Resources director. He raised various points *in limine,* the first of which was that the applicants had failed to exhaust domestic remedies. The second preliminary point raised is that there are material disputes of fact which make this matter incapable of resolution on the papers filed of record. The third preliminary point raised in the founding affidavit is that this matter is *lis pendens*, the decision of the arbitrator Mr. Mawire of 23 September 2013, not being final. The final preliminary point raised is that this matter has prescribed because the applicants' claims arose in August 2009, or alternatively January and August 2010.

On 20 February 2014, an answering affidavit was filed on behalf of the applicants. TRIANGLE was accused of usurping the power of the board of trustees of the TSSPF, and of attempting to close the Fund. The trustees deliberated over the dispute for more than two years and it was alleged that they have failed to resolve the issue because the chairman of the Fund frustrated all efforts to settle the matter. It was contended that TRIANGLE frustrated efforts by IPEC to resolve the dispute starting with the meeting of 6 October 2011, by failing to comply with the IPEC directives. The issues that fall for determination before this court are as follows:

1. Whether this court is correctly seized with this matter.
2. Whether the applicants failed to exhaust domestic remedies.
3. Whether the applicants claim has prescribed.
4. Whether there are material disputes of fact which are not capable of resolution on the papers filed of record.

5. What constitutes basic salary for purposes of calculating the contributions due from the applicants and from TRIANGLE for onward transmission to the TSSPF every month.
6. Whether the applicants are entitled to the relief sought.

POINTS IN LIMINE

(a) Whether this court is correctly seized with this matter-the cause of action

I am grateful to the insightful heads of argument filed by counsel for both parties' which provided great assistance to the court in the resolution of all the issues under consideration in this matter. It was submitted on behalf of TRIANGLE that that applicants' contention that their cause of action is derived from r 9 of the Fund rules, is a misconception. It was submitted that because there is no cause of action, no relief can be given by this court. Rule 9 of the Fund Rules reads as follows:

Rule 9 Disputes

> "If a dispute arises in respect of any Member or any person whose claim is derived from a Member, the Trustees, acting upon such evidence as they deem adequate, whether amounting to legal proof or not, shall determine the matter provided however, that the Member or person whose claim is derived from a Member shall have the right, in the event that they are not prepared to abide by the decision of the Trustees, to refer the dispute to any recognized body for arbitration or to a court of law within Zimbabwe for determination. In the event of such referral the Principal Officer shall inform the Registrar, in writing, of the nature of the dispute."

The contention that Rule 9 does not create a cause of action but merely sets out the pre-requisites to a right of action to resolve disputes against the TSSPF is a curious one. Let us examine it further.

TRIANGLE contended that, in order for this court to have jurisdiction to hear the dispute, we must consider whether the dispute contemplated by R 9 embraces a dispute between a member and the employer, we must consider whether the requirement of the matter being determined by the Trustees is a pre-requisite to further action, and whether a Member can rely on R 9 where there has been no decision by the Trustees, when R 42(ii) of the Fund Rules is taken into consideration.

Rule 42 Effect on terms of employment

> "(i)…
> (ii) No person shall have any claim in respect of the Fund or against the Fund or against the Trustees or the employers, except in accordance with the provision of these rules.
> (iii)…"

In paragraph 84 of its heads of argument, it is submitted on behalf of TRIANGLE that the dispute contemplated by Rule 9 is one between a member and the TSSF, and not between a Member and the employer. It is argued that Rule 9 gives no right of action to an employee against the employer, such a dispute must first be determined by the Trustees. Rule 9 is peremptory, in the event of a dispute the Trustees **Shall** determine the matter. It is mandatory that the Trustees first determine the matter. In the interpretation of statutes the word shall, is construed as being peremptory rather than directory. See ***Sutter* v *Scheepers*[1],** where the court said that:

> "Without pretending to make an exhaustive list I would suggest the following tests, not as comprehensive but useful guides. The word 'shall' when used in a statute is rather to be construed as peremptory than as directory unless there are other circumstances that negative this construction…"See also ***Prospect Estates Ltd* v *The King*[2], *Washaya* v *Washaya*[3], *Bulawayo Bottlers (Pvt) Ltd* v *Minister of Labour, Manpower Planning & Social Welfare & Ors*[4], *S* v *Makamba*[5].**

The word 'may' is directory, which means that when it is used in a statute, it gives a discretion whether or not to act. Clearly, R 9 explicitly gives a Member who is not prepared to abide by a decision of the Trustees, a right to refer the dispute to arbitration or to court. It was contended on behalf of TRIANGLE that the applicants do not have a right to approach this court, that doing so flies in the face of R 42(ii) of the Fund rules, because the alleged dispute has not been subject of a compulsory determination by the Trustees.

It is my view that the arguments proffered on behalf of TRIANGLE are self serving and circuitous. The record is replete with minutes of the Trustees meetings which show quite clearly that the Trustees were unable to resolve the dispute between the parties. The failure to make a decision is in my view a state of affairs that can be interpreted as a decision. At ad para 4.3 of

[1] 1932 AD 165 @ 173
[2] 1942 SR 41 @44
[3] 1989 (2) ZLR 195 (HC) @ 199
[4] 1988 (2) ZLR 129 (HC) @ 138
[5] 2004 (1) ZLR 169 (HC) @ 174

the applicants' answering affidavit, Record pages 395-396, is an averment made on behalf of the applicants that a dispute was declared on 7 October 2010. The dispute was referred to the Trustees in accordance with Rule 9. The TSSPF board of Trustees took two years to deliberate on the dispute, and failed to agree. Applicants averred that the Chairman of the TSSPF, who is nominated by TRIANGLE, frustrated all efforts to resolve the dispute.

It therefore cannot in my view, be said that the Trustees of TSSPF were not approached in terms of R 9, and asked to resolve the dispute between the parties, The Trustees were approached, and in their wisdom failed to resolve the dispute. The Trustees' failure to act, is itself the result of inability to resolve the dispute. In my view it is implied by the wording of R 9 that any decision made by the Trustees, or lack of decision, can be referred to arbitration or to a court, by any member who cannot abide by it. We have been petitioned by 67 members who cannot abide by the Trustees' failure to make a decision.

My reading of R 9 does not support the interpretation submitted on behalf of TRIANGLE, that the nature of the dispute contemplated, relates to a dispute between members and Trustees of the TSSPF only, and does not confer a right to legal recourse against TRIANGLE. Rule 9 makes no distinction between the Trustees of the TSSPF, and TRIANGLE. It is my view therefore that the applicants are properly before this court, in terms of Rule 9 of the Fund Rules, as read with R 42(ii). I find the argument proffered by the applicants persuasive, that the failure by the Trustees of the TSSPF to resolve the dispute for over two years, cannot and should not be allowed to preclude them from enforcing their rights as against the respondents, merely because it is not a 'positive' or a conclusive decision. Even a 'negative' decision, as in a failure to act, amounts to a decision that ought to be subjected to judicial review and scrutiny, in the interests of justice.

(b) <u>Did the applicants fail to exhaust internal remedies?</u>

This is an aspect of the r 9 argument, which is raised in the opposing affidavit para 6 at Record pages 247-248. To rehash the argument in brief, TRIANGLE contends that R 9 of the TSSPF Fund Rules mandates the Trustees to make a decision as a pre-requisite to a member referring a dispute to arbitration or to a court. Otherwise Rule 42(ii) prohibits such litigation. The court was reminded that the TSSPF Rules are binding on the parties by virtue of section 7(3) of the Pension and Provident Funds Act [*Chapter 24:09*]. The Rules are said to provide a complete

domestic remedy for disputes of this nature. It is contended that there has been no compliance with R 9.

It was submitted on behalf of the applicants, at record p 460, in their heads of argument, that there is no merit in this preliminary point. The applicants contended that, as a matter of law, a litigant has a duty to exhaust domestic remedies only where those remedies are capable of providing effective redress in respect of the complainant. The internal remedy must not be illusory or inadequate. The case of [6] ***Djordjevic* v *Chairman, Practise Control Committee, Medical and Dental Practitioners Council Of Zimbabwe & Anor*** was cited as authority for the proposition that where there are good reasons for not exhausting domestic remedies, they need not be resorted to before the court can entertain the cause. The court in that case had this to say:

> "Where domestic remedies are capable of providing effective redress in respect of the complainant, a litigant should first exhaust those remedies unless there are good reasons for not doing so".

Similarly in [7] ***Moyo* v *Forestry Commission***, it was held that:

> "A court will not insist on an applicant first exhausting domestic remedies where the appeal created by the code of conduct does not confer on the aggrieved party better and cheaper benefits than its remedies or where the decision appealed against undermined the domestic remedies. In the present case, the domestic remedy was not better and cheaper than the court remedy and the failure to hold an inquiry and to keep a record of proceedings undermined the domestic remedies themselves".

The applicants contended further, that the provisions of R 9 are clear. Trustees of the TSSPF should ordinarily, determine a dispute arising in respect of a Member or a person whose claim is derived from a Member, subject to the Trustees' capability to provide effective redress in respect of the complainant. I find this argument persuasive, especially when regard is had to the contents of the letter dated 15 February 2011 written by two TSSPF Trustees, in which they express dismay at TRIANGLE's failure to consult the Trustees on the future of the TSSPF in accordance with the Fund's Rules. There is a clear implication in that letter, by the Trustees, that the Rules of the Fund were not being followed by TRIANGLE, to the detriment of the TSSPF.

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[6] 2009 (2) ZLR 221(H)

[7] 1996 (1) ZLR 173(H)

At record p 109, where the letter appears, the Trustees state unequivocally that they were not being asked for input or direction. It is my view that this preliminary point lacks merit, for the reasons already stated above, and this court will not insist that the applicants first exhaust domestic remedies when the Trustees clearly failed to resolve the dispute over a two year period. The referral of the dispute to the Trustees did not provide effective redress to the applicants. The Trustees failure to resolve the dispute, by failing to come to any decision in regards to the dispute, is a very good reason why the applicants should not be made to go back and seek resolution from them. This preliminary point is dismissed for lack of merit.

(c) Is this matter still pending before another forum?

It was contended on behalf of TRIANGLE, that the applicants had referred a dispute to a labour officer who referred the matter to compulsory arbitration in terms of s 93(5)(a) of the ***Labour Act [Chapter 28:01]***. The arbitrator made a series of awards, the latest of which is dated 5 September 2013. That award, it is argued, is an interim award based on interim issues raised and is not a final award. For that reason, the resolution of the pension and labour issues on merit, is still pending before the arbitrator. It was submitted that the principle of *lis pendens* is one of public policy to avoid a litigant having to meet multiple actions on the same subject matter before different *fora* at the same time. The second court has a discretion whether or not to stay the additional proceedings having regard to the equities and to the balance of convenience in the matter. The court was referred to the following cases as authorities for this proposition. ***Baldwin* v *Baldwin*** [8]**, and *Mhungu* v *Mtindi*** [9]**.**

Applicants strenuously denied that this same matter is currently pending before the labour arbitrator, Mr. Mawire. They accepted that they had approached a labour officer on the basis that TRIANGLE was depriving them of their pension benefits. They admitted that the matter was referred to compulsory arbitration, and, after a protracted hearing, the arbitrator concluded, in an award dated 5 September 2013, that the enforcement of pension rights falls outside the purview of labour rights justiciable under labour courts and tribunals. The arbitrator said that:

> "While pensions are referred to in labour jurisprudence, this does not necessarily mean that they are exhaustively labour rights. They may have labour tenets but for purposes of enforcement, they

[8] 1967 RLR 289 (G)
[9] 1986 (2) ZLR 171 (SC)

retain a predominantly non- labour complexion. They fall outside the purview of labour rights justiciable under labour courts and tribunals".

Clearly the arbitrator declined jurisdiction to determine the dispute between the parties, and no appeal was filed by TRIANGLE, to the Labour Court, against this determination of lack of jurisdiction by the arbitrator. The decision of the arbitrator is extant. The Labour Court does not have jurisdiction to grant a declaratory order which is granted in terms of s14 of the ***High Court Act [Chapter 7:06]*** as follows:

"14 High Court may determine future or contingent rights
The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

In the case of ***Agribank v Machingaifa***[10] the court said that:

"The High Court's inherent jurisdiction to grant declaratory orders in labour matters has not been ousted. The only issue for determination was whether the case was a proper one for the exercise of the discretion under s14 of the High court Act. The fact that the dispute could well have been determined in the Labour Court was not the determining factor".

In ***Mushoriwa v Zimbank*** [11] it was held that:

"The power to issue a declaratory order is specific to the High Court. The Labour Court, unlike the High Court, has not been specifically empowered to issue declaratory orders and cannot create such relief or the procedure for granting such relief as it is not a court of inherent jurisdiction. Consequently, if the relief that an applicant seeks is in the nature of a declaratory order, the High Court would have original jurisdiction as that power has not been specifically ousted by statute"

It is trite that the Labour Court does not have power to grant interdictory relief. See ***NRZ v Zimbabwe Railway Artisans Union & Ors***[12] **.** It is my view that the preliminary point that the matter is pending before another forum clearly has no merit. Not only has an arbitrator declined jurisdiction to deal with the dispute between the parties, no appeal has been filed to challenge that finding by the arbitrator. This court clearly has jurisdiction to grant the relief sought, which the Labour Court does not. The Labour Court also cannot grant interdictory relief. There is no

[10] 2008 (1) ZLR 244 (S)
[11] 2008 (1) ZLR 125 (H)
[12] 2005 (1) ZLR 341 (S)

matter pending before another court between the same parties in regards to the same subject matter.

(d) Has the applicants' claim prescribed?

In terms of s 14(1) of the Prescription Act [*Chapter 8:11*] 'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant enactment applies in respect of the prescription of such debt'. A 'debt' is defined in section 2 as:

> "Without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict, or otherwise".

It was contended on behalf of TRIAGLE that, in terms of s 15(d) the period of prescription applicable in this matter is three years. In terms of s 16(1) 'prescription shall commence to run as soon as a debt is due'. A debt is due when the creditor has a complete cause of action, that is when all the facts necessary to sustain the cause of action have come into existence. See ***Syfin Holdings Ltd*** **v** ***Pickering***[13] ***,Dube*** **v** ***Banana***[14] ***, Peebles*** **v** ***Dairiboard Zimbabwe Pvt Ltd***[15] ***, Mukahlera*** **v** ***Clerk of Parliament & Ors***[16] The issue that falls for determination of this preliminary point is therefore this: Have all the facts necessary to sustain the applicants' cause of action come into existence? In my view they have not. Some of the applicants' pensions are not yet due because those applicants are yet to reach retirement age.

Prescription applies as much to a *declaratur* as to an interdict, which are common law remedies. See ***Syfin*** **v** ***Pickering***[17] ***, Maharaj*** **v** ***National Horseracing Authority of Southern Africa***[18] ***,Harker*** **v** ***Fussel***[19]**.** The purpose of the Prescription Act has been described as follows, in the case of ***Uitenhague Municipality*** **v** ***Molloy***[20]

> "One of the main purposes of the Prescription Act is to protect a debtor from old claims which it cannot effectively defend itself against because of loss of records or witnesses caused by lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription, that purpose would be subverted".

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[13] 1982 (1) ZLR 10(S) @19-20
[14] 1998 (2) ZLR (HC) @95-96
[15] 1999 (1) ZLR 41 (HC) @ 45-46
[16] 2005 (2) ZLR 365 (HC @ 368-369
[17] 1982 (1) ZLR 10 (SC) @ 19
[18] 2008 (4) SA 59(N) @ 68
[19] 2002 (1) SA 170(T)
[20] 1998 (2) SA 735 (SCA) @ 742-743

In Cape Town Municipality v Allie NO[21] the court said the following:

> "It cannot be denied that society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant by enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all".

TRIANGLE's argument in support of its contention that the applicants claim has prescribed, is that the applicants' cause of action arose out of the decision taken in 2009 to change the payment of salaries of all of TRIANGLE's employees from Zimbabwe Currency to United States dollars. The determination of what portion of that payment constituted basic salary for purposes of pensionable emoluments depended on the definition of basic salary. The letter of 1 April 2009, annexure F, at record p 86, made it clear that no decision had been made on the issue. Applicants contend that their claim has not prescribed, because the injury that they complain of, is of a continuing nature. I find this argument persuasive, when regard is had to the purpose of the Prescription Act, and to the TSSPF Rules. It has not been suggested that TRIANGLE needs to be protected because it has lost its records and witnesses due to the passage of time. Rule 30 of the TSSPF Fund Rules provides that a member of the TSSPF has a right to be paid a pension upon retirement. None of the applicants, except the nine retirees referred to by TRIANGLE have reached retirement age. Their rights are contingent on them reaching retirement age, death, or termination of their contracts of employment. None of these events have occurred to any of the applicants. For these reasons, it is my view that the applicants' claim has not prescribed.

(e) Whether there are material disputes of fact which are not capable of resolution on the papers filed of record.

The court was asked to bear in mind three fundamental principles well established in the law of this country, in its approach to this matter. The first principle submitted on behalf of TRIANGLE, was that it is a trite rule of procedure that an applicant bringing a matter by way of court application must make his or her case on the founding papers.

The court was referred to the following cases as authority for this proposition: ***Mauberger v Mauberger***[22] ***, Shepherd v Tuckers Land & Development Co (Pty) Ltd***[23]***, Mobil***

[21] 1981 (2) SA 1 (c) @ 5

[22] 1948 (3(SA 731 © @ 732-733

[23] 1978 (1) SA 173 (W) @ 178

Oil Zmbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd [24] ***and Mangwiza v Ziumne NO & Anor*** [25]. The approach has been well summarized in the case of ***Transnamib Ltd* v *Imcor Zinc (Pty) Ltd (Moly-Copper Mining and Exploration Corporation (WSA) Ltd and Another***[26], as follows:

> "It is trite law that, generally, an applicant must make out his case in his founding papers and that such papers are a combination of pleadings and evidence. Furthermore an applicant cannot merely set out a skeleton case in the founding papers and then fortify this in reply. If scant material is furnished in the founding papers the applicant runs the risk of his application being dismissed and should not complain if this is done as it was up to him to put more facts before the court if he could. The court may in its discretion allow deviations from the normal procedures but it must be borne in mind that the normal procedures developed as they did because they would almost invariably be consonant with the best interest of the administration of justice"

The second principle that the court was asked to bear in mind was that, having chosen to approach the court by way of application, the applicants took the risk that the matter would result in disputes of fact arising, and that those disputes of fact would be resolved on the basis of facts alleged by TRIANGLE, together with those of the applicants which are admitted, subject to any resolution of the disputed facts which could be made without causing injustice to either party. The applicants chose the procedure at their own peril. As authority for this proposition, the court was referred to the following cases; ***Tamarillo (Pty) Ltd* v *B N Aitken (Pty) Ltd*** [27]**, *Plascon-Evans paints Ltd* v *Van Riebek Paints (Pty) Ltd***[28]**, *Masukusa* v *National Foods & Anor***[29]***Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech*** [30]**, *Truth Verification Testing Centre CC* v *PSC Truth Detection CC & Ors*** [31]**, *Jirira* v *Zimcor Trustees Ltd & Anor***[32]**.**

The third well established principle that the court was asked to have regard to is that a court will not entertain a matter such as this court application where the applicants knew or ought to have known in advance that there were disputes of fact which could not be resolved on the papers. As authority for this proposition, the court was referred to; ***Masukusa* v *National Foods Supra, Tamarillo (Pty) Ltd* v *N B Aitken Supra, Adbro Investment Co Ltd***

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[24] 1990 (1) ZLR 67 (HC)
[25] 2000 (2) ZLR 489 (SC) @ 492
[26] 1994 NR 11 (HC) @ 15-16
[27] 1982 (1) SA 398(A) @ 430G-431A
[28] 1984 (3) SA 623(A) @635
[29] 1983 (1) ZLR 232 (HC) @ 234-235
[30] 1987 (2) ZLR 338 (SC)
[31] 1998 (2) SA 689 (W) @ 698E-99B
[32] 2010 (1) ZLR 133 (H) @136F

v ***Minister of the Interior*** [33]***, Shereni*** **v** ***Moyo***[34]. It was submitted that the applicants ought to have regard to the admonition by the Judge in the case of ***Mashingaidze*** **v** ***Mashingaidze*** [35] where he said that:

> "It is necessary to discourage the oft-recurring practice whereby applicants who know or should know, as was the case with the applicant in this matter, that real and substantial disputes of fact will are likely to arise on the papers, nevertheless resort to application proceedings on the basis that, at the worst, they can count on the court to stand the matter over for trial. ..Unless this practice is seen to be curbed, applicants will continue to believe that they have nothing to lose and, indeed, everything to gain tactically by embarking upon application proceedings notwithstanding their knowledge or belief at the time of doing so that the respondent will be able to show that genuine and serious disputes of fact exist on the papers".

Two examples of "known disputes of fact", were given on behalf of TRIANGLE at p 27 of its heads of argument. It was submitted that applicants knew in advance of instituting the present application that certain of their critical allegations were disputed. It was submitted further, that, at the very least the applicants must have realized that "real and substantial disputes of fact will or are likely to arise on the papers", and adopted the correct procedure. It was contended that the first substantial dispute of fact pertained to the booklet that was produced in the year 2000 at the time that the option to move from the TSSPF to the Money Plan. The applicants have disputed the assertion by TRIANGLE that the booklet was produced for and on behalf of the Trustees by the Fund administrators, AON Minet. At paragraph 59.1.2 of the opposing affidavit, at record p 262, TRIANGLE disputes that it produced this booklet. In my view, this is not a real and substantial dispute of fact which is incapable of resolution on the papers filed of record. As previously stated, the booklet is endorsed on its face that it was prepared by Aon Minet. Its contents clearly show that it was intended to provide an analysis of the pros and cons of the TSSPF as opposed to the Money Plan.

The second example of a known dispute of fact is the issue of the letter of 8 July 2009, which was produced as an example of how TRIANGLE allegedly communicated a change in the applicants' conditions of service and introduced a new form of remuneration. It was submitted that the applicants knew that this allegation would be disputed by TRIANGLE, and that TRIANGLE would argue that the letter was superceded after further discussions with E Band

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[33] 1956 (3) SA 345 (A) @ 350
[34] 1989 (2) ZLR 148 (S) @ 150
[35] 1995 (1) ZLR 219 (HC) @ 221-222

management by the letter of 31 July 2009 (see opposing affidavit Record pages 372-376). Again in my view, this issue referred to as an example of known disputes of fact cannot be said to constitute a 'real' or a substantial dispute of fact which is incapable of resolution on the papers. Applying the test set out on behalf of TRIANGLE, in regards to one of the three well established principles that the court was enjoined to keep at the back of its mind, the formula to be used in order to determine whether there are disputes of fact which cannot be resolved on the papers is 'that those disputes of fact must be resolved on the basis of facts alleged by TRIANGLE, together with those of the applicants which are admitted, subject to any resolution of disputed facts not causing injustice to either party'.

Applying this formula to the alleged dispute of fact, that is whether TRIANGLE unilaterally sought to alter the applicants conditions of service through communicating the same to them in a letter dated 8 July 2009, the following becomes clear: the letter of 8 July 2009 was meant for E Band employees only, not for all the applicants or for all Members of the TSSPF, the letter of 8 July 2009 was subsequently revised following representations by E Band employees, only ten applicants in this matter are E Band employees, an amended letter dated 31 July 2009 was subsequently sent to the E Band employees, 11 E Band employees counter signed that letter to show their acceptance of the revised conditions of employment. The 11 E band employees subsequently prepared similar letters for the D Band employees, of whom 21 out of 22 countersigned the letter, and 29 out of 34 C Band employees followed suit. In the result, there are no material, real, or substantial disputes of fact which are incapable of resolution on these papers, and there are no deficiencies in the applicants' founding papers, which would justify sanctions against them for choosing this procedure. That preliminary point is dismissed for lack of merit. I will now consider the merits of the matter before the court.

AD MERITS

The heart of the matter, the crux of it, the issue that falls for determination in the main matter between the parties is the question of what constitutes basic salary for purposes of calculating the contributions due from the applicants and from TRIANGLE for onward transmission to the TSSPF every month. In order to do justice to this question, it is necessary to

inquire into and determine whether the court may in the circumstances of this case, issue a declaratory order and an interdict.

(a) <u>Basic salary for purposes of calculating pensionable emoluments</u>

Rule 2 of the TSSPF Fund Rules defines pensionable emoluments, as;

> "Pensionable Emoluments" of a member shall mean his basic annual salary or wages together with any contractual bonus. For purposes of the Fund, changes in Pensionable Emoluments shall be recognized immediately". See Record page 39.

The dispute between the parties pertains to the definition of what constitutes 'basic annual salary or wages'. I agree with the contention that in order to answer that question, it is necessary to examine who is entitled to make that determination. The contract of the first applicant of July 1996, shows that the employer set out the definition of basic salary, and that first applicant signed the contract, in acceptance of this. TRIANGLE has promised to make its determination of what constitutes basic annual salary after a review, and applicants appeared to have accepted this stipulation, by signing to indicate acceptance of the 'restructured cash package'. First applicant in his answering affidavit at para 39, record p 410, appears to accept that the employer has a contractual right to set the basic salary at the point of initial engagement, but not thereafter.

Let us examine this assertion to see if it is correct both in fact, and law. Subject to any statutory requirement, an employer is entitled to make an offer to its existing employees in respect of salary structures. The employees have no obligation to accept the offer made by the employer, and often negotiate in that regard. Subject to anything that comes out of the negotiations, the offer made as to the structure of the salary is made unilaterally by the employer. Once the employees accept the offer it becomes binding on both the employer and the employees. It was contended that in this case, there was formal acceptance of the document containing the offer, and there was further acceptance by conduct in continuing to accept the salary package. I find this contention persuasive. First applicant was first employed in 1980. In 1996 he signed a new contract on terms set by TRIANGLE. So, in fact, and at law, the employer has the right to set the conditions of employment, including a determination of what an employee's basic annual salary is.

Having gotten that out of the way, it is pertinent at this stage, to consider whether the restructuring of the applicants' packages conformed with the TSSPF Rules, i. e. whether the

definition of cash package that the applicants accepted in 2009, complied with the TSSPF Rules specifically in relation to the co-relation between the 'basic salary' and the calculation of the pensionable emoluments. It has been contended that, by keeping the definition of basic salary in respect of TSSPF Members, at their January 2009 salaries, despite subsequent increases in salaries, TRIANGLE is unilaterally varying the Rules of the TSSPF, to the applicants' prejudice. The basic annual salary is being kept deliberately and intentionally low, at 2009 levels, for the specific reason that TRIANGLE intends to keep the basic annual salary down, in order to keep the applicants' pensionable emoluments down. That is the crux of the dispute. TRIANGLE has taken the stance that it will review this decision in due course.

Nine applicants have retired and had their pensionable emoluments calculated on the basis of their January 2009 salaries despite the fact that their actual salaries may have increased significantly since January 2009. Is this in accordance with the TSSPF Rules? In my view it is not. The reasons why I hold this view are discussed extensively below. I hold the further view that the applicants are entitled to have their pensionable emoluments calculated in accordance with the TSSPF Rules. Any continued contravention of the TSSPF Fund Rules is prejudicial to the applicants. The ways in which TRIANGLE has contravened the TSSPF Rule, in regards to the calculation of the applicants' basic annual salary, are explored in detail below.

(b) Are the applicants entitled to the relief that they seek, when regard is had to the TSSPF Rules?

It was submitted, on behalf of TRIANGLE, that the TSSPF Rules do not give the applicants such a cause of action as to be entitled to the relief sought in the draft order set out at Record pages 239-240. It was submitted further, that an analysis of the Fund Rules, will show that no cause of action arises in favour of the applicants. It was submitted that the Rules do not require adjudication as to what constitutes basic salary for the purposes of determining pensionable emoluments, or to compel TRIANGLE to make any particular contributions to the TSSPF. In a nutshell, the argument raised is that the applicant's action against TRIANGLE cannot lie in the TSSPF Rules. With all due respect to Mr. *DeBourbon* for TRIANGLE, again I find that this argument is circuitous and self serving and is not based on an accurate reading of the TSSPF Rules. Some of the parties rights and obligations set out in the TSSPF Rules form part of the contracts of employment between the applicants and TRIANGLE.

There is a correlation between the applicants' contracts of employment and the TSSPF Rules. The first applicant's initial contract of employment set out the terms and conditions of the employment of C band staff (loss control manager), as at I July 1996. The basic salary was pegged at ZW$90 948-00. The pension contribution of 13 % came to ZW$ 11 823-00. Under the heading "remuneration" was a note to the effect that the basic salary was pensionable and that the company currently contributed 13% to the Triangle Senior Staff Pension Fund. In terms of the submissions made on behalf of TRIANGLE on record pages 48 to 49 of its heads of argument, the applicants have the right to be paid their cumulative contributions as at the date of termination of employment. That right is derived from Rule 29 of the TSSPF Rules, as read together with the contract of employment, which specifies the parties respective pension contributions. The pension contributions are calculated in accordance with Rule 17 of the TSSPF Rules, as read together with the applicants' contract of employment.

Part of a letter written to Mrs. Eston (one of the applicants) on 21 February 2011by Human Resources confirmed that her remuneration package had been restructured. The restructured remuneration package was valid from 1 March 2011. The letter confirmed her actuarily calculated benefit in the TSSPF was to be based on the USD$ salary that had been used to determine her Fund Contributions since 1 January 2009. Now, surely, it not being suggested that Mrs. Eston. Fund Contributions since January 2009 had not been determined in terms of the Fund Rules as read with her contract of employment. The Fund Rules have a symbiotic relationship with the applicants' contracts of employments.

Some of the benefits which constitute the rights and obligations of the parties in the contract of employment, depend on the Fund Rules for their definition, and alteration, and amendment from time to time. It is simply not sustainable in my view, to argue that, as a matter of law, the applicants' cause of action cannot be determined in terms of the Fund Rules. The symbiotic nature of the parties rights and obligations is as clear as crystal, in my view. In conclusion, it is this court's view that the cause of action of the applicants against TRIANGLE lies in the TSSPF Fund Rules, as read with the parties contracts of employment.

Another contentious issue raised by TRIANGLE in opposition to the granting of the relief sought by the applicants, at record page 251 par 13 as read with annexures at record pages 291-293, is that the application was erroneously brought in the name of Godfrey Chiparaushe, a

C band employee, of TRIANGLE. It was submitted that the application should have been brought in the name of 58 employees and 9 retirees, broken down as follows:

E Band (senior management) 10 employees 1 retiree

D Band (middle management) 21 employees 1 retiree

C Band (supervisors) 27 employees 7 retirees

The point being made is that in terms of the definition of member in clause 2 of the TSSPF Rules those who are retirees are no longer members of the Fund, a member being a 'person prospectively entitled to any benefits' and a pensioner being a retired Member(see record p 39). TRIANGLE disputes, correctly in my view, the right of the nine retirees to the relief sought. I find persuasive, the argument raised on behalf of TRIANGLE, that the real cause of action concerns the determination of what constitutes basic salary for the purposes of contribution by the employer and the employees to the TSSPF. It was submitted that as such, the real cause of action in the present matter has already accrued to the nine retirees, and will accrue to the other applicants when they become entitled to the benefit in terms of the TSSPF Rules.I agree that the nine retirees, having already attained retirement age, and having had their pensions calculated on their retirement dates, have already exercised their right to be paid their cumulative contributions made to that date, the date of retirement. They have exercised their right to be paid a pension upon retirement, and *declaratur* made by the court at this stage cannot apply retrospectively to them in regards to TRIANGLE. Rules 22 and 29 are clear. The right to have one's pension calculated and paid, accrues at the retirement date, no sooner, and no later.

(c) <u>Requirements of a Declaratory Order</u>

Applicants seek a declaration of their rights. TRIANGLE is not opposed to the declarations sought by the applicants in terms of (a)-(c) and (d) of the draft order at record page 239-240. What is in issue is that the applicants want the court to declare that the pensionable emolument in respect of each applicant shall be his basic annual salary (as used for PAYE, Group Life Assurance and National Social Security calculations, together with any contractual bonus). Applicants seek the consequential relief that TRIANGLE be directed, forthwith, to recommence making its contributions towards the balance of the costs of providing benefits towards the applicants on terms of the TSSPF Rules as determined by the TSSPF actuary, including any arrears which have arisen until such a time as the TSSPF has been terminated in

accordance with the TSSPF Rules. Finally, applicants seek an order as to costs. It is not in dispute that the High Court has jurisdiction to issue a *declaratur*, in its discretion, at the instance of any interested person, i. e. to inquire into and to determine any existing, future or contingent right or obligation.

It was submitted, correctly in my view, on behalf of the applicants, that the requirements of a *declaratur* are as follows: Firstly, that, the issue of a *declaratur* is not contingent upon there being a possibility of providing consequential relief. The applicants referred the court to the following cases as authority for this proposition; ***Munn Publishing (Pvt) Ltd* v *ZBC***[36]**,** the grant of declaratory relief is discretionary, ***United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Anor***[37]**,** in order to qualify for a *declaratur* applicant must be an interested person with a direct and substantial interest in the subject matter of the suit that could be prejudicially affected by the judgment of the court. The interest must relate to an existing, future or contingent right, the court must not decide abstract, academic or hypothetical questions which are not related to the applicant's interest. See also ***Milani & Anor v South African Medical and Dental Council & Anor*** [38]**.** The existence of an actual dispute between persons interested is not a statutory requirement to an exercise of the court's discretion. See ***Anglo-Transvaal Collieries Ltd* v *SA Mutual Life Assurance Soc***[39]**.** The availability of another remedy does not preclude does not render the declaratory order incompetent. See ***Ex Parte Nell***[40]**, *Gelcon Investments (Pvt) Ltd* v *Adair Properties (Pvt) Ltd***[41]

The applicants submitted that, at the next stage of the inquiry it is incumbent upon the court to decide whether or not the case is a proper one for the exercise of its discretion in terms of s14 of the High Court Act. What constitutes a proper case has been described as follows:

> "…despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the

[36] 1994 (1) ZLR 337 (S)
[37] 1972 (4) SA 409 © @ 415
[38] 1990 (1) SA 889 (T) @ 902G-H
[39] 1977 (3) SA 631 (T) @ 635G-H
[40] 1963 (1) SA 754 (A) @ 759H-760A
[41] 1969 (3) SA 142 ® @ 144D-F

> applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought." See ***Adbro Investment Co Ltd* v *Minister of the Interior & Ors*** [42]**. See also *Johnsen* v *Agricultural Finance Corporation*[43]*,Exp Chief Immigration Officer*[44]*.***

TRIANGLE contended that the grant of declaratory relief is discretionary and will not be used to usurp the function of another court and cited the case of ***Khupe* v *Officer in Charge, Law & Order Section, ZRP, Bulawayo Central & Ors***[45], as authority for this proposition. It was submitted further, that, the courts will use the power to issue a declaratur sparingly, and with utmost caution. *See* ***Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd*** [46]**.** It is a power that will only be exercised where there is a good reason for so doing. See ***Vine v National Dock Labour Board***[47] . At p 73 of its heads of argument, para 152, TRIANGLE stated that, subject to its rights in terms of the TSSPF Rules, it does not challenge the issues raised in the first three paragraphs of the draft order seeking declaratory relief. The other two orders sought were disputed on the basis that the factual and legal basis for such declaratory orders has not been established on the papers. It was admitted that there is no dispute between the parties as to the rate of deduction from the salaries of the applicants, nor that such deductions have been made each month. There is no dispute as to the rate of contribution by TRIANGLE, nor as to the fact that TRIANGLE has been making that contribution each month.

It was submitted on behalf of the applicants that there can be no doubt that they are all interested parties, being members of the TSSPF or persons entitled to derive benefits from a member. On that basis, it is argued that they have a direct and substantial interest in the operation, existence, and regulation of the TSSPF. In addition, the issues in respect of which a *declaratur* is sought are not academic and they have a bearing on the existence of the TSSPF and on the accrual of applicants' pension benefits. Applicants view is that there are some tangible and justifiable advantages to be gained by the grant of the declaration in regards to their pension rights. It is this court's considered view that there is no legal impediment that would preclude the

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[42] 1961 (3) SA 283 @ 285B-C
[43] 1995 (1) ZLR 65 (SC) @72
[44] 1993 (1) ZLR 122 (S) @129F-G
[45] 2005 (2) ZLR 394 (SC) @ 397
[46] [1921] 2 AC 438 (HL) @ 445 Viscount Finlay
[47] [1957] AC 488 (HL) @500

applicants (except for the retirees) from being issued with a declaration in these circumstances. That leaves the issue of the definition of basic salary for the purposes of calculating pension emoluments as the only real dispute between the parties.

(d) <u>Interdict</u>

In order to obtain a final mandatory interdict (*a mandamus)*, an applicant must show the following requirements:

i. A clear or definite right-this is a matter of substantive law.

ii. An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.

iii. The absence of similar protection by any other ordinary remedy. The alternative remedy must be:

(a) Adequate in the circumstances. (b) Be ordinary and reasonable. (c) Be a legal remedy. (d) Grant similar protection. See *Tribac (Pvt) Ltd* v *Tobbacco Marketing Board* [48], *Setlogelo* v *Setlogelo*[49], *Diepsloot Residents and landowners Association & Anor* v *Administrator Transvaal*[50], *Kaputuza & Anor* v *Executive Committee of the Administration for the Heroes & Ors*[51].

It was contended on behalf of the applicants, that one of the requirements of a final interdict, a clear right, has been defined by the learned authors Herbstein & Van Winsen *The Civil Practise of the Supreme Court of South Africa* 4th ed, p1068, as 'a definite right'. The word 'clear' relates to the degree of proof required to establish the right. The existence of a right is a matter of substantive law. Whether the right is clearly established is a matter of evidence. In order to establish a clear right, the applicant has to prove on a balance of probabilities the right that he seeks to protect. See ***Devilliers* v *Soetsane*** [52]**, *Beukes* v *Crous***[53]. It was submitted on behalf of the applicants that, in terms of Rule 17 of the TSSPF Rules, they have a clear right to have a compulsory contribution equal to7% of their pensionable emoluments deducted from their basic monthly salary. It was submitted further, that, in terms of R 2 of the TSSPF Rules

[48] 1996 (2) ZLR 52 (SC) @56
[49] 1914 AD 221 @227
[50] 1994 (3) SA 336 (A) @ 344H
[51] 1984 (4) SA 295 (SWA) @317E
[52] 1975 (1) SA 360 (E)
[53] 1975 (4) SA 215 (NC) @ 219

pensionable emolumens are defined as basic annual salary together with any contractual bonus. In terms of R 19 of the TSSPF Rules the TSSPF has an obligation to contribute the balance of the costs of providing the benefits in terms of the Fund Rules, as determined by an actuary, which contribution shall be no less than the compulsory contributions paid by the members. See record p 44.

These obligations remain valid and binding for as long as the TSSPF has not been disbanded. Applicants submitted that TRIANGLE cannot change the definition of a pensionable emolument without amending the provisions of R 2 of the Fund Rules. TRIANGLE was charged with 'unilaterally' changing the structure of a Member applicant's remuneration to introduce a new structure of remuneration called "Guaranteed Package" which excludes any mention of how the pensionable emoluments of Member applicants would be dealt with. See Record pages 86 and 95. It was argued that R 2 of the TSSPF Fund Rules includes a Member's basic annual salary and any contractual bonus. It was submitted that Member applicants have a clear right to have their basic salary considered to be their pensionable emoluments, to have 7% deducted therefrom and to have TRIANGLE pay its share of the monthly contributions into the TSSPF.

It was contended on behalf of TRIANGLE that the interdict as claimed is premised on the false allegation, or alternatively the disputed allegation, that it is not making its contributions in terms of Rule 19 nor deducting the contribution of the members in terms of Rule 17 of the TSSPF Rules. It was submitted that these allegations are incorrect, and consequently, the requirements of a final interdict had not been met on the papers filed of record. TRIANGLE relied on the following cases as authority for this proposition; ***Nument Security (Pvt) Ltd*** **v** ***Mutoti & Ors*** [54]***, See also Stellenbosch Farmers Winery Ltd*** **v** ***Stellenvale Winery (Pty) Ltd***[55]where the court said that:

> "It seems to me that where there is a dispute of facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order".

I find myself unable to agree with the submissions made on behalf of TRIANGLE that there is a dispute of fact which is incapable of resolution on the papers, for reasons previously stated.

[54] 2007 (2) ZLR 300 (SC) @ 303
[55] 1957 (4) SA 234 © @ 235E-G

It was submitted further, that the proposed interdict confuses the obligations of TRIANGLE under R 19 and R 41(iii) of the TSSPF Rules. Rule 19 reads:

> "Each Employer shall contribute the balance of the costs of providing the benefits in terms of these Rules as determined by the actuary and agreed by the Principal Employer from time to time provided that the Employer's contributions shall not be less that the compulsory contribution by the Members."

Rule 41(iii) dealing with Actuarial valuation, reads:

> "If, as a result of a valuation by an Actuary, the Trustees decide that the benefits laid down in these Rules cannot be adequately financed by the maximum company contribution rate specified by the Principal Employer from time to time, then notwithstanding the provisions of Rule 45, the benefits shall be reduced or the employee contribution rate increased as the Trustees, with the consent of the Principal Employer, and on the advice of the Actuary, decide". Record pages 58-59. The Principal Employer is TRIANGLE.

In this matter the company contribution rate is 13.5% of each Members' basic salary. It is contended that this fulfills the obligation of TRIANGLE in terms of Rule 19. I agree with that interpretation of Rule 19 which requires that the employer's contributions be not less than 7%, which is what the employees are contributing. It was submitted on behalf of TRIANGLE that it is not in dispute that at present it is contributing 13.5% of each Member applicant's salary to the TSSPF. Rule 41(ii) allows a variation upwards or downwards of the monthly contributions by the employer and or by Member applicants, on condition that, after the contributions that are proposed to be varied are valued by an actuary, the Trustees must agree to the proposed variation, and TRIANGLE must agree with the decision of the Trustees. The issue that is taxing the court is that, in these circumstances, there was no such agreement by the Trustees to vary the monthly contributions of the Member applicants or of TRIANGLE, and consequently TRIANLGE could not purport to do so in the absence of any agreement to that course of action by the Trustees.

By altering the composition of the Member applicant's basic salary, TRIANGLE caused a ripple effect which varied the calculation of the Member applicants' monthly contributions, as well as TRIANGLE's own monthly contributions, and failed, refused or neglected to get the consent of the Trustees, to the proposed variation. A deduction of 7%, and 13.5% of the Member applicants' basic salary as at January 2009, for onward transmission to the TSSPF involves a decision to use Member applicant's January 2009 salaries as a benchmark for the deductions. The Member applicants' salaries as at January 2009 are not the same salaries that they were

individually paid when they joined TRIANGLE. Nor is it the same as the salaries that the Member applicants are being paid now. The decision to keep the January 2009 salary benchmark as a basis for calculating the member applicant's pensionable emoluments, requires the approval of the Trustees to bring it into line with Rules 2 and 19 and 41(iii). In my view, the applicants have proved on a balance of probabilities that they have a clear right that they seek to protect. The right to enforce compliance with the provisions of Rules 2, 19 and 41(iii) Of the TSSPF Rules. The right to have a valuation done by an actuary, as to whether their benefits in terms of the TSSPF Rules can no longer be adequately financed, and if so whether the benefits should be reduced, and if so, to what extent in regards to the employer and in regards to the Members of the TSSPF. The right to have the valuation done by an actuary put to the Trustees for consideration. The right to have a decision made by the trustees. And finally, the right to have the employer agree or disagree with the decision of the Trustees.

The second requirement for an interdict is an act of interference which is defined as 'injury actually committed or reasonably apprehended'. See ***Setlogelo* v *Setlogelo Supra***. The word 'injury' must be understood in the wide sense to include any prejudice suffered by an applicant as a result of the infringement of his rights. See ***Herbstein & Van Winsen Supra*** at p 1070. The injury must be a continuing one. The court will not grant an interdict restraining an act already committed for the object of an interdict is the protection of an existing right; it is not a remedy for a past invasion of rights. As authority for this proposition see ***Performing Right Society Ltd* v *Berman*** [56]. The test for apprehension is an objective one. The applicant must show, objectively, that, his apprehensions are well grounded. See ***Ex Parte Lipschitz***[57]**.** The apprehension must be induced by some action performed by the respondent or authorized to be performed by his agent. See ***Goldsmith* v *The SA Amalgamated Jewish Press*** [58].

The applicants contended that TRIANGLE stated that it will not consider the basic salary being paid to the Member applicants as their pensionable emoluments. As evidence of this is the minutes of June 2011 where TRIANGLE stated that:

> "…considering all the events that have taken place over the past few years, for TSSPF employees to argue that the full cash package should be pensionable is a position that the employer will not reconcile to".

[56] 1966 (2) SA 355 ® @357
[57] 1913 CPD 737
[58] 1929 AD 441

And minutes of the June 2011 Trustees meeting where the employer communicated a preference for employees to move to the defined contribution fund:

> "The Employer has signaled for some time that its preference is for employees to move to a DC Fund for the following reasons(amongst others):The Employer wants to ensure that going forward all employees are treated equitably in terms of their conditions of employment, there is a general move towards remuneration on a 'total package', or 'total cost of employment' basis, and once all employees are on a DC Fund, it would be much easier to ensure fair and equitable treatment of employees in terms of all their respective conditions of employment".

The applicants' well grounded fear is that, for every month that passes without TRIANGLE complying with its obligations in terms of the TSSPF Rules, it is interfering with the accrual of their pension benefits. It is this court's view, that the applicants have successfully discharged the onus on them, and adduced sufficient evidence on the papers, to show, on a balance of probabilities, that the applicant's fear is well grounded. An injury of a continuing nature is actually being perpetrated against them. The injury actually committed, which is continuing to be committed, is prejudicing them. The injury is compounded by the fact that TRIANGLE did not bother to cause an actuary to re-evaluate the respective parties' contributions, as provided in terms of Rule 41 (iii), and Rule 19. We are not taken into TRIANGLE's confidence with regards to the basis on which it decided to peg Member applicants' January 2009 salaries as the benchmark for calculating pensionable emoluments.

The third requirement for an interdict, is that there be no other satisfactory remedy available to the applicants. A final interdict is a drastic remedy which is within the discretion of the court. The court will not in general grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. See ***Reserve Bank of Rhodesia* v *Rhodesia Railways***[59]**.** It was held in this case that where there is an existing remedy with the same result for the protection of the applicant, an interdict will not be granted. Applicants submitted that they have no other remedy that can provide them with satisfactory redress in these circumstances. Attempts to have the matter resolved by the Trustees failed. The Commissioner of the Insurance Pension and Provident Fund, failed to resolve the dispute. The Labour arbitrator declined jurisdiction. A claim for damages would be inadequate.

[59] 1966 (3) SA 656 (SR)

It is this court's view that the three requirements of an interdict were met by the applicants. The final mandatory interdict sought in this matter, in effect is a direction that TRIANGLE abides by the Rules of the TSSPF Fund, more particularly, that it allows the TSSPF actuary to determine what the balance of the cost of providing benefits towards the applicants is, in accordance with the TSSPF Rules. The mandatory interdict sought, is merely an order to TRIANGLE to comply with the Rules of the TSSPF, by consulting the TSSPF Trustees and actuary, and working with them to achieve consensus, in terms of the TSSPF Rules. It is accepted however, as previously stated, that the nine retirees are excluded from the relief granted to the rest of the applicants, in regards to the interdict.

(e) <u>Whether the applicants are entitled to the *declaratur* sought and an interdict in the circumstances</u>

It is common cause that TRIANGLE put in place an arrangement whereby each of its employees received a payment in United States dollars, after dollarization in 2009. The arrangement was that each of its employees would receive payment in United States dollars, and in respect of members of the TSSPF who opted to remain with the TSSPF, the question of the extent to which any payment or portion of payment in United States dollars was to be treated as a basic salary and therefore pensionable, remained open. TRIANGLE then purported to 'restructure' the conditions of employment of its employees, starting with the E Band employees. After negotiations with senior employees, the final restructured package was set out in a letter dated 31 July 2009. The letter carried a caveat that the employees would be advised in due course, of the extent to which the current cash package would be pensionable. It is common cause that 11 of the E Band employees signed the letter. It was contended on behalf of TRIANGLE that, by accepting the revised remuneration offered each month thereafter 31 July 2009, the employees accepted this position by their conduct.

On 19 January 2009, a similar letter was dispatched to middle management employees, D Band. The letter was prepared by some of the E Band employees. 21 out of the 22 D Band employees signed the letter in acceptance of the 'restructured package'. Thereafter restructuring of the salaries and other terms of employment of supervisory and skilled staff, C Band employees was dealt with by way of a letter dated 24 August 2010. 29 out of the 34 C Band employees signed the letter and indicated acceptance of the revised terms. The applicants

contended that these changes to the conditions of employment were imposed unilaterally. It was submitted on behalf of TRIANGLE that the evidence does not support this contention. I find myself in agreement with the position adopted by TRIANGLE, that the 'restructuring' of the remuneration packages was done in consultation with senior staff E Band employees. It is common cause that 61 out of the 66 applicants signed acceptance of the new conditions of employment. Subsequently, the employees who had signed the letters received increases in their monthly cash packages, which indicate further acceptance of the changes in their contracts. The letter of 16 August 2010 repeated the assertion that the review of the status of defined benefit funds and of the TSSPF was still in progress. The applicants continued to accept payment of their 'restructured cash package', on that basis. Are the applicant bound by an issue estoppel?

In the celebrated case of ***Ais Enterprises (Finance) (Pty) Ltd* v *Protea Assurance Co Ltd***[60] the court had this to say:

> "The essence of the doctrine of estoppels by representation is that a person is precluded, i.e. stopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, i. e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly (*ibid* para 371); and in general it must relate to an existing fact (*ibid* para 372)".

I am in agreement with the contention that, the essence of the issue in the present matter, and of the problem caused by the relief sought by the applicants, is that, they have been paying less than what they should have as a contribution to their pension, 7% of the January 2009 salary and not 7% of the total cash package or total remuneration. Likewise TRIANGLE has been paying 13.5 % of the January 2009 salary as the employer's contribution to the pensions scheme. The applicants seek that position to change only in relation to TRIANGLE (based on the terms of the mandatory interdict sought) and for a *declaratur* that their rights to a pension are based on quite a different figure from that on which they have been making payment, but with no corresponding declaration that they have to make a contribution based on their total cash package. This would create gross inequality between the applicants themselves, and the nine retirees, and cause prejudice to the TSSPF and to TRIANGLE. Applicants have not tendered

[60] 1981 (3) SA 274 (A) @ 291 D-E

repayment of all the arrears of the difference between that which was paid and 7% of the remuneration received.

For these reasons it is this court's view that, the applicants by conduct accepted remuneration between January 2009 and the introduction of the total cash package with the explicit knowledge that TRIANGLE has been paying 13.5% of the January 2009 salary as the employer's contribution to the TSSPF. With the introduction of the total cash package the applicants knew that there was no question that the amount being paid to them each month was to be treated as their basic salary, and each of them accepted that position. It was clear to them, and each of them accepted the position, that their pension contributions were based on an amount less than their actual total pay package. By their conduct in continuing to accept that position the applicants represented to TRIANGLE their acceptance of what TRIANGLE had determined. It must be borne in mind that, in granting declaratory relief to an interested person, person's interest must concern an 'existing, future or contingent right'.

The court finds that the applicants are estopped from enforcing their existing interests in the TSSPF, in the sense of recouping arrear contributions from TRIANGLE. It would have been in the interests of justice to order both parties to pay their mutual arrear contributions to the TSSPF, had the applicants not accepted by their conduct the determination of basic salary by their employer. However, the court sees no reason why applicants may not be granted consequential relief with regards to their future, or contingent rights. For these reasons the following orders are made:

Applicants are accordingly esstopped:

(a) From disputing the right of their employer, TRIANGLE to determine what portion of their total remuneration package is to constitute basic salary for the purposes of pension contributions and determining their pensionable emoluments between the period January 2009 to the date of this judgment.

(b) From denying that their basic salary in terms of the TSSPF Rules is the full amount paid to each of them for the month of January 2009, up to the date of this judgment.

The parties being in agreement on certain issues in respect of which the applicants sought a *declaratur*, and these *declaraturs* not having retrospective effect:

IT IS HEREBY DECLARED WITH THE CONSENT OF THE PARTIES THAT:

(a) The Triangle Senior Staff Pension Fund is valid and binding in accordance with its Rules.

(b) TRIANGLE LIMITED can only disband the Triangle Senior Staff Pension Fund in accordance with its Rules.

(c) The applicants who are members of the Triangle Senior Staff Pension Fund (a defined benefit fund) have no obligation to move to the Money Plan (a defined contribution plan).

IT IS HEREBY DECLARED AND IT IS COMMON CAUSE THAT:

(d) TRIANGLE LIMITED has an obligation to deduct 7% of the applicants' basic annual salary as their contribution towards the TSSPF and to meet its share of the contribution towards the TSSPF in accordance with Rule 19 of the TSSPF Rules.

(e) IT IS HEREBY DECLARED THAT TRIANGLE LIMITED has an obligation to cause the determination of the applicants' basic annual salary for purposes of the calculation of applicants' pensionable emoluments, from the date of this judgment onwards, in accordance with the TSSPF Rules, and that, this obligation shall be discharged, in full, within (90) ninety days of the date of this order.

(f) CONSEQUENT TO THE ABOVE DECLARATIONS, TRIANGLE is hereby directed, within (90) ninety days of the date of this order, to recommence making its contributions, and to deduct the applicants' contributions for onward transmission to the TSSPF, towards the costs of providing benefits towards the applicants in terms of the TSSPF's rules as determined by the TSSPF's actuary, and approved by the TSSPF Trustees, EXCLUDING any arrears which arose between January 2009 and the date of this order, until such time as the TSSPF has been terminated in accordance with the TSSPF Fund Rules.

(g) TRIANGLE shall pay the costs of this application.

Messrs Chinawa Law Chambers, applicants' legal practitioners
Messrs Gill Godlonton & Gerrans, 1st respondent's legal practitioners
Messrs Scanlen & Holderness, 2nd respondent's legal practitioners

ANNEXURE 'A'

1. G. CHIPARAUSHE
2. D.D. SOKO
3. B. MACHOKOTO
4. K. NYEVEDZANAI
5. E. ESTON
6. T. MUNYERI
7. G. MABIKA
8. C. NYATI
9. R.B. MAGOCHA
10. J. CHIRUME
11. S. MUDARIKWA
12. D. CHITIYO
13. C. P. MUTANGA
14. S.M. MANDLEKO
15. S. MASHAPA
16. S.J. LEATT
17. K.D.M. MOLYNEUX-SANDWITH
18. R. MOLYNEUX-SANDWITH
19. P.J.G. BOOTHWAY
20. L. MAKONESE
21. E.M. MAPAPA
22. S.C. NHONDOVA
23. I.D.C. MIDDLETON

24.B. MIDDLETON

25.L.H. CURRUTHERS-SMITH

26.I. CURRUTHERS-SMITH

27.D.MAZAMBANI

28.H. MATEVEKE

29.G.T. TAKAYEDZA

30.L.MUTANDA

31.O. ESTON

32.M. M. CHUCHU

33.Y. DENENGA

34.C.T. MUWANI

35.S. MAKOPA

36.C. NDAIRA

37.A.B. MORM

38.O. MUSHORIWA

39.D.I. MACINTOSH

40.M.E. MUGAZAMBI

41.A. J. J. RENSBURG

42.R. CHIGAGURE

43.D. MAKATI

44.R. NHONDOVA

45.A. P. NYIKADZINO

46.S. MAKOVERE

47.J. MANYONGA

48.A.J. MUSIIWA

49.N.D. MUTOVO

50.D.Z.SHIRICHENA

51.A.J. BOSCH

52.C. CHISARE

53.E.MUTANDE

54.V.R.C. STREAK

55.C.J. NAGO

56.D.M. SIBANDA

57.K.T. MUTANDA

58.V. GANDANZARA

59.T. W. MHLAFUNA

60.J.C. SHAMUYARIRA

61.E.M. GAVAZA

62.K. GWAMURA

63.L. MABIKA

64.M. KOKAI

65.T. MAVHUNDU

66.J. MUKAHLERA

67.R.T. KARIDZA