



everingham^{inc}

DATE : 9 September 2011

OUR REF. : N Everingham/CAMA1-10180

TO : Mr T Kamionsky
64 Club Street
cnr Club Street and Council Street
LINKSFIELD

AND TO : Dynam-ique SA Consultants and Actuaries (Pty) Limited
c/o Mr T Kamionsky
64 Club Street
cnr Club Street and Council Street
LINKSFIELD

Dear Sir

CLAIMS BY : T KAMIONSKY and DYNAM-IQUE SA CONSULTANTS
AND ACTUARIES (PTY) LIMITED

1. We note that you represent yourself in your personal capacity and also purport to represent Dynam-ique SA Consultants and Actuaries (Pty) Limited ("*Dynam-ique Consultants*").

THE RELEVANT POLICIES

2. We have been informed that Dunster & Associates on behalf of Dynam-ique SA Umbrella Pension Fund, Dynam-ique SA Provident Fund,

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Unit 69, Roeland Square, Roeland Street, Cape Town - P O Box 2030, Cape Town, 8000 - Docex 269, Cape Town

Directors: Nigel A. Everingham and Adrian J. Kennedy

IF Umbrella Provident Fund and IF Umbrella Pension Fund (*"the Funds"*) are in communication with you regarding your request to be provided with copies of the insurance policies. As is already apparent to you, the policies incorporate the standard wording attached as annexure "FA1" to your founding affidavit in the application under case number 4175/2011 referred to hereafter.

3. We confirm that we act for the insurers named in those policies. In particular, we act on behalf of the insurers named in the four relevant policies which are dated 17 September 2010, who are Lloyds Syndicate 2987 and Mutual & Federal Insurance Company Limited.

THE INSURED

4. In terms of each of the policies, the insured is identified in each case as the particular fund referred to therein. In the result, it is the Funds who are the insured persons under the policies and they are the entities with the insurable interest which was insured in terms of the policies.

THE APPLICATION

5. We also act for Camargue Underwriting Managers (Pty) Limited (*"Camargue"*), who are the First Respondent in the application brought by you and Dynam-ique Consultants under case number 30888/2011 (*"the application"*). As you are aware, we have on behalf of Camargue entered an Appearance to Defend your application.
6. In terms of prayer 2 of your Notice of Motion filed in the application you seek an order directing the Respondents to furnish you with full copies of the policies. In the event that the Funds, represented by Dunster &

Associates, accede to your request to be provided with the policies, the need for that relief will fall away.

7. In prayers 3 and 4 of your Notice of Motion you seek orders that Camargue is directed to admit your insurance claims and to confirm that you and Dynam-ique Consultants are covered under the policies. An opposing affidavit to your application setting out Camargue's defence will be filed shortly by ourselves on behalf of Camargue.

THE PURPOSE OF THIS LETTER

8. We further confirm that our client has previously advised you that the claims intimated by you and Dynam-ique Consultants in terms of the policies are not covered by the policies. The purpose of this letter is to reaffirm our client's standpoint and to elaborate on the reasons for the rejection of your claims in terms of the policies.

YOU ARE NOT THE INSURED

9. As already made clear, our clients have no contractual relationship with you, neither you nor Dynam-ique Consultants are named as the insured in terms of the policies and our clients dispute that you, separate from the Funds, have an actionable claim against the insurers. In any event, the claims which you assert against our clients, do not fall within the ambit of what has been insured in terms of the policies.
10. Our clients accordingly deny that you, or Dynam-ique Consultants, have any contractual rights under the policy which entitle you, or Dynam-ique Consultants, to receive an indemnity for a loss sustained by the Funds arising out of a wrongful act. Similarly, neither you nor Dynam-ique

Consultants have any direct rights of enforcement under the policies against our clients.

THE POLICIES NEVER CAME INTO EFFECT

11. Over and above the foregoing, the policies never came into effect. The policies were subject to the due payment of the agreed premium as reflected on the respective policy schedules. In this regard we draw your attention to the Insuring Clause of the policy which states :

“Subject to the terms, exclusions and conditions (precedent or otherwise) and in consideration of, and conditional upon the prior payment of the premium by or on behalf of the Insured and receipt thereof by or on behalf of the Insurers, the Insurers agree to indemnify the Insured in respect of the Defined Events ...”

12. The Insuring Clause is to be read in conjunction with Condition 1 of the policy which makes it clear that the due observance of the conditions and stipulations of the policy are conditions precedent to the insurers' liability, and that no waiver of any of the terms or conditions or stipulations shall be valid unless made in writing upon the policy and signed on behalf of the insurers.
13. The premiums payable in terms of the policies for the relevant period namely from 1 August 2010 to 31 July 2011, were not paid. Accordingly, the policies never came into effect and in any event, our client informed the Funds' intermediary that the policies had lapsed.
14. Accordingly, the policies issued to the Funds in respect of the period during which the claims against you and Dynam-ique Consultants were

made, never came into effect and/or have lapsed and are of no force or effect.

MISREPRESENTATION AND NON-DISCLOSURE

15. It is the obligation of the insured or its agent or representative, when proposing for the insurance, to disclose all facts material to the assessment of the risk and the premium.
16. Further, in completing and submitting the proposal form to the insurers for the relevant insurance, it is declared that the statements and particulars in the proposal are true and that no mis-statements have been made and no material facts have been suppressed.
17. In the proposal forms submitted on behalf of the Funds in respect of the policies of insurance with effect from 1 August 2009, it was represented that :
 - 17.1. the Funds had not suffered any loss caused by dishonesty or negligence during the preceding five years;
 - 17.2. after specific investigation, the Funds were not aware of any circumstances that could reasonably be expected to give rise to a claim in terms of the insurance being applied for.
18. At all material times prior to the inception of the policy commencing 1 August 2009 you bore knowledge of material facts relating to errors or omissions, or alleged errors or omissions, with regard to the administration of the Funds by Dynam-ique Consultants.

19. Such information was material to the assessment of the risk and should have been disclosed to insurers prior to the inception of the policies commencing with effect from 1 August 2009.
20. Accordingly, and even if the policies had not lapsed due to non-payment of premium, and even if it could be said that you and Dynam-ique Consultants were entitled to claim in terms of the policies (all of which is denied), the policies would have been void, alternatively voidable at the insurers' instance, with effect from the inception date being 1 August 2009, and no rights or obligations would arise thereunder.

THE SPECIFIC EXCLUSION

21. The proposal forms submitted on behalf of the Funds for the renewal of the policy effective from 1 August 2010, which were dated 10 August 2010, contained a disclosure of circumstances which could be expected to give rise to a claim, described as "*the rebuild of the Fund at a cost*".
22. The documents submitted in support of the proposal for insurance included the Annual Financial Statements for the Dynam-ique Funds prepared by BDO Spencer Steward for the period 1 August 2005 to 28 February 2006, and the Annual Financial Statement for the IF Funds prepared by VVR & Company in respect of the period from 1 January 2004 to 31 May 2006. In addition, the documents included a letter and report to the Administrators and Trustees setting out material weaknesses which had come to the auditors' attention during the course of the audit.
23. Our client was only prepared to renew the policy on the basis that claims or losses arising in any way from the issues raised by the auditors following their audit for the year ended 28 February 2006 would be specifically excluded. The Specific Exclusion was endorsed on the Cover

Details attached to the policy schedules which were issued on 17 September 2010.

24. The issues raised by the auditors related to the facts which gave rise to the Funds' claims against you and Dynamique Consultants and/or the claim which has been made against you and Dynamique Consultants arises, either wholly or partly, from the issues raised by the auditors. Consequently your and Dynamique Consultants' claims, even if they could be asserted against the insurers, would have fallen within the scope of the Specific Exclusion.

THE CURRENT POLICY

25. At the request of the Funds and the intermediaries Aon South Africa (Pty) Limited ("*Aon*") a new policy of insurance was issued to the Funds in respect of the period of insurance from 1 June 2011 to 31 May 2012.
26. The current policy makes it quite clear that the claims asserted by you and Dynamique Consultants are excluded.

POLICY CRITERIA NOT SATISFIED

27. Due to the fact that the current policy is inapplicable to the claim for indemnity, and the prior policies are of no force or effect for the reasons stated above, it is not necessary to address issues of policy coverage any further.
28. Nevertheless, for the sake of completeness, we deal with a number of issues below which indicate that, even if the prior policies had been in force at the relevant time, they would not respond to the claims lodged by you and Dynamique Consultants.

THE SCOPE OF THE INDEMNITY

29. We are of the view that the legal actions which have been instituted against you in your personal capacity, and against Dynam-ique Consultants, at the instance of the Funds, falls outside the scope of the policy coverage.
30. The claim which is envisaged in Defined Event 1 of the policy is a claim by a third party, which would include a member who claims to have suffered a loss of pension and/or provident monies due to a wrongful act committed by the officer. The indemnity does not cover claims or losses associated with litigation between the insured itself and its own Trustee.
31. Attention is also drawn to proviso (d) to the Defined Events which reads as follows :
- “The liability of the Insurers is limited to losses incurred by the Insured relative to pension/provident/disability/trust monies in respect of past, present or future employee benefits.”*
32. The costs which have been incurred by the Funds to Messrs Deloitte in respect of the rebuild of the data constitutes an expense which has been deliberately incurred by the Funds for purposes of the administration of the Funds’ business. Such an expense is not recoverable in terms of the policies.
33. It is also evident from the particulars of claim in respect of the action by the Funds against you in your personal capacity that the two separate causes of action set out therein are not covered in terms of the policies.

CONDITION 2 – CLAIMS NOTIFICATION

34. Condition 2 provides, *inter alia*, as follows :

“Notification of any claim or circumstance which may give rise to a claim shall be given in writing as soon as is reasonably possible, with the fullest information thereof.”

35. The knowledge which you had of the administration of the Funds' affairs by Dynam-ique Consultants had been acquired during the period in which the administration services were rendered, namely, the period from 1 August 2005 to 1 February 2008. Accordingly, in the event that an indemnifiable claim which could be made by you and Dynam-ique Consultants existed under the policy (which is denied), then it is evident that you were aware of a claims circumstance as at 1 February 2008, at the latest, but failed to notify this to insurers in accordance with Condition 2 and further failed to provide full information in respect of such circumstance. The breach of Condition 2 would therefore disentitle you from the indemnity which is sought.

PRE-EXISTING EVENT

36. Over and above the foregoing, the claims asserted by you appear to have their origin in a period which is not covered by the insurance.

RESERVATION OF RIGHTS

37. All rights of our clients are fully and expressly reserved, including the right to amend or amplify the existing grounds of rejection and raise additional policy defences, should this be deemed necessary, at a later stage.

Yours faithfully



N A Everingham

EVERINGHAMS ATTORNEYS