

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 49616/2013

In the matter between:

LE GRELLIER GAIL	First Applicant
BOTHA RENIER	Second Applicant
LEPAR DAVID	Third Applicant
SMITH CAREL	Fourth Applicant
and	
LUKHIMANE M.A. N.O.	First Respondent
AFFIRM MARKETING SERVICES (PTY) LIMITED	Second Respondent
BEEFMASTER (PTY) LIMITED	Third Respondent
H BIRKENMEYER (PTY) LIMITED	Fourth Respondent
DR GEBKA, HELBIG & KLUG INC.	Fifth Respondent
DR RITZ INC.	Sixth Respondent
ETERNAL FLAME INVESTMENTS (PTY) LIMITED	Seventh Respondent
EXPECTRA 89 (PTY) LIMITED	Eighth Respondent
HESTICO (PTY) LIMITED	Ninth Respondent
HETTAS CC	Tenth Respondent
CONVISTA CONSULTING (PTY) LIMITED	Eleventh Respondent
IDI TECHNOLOGY SOLUTIONS (PTY) LIMITED	Twelfth Respondent
PROGRESSIVE PACKAGING (PTY) LIMITED	Thirteenth Respondent

WORLD CARGO SERVICES (PTY) LIMITED	Fourteenth Respondent
CONDUIT RISK AND INSURANCE HOLDINGS (PTY) LIMITED	Fifteenth Respondent
DELL COMPUTER (PTY) LIMITED	Sixteenth Respondent
THE BRAND UNION (PTY) LIMITED	Seventeenth Respondent
ULTRA LITHO (PTY) LIMITED	Eighteenth Respondent
NEWSCLIP MEDIA MONITORING (PTY) LIMITED	Nineteenth Respondent
MIXTEC CC	Twentieth Respondent
PETROMARK (PTY) LIMITED	Twenty-First Respondent
DEHTEQ (PTY) LIMITED	Twenty-Second Respondent
WAVELENGTHS 32 (PTY) LIMITED t/a INSALO COMMUNICATIONS	Twenty-Third Respondent
PANORAMIC COMPONENTS (PTY) LIMITED	Twenty-Fourth Respondent
CHICKEN MANAGEMENT SERVICES (PTY) LIMITED	Twenty-Fifth Respondent
HANSEN TRANSMISSIONS (PTY) LIMITED	Twenty-Sixth Respondent
ENABLEMED (PTY) LIMITED	Twenty-Seventh Respondent
PRIMESERV GROUP LIMITED	Twenty-Eight Respondent
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	Twenty-Ninth Respondent
JOHANNESBURG CHILD WELFARE SOCIETY	Thirtieth Respondent
THE EMPLOYEES OF THE SECOND TO THIRTIETH RESPONDENTS WHO ARE MEMBERS OF THE IF UMBRELLA PROVIDENT FUND AND THE IF UMBRELLA PENSION FUND	Thirty-First Respondent
IF UMBRELLA PROVIDENT FUND	Thirty-Second Respondent
IF UMBRELLA PENSION FUND	Thirty-Third Respondent
KAMIONSKY, TONY	Thirty-Forth Respondent

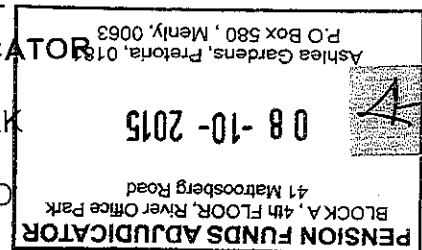
FILING NOTICE

DOCUMENT: 1ST TO 3RD APPLICANTS REPLYING AFFIDAVIT TO
THE 34TH RESPONDENTS ANSWERING AFFIDAVIT

FILLED BY: JACOBS GONYORA INC
C/O BARES & BASSON ATTORNEYS
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REF: LJ285/ C LIEBENBERG

TO: THE REGISTRAR OF THIS
HONOURABLE COURT
PRETORIA

AND TO: M A LUKHIMANE N.O.
THE FIRST RESPONDENT
PENSION FUND ADJUDICATOR
4TH FLOOR
RIVERWALK OFFICE PARK
BLOCK A,
41 MATROOSBURG ROAD
ASHLEY GARDENS
PRETORIA



AND TO: DUNSTER & ASSOCIATES

c/o SAVAGE JOOSTE & ADAMS
ATTORNEYS FOR 32ND & 33RD
141 BOSHOFF STREET
NIEUW MUCKLENEUK
PRETORIA

KITOUDES | 75738

SAVAGE JOOSTE & ADAMS
Accepted without Prejudice
Ontvang sonder Benadeling van regte
RESPONDENTS
2015 -10- 07
[Signature]



AND TO:

CLIFFE DEKKER HOFMEYER
ATTORNEYS FOR THE 16TH
C/O JACOBSON & LEVY
215 Orient Street
Arcadia
Pretoria
Ref: Mr J Levy/DB/L11752

JACOBSON & LEVY INC
RECEIVED WITHOUT PREJUDICE
ONTVANG SONDER BENADELING
DATE: 07. 10. 2015
TIME: 11:50 *[Signature]*



AND TO:

**THE SECOND TO THE FIFTEENTH AND THE SEVENTEENTH TO
THIRTY-FIRST RESPONDENTS**
who by agreement will accept service at the address of their
attorneys at **JONATHAN MORT INC**
at c/o **JONATHAN MORT INC**
ATTORNEYS FOR THE SECOND TO THE FIFTEENTH AND THE
SEVENTEENTH TO THE THIRTY-FIRST RESPONDENTS
3A SIR GEORGE GREY STREET
ORANJEZICHT
8001

BY REGISTERED MAIL

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 49616/2013

In the matter between:

LE GRELLIER, GAIL
BOTHAS, RENIER
LEPAR, DAVID
SMITH, CAREL

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant

and

LUKHIMANE M.A. N.O.
AFFIRM MARKETING SERVICES (PTY) LIMITED
BEEFMASTER (PTY) LIMITED
H BIRKENMEYER (PTY) LIMITED
DR GEBKA, HELBIG & KLUG INC.
DR RITZ INC.
ETERNAL FLAME INVESTMENTS (PTY) LIMITED
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PROGRESSIVE PACKAGING (PTY) LIMITED
WORLD CARGO SERVICES (PTY) LIMITED
CONDUIT RISK AND INSURANCE HOLDINGS (PTY) LIMITED

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent
11th Respondent
12th Respondent
13th Respondent
14th Respondent
15th Respondent

DELL COMPUTER (PTY) LIMITED	16 th Respondent
THE BRAND UNION (PTY) LIMITED	17 th Respondent
ULTRA LITHO (PTY) LIMITED	18 th Respondent
NEWSCLIP MEDIA MONITORING (PTY) LIMITED	19 th Respondent
MIXTEC CC	20 th Respondent
PETROMARK (PTY) LIMITED	21 st Respondent
DEHTEQ (PTY) LIMITED	22 nd Respondent
WAVELENGTHS 32 (PTY) LIMITED t/a INSALO COMMUNICATIONS	23 rd Respondent
PANORAMIC COMPONENTS (PTY) LIMITED	24 th Respondent
CHICKEN MANAGEMENT SERVICES (PTY) LIMITED	25 th Respondent
HANSEN TRANSMISSIONS (PTY) LIMITED	26 th Respondent
ENABLEMED (PTY) LIMITED	27 th Respondent
PRIMESERV GROUP LIMITED	28 th Respondent
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	29 th Respondent
JOHANNESBURG CHILD WELFARE SOCIETY	30 th Respondent
THE EMPLOYEES OF THE SECOND TO THIRTIETH RESPONDENTS WHO ARE MEMBERS OF THE IF UMBRELLA PROVIDENT FUND AND THE IF UMBRELLA PENSION FUND	31 st Respondent
IF UMBRELLA PROVIDENT FUND	32 nd Respondent
IF UMBRELLA PENSION FUND	33 rd Respondent
KAMIONSKY, TONY	34 th Respondent

**1ST TO 3RD APPLICANTS' REPLYING AFFIDAVIT TO THE
34TH RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

GAIL DENISE LE GRELLIER

do hereby make oath as follows:

1. I am the deponent to the applicants' founding affidavit and replying affidavits to the 16th respondent's ("Dell") and the 32nd and 33rd respondents' (collectively referred to herein as "the Funds") answering affidavits, and remain duly authorised to depose to this affidavit on behalf of the 2nd and 3rd applicants. I annex hereto marked "GG" and "GG2" confirmatory affidavits deposed to by the 2nd and 3rd applicants.
2. The 4th applicant is now represented by a new firm of attorneys, Norton Rose Fulbright (South Africa) and as such I do not depose to this affidavit on his behalf.
3. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief both true and correct.
4. Legal conclusions arrived at herein are on the advice of my legal representatives, which I accept as correct.

BACKGROUND

5. I depose to this replying affidavit following the intervention by the 34th respondent ("Kamionsky") in these proceedings. Kamionsky was not initially a party to these proceedings as the applicants had been advised that he does not have a legal interest therein.
6. The Adjudicator's determination affected the applicants and not Kamionsky. He clearly would have no *locus standi* to seek the relief sought by the applicants in this

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application (i.e. the setting aside of the Adjudicator's determination and dismissing the complaint against the applicants, alternatively, remitting the matter to the Adjudicator for the hearing of oral evidence). In addition, the applicants do not seek any relief against Kamionsky (save for costs, which are now sought against him as a result of his unwarranted intervention).

7. Furthermore, and as is evident from his answering affidavit, Kamionsky did not seek leave to intervene because he opposes the dismissal of the complaint. On the contrary, he appears to be motivated by self-interest (not a legal interest). Kamionsky appears to apprehend that if the Adjudicator's determination is set aside and the complaint is not dismissed and if the matter is remitted back to the Adjudicator for the hearing of oral evidence, he may somehow be implicated with the potential of being found liable by the Adjudicator. This apprehension, however, does not confer upon Kamionsky a legal interest in these proceedings.
8. Be that as it may, the applicants were subsequently advised by their legal representatives not to oppose Kamionsky's intervention in these proceedings by virtue of the wide interpretation of section 30P(1) of the Pension Funds Act 24 of 1956 ("the PFA"). For that reason only, and not because the applicants' conceded that Kamionsky had a legal interest, the applicants decided not to persist with their opposition to Kamionsky's intervention application.
9. Kamionsky's answering affidavit must thus be seen in the light of his apparent fear that if the Adjudicator's determination against the applicants is set aside, he may be implicated and found liable by the Adjudicator. The reason for this fear is because, to Kamionsky's knowledge, the real cause of the rebuild exercise was Dynamique Consultants and Actuaries (Pty) Limited's ("**Dynamique**") neglect to comply with its

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obligations as the duly appointed administrator of the Funds.

10. As I have said in my founding affidavit, from September 2006 Dynamique was the administrator of the Funds until February 2008, when Aon South Africa (Pty) Limited ("Aon") purchased Dynamique's business and took over the administration.
11. Kamionsky, who is also a qualified actuary, was at all material times the managing director and controlling mind of Dynamique. He was also, over the same period, an internal or administrator-appointed trustee of the Funds.
12. In terms of its administration agreements with the Funds and the various employers, Dynamique, represented and controlled by Kamionsky, was required to perform, *inter alia*, the following services:
 - 12.1. standard administration services including, *inter alia*: setting up of fund records; statutory reporting and payments; monthly returns and contribution updates; maintenance and storing of member records; payment of claims in terms of the rules of the funds and in terms of any applicable legislation; tax calculations and payments; administration and calculation of insured and funded benefits and premiums; maintaining accounting records; producing data required for valuations and annual fund audits;
 - 12.2. standard consulting services including *inter alia*: attending trustee meetings to guide trustees on meetings; secretarial services to the trustee meetings, including but not limited to scheduling the meetings, compiling the agenda, sending out trustee meeting packs in advance of the meetings and taking minutes; investment reports and guidance on

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investment; regular updates on legislation and retirement fund related matters;

12.3. standard actuarial services including, *inter alia*: monthly schedules on investment performance; actuarial verification of rule defined member benefits or regulatory entitlements; preparation and certification of all standard documents and schedules required by the PFA;

12.4. to ensure that adequate internal record keeping mechanisms, accounting systems and records, computer systems and controls are maintained for the size and complexity of the pension fund administration business it conducts in terms of the PFA;

12.5. within six months of the Funds' financial year-ends, to submit to the Registrar of Pension Funds the financial statements of the Funds as required in terms of the PFA; and

12.6. to respond to any enquiries directed to it by the Funds' boards of trustees or the employers.

13. I attach by way of an example, marked "GG3", an administration agreement concluded between Dynamique, the IF Umbrella Provident Fund and one of the employers, Genlux Lighting, in which these duties are set out. All of the administration agreements between Dynamique, the Funds and the various employers set out identical duties.

14. As I have explained extensively in my founding affidavit, unbeknown to the applicants at the time, Dynamique had dismally failed to perform its obligations in terms of these administration agreements. Kamionsky represented to us and continuously assured

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us at trustee meetings that everything was in order and that the issues raised from time to time by the applicants were being attended to.

15. Whilst we were aware of certain challenges faced by Dynamique in relation to the completion of the financials and the formatting of the reporting, we do not perceive any maladministration at the time. Kamionsky constantly assured us that all was in order and being attended to. Nothing he said to us at the meetings led us not to believe him. At the time we believed the veracity of his assurances, but, as it turned out, we were being misled by him.
16. I also mention that the challenges regarding the financials were not unusual at the time. Many funds had difficulties finalising their financials at the time, which is what prompted the Financial Services Board ("the FSB") to issue the blanket extension referred to in my founding affidavit.
17. In his answering affidavit, Kamionsky claims that there was no maladministration on the part of Dynamique. However, Kamionsky fails to introduce any evidence in support of this conclusion.
18. Furthermore, the subsequently discovered facts and evidence tell a different story to Kamionsky's bald denial of maladministration by Dynamique. During the course of Dynamique's administration of the Funds, and unbeknown to the applicants at the relevant time:
 - 18.1. reinvestments (i.e. interest and dividends) were not credited to members' accounts;
 - 18.2. redemptions were paid from monies owing to other members;

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- 18.3. switches between investments were not correctly recorded in members' accounts;
- 18.4. inaccurate deposits of monies were deposited in the bank accounts of other funds which Dynamique also administered;
- 18.5. monies were invested in, or disinvested from, incorrect investment portfolios;
- 18.6. Dynamique failed to indentify and or rectify these errors; and
- 18.7. as a result of this monthly and annual audits were not performed.
19. After the Funds' subsequent administrator, Aon, was unable to rectify the problems caused by Dynamique, the trustees at the time (including the applicants) then resolved that the most prudent course to adopt was to appoint Deloitte to undertake a data rebuilding exercise.
20. Although in its supplemented complaint Dell opportunistically (and in contradiction to its initial complaint) sought to align itself with Kamionsky's contention that there was no maladministration to justify the cost of the rebuild:
- 20.1. in paragraph 30.3 of its answering affidavit filed in these proceedings it states that "*The reality is that there was woefully deficient record-keeping by the Funds from their inception until at least the end of the 2008 financial years*"; and
- 20.2. in paragraph 30.4.2 Dell quotes correspondence from Aon's chief executive officer dated 8 October 2012 in which he states the following:

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"To put it into context – this project involves the rebuild of every administration record, for every member, since the inception of the funds in 2004 and 2005. This is a very big and complex project."

THE DELOITTE REPORT

21. These sentiments are supported by the Deloitte report, a copy of the findings of which is annexed hereto marked "GG4".

21.1. The Background and Scope of the report is described as follows:

"The purpose and objective of the ALM Project was to re-create the member records from the inception of the umbrella funds to 31 January 2008, which would inter alia, facilitate future member asset/liability reconciliations at an individual participating employer level, and to some degree restore the integrity of the umbrella funds' member data.

Key Scope Criteria

The scope of work to be performed as part of the project covered:

- *The full analysis (re-build) of the umbrella fund accounts at member level for the umbrella funds from inception to 31 January 2008:*
...
- *The scope covered the Dynami-que Pension Fund, Dynami-que Provident Fund, IF Pension Fund and the IF Provident Fund and included all the participating employers (approximately 280 in total) and their member accounts (comprising approximately 11 500 members)...*

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- *Review and analysis of the relevant information relating to the umbrella funds contained in the documentation and electronic data provided by Aon.*
- *Cash book reconciliations for each of the 4 umbrella funds to bank statements provided.*

Delivery at the conclusion of the project:

- *A schedule of members with closing values as at the year-end date*
- *Details of contributions, investments, deductions, voluntary contributions, and any Section 14 transfers*
- *A schedule of investments which are found to be not in accordance with funds'/members' mandates and the proposed corrective action*
- *Cashbook reconciliations for each of the 4 umbrella funds"*

21.2. Under the heading "Approach and Methodology" and the subheading "Information provided" the following evidences the fact that Dynamique (controlled by Kamionsky) failed to keep proper records:

"We were advised that there was no paper based information for the 4 umbrella funds for the period to 31 January 2008.

...

... Our process included the following:

...

- *Preparation of an initial summary of data provided and*

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identification of missing data for distribution to Aon to request assistance with location of missing data

Our assessment of the supporting data provided found that it was substantially incomplete and that a significant amount of information required as per the listing above was missing or not provided."

- 21.3. Deloitte had to take the following additional steps (at the cost of the Funds) in order to try and source as much supporting data as possible, as a result of Dynamique's maladministration:
- 21.3.1. Aon was requested to search and provide as much of the missing data as possible;
 - 21.3.2. Aon sent out communications to all brokers requesting that they provide as much data to Deloitte as they can for purposes of the exercise. A copy of such a communication is attached marked "GG5";
 - 21.3.3. where brokers were forthcoming with information (which were only a few), such data was further analysed and incorporated into the full data set;
 - 21.3.4. a full set of bank statements for the period up to 31 January 2008 for all four bank accounts was requested directly from the bank;
 - 21.3.5. most of the missing fund rules were obtained from two sources, namely the FSB and from the auditor;

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21.3.6. investment managers were requested to provide fund investment statements by participating employer and/or umbrella fund.

21.4. The system used by Dynamique was called "Everest", but was found by Deloitte to be unreliable based on the following factors: incomplete data; duplicated data; certain transactions were grouped or backdated therefore not presenting an accurate record of transactions; the bank accounts in Everest had not been reconciled and could not be relied upon; the static data such as risk premiums and administration cost allocation percentages/rates were inconsistent/did not tie up to fund rules/were incomplete.

21.5. In fact, Deloitte went on to state that no reliance could be placed on the Everest data:

"The following base assumptions were applied to the re-build:

- *Given the known issues with Everest, no reliance can be placed on its data. Rather Everest is to be used as a supporting tool and in instances where it was appropriate, the output can be compared to Everest*
- *The re-build is based on source documentation/information as far as possible;*
- *Cash is King principle. Given that much of the source data for transactions was missing, it was decided that any decisions on how to treat a transaction, would be based on the evidence of a cash transaction, and this would take*

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precedent over any transactions recorded in Everest which could not be supported"

21.6. Under the heading "*Specific Reconstruction Issues / Findings*" the following findings were made by Deloitte and which I submit are self explanatory :

"We have summarized below the status of the supporting information as well as the quality and state of the member data as recorded on the Everest database provided to us at the commencement of the project.

- *Payments made into the incorrect bank accounts from participating employers*
- *Transactions allocated to the incorrect umbrella fund*
- *Investments in Everest and in the market allocated to incorrect participating employers*
- *Missing investments in the market for various months' contributions*
- *Lack of member information from participating employers*
- *Timing of investments in the market not in line with Fund's service level agreement*
- *Risk rates not consistently applied*
- *Assets allocated to the incorrect products in the market*
- *Switches not done in accordance with the switch*

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- *Fund rules not always loaded correctly on Everest (exclusive versus inclusive, incorrect contribution and expense rates)*
- *Duplicate/missing members recorded on Everest*
- *Everest reports for the same period and funds show different member details*
- *Missing member investment elections in Everest for some months*
- *Pooled asset accounts for IF pension and provident funds*

Our overall assessment of the quality of the data provided is that the status of the member data was for the most part inaccurate and given the number and nature of problems encountered it was not easy to resolve the issues other than through a full re-build."

22. The applicants were not in possession of the Deloitte report and upon request to Deloitte to provide a copy, were met with a declination claiming that it was privileged. It was only after a *subpoena duces tecum* was issued that the applicants were able to obtain a copy thereof. The *subpoena duces tecum* had been issued in a separate action instituted by Kamionsky against the first to third applicants under case number 44507/2013 of this Honourable Court, in which he claims damages from them for alleged defamation. The first to third applicants have defended the action and after having delivered their plea, Kamionsky has taken no further steps to progress the matter for about a year. A copy of the subpoena is attached marked "GG6".

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23. On receipt of the report and on consideration of same, this replying affidavit was prepared. In the course thereof, the applicants attorneys requested, as a matter of caution, Deloitte to provide a confirmatory affidavit in support of the report which was to be attached to the replying affidavit. Deloitte have declined to furnish a confirmatory affidavit advising that the applicants are not its clients and thus they have no obligation to assist in providing such an affidavit. The report in any event speaks for itself and is what it purports to be and has moreover been relied upon by the Funds.

24. In this regard, I refer to the following extract from a communication sent by the Funds' current trustees to intermediaries, participating employers and members dated 23 September 2011:

"12. What irregularities have been discovered by Deloitte?"

A full report will be issued in due course. The irregularities that were discovered related to the administration of the Funds prior to 31 January 2008 and included things such as contributions not being allocated properly, contributions being invested into incorrect investment portfolios and payments paid out of the wrong Fund's bank account."

25. A copy of the communication dated 23 September 2011 is annexed marked "GG7".

26. Seen in the light of this it is disingenuous for Kamionsky to contend that there was nothing wrong with the Funds' data and that the applicants were negligent in authorising the rebuild exercise. On the contrary, the rebuild was the only responsible thing to have done once the extent of the challenges came to light, which was only after Dynamique and Kamionsky had left.

27. When the extent of Dynamique's neglect was discovered, in January 2011 the Funds

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(together with two other funds administered by Dynamique, namely the Dynamique SA Umbrella Pension Fund and the Dynamique SA Umbrella Provident Fund) instituted action against Kamionsky for payment of the sum of R18 162 480.00 (i.e. the amount of the rebuild exercise) as a result of, *inter alia*, the breach of Kamionsky's fiduciary duties owed to the Funds and his failure to prevent or rectify Dynamique's maladministration and poor record keeping. The action was eventually settled on the basis of Kamionsky making payment of R1 million to the Funds. If Kamionsky and Dynamique had acted with due diligence and complied with their obligations, as Kamionsky alleges, one wonders why they made payment of R1 million. Kamionsky fails to explain this in his answering affidavit.

28. The Adjudicator found in paragraph 5.26 of her determination that the R1 million paid by Kamionsky and Dynamique in this regard was negligible, having regard to the amount of the financial loss suffered by the Funds and members as a result of Dynamique's maladministration and the subsequent rebuild exercise. The Adjudicator found further that a reasonable settlement should have taken into account the financial prejudice to members and the Funds.
29. Kamionsky had hoped that the settlement and the Adjudicator's determination would be the end of the matter insofar as he and Dynamique were concerned. That is the real reason why he has sought to intervene in this application and why he has filed an answering affidavit (which does not contribute anything to the determination of the issues at hand and has merely caused delay and unnecessary additional costs), in the hope that a final order can be made against the applicants.

KAMIONSKY'S ANSWERING AFFIDAVIT

30. Against this background, I turn to Kamionsky's answering affidavit. He has in essence

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raised five issues.

31. First, he contends that there has been a non-joinder of other erstwhile trustees, specifically Jager, Rosen, Mol, Murewa and Stolterfoht. On 1 July 2014 these trustees were notified of the application by letter and invited to join the proceedings should they so wish. I attach in this regard the relevant correspondence and covering emails marked "GG8.1" to "GG8.5". Upon receipt of Kamionsky's answering affidavit and *ex abundante cautela*, we served copies of the proceedings on the abovementioned trustees personally and by sheriff where necessary. They have elected once again not to be joined to the proceedings. I annex hereto marked "GG9" a service affidavit deposed to by Mr Michael Dippenaar of the applicants' attorneys of record.
32. Second, Kamionsky contends that there has been a misjoinder of the Funds. Kamionsky contends that the Funds do not have a legal interest in these proceedings because they were not parties to the complaint, and because, regardless of the outcome of the application, it affects the members of the Funds but not the Funds themselves. Kamionsky has obviously not read the Adjudicator's order, even though it is attached as annexure "GL39" to the founding affidavit. In terms of her order the Adjudicator found that:
- 32.1. the applicants did not manage the Funds properly and as a result caused financial loss to the Funds and ultimately the members;
- 32.2. the Funds were ordered to compute the amount of the financial loss to the Funds and the members occasioned by the rebuild exercise;
- 32.3. the applicants were ordered to pay the Funds the amount of the financial loss (less the amount of R1 million already paid by Kamionsky and

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Dynamique);

32.4. the applicants were ordered to notify the Funds and the Adjudicator of the payment.

33. It is thus clear that the Adjudicator's order was granted in favour of the Funds. It is that order which the applicants seek to have set aside in these proceedings. The Funds therefore clearly have a legal interest in these proceedings and were required to be joined as respondents.

34. Third, Kamionsky contends that the applicants have deliberately tried to mislead the Court by not raising the Funds' insurer's rejection of their claim for the costs of the rebuild exercise in the founding affidavit. Kamionsky's contentions are misconceived for the following reasons:

34.1. they contradict his contention that there was no need for the rebuild exercise because, according to Kamionsky, there had been no maladministration on the part of Dynamique. Kamionsky cannot have it both ways: either there was no maladministration by Dynamique with the result that the insurance issue becomes irrelevant or there was indeed maladministration on the part of Dynamique and the question is then whether the applicants should be held liable for such maladministration;

34.2. the Adjudicator did not make any finding in regard to the lapsing of any insurance cover in her second determination (she merely made a comment in passing in relation thereto in her first determination which was subsequently set aside by the Court). Instead, the Adjudicator found that the rebuild exercise was necessary because Dynamique (and by

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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 the 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." (my emphasis)

35. Fourth, Kamionsky contends that the mere attendance of board meetings and the interrogation of Dynamique did not constitute a reasonable and appropriate exercise

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of the applicants' oversight functions. Coming from Kamionsky, this assertion is nothing less than astounding. As I have detailed extensively in my founding affidavit and as reflected in the minutes, the applicants were simply misled by Kamionsky who consistently assured us that all was well and that there were only a few minor challenges which were being addressed. It was only after Kamionsky and Dynamique had left and when Aon took over the administration that the extent of the challenges and the fact that Kamionsky had misled us came to light.

36. Fifth, Kamionsky seemingly concedes that he was negligent and contends that because he was a member of the board of trustees at the time, the whole board of trustees, including the applicants, are jointly and severally liable for his negligence. There is, I am advised, no such broad proposition in our law that an innocent trustee is *per se* liable for the maladministration by another trustee.

37. In the present case the applicants, who are innocent trustees in that we were not responsible for the maladministration, should not be held liable for Kamionsky's breach of trust for the following reasons:

37.1. as is evident from the founding affidavit and the minutes attached thereto, we did not sit back supinely, but actively interrogated Kamionsky, who hid the problems from us and misled us into believing that issues raised by us were being attended to;

37.2. we did not authorise Kamionsky's breach of trust, nor did we acquiesce in them, or negligently fail to interfere;

37.3. we acted honestly and reasonably at all times; and

37.4. we did not fail to take reasonable steps to monitor or be informed of

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Kamionsky's maladministration.

38. Furthermore, section 7F of the Pension Funds Act 24 of 1956 ("the PFA") provides as follows:

"7F Liability of board member - (1) In any proceedings against a board member in terms of this Act, other than for wilful misconduct or wilful breach of trust, the court may relieve the board member from any liability, either wholly or partly, on the terms that the court considers just, if it appears to the court that –

- (a) the board member has acted independently, honestly and reasonably; or*
- (b) having regard to all the circumstances of the case, including those connected with the appointment of the board member, it would be fair to excuse the board member."*

39. As I have demonstrated in the affidavits filed by me in these proceedings:

39.1. there is no evidence whatsoever of any wilful misconduct or wilful breach of trust by the applicants;

39.2. the applicants at all times acted independently, honestly and reasonably.

40. In the circumstances, and on this basis alone, the applicants ought to be relieved from liability for the cost of the rebuild exercise.

41. In addition, having regard to the circumstances connected with the applicants' appointments as board members of the Funds and the fact that they were at all times misled by an administrator, duly approved by the registrar of pension funds in terms of section 13B of the PFA, it would be fair to excuse the applicants from such liability.

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42. I have been advised that although the notice of motion is wide enough to provide for such relief, out of abundant caution, it should nevertheless be amended to expressly include it. It was not expressly included at the time when the application was launched on 13 August 2013 because section 7F was only introduced on 28 February 2014. A copy of the notice of motion which will be served on the relevant respondents is annexed hereto marked "GG10".

SERIATIM RESPONSE

43. I turn now to deal *seriatim* with some of the allegations in Kamionsky's answering affidavit. Given that the relevant issues have been dealt with above, I do not, however, intend to deal extensively with the allegations contained therein and will only deal with those allegations which require a response. Any allegation in Kamionsky's answering affidavit not dealt with by me and which is in conflict with what is stated in the affidavits already filed by me and in this affidavit is denied.

44. AD PARAGRAPHS 4 TO 9

- 44.1. I deny that Kamionsky's evidence is crucial. As I have said, he has no legal interest in these proceedings and the only reason for his involvement is because he fears that if the Adjudicator's award is set aside it may result in him attracting liability *vis-à-vis* the members (since his and Dynamique's settlement was only with the Funds).
- 44.2. Kamionsky's intervention in these proceedings has unnecessarily caused a delay in the finalisation of this matter and has also unnecessarily raised further matter that is not relevant to these proceedings.
- 44.3. The applicants will thus be seeking an order that Kamionsky be liable

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jointly and severally with Dell for the costs of this application.

45. AD PARAGRAPHS 10 TO 30

I have already dealt with these allegations and refer to what I have stated above.

46. AD PARAGRAPHS 31 TO 33

Kamionsky has misconstrued the founding affidavit. Whilst Dynamique, controlled by Kamionsky, was the administrator, the applicants did not know of any maladministration. We were at the time primarily concerned about two administration related issues, i.e. a lack of adequate reporting and a lack of annual financial statements. We were told by Kamionsky that both of these issues were being attended to by Kamionsky and Dynamique. As I have said, it was only after Dynamique and Kamionsky left that the extent of Kamionsky's and Dynamique's maladministration came to light.

47. AD PARAGRAPH 34

47.1. It was never the applicants' duty to construct the Funds' records. That was the function of the Funds' administrator, Dynamique. The applicants were, moreover, never paid to construct member records nor did we possess the actuarial knowledge or skill that generally resides in an administrator in order to do so.

47.2. Kamionsky's *ex post facto* speculation of what we should have done to uncover his maladministration and concealment thereof is denied.

47.3. Given Kamionsky's repeated assurance, the applicants were not put on guard so as to suspect any maladministration such that at the time it would

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have warranted an approach to the FSB to do an onsite compliance visit on the Funds. We in any event assumed that the Registrar had done the necessary checks on Dynamique's systems when issuing it with the section 13B licence.

47.4. Kamionsky, belatedly, contends that the trustees and inclusive of himself no doubt, could have contacted the brokers.

47.4.1. First, brokers are not experts on administration systems and do not possess the necessary actuarial skill and knowledge, so they would not have been in any better position than the applicants.

47.4.2. Second, and in any event, on two occasions we did make contact with brokers.

47.4.2.1. I refer to annexure "GL10" to the founding affidavit, which is a minute of a special meeting held on 5 July 2007. That minute records that a complaint was received by a broker, Mr Anthony Cohen, which complaint dealt with the late allocation of monies by Dynamique. The minute records the following assurances given by Kamionsky to the applicants:

"TK gave the trustees background to the problems that Dynam-ique SA had recently had on the IF Funds. The staff member looking after these funds had let

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Dynam-ique SA down and then the replacement staff member also let Dynam-ique SA down. There had therefore been delays with the monthly allocations of monies. The situation was being addressed by Dynam-ique SA transferring one of their experienced existing staff members onto the IF umbrella funds to look after Anthony Cohen's funds and other intermediary's funds.

TK assured the trustees that he was taking Anthony Cohen's complaints seriously and was making every effort to ensure a smooth administration service is provided to all Dynam-ique SA's clients. In this regard Dynam-ique SA had employed an additional six staff members over the last two months to beef up their administration, accounting and technical teams.

The trustees pointed out that after the last trustee meeting based on the quality of the information provided they did feel that the administration was not where it should be and that they thought it was a matter of time before they get a complaint from

TK
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either the Fund members or the intermediaries. The trustees are therefore glad that the problems are being addressed..."

47.4.2.2. On another occasion in May 2007, as is evident from annexure "GL9" to the founding affidavit, there was a further issue regarding a broker, Mr Martin Morris, which concerned investments that had not been made and/or incorrectly made by Dynamique. In Kamionsky's reply to my email he conceded that there had been challenges and gave the excuse that it was because Mr Morris had used an investment manager that was not on Dynamique's "platform".

47.5. I also mention that at the last trustees' meeting with Kamionsky and Dynamique on 27 November 2008 (the minute is attached as annexure "GL11" to the founding affidavit) Kamionsky suggested that given the need to improve the quality of the administration reporting to the trustees that a new principal officer with stronger administration abilities be appointed in place of Oswald Mokoena.

47.6. Following this, as is apparent from annexure "GL12" to the founding affidavit, I sent an email to Kamionsky advising him as follows:

"Hi Tony

It is around 2 weeks since our trustee meeting. We resolved that

GLC
#

the administrator must come up with a plan to sort out the IF financials. The plan should include target dates etc. Please could we be advised of that plan (we decided on a deadline of two weeks). It is absolutely imperative that we get things going on this issue. It is vital for the membership that the financials are finalised, whatever that takes in order to do so..."

47.7. Kamionsky replied as follows:

"I confirm we have now worked through the unreconciled items and have addressed what we can and what remains is not material. We are therefore proceeding with the audit and the unreconciled items will be allocated to an unreconciled account - I have cleared this with the FSB and they have accepted this approach. We therefore just need to put together our working papers which we will now start doing - with the holidays and allowing for some leeway I will look to book the auditors for the end of January. We will therefore make the new FSB blanket extension date of March 2008 and hence there will be no penalties. It is also good news for us as trustees that none of the unreconciled items are material."

47.8. Self-evidently, the trustees were being led up the garden path by Kamionsky, who never provided the financials as promised and, as subsequent events revealed, was probably in the process of selling Dynamique's business to Aon at the time.

47.9. I emphasise that at that stage the applicants had no idea of the extent of the challenges which had been concealed by Kamionsky and Dynamique and we were led to believe by Kamionsky that the administration reporting

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was superficially deficient and would be addressed and that the annual financial statements, although late, would be finalised imminently.

48. AD PARAGRAPHS 35 - 39

I have already dealt with these allegations and refer to what I have stated above.

49. AD PARAGRAPH 41

49.1. Kamionsky has obviously misread paragraph 65 of my founding affidavit. Nowhere in paragraph 65 do I say that what is stated therein had been minuted. I simply stated that "*at this point I believed that Dynamique required substantial guidance with the compliance and governance aspects of the funds*". I stand by this.

49.2. Significantly, as is consistent with the other minutes attached to my founding affidavit, annexure "TK8" to Kamionsky's answering affidavit states the following:

"6. Administration Report

The PO and/or the administrator were not properly prepared to table complete information to the trustees. Information was tabled but the information had not been presented nicely and was difficult to follow and was incomplete. Included in what was tabled was

- *contributions received*
- *claims paid*
- *outstanding claims*

TK8

- membership stats.

The Trustees insisted that in future trustee packs should be send (sic) to the Trustees a week before the meeting (seven days) to enable the Trustees to have enough time to look at the reports. It was further decided that the Dynam-ique SA Head of Administration should be at the meeting to present the reports to the Trustees. This would also help the Trustees to raise any concerns that they have in this regard."

50. AD PARAGRAPH 42

50.1. I admit what is stated in paragraph 67.1 of my founding affidavit.

50.2. I deny the remaining allegations. It is clear from the minutes that on 21 November 2007 Dynamique, for the first time, attempted to shift the blame to Integrated. In none of the prior minutes did Kamionsky ever contend that there were serious problems which he had inherited from Integrated. Instead, he continually assured the applicants that the problems were minor and being attended to.

51. AD PARAGRAPH 43

Kamionsky misses the point. The allegation is not that he failed to revert - it is that he failed to revert with an audit plan. I persist with my contention that he failed to do so and invite him to submit the audit plan provided by him in the event that he disputes this.

52. AD PARAGRAPH 44

W.D.