

**IN THE NORTH GAUTENG HIGH COURT OF THE DISTRICT OF
TSHWANE HELD IN PRETORIA**

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 49616/13

In the matter between:

LE GRELLIER GAIL	First Applicant
BOTHA REINIER	Second Applicant
LEPAR DAVID	Third Applicant
SMITH CAREL	Fourth Applicant

and

LUKHIMANE M.A. N.O.	First Respondent
AFFIRM MARKETING SERVICES (PTY) LTD	Second Respondent
BEEFMASTER (PTY) LTD	Third Respondent
H BIRKENMEYER (PTY) LTD	Fourth Respondent
DR GEBKA, HELLING & KLUG INC.	Fifth Respondent
DR RITZ INC.	Sixth Respondent
ETERNAL FLAME INVESTMENTS (PTY) LTD	Seventh Respondent
EXPECTRA 89 (PTY) LTD	Eighth Respondent
HESTICO (PTY) LTD	Ninth Respondent
HETTAS CC	Tenth Respondent
CONVISTA CONSULTING (PTY) LTD	Eleventh Respondent
IDI TECHNOLOGY SOLUTIONS (PTY) LTD	Twelfth Respondent
PROGRESSIVE PACKAGING (PTY) LTD	Thirteenth Respondent
WORLD CARGO SERVICES (PTY) LTD	Fourteenth Respondent

CONDUIT RISK AND INSURANCE HOLDINGS(PTY) LTD	Fifteenth Respondent
DELL COMPUTERS (PTY) LTD	Sixteenth Respondent
THE BRAND UNION (PTY) LTD	Seventeenth Respondent
ULTRA LITHO (PTY) LTD	Eighteenth Respondent
NEWSCLIP MEDIA MONITORING (PTY) LTD	Nineteenth Respondent
MIXTEC CC	Twentieth Respondent
PETROMARK (PTY) LTD	Twenty-First Respondent
DEHTEQ (PTY) LTD	Twenty-Second Respondent
WAVELENGTHS 32 (PTY) LTD	Twenty-Third Respondent
PANORAMIC COMPONENTS (PTY) LTD	Twenty-Fourth Respondent
CHICKEN MANAGEMENT SERVICES (PTY) LTD	Twenty-Fifth Respondent
HANSEN TRANSMISSIONS (PTY) LTD	Twenty-Sixth Respondent
ENABLEMED (PTY) LTD	Twenty-Seventh Respondent
PRIMESERV GROUP (PTY) LTD	Twenty-Eighth Respondent
THE CHURCH OF JESUS CHRIST OF THE 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
TONY KAMIONSKY	Thirty-Fourth Respondent

THIRTY-FOURTH RESPONDENT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

TONY KAMIONSKY

do hereby make oath and state as follows:

1. I am an adult male and the thirty-fourth respondent.
2. The contents of this affidavit are within my personal knowledge, unless otherwise indicated, and are both true and correct.
3. I have structured my affidavit into the following sections:
 - A. Background to this Supplementary Affidavit
 - B. The First Applicant's claims of maladministration
 - C. The Deloitte's audit report
 - D. The non-payment of the insurance premiums
 - E. Other points raised in The First Applicant's Replying Affidavit
 - F. Points not addressed in The First Applicant's Replying Affidavit
 - G. Mr Khoza's breach of his obligations in terms of the Pension Funds Act
 - H. Mr Khoza's authority to submit the 32nd and 33rd RESPONDENT'S FURTHER SUPPLEMENTARY / REPLYING AFFIDAVIT
 - I. The contents of Mr Khoza's Further Affidavit
 - J. Conclusion

A. Background to this Supplementary Affidavit

4. This Supplementary Affidavit has been necessitated as there is a need to respond to the additional points raised in the following two Affidavits:
 - 4.1. 1st TO 3rd APPLICANT'S REPLYING AFFIDAVIT TO THE 34th RESPONDENT'S ANSWERING AFFIDAVIT (hereinafter referred to as "1st Applicant's Replying Affidavit") ;
 - 4.2. 32nd and 33rd RESPONDENT'S FURTHER SUPPLEMENTARY / REPLYING AFFIDAVIT (hereinafter referred to as "Mr Khoza's Further Affidavit").
5. Once again I am not opposing this Application nor am I seeking any relief but I am merely putting the facts before the Honourable Court in order that the Honourable Court can arrive at an informed decision, and hence there is no grounds whatsoever for the Honourable Court to make any cost ruling against me.
6. It needs to be mentioned that the Applicants did not serve a copy of the 1st Applicant's Replying Affidavit on me (eventhough I am a Respondent in this matter) and the only reason I received a copy is that I found out via Mr Khoza's Further Affidavit about the 1st Applicant's Replying Affidavit, at which point I wrote to the Applicant's attorneys demanding a copy.

7. Not only is the failure by the Applicants to serve me a copy of their Affidavit unethical and unlawful, but the fact that the Applicants are continually trying to keep me out of this Application (The Honourable Court will know that the Applicants excluded me all together when they brought this Application and I had to bring an Application for Leave to Intervene) should sound serious warning bells for the Honourable Court and the Honourable Court should therefore pay important attention to what I have to say.

8. The Applicants in the 1st Applicants Replying Affidavit hypothecate in a number of clauses (see clauses 7, 9 and 29) as to what my intentions in intervening are. Well they clearly didn't read my Answering Affidavit as in it I detailed the necessity for me to have to intervene. In a nutshell 11,000 members lost money due to the negligence of the Applicants and hence it was important that the Applicants were not allowed to escape liability by their placing inaccurate and misleading information before the Honourable Court.

9. Which brings me onto the claim made by the Applicants that I have not contributed anything to this Application. On the contrary, it is clear from a simple read through of my submissions that I have put copious amounts of relevant information in front of the Honourable Court and had it not been for my involvement the Honourable Court would have *inter alia* not know that:
 - 9.1. No maladministration by Dynam-ique has ever been proven and Dynam-ique has never been found guilty of any wrong doing whatsoever;

- 9.2. No wrongdoing by myself has ever been proven and I have never been found guilty of any wrong doing whatsoever;
- 9.3. The Applicants did not pay the premiums on the Funds indemnity insurance policies leaving the members with no cover;
- 9.4. The 32nd and 33rd Respondents are not valid Respondents in this Application;
- 9.5. There is a highly irregular collusion going on between the Applicants and the 32nd and 33rd Respondents (as detailed further in this Affidavit).

B. The First Applicant's claims of maladministration

10. The majority of the 1st Applicant's Replying Affidavit is made up of unsubstantiated allegations of maladministration by Dynam-ique and/or myself which, given the Applicants provide no valid proof to support any of these allegations, do not warrant a response.
11. More specifically the following clauses of the 1st Applicant's Replying Affidavit are unsubstantiated and can be set aside: Clauses 9, 14, 15, 18, 19, 20, 27, 35, 37, 41, 46, 47, 49 and 50.

12. It is both sad and laughable at the same time how the Applicants, 5 years after the event, are still clinging to these unsubstantiated claims of maladministration as their way of defending their actions, especially given the Applicants are well aware that no maladministration was ever proven.
13. Contrary to what is stated in Clause 17 of the 1st Applicant's Replying Affidavit, there is no obligation on myself whatsoever to prove that there was no maladministration, but rather the Applicants are the ones who made allegations that there was maladministration and the burden of proof rests, and has rested, at all times with the Applicants to prove their allegations, which they never did.
14. What the Applicants are doing by repeatedly making these unsubstantiated allegations of maladministration is blatant defamation and they will be held to account for this in the defamation claim I have brought against them in the South Gauteng High Court.
15. Also, unfortunately for the Applicants, as much as they were hoping that the Deloitte's report would substantiate their allegations of maladministration, it never did, in fact it doesn't even mention the word maladministration and the Deloitte's report actually landed up being very damaging to the Applicants (as I have explained below)

C. The Deloitte's audit report

16. I have attached as Annexure TKSA1 a copy of detailed analysis of the Deloitte's report that I prepared for the Financial Services Board. The key findings (detailed fully in my attached analysis) emanating from this analysis were as follows:

16.1. The decision to scrap the existing database and spend R20m rebuilding everything was fundamentally flawed and driven by conflict of interest and greed;

16.2. Deloitte's have deliberately tried to misrepresent the facts and exaggerate the problems;

16.3. The Deloitte's issues Log is plagued with incorrect findings;

16.4. The Deloitte's rebuilt member values are wrong;

16.5. Deloitte's don't understand pension fund administration;

16.6. There was a callous disregard for the members as evidenced by the lack of attention to detail and the failure to follow due process;

16.7. The problems found only applied in a handful of instances and in no way justified the decision to rebuild everything;

16.8. Deloitte's conclusion of the rebuild being required is totally devoid of any merit;

16.9. There is no evidence whatsoever of any maladministration.

D. The non-payment of the insurance premiums

17. Clause 34 of the 1st Applicants Replying Affidavit deals with the non-payment by the Applicants of the premiums on the Funds' insurance policies, however they don't deal with any of the points of substance raised in my Answering Affidavit. This isn't surprising as for them to have not paid the premiums is indefensible, grossly negligent and grounds alone for upholding the Adjudicators determination which found the Applicant's to be negligent. No reasonable person will buy the Applicant's claim that their non-payment of premiums on the policy wasn't the primary factor in the insurer's repudiation of the claim.

18. In relation to the Applicants having misled the Honourable Court by not bringing it to the Honourable Court's attention that they hadn't paid the premiums, the Applicants respond as follows, none of which responses in any way addresses the allegation:

18.1. The Applicants go off on a tangent regarding whether there was or wasn't maladministration – this is irrelevant, as whether or not there was maladministration doesn't excuse the Applicants from

not having informed this Honourable Court about their non-payment of the insurance premiums;

18.2. The Applicants argue that the Adjudicator did not make a finding in regard to the lapsing of the insurance policy – once again this doesn't excuse the Applicants not having informed the Honourable Court about their non-payment of the insurance premium which is a material factor in the sequence of events that they so painstakingly set out in their Founding Affidavit;

18.3. The Applicant's argue that a communication by the trustees is evidence that the insurer would have not paid the claim – this is laughable as trustees can't take a decision on behalf of the insurer, but rather it is the insurer, and the insurer alone, who can accept or repudiate a claim. The Applicant's argument here is once again not a valid reason for the Applicants not having informed the Honourable Court about their non-payment of the insurance premium;

18.4. Lastly the Applicants quote from a letter from the insurer dated 9 September 2011, which they correctly point out was annexure TK3 to my Answering Affidavit. However quite unbelievably they don't then go on to quote from annexures TK4, TK5, TK6 and TK7 to my Answering Affidavit which were the subsequent communications with the insurer from which communications it is blatantly clear

that the insurer could never substantiate any of the other reasons for repudiation set out in their letter dated 9 September 2011 and the insurer themselves ended off by confirming that the only reason not in dispute for the repudiation is the non-payment of the insurance premiums.

19. The question also is why, when the insurer put forward these other alleged repudiation reason set out in Clause 34 of the 1st Applicants Replying Affidavit, was it me who had to take the insurer to task on their reasons for repudiation when the Applicants had a duty and obligation on behalf of the members to have done so and to have tried to get the insurer to pay the claim. The answer is that the Applicants knew they hadn't paid the premiums on the policies and hence they knew to challenge the insurer on any other aspects would have been a futile exercise. It also suited the Applicants to have these other repudiation reasons hanging in the air (even though they were not valid reasons) as the Applicants are using these other unsubstantiated grounds for repudiation to save their skin in connection with then not having paid the premiums on the insurance policies.
20. Lastly on this issue, it would have been very easy for the Applicants to go to the Insurer now and get a letter from them confirming that the non-payment of premiums by them is not the reason for the repudiation of the claim. The reason they have not done this is simply that the insurer would not have given them such a letter as clearly the non-payment of premiums did result in the repudiation of the claim and for the Applicants to try argue otherwise is

just insulting the intelligence of the Fund members, the Respondents to this Application and the Honourable Court.

E. Other points raised in The First Applicant's Replying Affidavit

21. The Applicants on numerous occasions attempt to argue that I am not a valid Respondent to this Application, see clauses 5, 6, 7, 8 and 44. However the fact of the matter is that I am a Respondent to this Application and hence these clauses can be set aside.
22. In clause 27 of the 1st Applicants Replying Affidavit the Applicants effectively ask me to explain why I paid a settlement in relation to the claims against me and suggest it is an admission of guilt. On the contrary, the settlement was made totally without any admission whatsoever of any wrongdoing and it was a pure economical decision to make the settlement payment in that the costs of continuing to defend the lawsuit would have been more than the settlement amount. What is noteworthy about the settlement amount is that the amount was less than 5% of what I was being sued for indicating that the trustees attached a probability close to zero of success against me.
23. In clause 28 of the 1st Applicants Replying Affidavit they claim that the Adjudicator found that there had been maladministration by Dynam-ique. Clearly the Applicants didn't read the Adjudicator's Determination. At no time did the Adjudicator investigate whether or not there had been maladministration by Dynam-ique but rather the Adjudicator accepted as fact

the Applicants' allegation that there had been maladministration. Accepting something to be true and finding something to be true are two very different things.

24. In clause 32 of the 1st Respondents affidavit, in response to my claim that the Funds have been incorrectly included as Respondents and are not valid parties to this Application given they were not a party to the Adjudicator claim that gave rise to this Application, the Applicants argue that the 32nd and 33rd Respondents are valid respondents on the basis that they have been mentioned in the Adjudicators Determination. However, I too have been mentioned numerous times in the Adjudicators Determination however they have argued vehemently that this doesn't make me a valid party to this application.
25. In addition the applicants argue that the fact that the Funds have a financial interest in the outcome of this Application means that they have a legal interest. However the Applicants have argued in the 1st Applicants Replying Affidavit that I too have a financial interest in the outcome of this Application and yet they vehemently argue that I am not a valid Respondent in this matter. The Applicants are therefore clearly willing to put forward whatever arguments suits their particular purpose.
26. But the point still remains that it is only the Honourable Court who can decide whether the 32nd and 33rd Respondents are allowed to intervene in this Application matter and it is unacceptable for the Applicants to have

unilaterally just included them as Respondents when the 32nd and 33rd Respondents are clearly not parties to the Adjudicator Complaint that is being appealed in this Application.

27. The question that also needs to be asked is why the Applicants would want the 32nd and 33rd Respondents to be part of this Application when the Adjudicator ruled in favour of the members of the 32nd and 33rd Respondents and one would expect, and the Pension Funds Act would require, that the 32nd and 33rd Respondents ensure that the Adjudicator ruling however the 32nd and 33rd Respondents are doing the exact opposite by assisting the Applicants in escaping liability. This highlights a sinister collusion between the trustees of the 32nd and 33rd Respondents and the Applicants which is something I discuss again further in my Affidavit.
28. Another example of the Applicants putting forward diametrically opposed arguments based on whatever argument suits them at the time can be found in Clause 9 of the 1st Applicants Replying Affidavit where they state: *"Kamionsky's answering affidavit must thus be seen in the light of his apparent fear that if the Adjudicator's determination against the Applicant is set aside, he may be implicated and found liable by the adjudicator"*.
29. Contrast this with what the Applicants stated when they opposed me intervening in this matter, at which point they argued the opposite, namely they argued that I can't be found liable by the Adjudicator, stating in their Heads of Argument as follows: *"... the Adjudicator has already made a finding*

that by virtue of the settlement agreement concluded between the applicant (Kamionsky) and the Funds ... she has in effect no further jurisdiction over him."

30. In clause 35 the Applicants attempt to deal with my allegation that their actions did not constitute a reasonable and appropriate exercise of their oversight functions. However they don't address my allegation – all they say is "*we were simply misled by Kamionsky*" which is a ridiculous response as firstly they don't provide any evidence to support this claim and secondly this response highlights that they didn't do enough, in other words to just pitch up to a quarterly trustee meeting and accept someone's reassurance (assuming for a moment that this did happen) when you are concerned about the administration is exactly what I am saying constitutes an inadequate exercise of the Applicants oversight functions.

31. In clause 35 the Applicants discuss my claim that all trustees are jointly and severally liable and their argument here is that they are not liable if I was negligent. I fully agree that they would not be liable if I was negligent however this is not what I had claiming in my Answering Affidavit and so clearly they didn't read my Answering Affidavit properly. Further at no time have I been found guilty of any negligence whatsoever and so there argument is moot. The point I made in my Answering Affidavit, which they have not addressed (because it is an indisputable fact), is that if a board of trustees is responsible for something and if that something doesn't happen then all the trustees are jointly and severally liable. The Applicants were

therefore wrong and malicious to single me out and try pass all the blame onto me for alleged breaches of things that the board of trustees was required to do.

F. Points not addressed in The First Applicant's Replying Affidavit

32. In the 1st Applicants Replying Affidavit the Applicants dispute a number of points made in my Answering Affidavit however what is just as noteworthy is the numerous fundamental points made in my Answering Affidavit for which the Applicants put forward no argument whatsoever to dispute, which points include:

32.1. My point that I am the only Respondent in a position to give input to this Honourable Court as I am the only Respondent with first hand knowledge of the events at hand;

32.2. My point that the Applicants are trying to have their cake and eat in when they claim now that the trustees acted reasonably, as in total contradiction to this, in their claims they brought against me in my capacity as a trustee they effectively alleged that the board did not act reasonably as it breached various of its obligations;

32.3. My point that the Applicant's comments about Cassim Patel were both inappropriate and inaccurate;

- 32.4. My point that the Applicants' decision to do the rebuild was based on an asset liability match effective two years after Dynam-ique's involvement with the Funds ended and hence they could not have determined from that that the problems did in fact lie with Dynam-ique;
 - 32.5. My point that the Applicants did not have the require skill or knowledge to make the determination they made that the values from Dynam-ique could not be trusted;
 - 32.6. My point that the Applicants should just have insisted that AON ensure the values are accurate;
 - 32.7. My point that the trustee minutes in their entirety do not support the Applicants' version of events;
 - 32.8. My point that the rebuild achieved nothing, meaning that the R20m of the members money had been wasted;
 - 32.9. My point that sending the Adjudicators Complaint back to the Adjudicator is not a workable option.
33. I now turn my attention to Mr Khoza's Further Affidavit.

G. Mr Khoza's breach of his obligations in terms of the Pension Funds Act

34. Mr Francisco Jabulane Khoza ("Mr Khoza") is the deponent of the 32nd and 33rd RESPONDENT'S FURTHER SUPPLEMENTARY / REPLYING AFFIDAVIT.
35. Mr Khoza's Further Affidavit is essentially one long defence of the Applicants' actions in regard to their failure to have paid the premiums on the Funds' indemnity policies, seemingly being the only matter from my Answering Affidavit that the 32nd and 33rd Respondents are now disputing.
36. The question is why does Mr Khoza feel the need to defend the Applicants, which defence is blatantly against the interests of the 32nd and 33rd Respondents and all the members of these Respondents whose very interests Mr Khoza had been appointed to protect.
37. Not only has Mr Khoza been appointed to protect the interests of the 32nd and 33rd Respondents and their members but he is required in terms of the Pension Funds Act to do so, more specifically Section 7C of the Pension Funds Act provides as follows:

7C Object of board

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

(2) In pursuing its object the board shall-

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

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

(c) avoid conflicts of interest;

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

38. The Fund members were successful at the Adjudicator in getting a R19m judgement against the Applicants and instead of Mr Khoza as a trustee assisting the members to recover this money from the Applicants, Mr Khoza is

instead assisting the Applicants in trying to get out of having to pay this money to the members.

39. Mr Khoza has no duty nor contractual obligations towards the Applicants and hence by him trying to protect the Applicants in this way is a complete dereliction of his duty to the Funds and fund members and a complete breach of his duties in terms of the Pension Funds Act and hence Mr Khoza has committed a serious offence and would be guilty of gross misconduct. The Funds or their members would therefore have every right to bring a claim against Mr Khoza in his personal capacity.

H. Mr Khoza's authority to submit the 32nd and 33rd RESPONDENT'S FURTHER SUPPLEMENTARY / REPLYING AFFIDAVIT

40. In respect of the 32rd Respondent Mr Khoza claims to be authorised to depose to his Affidavit on behalf of the 32nd Respondent however he provides no supporting evidence to back up this contention.
41. Just being a member of a board does not give a person the automatic right to submit Affidavits on behalf of a fund. It is only the board of the fund who can approve such an affidavit being submitted.
42. In this instance given Mr Khoza's actions in defending the Applicants are a breach of the Pension Funds Act and open himself up to claims against himself in his personal capacity, it should not be automatically accepted that

the board of the 32nd and 33rd Respondents has approved him submitting this affidavit.

43. If the Board has in fact approved Mr Khoza's Further Affidavit, then for the reasons already stated above, the entire board would be in breach of the Pension Funds Act and liable to the members in their personal capacities.
44. In respect of the 33rd Respondent Mr Khoza claims to be authorised by the appointed liquidators of the 33rd Respondent to submit his affidavit on behalf of the 33rd Respondent. Mr Khoza has not produced any evidence to support this claim.
45. I do not believe, for reasons set out above relating to Mr Khoza being in breach of the Pension Funds Act, that the liquidators would have given Mr Khoza such authorisation and the Honourable Court should therefore call on Mr Khoza to produce written proof of such authorisation.
46. One of two things will then apply:
 - 46.1. Should Mr Khoza be unable to provide the necessary proof that the liquidators have endorsed his Affidavit then his entire Affidavit should be set aside and action should be taken against Mr Khoza for misrepresentation.

46.2. Should the liquidators confirm their support of the contents of Mr Khoza's Further Affidavit then the liquidators would be in breach of the Pension Funds Act and be guilty of not acting in the interests of the members and the members of the 32nd and 33rd Respondents would have valid grounds to bring an application asking for the removal of the liquidators.

47. Until the above authority issues are resolved the Honourable Court should in my view set aside Mr Khoza's Further Affidavit.

I. THE CONTENTS OF MR KHOZA'S FURTHER AFFIDAVIT

48. In Clause 6 of Mr Khoza's Further Affidavit he sets out the allegations I made against the Applicants in respect of the non-payment of the insurance premiums. He then goes on in Clause 7 of his Affidavit to say that these allegations are not correct for the following reasons however no evidence then follows that disapproves any of my allegations, more specifically:

48.1. He provides no evidence whatsoever to refute my allegation that the trustees hid from members the fact that they had not paid the premiums on the Funds' indemnity policies. In this regard it should be noted that the trustee communication dated 3 August 2011 that Mr Khoza attached to his Affidavit, which he uses to try show that the trustees did inform the members of the non-payment of the insurance premiums, was issued only after I had

exposed the issue of the non-payment of the premiums and informed the members, however all the communications prior to that point, many of which had referred to the matter of the insurance cover, had never mentioned to the members the fact that the trustees hadn't paid the insurance premiums;

48.2. Mr Khoza provides no evidence whatsoever to contradict my allegation that he (and the other trustees) could have informed the Honourable Court in their first Affidavit about the non-payment of premiums but failed to do so;

48.3. Mr Khoza provides no evidence to contradict my claim that the trustees refused to give me copies of the Funds' insurance policies and that I had to bring an Application in the High Court to get these copies (in fact he actually concedes this point but instead tries to justify the actions of the trustees);

48.4. He provides no evidence to contradict my claim that it was only as a result of my court action against the trustees that I found out about the non-payment of the premiums (instead he dodges the issue by going off on a tangent discussing whether I had an insurable interest or whether I had a right to this information)

49. In Clauses 8 and 9 of his Affidavit Mr Khoza just regurgitates what has already been stated in previous Affidavits, save for the sarcastic comment

about me pursuing hobbyhorses. It baffles the mind how someone can refer to a hobbyhorse the serious and material matter of the Applicants' failure to have paid the premiums on the Funds indemnity policies, leaving some 11000 members with no insurance cover resulting in these 11000 members having to pick up the cost of the claims in their personal capacities.

50. In clauses 10 and 11 Mr Khoza suggests that a communication by the trustees, of which Mr Khoza is one of them, is evidence that the insurer would not have paid the claim. This is absurd and laughable as the trustees had no authority to act on behalf of the insurer. As already stated it is the insurer, and only the insurer, which can confirm or repudiate a claim.

51. I already attached to my Answering Affidavit as annexures TK3 to TK7 copies of written correspondence with the insurer in which the insurer confirms that the only issue not in dispute as to why the claim was repudiated is that the premiums were not paid.

52. Further Mr Khoza's arguments about the non-payment of premiums not being relevant are just utterly ridiculous and I wish to illustrate the point with simple example, as follows:--
 - 52.1. Scenario 1: I have insurance on my house for 10 years uninterrupted and in June 2015 my house burns down and the insurer pays me out. Straightforward.

- 52.2. Scenario 2: I have insurance on my house for 10 years uninterrupted and in June 2015 my house burns down, however this time I never paid the premium in January 2015 for the premium year 1 Jan 2015 to 31 Dec 2015 and so the insurer repudiates my claim.
- 52.3. I then go to the insurer and agree to pay the premium for 2015 and in return they agree to reinstate cover back to 1 Jan 2015 BUT with an exclusion for my house burning down as there is no way they are going to agree to retrospectively cover my house having burnt down.
- 52.4. So now the insurance cover on my house is reinstated with no gap in cover but with an exclusion for my house burning down, the cost of rebuilding which I have to pay myself.
- 52.5. It is blatantly obvious that the failure to pay the premium, and not the exclusion, is what has led to me not being paid out for my house burning down.
- 52.6. If you however apply Mr Khosa's reasoning to this example Mr Khoza argues that it is not the non-payment of the premium that has caused the repudiation but rather the exclusion that has resulted in the repudiation. I am sorry but this is just ridiculous.

53. Further in Clauses 10, 15 and 16 of his affidavit Mr Khoza states that the exclusions relating to the reinstated cover are the same as the exclusions that applied to the cover prior to the lapse. This is factually incorrect. The exclusion clause on which the rebuild claim was repudiated was a specific exclusion which excluded claims arising from the rebuild and this specific exclusion was most certainly not in the policy that applied at the time the rebuild decision was taken by the Applicants, namely the policy covering the period 1 August 2009 to 31 July 2010 (copy of this policy schedule was attached as annexure TK10 to my Answering Affidavit).
54. Mr Khoza also doesn't appreciate that as long as you have continuous cover on a fund since its inception it doesn't really matter when the problems arise but rather the issue would just be in which policy year the claim will be admitted into. In other words where there is continuous cover since inception the insurer can't repudiate the claim, save for premiums not having been paid, which is what happened in this instance.
55. In addition, the trustees' own communication dated 3 August 2011, which Mr Khoza attaches to his affidavit confirms as follows *"The trustees have opinion from their legal advisors that claims which arise from the rebuild such as claims from members for their contributions to the cost of the rebuild are probably exclude under the terms of the policies. **This is a result of the exclusions imposed by the insurers on the renewal of the policy as at 1 August 2010.**"* (my own highlighting)

56. In Clause 12 of his affidavit Mr Khoza deals with the High Court application I had to bring to force him, and the other trustees, to give me copies of the funds indemnity policies. Once again his allegations here are just non-sensical for the following reasons:

56.1. Mr Khoza claims that the reason the funds withdrew their opposition to my application was due to them not wanting to incur costs. This cannot be the reason as if this was the case then they would have just given me the copies when I first requested them without there ever being a need to bring a high court application or they would not have opposed my application in the first place. So for them to have made a conscious decision to incur costs in opposing me means they can't then turn around afterwards and claim that they withdrew just to avoid costs.

56.2. Mr Khoza claims I did not have an insurable interest. This is factually incorrect. It appears necessary to explain the concept of insurable interest to Mr Khoza. Any entity that is subject to a financial event has an insurable interest in that event. Therefore any trustee of a fund (be it a current or former trustee of the fund) has an insurable interest in any event that can lead to claims against them in their personal capacity. And it is for this very reason that funds take out trustee indemnity policies.

- 56.3. These Trustee indemnity policies are put in place with the specific intention of protecting the Trustees (both current and former trustees) of which I was one of them. In fact it can be seen from the policy itself (copy attached as annexure TKSA2) that the name of the policies was even "PENSION FUND TRUSTEES LIABILITY INSURANCE POLICY".
57. In Clause 13 of Mr Khoza's Further Affidavit he claims I did not have a right to this information (regarding the insurance policies). This is inaccurate as clearly in my capacity as a former trustee who relied on these trustee indemnity policies for protection I had a clear right to information about the policies.
58. In Clause 15 of Mr Khoza's Further Affidavit he alleges that there was non-disclosure by me on the insurance policies and he bases this allegation on a statement made in the insurer's letter dated 9 September 2011. Clearly Mr Khoza neglected to read all the correspondence with the insurer (attached as Annexures TK3 to TK7 to my Answering Affidavit) from which communications it is clear that the insurer could never substantiate the allegation that there was non-disclosure on my part. This isn't surprising as in the time I was involved with the Funds there was never any need for a rebuild of the records.
59. In Clause 17 of Mr Khoza's Further Affidavit he argues that the policy applicable to any claim is when notification is made and quotes some

passages from the policy. Mr Khoza is clearly missing the point here, more specifically:

- 59.1. In June 2010 when the decision was taken by the Applicants to spend R20m on the rebuild the applicable policy at that time was the policy for the period 1 August 2009 to 31 July 2010 (which as I already have stated, and which can be clearly seen from annexure TK10 to my Answering Affidavit, has no exclusion for the rebuild).
- 59.2. The Applicants were obliged in terms of the policy to have then given notice to the Insurer of this circumstance which can give rise to a claim.
- 59.3. The fact that Applicant's didn't give notice at that point but only gave notice in February 2011, constitutes gross negligence by the Applicants. In fact not only did the Applicants not notify the insurer of the claim at the correct time, they went ahead and approved a R20m rebuild without the permission of the insurer and before the insurer even knew about the claim. This is equivalent to having a car accident, going ahead and having the car repaired and then only 6 months later advising the insurer about the accident. In such instance the insurer would have valid grounds for rejecting the claim.

60. In Clause 17 and 18 of Mr Khoza's Further Affidavit he is trying to argue the matter on behalf of the insurer, however he has no authority to act on behalf of the insurer. Mr Khoza could simply have approached the insurer for an Affidavit confirming that the non-payment of premiums was not the reason for their repudiation of the claim, however we all know that the insurer can't and wouldn't give such a confirmation.

61. One last point regarding Mr Khoza's Further Affidavit, what is noteworthy is that Mr Khoza doesn't dispute the point I made in my Answering Affidavit that no other trustee, other than the Applicants, can be found liable for the loss as no other trustee was a party to the decision to do the rebuild.

J. CONCLUSION

62. Mr Khoza's authority to submit his further affidavit is questionable. It is puzzling why Mr Khoza even opted to submit his further affidavit, especially since he has no obligation to assist the Applicants. This suggests there is collusion between the Applicants and the trustees of the 32nd and 33rd Respondents.

63. My Khoza is in blatant breach of the Pension Funds Act by acting in contradiction to the interests of the 32nd and 33rd Respondents and their members whose interest he is meant to be protecting.

64. Should the Applicants, with Mr Khoza's assistance, get let off the hook by this Honourable Court for not paying the premiums on the Funds' indemnity policies then the members will have valid grounds for bringing a claim against Mr Khoza in his personal capacity and possibly against the other trustees and the liquidators.
65. Then as far as the Applicants are concerned, they end off the 1st Applicant's Replying Affidavit with statements like "*the applicants, who are innocent trustees*" and "*we acted honestly and reasonably at all times*" and "*we did not fail to take reasonable steps*". However these statements, whilst they are intended to create sympathy for the Applicants, are not consistent with the facts of this case, which facts as follows:
- 65.1. The Applicants have never proven that there was any maladministration by Dynam-ique – FACT;
- 65.2. The Applicants have never proven that the rebuild was necessary – FACT;
- 65.3. The Applicants never gave Dynam-ique the opportunity to fix any problems nor did they ever raise any problems with Dynam-ique prior to commencing with the rebuild – FACT;
- 65.4. The Applicants have never demonstrated that there was any benefit to the members in spending this R20m – FACT;

- 65.5. The applicants did not consider nor attempt any more cost effective solutions for sorting out any problems - FACT;
- 65.6. The Applicants did not pay the premiums on the Funds' indemnity insurance policies leaving the members with no insurance cover – FACT;
- 65.7. The Applicants have tried repeatedly to block these facts from coming to the attention of this Honourable Court – FACT;
- 65.8. The Applicants only lodged the claim with the insurer after they had spent R20m on an unjustified rebuild – FACT;
- 65.9. The Applicants have not put forward any valid grounds for this Honourable Court overturning the Adjudicators decision, instead focussing their arguments on supposed maladministration which has never been proven – FACT.
66. In conclusion, I sincerely hope that the 11,000 members who lost a significant amount of their retirement savings, due to the negligence of the Applicants who spent R20,000,000 of the members' money on an unnecessary and overpriced rebuild that didn't achieve anything, are not let down by this Honourable Court overturning the Adjudicators finding.

DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at **JOHANNESBURG** on the day of **2014** the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS
FULL NAMES
ADDRESS
OFFICE