

31. The first respondent also appears to conclude, at paragraphs 5.14 to 5.23 of the second determination, that previous trustees/board members were indeed in breach of their statutory and fiduciary duties in failing to ensure that accurate records were maintained.
32. However, instead of analysing which of the previous trustees may have been liable, and detailing the evidence against each, the first respondent contented herself with attacking the validity of the deduction which was made two and a half years later by a board partially comprising of trustees/board members (the third and fourth applicants) who had no involvement with the Funds' boards at the relevant time period.
33. The first respondent has accordingly, in omitting to consider the actions of the trustees/board members listed at paragraph 21 above, failed to consider the complaint as directed by the North Gauteng High Court requiring the third respondent to consider "*only the former trustees of the Applicants for breach of their statutory and fiduciary duties owed to the Applicants*".
34. A short overview of how the eight relevant trustees were actually considered is provided below.

First applicant

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JTK

35. The first applicant acted as a board member during the relevant period, from September 2006 to February 2008. Based on the first respondent's finding that the trustees indeed conducted themselves negligently, the determination against the first applicant appears to be *prima facie* correct (but not because the first applicant was a member of the board which authorised the deduction).

Second applicant

36. The second applicant acted as a board member during the relevant period, from March 2006 to February 2008. Based on the first respondent's factual finding that the trustees indeed conducted themselves negligently and must be personally liable, the determination against the first applicant appears to be *prima facie* correct (but again not because the first applicant was a member of the board which authorised the deduction).

Third applicant

37. The third applicant was not a board member during the rebuild period, having only been appointed as a board member of the Funds on 9 July 2008. He thus cannot attract liability by virtue only of having been on the board of trustees that authorised the deduction.

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[Signature]

Fourth applicant


38. The fourth applicant was not a board member during the rebuild period, having only been appointed as a board member of the Funds on 9 July 2008. He thus also cannot attract liability on any conception of the facts.

Tony Kamionsky

39. Mr Kamionsky was a board member during the rebuild period from September 2006 to February 2008. Mr Kamionsky was also the managing director of one of the Funds' administrators, Dynam-ique Administrators (Pty) Ltd, during the relevant period, the other being Integrated.

40. As already mentioned, the Funds' instituted action against Dynam-ique and Mr Kamionsky (in his capacity as both a trustee and as managing director of Dynam-ique). This litigation between the Funds and Mr Kamionsky has been fully and finally settled after receipt by the Funds of payment of R1 million.

41. The first respondent appears to have adopted attitude that such claims as may be advanced by the complainants and other members and employers, are no longer cognizable by her by virtue of the above settlement. In terms of the settlement agreement with Mr Kamionsky

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the Funds are in certain instances precluded from making statements about the matter. Any potential liability of Mr Kamionsky, although now extinguished vis-à-vis the Funds by virtue of the settlement agreement, was not extinguished as regards third parties. The Funds are constrained to point out that they have not by means of the settlement agreement settled any potential claims on behalf of members against Mr Kamionsky.

Tammy Murewa

42. Ms Murewa was a board member during the period September 2006 to November 2007. Based on the first respondent's conclusion that previous trustees who presided during the time of the maladministration were indeed negligent, Ms Murewa appears to be in breach of her statutory and fiduciary duties. Ms Murewa however does not appear to have received any notice of the complaint despite the Funds suggesting that she should. The determination against her is thus procedurally untenable.

Penny Stolterfoht

43. Ms Stolterfoht was a trustee during the period September 2006 to November 2007. Based on the first respondent's conclusion that previous trustees who presided during the time of the maladministration were indeed negligent, Ms Stolterfoht appears to be in breach of her

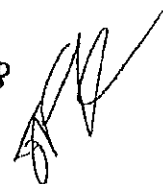
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BAC

statutory and fiduciary duties. However, Ms Stolterfoht similarly does not appear to have received any notice of the complaint. The determination against her is thus procedurally unfair.

Claire Mol, Brian Rosen and Lorraine De Jager

44. These trustees were in office from the inception of the Funds to September 2006, being the date that the administration was handed over to Dynam-ique. Based on the first respondent's conclusion that previous trustees who presided during the time of the maladministration were indeed negligent, these trustees also appear to be in breach of their statutory and fiduciary duties. However, the first respondent exempted them from any examination as to their liability on the basis they joined the board after the decision authorising the rebuild (which, it is respectfully submitted, is simply incorrect).
45. In summary it appears that the second determination of the first respondent is erroneous in many respects, to name but a few:
- 45.1. The finding that the deduction was unauthorised is not correct;
- 45.2. Some trustees (Murewa and Stoterfoht) were not considered when plainly, on the rationale adopted in the determination, they should have been; and

C.P.

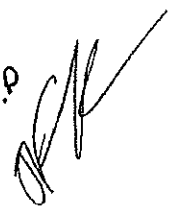


45.3. Certain conclusions which are probably incorrect in law are made, for instance, that the settlement by the Funds with Mr Kamionsky precludes claims by third parties, such as members and employers.

46. In short, the first respondent should have carefully and comprehensively considered the role played by each of the previous trustees in contributing to (or failing to halt) the maladministration, and hence also the extent to which they were negligent in relation to the damages sustained by the Funds and their members when the rebuild became a necessity. This she has plainly not done.

47. I also point out in this regard that the Funds do not accept as correct the applicants' contentions in paragraphs 125 to 129 which appear to be to the effect that the applicants can only be liable for grossly negligent, dishonest, or fraudulent conduct.


48. This thesis emanates from the Funds' rules which state (in respect of the 33rd Respondent) that "*the TRUSTEES, officers of the FUND and persons to whom they have delegated their functions will not be personally liable for decisions taken or actions authorised except if such decisions or actions constitute a gross negligence, dishonesty, fraud or a breach of trust*" (clause 6.17.1) or, in the case of the 32nd Respondent, that "*the TRUSTEES and the PRINCIPAL OFFICER of the FUND shall be indemnified by the FUND against all proceedings,*

r.p.


costs and expenses incurred by reason of any claim in connection with the fund not arising from the gross negligence, dishonesty or fraud" (clause 12.8.1).

49. However, these rules do not and cannot give rise to a situation where trustees/board members are only liable for gross negligence, dishonesty or fraud. Such a situation would be contrary to the Act and other applicable legislation such as the Financial Institutions (Protection of Funds) Act 28 of 2001.
50. Furthermore, I point out that the above issues are plainly complex, and will probably entail consideration of material and wide-ranging factual disputes, particularly as the versions of various board members differ markedly (the most notable example being that Kamionsky denies that any maladministration occurred, whereas the applicants blame the maladministration on Kamionsky).
51. Despite the above, the first respondent stated at paragraph 1.3, that:

"After considering the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated."

T.P.


- 52. Firstly, it is obvious that the background facts "known to the parties" are not common cause.

- 53. Secondly, whilst the first respondent's approach may be expedient in successfully disposing of minor or relatively uncontentious complaints with which she deals on a routine basis, such an approach is plainly not appropriate in the present instance. It is respectfully submitted that relying on written submissions and contentions, most of which are not even attested under oath, let alone tested in cross-examination, is dangerous in the present circumstances, and can only add to the confusion being generated on paper.

- 54. The machinery of the Act specifically empowers the first respondent to conduct investigations in an inquisitorial manner, and even to constitute a commission to take evidence with the powers conferred by the Commissions Act 8 of 1947, if that is necessary (section 30J). It is furthermore competent for the first respondent to hear oral evidence. None of these procedures were implemented or even considered.

- 55. Accordingly it is the respectful view of the Funds that the first respondent's decision to dispose of the issues in the summary manner which she adopted was inappropriate in the circumstances and constituted misdirection on her part.

28



56. However, as already alluded to in previous submissions, the Funds have taken the considered view that the prospects of success and recovery against previous trustees/board members are insufficient to warrant further expenditure of members' monies. This is particularly so where the first respondent has ruled that:

56.1. only some of the former trustees/board members are liable, when plainly others in the same position have not even been considered; and

56.2. other former trustees/board members are liable when such trustees/board members plainly cannot attract liability on any conception of the facts.

57. It is accordingly the Funds' considered view that, whatever merit there may be in certain conclusions reached by the first respondent, and even in the absence of recoverability concerns, the determination by the first respondent is flawed in too many respects to be supportable, at least at this juncture.

58. It is for these reasons, and the others set out in this affidavit and elsewhere in submissions by the Funds, that the Funds have at this point elected to abide the decision of this Court.

RP


59. However, the Funds do tender whatever assistance may be necessary to this Court and to the first respondent, in the event of a remittal, such as may conduce to a proper determination of the complaints.

60. If this Court is inclined to grant some form of relief to the applicants, the Funds would support the alternative relief claimed whereby the complaint would be referred back to the first respondent for appropriate investigation and/or oral evidence.

61. In those circumstances, it is respectfully suggested that the appropriate order would be that the first respondent be directed to:

52.1 Take all such steps as may be necessary to ensure that all previous board members/trustees who were in office in the period prior to 1 February 2008 are made parties to the complaint in terms of section 30G(d);


52.2 Conduct an investigation in an inquisitorial manner in terms of section 30J(1), and/or appoint a commission in terms of section 30J(3);

52.3 Review the conduct of the aforesaid previous trustees/board members from the inception of the Funds to 1 February 2008 in order to determine whether their actions during that period

r.p.



amounted to a breach of their statutory and fiduciary duties; and, if so to impose a finding of liability on such previous trustees/board members as and where appropriate



FRANCISCO JABULANE KHOZA

The deponent has acknowledged to me that he knows and understands the contents of this affidavit which was signed and sworn before me at Johannesburg on the 20 day of September 2013, the regulations contained in Government Notice R1258 of 21 July (as amended) having been complied with.


COMMISSIONER OF OATHS

TSHEPANG PORTIA MATSHANA
EX OFFICIO
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
165 WEST STREET
SANDTON



IF Umbrella Pension and Provident Fund



Dynam-ique SA Umbrella Pension and Provident Fund

1 November 2010

COMMUNICATION FROM THE BOARD OF TRUSTEES

Rebuild of Funds

In July 2010 the board of trustees of the above funds appointed Deloitte to perform a member level rebuild of the funds. The reasons for making the decision to undertake this exercise was that the data held in respect of the funds was questionable and the trustees and current administrator were not convinced that it was entirely accurate. The funds have been administered by two different administrators (and in the case of the Integrated Futures funds by three) since inception. They are currently administered by Aon. Due to the potential inaccuracy of the data it was decided that in order to ensure the efficient running of the funds going forward, a total rebuild of the fund would need to be undertaken from inception date to 31 January 2008.

The trustees obtained two formal quotes before appointing Deloitte and debated the reconstruction exercise with other providers currently undertaking similar exercises within the industry. In addition the trustees debated the need for a rebuild extensively among themselves. The cost of the rebuild exercise will be approximately R20 million. This involves a rebuild for each and every member at member level. The trustees had to charge the cost of the rebuild to the funds as the rebuild exercise falls outside the scope of day to day administration of the funds. In any event the current administrator would not have had the time or resources to undertake such a vast exercise. Prior to making this decision, the trustees took legal advice regarding their right to debit the funds with the cost of the rebuild and the method of allocation of the cost among the assets of the fund. The following conclusions were reached –

- The assets of a fund belong to the fund (not to the members or the employers) and it is only when a member leaves the fund that such member becomes entitled to a part of the fund assets, in the form of a benefit. Thus the trustees, on behalf of a fund, may incur such costs as are reasonable and necessary to ensure that the fund is managed and administered accurately and that all the

Registration number: IF Pension (12/8/37464) IF Provident (12/8/37452)
 Dynam-ique Pension (12/8/37635) Dynam-ique Provident (12/8/37634)
 Registered Address: 1 Sandton Drive, The Place, Sandton, Johannesburg
 Trustees: G Le Grellet (Independent Chairman), R Botha (Independent Trustee),
 C Smith (Trustee), D Lepor (Trustee),
 L Wingrove-Gibson (Independent Principal Officer)

requirements of legislation are met. The trustees do not need to seek the approval of members, employers, brokers or consultants in order to incur these costs.

- The trustees debated the method of allocation of the costs among the funds and members and were inclined to try to use some methodology that related the costs of the project to the members who had potentially been affected at the time. This raised numerous further queries and issues which we will not go into, save to say that it would have been very difficult to isolate the debt in a way that everyone would agree was equitable. After debating the issue with the lawyers, taking into account that the assets of the fund belong to the fund, that the rules provide for the incurring of these costs, and that the funds would continue to be paralysed if the rebuild was not properly done, the trustees decided that the funds would be debited with these costs during the course of September 2010. It is also important to note that all members would be impacted if the funds were to continue to be paralysed. This means that it would have been very difficult to produce annual financial statements and accurate benefit statements. In addition the potential for incorrect payments that could prejudice the remaining members of the funds would continue to exist.

In order to provide for the cost of the rebuild, the trustees have debited each member's share with approximately 2.5% of asset value. The money required to pay for the rebuild of the funds has been disinvested from the market and placed in an interest bearing account in the name of the funds. Only as invoices are approved are moneys actually paid out of the fund.

As is clear from what is set out above, there are questions around the accuracy of fund data and for that reason, the trustees have taken a decision not to issue benefit statements until such time as the rebuild has been completed. All Section 14's transferring out of the funds will be suspended. The trustees have directed AON to inform the Financial Services Board of their intention not to pay Section 14's.

Please note that representatives of the FSB have been made aware of the situation (in a meeting as well as via subsequent correspondence), and while they are unable to endorse the process they have not raised any concerns. They are being kept abreast of the progress of the project.

Regarding the question of recovery of the costs incurred in this project, the trustees have taken legal advice on the various options available to recover costs. We cannot discuss the merits of any legal action as this matter is *sub judice*. Any costs recovered will be for the benefit of the funds.

While we sympathise with the extreme frustration and anger that has arisen from the ongoing problems with the funds and also from this latest decision, we stand firmly by our decision and remain committed to seeing the project through to a favourable conclusion. The rebuild is due for completion in June 2011. The trustees are having regular meetings with Deloitte and thus far the progress of the project is well

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[Signature]

within the time lines given. Further communication will be provided during the course of the rebuild and once the project is complete.

Should you wish to contact the trustees directly; all correspondence can be sent to trusteesmail@gmail.com.



Gail Le Greller
Chairman

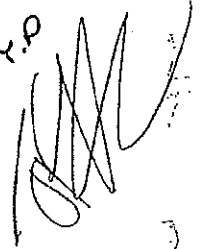


Lindy Wingrove-Gibson
Principal Officer

T.P.


'FJK2'

Prior to Sept 2006	Sept 2006 - November 2006	November 2006 - November 2007	November 2007 - February 2008	February 2008 - July 2008	July 2008 - August 2010	August 2010 - December 2010	December 2010 - February 2011	February 2011 - April 2011	April 2011 - June 2011	June 2011 - Current date
	Kamionisky	Kamionisky	Kamionisky		Sraith			Rollason	Rollason	Rollason
Botha	Botha	Botha	Botha	Botha	Botha	Botha	Botha	Welham	Welham	Welham
Jager	Le Grellier	Le Grellier	Le Grellier	Le Grellier	Le Grellier	Le Grellier	Le Grellier	Bredenkamp	Bredenkamp	
Rosen		Stalterfont	Stalterfont	Stalterfont	Lepar	Lepar	Lepar		Khoza	Khoza
Moi	Murewa	Murewa					Stuart	Stuart	Stuart	Stuart

7.10


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

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
- EXTERNAL 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-Eighth 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

FILING NOTICE

KINDLY TAKE NOTICE that the 16th Respondent, Dell Computer (Pty) Limited, presents its Answering Affidavit for service and filing.

BROOKS & LUYT INC.
16th Respondent's Attorneys
The Waverley Business Park
Building 20, Suite 301C
Wyecroft Road, Mowbray
Cape Town
Tel: (021) 447 5322
Fax: 086 549 1632
Docex 226 Cape Town
Email: ryandeklerk@brooksluyt.co.za
Ref: R de Klerk/Dell/IF Funds/D138
PO Box 1409, Parklands, 2121
c/o NEWTONS INC
2nd Floor (Lobby 3) Brooklyn Forum Building
337 Veale Street, Brooklyn
P O Box 2103
Pretoria, 0001

TO:
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
PRETORIA

AND TO:
ROUTLEDGE MODISE INC
Applicants Attorneys
22 Fredman Drive
Sandton
PO Box 78333, Sandton City 2147
Docex 7, Sandton Square
Tel: (011) 523 6286
Fax: 086 743 2729
Ref: I33213/Mr Thyne/Ms Di Siena
Email: hunter@rmlaw.co.za
c/o Jacobson & Levy
215 Orient Street
Arcadia
Pretoria
J LEVY/DB/L11752

(service via email and/or facsimile as agreed)

**IN THE NORTH GAUTENG HIGH COURT
REPUBLIC OF SOUTH AFRICA**

Case No: 49616/2013

In the matter between:

GAIL LE GRELLIER & THREE OTHERS

Applicants

and

**M.A. LUKHIMANE N.O. AND
THIRTY-TWO OTHERS**

Respondents

SIXTEENTH RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

YOLANDA PETRONELLA VAN WYK

hereby make oath and say that:

1. I am the Legal Director of the Sixteenth Respondent, Dell Computer (Pty) Ltd ("Dell"), based at its offices in Observatory, Cape Town.

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2. I am duly authorised to depose to this affidavit, and oppose this application, on Dell's behalf.
3. The facts contained in this affidavit are within my personal knowledge, or are derived from information contained in documents in the possession of Dell, which I verily believe to be accurate. To the best of my knowledge and belief, the contents of this affidavit are true and correct.
4. Where I make legal submissions, I do so on the advice of Dell's legal representatives, which I verily believe to be well-founded.
5. I have read the founding affidavit, deposed to by the First Applicant ("**Le Grellier**"). The bulk of that affidavit consists of background information, pertaining to the identity of the parties or the nature of the application (pp 2-14 paras 1-45), or what is described as the "factual matrix" (pp 14-57 paras 46-104). The section dealing with the "factual matrix" is, in turn, largely devoted to a recordal of minutes of meetings of the trustees of the Thirty-second Respondent ("**the Provident Fund**") or the Thirty-third Respondent ("**the Pension Fund**"), or of correspondence exchanged between the trustees of those funds (which shall be referred to collectively as "**the Funds**"). It is only the last twelve pages of the founding affidavit (pp 58-69) which deal with the complaints upheld by the First Respondent, the Pension Funds Adjudicator ("**the Adjudicator**"), and motivate why the second determination of the Adjudicator, dated 3 July 2013 ("**the Adjudicator's second determination**"), purportedly falls to be set aside.
6. It is therefore unnecessary for me to deal individually with most of the paragraphs of the founding affidavit, and in particular paragraphs 1 to 104

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thereof. It suffices to record, insofar as those paragraphs are concerned, that:

6.1. it is admitted that:

6.1.1. Dell, whose head office is the address mentioned in paragraph 22 of the founding affidavit, is an employer participating in the Provident Fund;

6.1.2. the Second to Fifteenth, and Seventeenth to Thirtieth Respondents (whose further particulars are set out in paragraphs 8 to 21 and 23 to 36 of the founding affidavit) are employer members of either the Provident Fund or the Pension Fund;

6.1.3. the Thirty-first Respondent is made up of employees of certain employer members who are themselves members of the Provident Fund or the Pension Fund;

6.1.4. this Honourable Court has the jurisdiction to hear the application;

6.1.5. the Funds were established on 1 January 2004;

6.1.6. the Rules of the Funds (as amended) are appended to the founding affidavit as "GL4" (in the case of the Pension Fund) and "GL5" (in the case of the Provident Fund);

- 6.1.7. the parties reflected as the “Employer Complainants” and the “Member Complainants” on the first page of annexure “GL26” lodged a complaint with the Adjudicator, against the respondents referred to therein, on or about 3 May 2011 (a copy of which is appended, without annexures, to the founding affidavit marked “GL26”);
- 6.1.8. the Funds and the current boards of trustees thereof filed a statement in response to that complaint (appended to the founding affidavit, without annexures, as “GL27”);
- 6.1.9. the Adjudicator’s initial determination in respect of that complaint (“**the first determination**”) (“GL28” – not “GL29” as stated in the founding affidavit) was handed down on 31 July 2012;
- 6.1.10. the first determination was set aside on 5 February 2013 in the South Gauteng High Court by the Honourable Acting Judge Mashile, whose order *inter alia*: remitted the complaint back to the Adjudicator to enable the complainants to pursue relief against the former trustees of the Funds for breach of statutory and fiduciary duties, and directed that the respondents to that application, which included Dell, were permitted to supplement the complaint with any further submissions which they wished to make to the Adjudicator (the order is appended to the founding affidavit as “GL29” – not “GL30”, as stated in that affidavit);

- 6.1.11. the parties thereafter filed the further documents in relation to that complaint which are referred to in paragraph 102 of the founding affidavit – albeit that those documents are not annexed marked “GL31” to “GL38” as Le Grellier incorrectly states, but are instead appended to that affidavit as “GL30” to “GL37”;
- 6.1.12. among the documents lodged with the Adjudicator pursuant to the South Gauteng High Court’s order were a supplementary complaint from Dell, dated 7 May 2013 (annexed to the founding affidavit as “GL35”, and not “GL36” as Le Grellier states), and a reply from Dell to Le Grellier’s response to Dell’s supplementary complaint (“GL37” – not “GL38” as stated in the founding affidavit);
- 6.1.13. the Adjudicator thereafter issued a second determination, dated 3 July 2012 [*sic* – the year should clearly have been 2013] against *inter alia* the Applicants (defined above as “the Adjudicator’s second determination”) (annexed to the founding affidavit as “GL38”, and not “GL39” as stated in that affidavit);
- 6.2. it is also admitted that AON South Africa (Pty) Ltd (“AON”) took over the administration of the Funds from 1 February 2008, after purchasing the business of the previous administrator, Dynam-ique SA Consultants and Actuaries (Pty) Ltd (“Dynamique”), which had administered the Funds from August / September 2006 to 31 January 2008;
- 6.3. it is not disputed that Le Grellier served as a trustee of the Funds from 22 November 2006 to 10 February 2011; that the Third Applicant,

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David Lepar (“**Lepar**”), served as a trustee of the Funds from 9 July 2008 to 10 February 2011; and that the Fourth Applicant, Carel Smith (“**Smith**”), also served as a trustee of the Funds from July 2008 – though it is not apparent precisely when Smith left the boards of the Funds, and it is thus denied that Smith resigned on 30 June 2010, as Le Grellier alleges;

- 6.4. it is admitted that the Second Applicant, Renier Botha (“**Botha**”), served as a trustee of the Funds until about 10 February 2011, but it is denied that he was appointed as a trustee on 13 March 2006: as far as Dell can ascertain, Botha was a trustee of the Funds from their inception, and was thus appointed on 1 January 2004 (together with Mol, Jager and Rosen);
- 6.5. Dell has no knowledge as to why Smith did not file a response to the complaints or the supplementary complaint of Dell, and thus does not admit the allegations in paragraph 103 of the founding affidavit;
- 6.6. the minutes and correspondence which are appended to the founding affidavit as “GL6” to “GL25” were not furnished by the Applicants (or any other party) to the Adjudicator in response to the complaint (either in its original form, or as supplemented), and may thus not be included in the documentation before this Court, in terms of section 30P of the Pension Funds Act, 24 of 1956 (“**the Act**”) without the permission of this Honourable Court;
- 6.7. in the event that this Honourable Court finds that further evidence may be adduced, and thus that the Applicants should be allowed to supplement the record before the Adjudicator, the recordal of what is

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said to be contained in those annexures is admitted to the extent that it accords with what is contained therein, and denied insofar as it is at variance with those documents;

- 6.8. the remaining allegations in those paragraphs are denied to the extent that they are inconsistent with what is set out in this affidavit.
7. I shall concentrate below on what is contained in paragraphs 105 to 134 of the founding affidavit – the paragraphs which, as mentioned, contain the discussion of the augmented and supplemented complaint, and submissions as to why that complaint should purportedly have been set aside. As will be apparent from what is set out below, it is submitted that it would not be appropriate for the Adjudicator's second determination to be set aside, while there is in any event no basis at all for the substituted relief that the Applicants seek. The Applicants have also notably failed to engage with the Adjudicator's second determination, or motivate why that decision purportedly falls to be set aside.
8. I respond below to those averments in paragraphs 105 to 134 of the founding affidavit which warrant a direct reply. Allegations not expressly addressed are denied. In order to provide the context for the discussion of those paragraphs, I shall also at the outset make certain observations about the complaint, as augmented and supplemented, and the Adjudicator's second determination.

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Or

The complaint (as supplemented) and the Adjudicator's second determination

9. As is common cause, the record-keeping in respect of the Funds from their establishment in January 2004 to at least the end of their 2008 financial years was grossly deficient. The various instances of maladministration with regard to the capturing and storage of data included the fact that reinvestments were not credited to members' accounts, switches between investments were not correctly recorded, and monies deposited into bank accounts of other funds were inaccurately recorded. In addition, the requisite monthly and annual audits were not performed, and asset and liquidity requirements were not maintained.
10. The Funds' records in respect of the period from 1 January 2004 to 31 May 2008 were still woefully inadequate by the middle of 2010, when the then trustees of the Funds decided to appoint the auditors Deloitte & Touche ("Deloitte") to reconstruct each participating employers' records at member level to ensure that the assets are correctly reflected. A copy of Deloitte's appointment letter, without annexures, is appended to the founding affidavit as "GL23". The fee which the trustees agreed to pay Deloitte for this reconstruction exercise was around R20 million. (Deloitte's brief in respect of the Provident Fund and the Pension Fund was subsequently extended to cover the period up to 31 May 2008.)
11. One of the participating employers affected by this gross maladministration is Dell, which has made contributions to the Provident Fund on behalf of about 300 employees. The current asset value of the funds held by the Provident Fund on behalf of employees and former employees of Dell is in the region of R106 million.

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12. While part of the blame for the gross maladministration may lie with the fund administrators, and particularly Dynamique and AON, the ultimate responsibility therefor lies with the trustees of the Funds (see rule 6.1 of the Funds' Rules). The trustees owe fiduciary and statutory duties to the Funds and their members, and are required to ensure that the Funds are properly managed at all times (see sections 7C and 7D of the Act). The trustees' duties include the duty to act with due care, diligence and good faith; the duty to act in the interests of the members (and to take all reasonable steps to ensure that the interests of the members are protected); the duty to take measures to protect the assets of the Funds; the duty to ensure that proper records essential for the efficient administration of the Funds (including proper registers, books, records and minutes) are kept; the duty to ensure that proper control systems are in place; and the duty to ensure that the operation and administration of the Fund complies with the Act and all other applicable statutes (see rules 6.7.1.13 and 6.14.1 of the Funds' Rules, and sections 7C and 7D of the Act).

13. The aforementioned maladministration, which was considered by the trustees in July 2010 to require a very expensive reconstruction exercise to be performed by Deloitte, was thus the result of breaches of fiduciary and statutory duties by the trustees of the Funds, and ultimately attributable to them. To the extent that the trustees considered the chaotic record-keeping to be attributable to the Funds' administrators, or any other entity to which they had delegated powers, it was moreover the responsibility of the trustees to recover from such third parties the costs occasioned by the remedying of their grossly negligent conduct.

14. When deciding to engage Deloitte to “recreate credible member records” (to use the language of the letter of appointment to Deloitte), the trustees of the Funds did not, however, acknowledge the culpability of the boards of the Funds or any third parties (and more particularly the Fund administrators) to whom duties had been entrusted. Instead, they decided to treat the reconstruction exercise as a special *ad hoc* cost to the Funds, and to penalise the members by using 2.5 of the members’ fund credits to fund the cost of the record and data rebuilding which was attributable to the maladministration of the Funds.
15. Assuming for present purposes that the fund credits of Dell members was R106 million as of 2010, the Dell members’ assets were thus reduced by around R2.65 million to pay for the Provident Fund to produce “credible member records” for them. That is, by any reckoning, a staggering and inexplicable development. The board of the Funds and the Fund administrators were paid to ensure that there were such records; and if they abjectly failed to perform their duties, the Fund members could hardly be required to pay for the costs of remedying those breaches.
16. The trustees informed the members and participating employers of their decision to appoint Deloitte to “rebuild” the funds by means of a letter dated 1 November 2010, which was signed by Le Grellier. That communication was sent out some four months after the appointment of Deloitte on or about 1 July 2010, and some three months after the trustees had decided to fund the reconstruction of the Funds’ records and data by means of 2.5% once-off deduction from the assets of the Funds.
17. The participating employers and members strongly objected to the trustees’ decision to debit the members’ shares accounts by that percentage amount.

A handwritten signature in black ink, appearing to be 'Le Grellier', with the letters 'GE' written above it.

They pointed out in correspondence that they had, as a result of that decision, suffered a loss which was attributable to the maladministration of the Fund by the trustees and the Funds' administrators. It was also argued on behalf of the participating employers and the members that the trustees should look to the Funds' and the administrators' indemnity insurance cover to pay for the data reconstruction exercise.

18. When they failed to obtain a satisfactory response from the trustees (and thus the Funds), the Second to Thirty-first Respondent instituted a complaint with the Adjudicator. That complaint, dated 28 April 2011, was received by the Adjudicator on 3 May 2011. As noted above, the complaint, without annexures, has been annexed to the founding affidavit as "GL26". For the sake of completeness, I attach hereto marked "DELL1" a copy of the complete complaint. The annexures to the complaint include the correspondence of which I have made mention in preceding paragraphs.
19. The first respondents in respect of the complaint were Le Grellier, Botha, Lepar and Clive Stuart ("Stuart"), while the second respondents were described as "any former trustee of the Boards of the IF Umbrella Provident Fund and the IF Umbrella Pension Fund over the period relevant to the complaint, whose identities are unknown". Stuart, an AON employee, was another former trustee of the Funds.
20. Le Grellier first attended a meeting of the trustees of the Funds on 22 November 2006, and remained on the boards until February 2011. (She was thus a trustee during the time period covered by the minutes appended to the founding affidavit as "GL7" to "GL25".) Le Grellier was the chairperson at the time of the December 2010 meeting. Botha was a trustee of the Funds throughout the period covered by the minutes annexed to the

founding affidavit as “GL6” to “GL25” (i.e. between September 2006 and December 2010). As far as Dell can ascertain, he was also a trustee prior to that date, and indeed from the establishment of the Funds on 1 January 2004. Lepar, an employee of AON, was a trustee from July 2008 to February 2011 and thus attended the board meetings from September 2008 to December 2010. Smith, another AON employee, also became a trustee in July 2008, and thus attended the board meeting from September 2008. It is recorded at the 10 December 2010 trustees’ meeting that Smith had left the employ of AON, and as a result resigned from the boards of the Funds. It is not, however, apparent precisely when, between 15 June 2010 and 10 December 2010, Smith left AON and concomitantly the boards of the Funds. During his time on the boards, Smith was the chairperson.

21. Stuart attended the 15 June 2010 trustees’ meeting as an employee of AON, and it is apparent from the minutes of the meeting that he played a prominent role in the appointment of Deloitte. Stuart subsequently replaced Smith on the boards, as the minutes of the 10 December 2010 meeting indicates.
22. One of the main contentions in the complaint was that the cost of the “rebuild exercise” should have been met from the professional indemnity insurance cover held in respect of the trustees and the Funds. It was also submitted that the trustees of the Funds (the first respondents in the complaint) had failed to address their accountability or the accountability of the prior boards of trustees (the second respondents) for the complete failure of the oversight function which the boards were required to perform, and thus their responsibility for the losses which the Funds’ members had sustained as a result of the rebuilding exercise. It was accordingly submitted that the trustees of the Funds should be held accountable for the

loss sustained by the Funds' members pursuant to the "rebuild exercise", and that the members' shares in the Funds should be credited with the 2.5% which had been deducted from them, together with fund return, alternatively interest.

23. It subsequently transpired that the insurance premiums for the professional indemnity insurance cover for the trustees and the Funds had not been paid, and so the insurer repudiated the claims. That was another instance of gross maladministration. The effect thereof is that the trustees must make good the members' loss themselves, and then look to any third parties who in their view may also have been liable for full or partial redress.
24. The subsequent developments in respect of the complaint have been summarized at paragraphs 6.1.8 to 6.1.13 above. I merely make two further observations:
 - 24.1. Dell participated in the application before the South Gauteng High Court in which the first determination was set aside. Dell filed a short affidavit in which it indicated that it did not oppose the granting of an order setting aside the Adjudicator's determination, but opposed the grant of an order dismissing the complaint. Dell instead proposed an order along the lines of the one which was granted by that Court on 5 February 2013. A copy of Dell's affidavit in that matter is annexed marked "**DELL2**".
 - 24.2. Dell's reply to Le Grellier's response before the Adjudicator ("GL37" to the founding affidavit) also contained an attachment, which has been omitted from the annexure in the founding affidavit.

I annex a complete copy of Dell's response, with the annexure (marked "X"), as "DELL3".

Paragraphs 105 to 134 of the founding affidavit

25. Ad paragraph 105:

It appears that section 30P of the Act (headed "Access to court") has been correctly quoted. As is apparent therefrom, a party which is aggrieved by a determination of the Adjudicator is not necessarily permitted to adduce further evidence in order to show why the Adjudicator's decision should be set aside. I am advised and submit that the Applicants should thus, in this case, have provided this Honourable Court with all the information and documentation which was before the Adjudicator, and then indicated that there was also further evidence which it wanted to adduce, and explained why that documentation had not been presented to the Adjudicator if it was purportedly material.

26. Ad paragraph 106:

I deny that the Applicants are entitled to the orders which they seek. There is no basis to set the Adjudicator's second determination aside; and even were it to be set aside (which it is denied would be appropriate) there are no exceptional circumstances warranting the substitution of a decision by this Honourable Court for the Adjudicator's determination. There is furthermore no reason for any oral evidence to be heard by the Adjudicator; and the Applicants have notably not indicated what evidence might purportedly need to be adduced were the complaint (as supplemented) to be remitted.

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27. Ad paragraph 107:

I admit that the complaint comprised two legs; but I deny that those two legs have been accurately described. The complaint alleged, in the first instance, that it was an improper exercise of the trustees' discretion to resolve that the costs of the reconstruction exercise be paid by deducting 2.5% from all members' shares in the Funds. It was also alleged that, in any event, the trustees of the Fund had been guilty of gross dereliction of their statutory and fiduciary duties (and thus gross maladministration of the Funds), and should consequently be liable anyway for the loss sustained by the Funds pursuant to the "rebuild" of data and records.

28. Ad paragraph 108:

The supplementary complaint by Dell was, as Le Grellier states, just over two-and-a-half pages. But, insofar as Le Grellier implies that it was deficient as a result of its brevity, this is denied. Insofar as amplification of the allegations was needed, they were found in the documents to which Dell cross-referred. Dell's complaint has also been incorrectly summarized. That supplementary complaint again involved two components. It was alleged that the Le Grellier, Botha and Lepar were reckless and grossly negligent in authorising the rebuilding of the Funds' records in the way in which they did; and also that the former trustees of the Funds failed to comply with, and discharge, the statutory and fiduciary duties which they owed to the Funds.

29. Ad paragraphs 110 to 124:

29.1. As I have pointed out above, the first leg of the complaint has been incorrectly summarized. As a result, the attempted rebuttal of that leg misses the mark, and fails to deal with the substance of the complainants' allegations. The Applicants' argument in these paragraphs also fails to engage with the determination made by the Adjudicator – and it is notable that there is no mention of any paragraph in the Adjudicator's second determination in this context.

29.2. It is not in dispute that trustees can delegate powers, *inter alia* to the administrator of the fund in question. It is also not in dispute that, from 1 July 2009, the trustees were able to charge “expenses” and “*ad hoc* expenses” to the Fund. What the complainants instead complained about was the trustees' decision to deplete the members' assets in order to remedy something that was attributable to the gross maladministration of the Funds by the trustees (and any persons responsible to them). The complainants' contention is that the trustees cannot, after breaching their statutory and fiduciary duties, charge the members for the remedial steps required to address those breaches; and that the Applicants' decision to do this is an improper exercise of their powers which must not be allowed to stand.

30. Ad paragraphs 125 to 133:

30.1. It is denied that the supplementary complaint by Dell was prompted by any belated awareness of the rules of the Funds referred to in paragraphs 126 and 127. Dell supplemented the complaint, in accordance with its entitlement under the South Gauteng High

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Court's order, because there were additional aspects which it wanted to emphasize.

- 30.2. It is denied, in any event, that in order for the complaint (as supplemented) to succeed, it is necessary to show that the trustees of the Funds were grossly negligent, dishonest, fraudulent, or guilty of a breach of trust – although it is submitted that that question is academic as gross negligence and breaches of trust have clearly been shown.
- 30.3. It is accordingly also denied that there is “not a shred of evidence” of gross negligence or breach of trust; as well as any lack of evidence of negligence or maladministration. 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.
- 30.4. The extent of the problem which the trustees allowed to develop is indicated by the fact that, for example:
- 30.4.1. in Deloitte's letter to AON of 12 November 2010 (annexed hereto as “DELL4”), it was stated that it was estimated that it would take Deloitte between 9 to 12 months to complete the project, and even then they would have to devote extra resources to the project to enable them to meet that target;
- 30.4.2. even that lengthy timeframe apparently proved unrealistic, as evidenced by the letter which AON sent to the Dell members (and presumably also other members of the Funds), dated 8 October 2012 (annexed as “DELL5”), in which the chief

executive officer of AON (the Funds' administrators) *inter alia* stated the following:

"Since taking up my new role in April 2011, most of my time has been devoted to resolving the issues on these funds ...

To my mind matters have been allowed to drift for too long, and incorrect expectations had been set about when the work would be completed.

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 good news is that we have made significant progress. Whilst there have been hiccups along the way, as you would expect in a project of this magnitude, we are now in the process of integrating the rebuilt values – as at 2010 – into our administration system. The 2007, 2008, 2009 and 2010 financial statements for these funds have also now been signed off by the Trustees.

We will then have to update the administration since that date, using these corrected 'starting values'. For example, we will have to go and revisit every claim payment made after this date, and every switch between investment managers since 2010 to ensure that the record-keeping is up to date and correct. This is a significant piece of work ...

The long and the short of it is that there is still some work to be done, but I am confident that we will start issuing up to date benefit statements by the end of this year, and into early next year, once this catch-up work has been completed. I am currently unable to say for which of the 4 umbrella funds we will be able to issue benefit statements this year."

30.4.3. Deloitte's report to the Funds in respect of Phase 1, dated 7 March 2012 (annexed hereto as "DELL6") stated *inter alia* the following under the heading "Approach and Methodology":

"A full download of the Everest database for all 4 umbrella funds was provided. ...

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No files or paper copies of any data was provided. We were advised that there was no paper based information for the 4 umbrella funds for the period to 31 January 2008.

Deloitte undertook a comprehensive data trawling and analysis process of the data to determine the quality and completeness of the data provided. Our process included the following:

- Full data search performed by Deloitte Forensics ...
- Sorting of data found in the 'G' drive by umbrella fund and by participating employer
- Analysis of data by data type and checking for completeness
 - Fund rules
 - Member contribution schedules
 - Section 14 transfer notifications
 - Switch instructions
 - Investment manager statements
 - Administration Agreements
 - Premium documents from insurance provider (TSA)
- Preparation of an initial summary of data provided and 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. The following additional steps were put in place to try to source as much supporting data as possible:

- Aon were requested to search and provide as much of the missing data as possible
- Aon sent out communications to all brokers ...
- Where brokers were forthcoming with information (only a few) such data was further analysed ...
- A full set of the bank statements for the period to 31 January 2008 for all 4 bank accounts was requested directly from the bank
- Most of the missing fund rules were obtained from two sources, namely the FSB and from the auditor
- Investment managers were requested to provide fund investment statements by participating employer and / or umbrella fund

The standard of the data identified on the Everest database provided was assessed as not fully reliable based on the following factors identified:

- Incomplete data
- Duplicated data
- Certain transactions were grouped or backdated
- The bank accounts in Everest had not been reconciled and could not be relied on

- The static data such as risk premiums and administration cost allocation percentages / rates were inconsistent / did not tie up to fund rules / were incomplete

...

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 ...
- 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 decision on how to treat a transaction, would be based on the evidence of a cash transaction, and this would take precedent [sic] over any transaction in Everest which could not be supported
- All investments and withdrawals from the markets were recorded in the re-build based on what actually happened in the market as evidenced in investment manager statements.
- ..."

30.5. As has been pointed out above, the trustees of the Funds are ultimately responsible for the deplorable state of affairs which developed with regard to the Funds' records and data, and thus, too, for the various breaches of the Funds' Rules and the Act. In addition to the provisions of the Rules and the Act which I have referred to above, I should also mention section 15 of the Act, which requires registered funds (such as the Provident Fund and the Pension Fund) to furnish to the Registrar every six months duly-audited statements which reflect the funds' revenue, expenditure and financial position, as well as various other reports and statements.

30.6. Le Grellier and Botha bear particular responsibility for the maladministration with regard to record-keeping, and data capture and retention, given that they were trustees of the Funds during the

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period in which the records were manifestly deficient, and thus the period which had to be addressed by the Deloitte “rebuild”.

30.7. Before engaging on a reconstruction exercise costing around R20 million, the trustees should moreover have explored other options, including compelling the Funds’ administrators to remedy at their own cost any problems which were thought to be attributable to them. It was also incumbent on the trustees, in the circumstances, to take particular care to ensure that the PI cover for the trustees and the Funds was in place, and that the premiums were paid in respect of those policies, in order that any remedial work which needed to be carried out by a third party could be funded through those insurance policies. The trustees could never responsibly, or in accordance with their fiduciary duties, have allowed the Funds’ members to bear the costs of rectifying the trustees’ fiduciary and statutory breaches.

30.8. There is no answer to the Adjudicator’s findings as to the trustees’ breach of their statutory and fiduciary duties, and there is in fact not even an attempt by the Applicants to engage with those findings, or show how they are purportedly wrong. The second leg of the complaint and the supplementary complaint were therefore, with respect, correctly upheld by the Adjudicator.

31. Ad paragraph 134:

For the reasons given above, the allegations in this paragraph are denied.

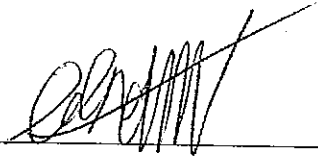
Conclusion and relief

32. It is accordingly respectfully submitted that the application should be dismissed with costs, including the costs consequent upon the employment of two counsel.


YOLANDA-PETRONELLA VAN WYK

I certify that:

- 1. The deponent has acknowledged to me that:
 - 1.1 she knows and understands the contents of this declaration;
 - 1.2 she has no objection to taking the prescribed oath;
 - 1.3 she considers the prescribed oath to be binding on her conscience.
- 2. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God."
- 3. The deponent signed this declaration in my presence at the address set out hereunder on this 23 day of SEPTEMBER 2013.


COMMISSIONER OF OATHS

CHRISTIAAN ERASMUS VAN DER MERWE
Commissioner of Oaths - Chartered Accountant CA (SA)
Noland House, River Park
River Lane, Mowbray 7700

"DELL 1"

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR:

CASE NUMBER:

In the matter between:-

Affirm Marketing (Pty) Ltd, Beefmaster (Pty) Ltd, Birkenmeyer (Pty) Ltd, Dr Gebka, Hellig & Klug Inc, Dr Ritz Inc, Eternal Flame Investments (Pty) Ltd, Expectra 88 (Pty) Ltd, Hestico (Pty) Ltd, Hettas CC, ConVista Consulting (Pty) Ltd, IDI Technology Solutions (Pty) Ltd, Progressive Packaging (Pty) Ltd, World Cargo Services (Pty) Ltd, Conduit Risk and Insurance Holdings (Pty) Ltd, Dell Computer (Pty) Ltd, The Brand Union (Pty) Ltd, Ultra Litho (Pty) Ltd, Newsclip Media Monitoring Pty Ltd, Mixtec CC, Petromark (Pty) Ltd, Dehteq (Pty) Ltd, Wavelengths 32 Pty Ltd t/a Inzalo Communications, Panoramic Components Pty Ltd, Chicken Management Services (Pty) Ltd, Hansen Transmissions Pty Ltd and Saint Andrews Brokers (Pty) Ltd – Employers Participating in the IF Umbrella Provident Fund

The Employer Complainants

and

Enabled (Pty) Ltd, Primeserv Group Limited, The Church of Jesus Christ of Latter-day Saints, Jo'burg Child Welfare and Heritage Management Services (Pty) Ltd – Employers Participating in the IF Umbrella Pension Fund

The Member Complainants

and

The employees of the abovenamed Participating Employers who are members of the IF Umbrella Provident Fund and the IF Umbrella Pension Fund respectively

The First Respondents

and

Gall le Grellier, Renier Botha, David Lepar and Clive Stuart - collectively the former Board of Trustees of the IF Umbrella Provident Fund and the IF Umbrella Pension Fund

and

Any former Trustee of the Boards of the IF Umbrella Provident Fund and the IF Umbrella Pension Fund over the period relevant to complaint, whose identities are unknown

Collectively the Second Respondents

**COMPLAINT IN TERMS OF
SECTION 30A OF THE PENSION FUNDS ACT, 1956**

THE PARTIES TO AND RELEVANT TO THE COMPLAINT

1. The Employer Complainants are the above-named Employers who participate in the IF Umbrella Pension or the IF Umbrella Provident Fund ("the IF Funds"). The Member Complainants are employees of the Employer Complainants and members of the IF Funds. The Employer and Member Complainants shall be referred to in this complaint collectively as the Complainants. The IF Pension and Provident Funds are pension fund organisations registered in terms of section 4 of the Pension Funds Act, 1956 ("the PF Act") with registration numbers 12/8/37464 and 12/8/37452 respectively, their registered address being 1 Sandton Drive, The Place, Sandton, Johannesburg. The IF Funds are umbrella funds.

2. The First Respondents are collectively the former board of trustees of the IF Funds, composed of Gallie Grellier (independent chairperson), Renier Botha (independent trustee), Clive Stuart (trustee) and David Lepar (trustee). The Second Respondents are the trustees of any board of the IF Funds prior to the board composed of the First Respondents, who held office over any period relevant to this complaint, and whose identities are not known to the Complainants. The First Respondents resigned as trustees of the IF Funds with effect from 31 January 2011. The Principal Officer of the IF Funds is Lindy Wingrove-Gibson.

THE NATURE OF THE COMPLAINT

3. The complaint is brought in terms of paragraphs (a) and (b) of the definition of "complaint" in the PF Act.

4. The Employer Complainants are complainants because in terms of the definition of "complainant" in the PF Act, they are employers who participate in the IF Funds. The retirement benefits of the Member Complainants are part of their employment promise, as Employers, to their employees, which

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benefits are delivered via the retirement funds in which they participate. The Employer Complainants elected to participate in the IF Funds and any decision(s) taken by the Respondents which compromise the employment promise made to their employees potentially prejudices the Employer Complainants. An employer owes a duty of good faith to its employees to ensure that the retirement benefits promised are delivered by the fund in which the employer participates.

5. The Member Complainants are complainants because they are members of the IF Funds and are directly affected when their retirement benefits are compromised by any decision(s) taken by the Respondents.
6. There are two legs to the complaint. This first leg is that in relation to the administration of the IF Funds, the decision(s) taken by the Respondents (as are fully set out below) was an improper exercise of their powers as referred to in paragraph (a) of the definition of "complaint" in the PF Act. The second leg of the complaint is that the Complainants have sustained or may sustain prejudice in consequence of the maladministration of the IF Funds by the Respondents and/or the agents appointed by them, whether by act or omission as referred to in paragraph (b) of the definition of "complaint" in the PF Act.

FACTS AND CIRCUMSTANCES

7. Until 31 January 2008, Dynamique SA Consultants and Actuaries (Pty) Ltd ("Dynamique") was the administrator of the IF Funds. A change in the administration of the IF Funds occurred in January 2008 as a result of Aon South Africa (Pty) Ltd ("Aon") concluding an agreement with Dynamique for the purchase of Dynamique's business including its right, title and interests in the administration agreements concluded in respect of the IF Funds.
8. Subsequent to the change in the administration of the IF Funds, the First Respondents appointed an auditing company, Deloitte & Touche ("Deloitte"), to rebuild the data and records of the IF Funds at member level ("the rebuild exercise").
9. The rebuild of the IF Funds records at member level was necessitated as a result of the maladministration of the IF Funds, *inter alia*, by:

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- 9.1. reinvestments (i.e. interest and dividends) not being credited to members' accounts;
 - 9.2. redemptions being paid from monies owing to other members;
 - 9.3. switches between investments not being correctly recorded in members' accounts;
 - 9.4. inaccurate deposits of monies being deposited in the bank accounts of other funds (whom Dynamique also administered);
 - 9.5. monies being invested in, or disinvested from, incorrect investment portfolios;
 - 9.6. the failure to identify and/or rectify the above errors; and
 - 9.7. the lack of monthly and annual audits being performed.
10. The rebuild of the records required to be performed by Deloitte was from the inception of the IF Funds until 31 January 2008.
 11. The decisions taken in respect of the rebuild exercise were decisions of the First Respondents, alternatively the First and Second Respondents.
 12. The complainants were advised by the First Respondents that the cost of the rebuild exercise would be approximately R20 million – this also included the rebuild of member records of the Dynamique SA Pension and Provident Funds – in respect of whom Dynamique was also the administrator.
 13. The cost of the rebuild exercise translated into an individual cost for each member of the IF Funds of 2.5% of their fund credits. Attached marked Annexure "A" is communication dated 1 November 2010 on behalf of the First Respondents in which the cost of the rebuild exercise and the debiting of each member's fund share by 2.5% is set out.
 14. As a result of dissatisfaction with the level of communication by the First Respondents and their failure to adequately answer queries made by or on behalf of members of the IF Funds regarding the cost of the rebuild exercise and the decisions taken by the trustees in relation thereto, 10 of the abovementioned Employer Complainants participating in the IF Funds instructed the Complainants'

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attorney to address correspondence to the First Respondents and Aon, in which they were notified, *inter alia*, of their:

- 14.1. demand for full reimbursement of the cost of the rebuild exercise as a result of the loss suffered by the members in consequence of the cost being deducted from their fund credits;
 - 14.2. request for confirmation of what action was being taken to recover the loss;
 - 14.3. request for an undertaking that the cost of the rebuild exercise would be restored in full, so that the members would be put back in the same position they would have been in had the rebuild exercise not taken place; and
 - 14.4. request for an assurance that any claim against the IF Funds and/or their current or previous administrators would be met from professional indemnity insurance cover held in respect of the IF Funds.
15. A copy of this letter, dated 8 December 2010, is attached marked Annexure "B".
16. On 24 January 2011, a letter in reply was received from Dunster & Associates Attorneys ("Dunster"), a copy of which is attached marked Annexure "C". Although the letter (8 December 2010) was addressed to the trustees of the IF Funds (the First Respondents), Dunster replied on behalf of the IF Funds, which are separate legal entities and distinct from the board of trustees. In paragraph 6 of Dunster's letter, it is stated that the trustees were taking all action necessary to recover the cost of the rebuild exercise. Paragraph 7 contains a denial that members of or employers participating in the IF Funds had any claim against the IF Funds before members became entitled to payment of benefits in terms of the IF Funds' rules.
17. On 2 February 2011, a letter was sent to Dunster in response, a copy of which is attached marked Annexure "D". In paragraph 2 of the letter, it is stated that the failure of the IF Funds or the trustees to adequately communicate and supply the requested information is prejudicial to the members or may cause them to sustain prejudice. It is also noted in paragraph 4 of the letter that no assurance or undertaking had been given in regard to the professional indemnity insurance cover. In paragraph 5 of the letter, it is recorded that the First Respondents must have been aware of the data problems from

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at least January 2008 when the administration of the IF Funds was transferred to Aon and the fact that a Summons had not yet been issued was a concern and thus a reason for potential prejudice being suffered by the members of the IF Funds.

18. A response to the letter (8 December 2010) addressed to the trustees of the IF Funds and Aon was also received from Schwarz-North Inc Attorneys on behalf of Aon, a copy of which is attached marked Annexure "E". This letter purports to deny any liability on the part of Aon for the maladministration of the IF Funds (which denial is not accepted or admitted by the Complainants). In paragraph 4 of this letter, it is stated that the decision regarding the funding of the rebuild exercise was a decision taken "by the trustees of the funds" and not by Aon. Furthermore, that "any loss purportedly suffered by your clients (now the Complainants) is a loss that has been suffered at the hands of the trustees of the funds". In paragraphs 9 and 11, it is stated that any undertakings or assurances sought by (now the Complainants) regarding the cost of the rebuild exercise should be sought directly from the trustees of the IF Funds.

19. Despite denial of liability by Aon in respect of any maladministration of the IF Funds, a Summons was issued against Aon in the High Court of South Africa (South Gauteng High Court) by the IF Funds and the Dynamique SA Pension and Provident Funds under case no. 3904/2011. A copy of the Summons and the Particulars of Claim are attached marked Annexure "F". The averments contained in the Particulars of Claim and in particular paragraphs 15 to 18, are relevant to the maladministration of the IF Funds by the previous administrator Dynamique and by Aon. Paragraphs 15 to 16 of the Particulars of Claim records that Aon entered into a verbal administration agreement with the IF Funds and the terms of such verbal agreement. Paragraph 17 of the Particulars of Claim sets out how Aon breached its duty of care and/or breached the terms of the administration agreement, which includes in paragraphs 17.4.4.1 to 17.4.4.3 the manners in which Aon failed to administer the IF Funds administration portfolios in a responsible manner and failed to ensure that claims which the IF Funds had against Dynamique were adequately secured and/or insured (paragraph 17.5). Paragraph 18 of the Particulars of Claim states that Aon failed to rectify the members' investment accounts after the conclusion of the sale agreement between it and Dynamique, and instead allowed them to become increasingly unreliable and incorrect.

20. The IF Funds (together with the Dynamique SA Pension and Provident Funds) have also instituted action in the High Court of South Africa (South Gauteng High Court) under case no. 4175/2001 against Tony Kamionsky in his capacity as director of Dynamique. A copy of the Summons and Particulars of Claim are attached marked Annexure "G". Paragraphs 20 to 21 of these Particulars of Claim contain the averments regarding the maladministration of the IF Funds by its previous administrator, Dynamique, causing the members investment records to become unreliable and corrupt and requiring the rebuild exercise in consequence thereof.
21. The maladministration of the IF Funds was reported in the press and in this regard an article dated 12 March 2011, which appeared in "The Star" newspaper is attached marked Annexure "H".

COMPLAINT SUBMISSIONS

22. The manner in which the IF Funds' administrator breached its administration agreements with the IF Funds and in consequence resulted in the maladministration of the IF Funds is set out in paragraph 20 of the Particulars of Claim against Tony Kamionsky in his capacity as director of Dynamique. These are described in the same terms as set out above in sub-paragraph 9.1 to 9.7 of this complaint, namely relating to the errors in the allocation of reinvestments (interest and dividends), errors in redemptions, switches, inaccurate deposits of monies, incorrect investments and disinvestment into and from investment portfolios; and the failure to identify and/or rectify these errors.
23. Paragraph 20.3 of these Particulars of Claim states that there was a failure to ensure that the IF Funds investments were made in accordance with the provisions of the PF Act and that the administration business was conducted in accordance with the Financial Advisory and Intermediary Services Act, 2002 ("the FAIS Act"), in particular that: -
- 23.1. The administrator failed to keep proper records, employ adequately trained staff, or have well-defined compliance procedures as required in section 13B(5)(b) to (e) of the PF Act;
- 23.2. The required monthly and annual audits in terms of the PF Act and/or in terms of section 19 of the FAIS Act were not performed, preventing identification and/or rectification of errors;

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- 23.3. No auditor conducted the relevant investigations and reviews set out in section 5 of Board Notice 24 ("BN24");
 - 23.4. Deposits of fund monies were made later than a business day following the date of receipt thereof in contravention of section 8 of BN24;
 - 23.5. Assets and liquidity were not maintained in accordance with section 7 of BN24, in particular after the sale of the administration business to Aon, in order to cover liability for past administrative errors; and
 - 23.6. The sale of Dynamique's fund administration business to Aon, lock, stock and barrel, was not adequately disclosed or otherwise dealt with in terms of section 13B(5)(a) of the PF Act.
24. As a result of the above, the records of the IF Funds members' investments became increasingly unreliable and incorrect and it was necessary to engage Deloitte to rebuild the IF Funds records at member level.
25. Turning now to the functions and duties of a board of trustees, these are set out in section 7C and section 7D of the PF Act and are the following:-

"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;*

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- (c) *avoid conflicts of interest;*
- (d) *act with impartiality in respect of all members and beneficiaries.*

7D. Duties of board

The duties of a board shall be to—

- (a) *ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;*
- (b) *ensure that proper control systems are employed by or on behalf of the board;*
- (c) *ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;*
- (d) *take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;*
- (e) *obtain expert advice on matters where board members may lack sufficient expertise;*
- (f) *ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001), and all other applicable laws.**

26. It is widely accepted and acknowledged that it would be impossible for the board of a retirement fund to perform every act in fulfilment of the duty to direct and control the operations (and management) of a fund. For this reason, most if not all boards of funds delegate their powers and duties to third parties, including fund administrators, consultants and asset managers. However, where the management, administration and investment functions of a fund are delegated, board members (in this case the Respondents) remain responsible for the actions of such service providers who are the agents of the fund. This is importantly and specifically reflected in the oversight function contained in section 7C(1) of the PF Act. The delegation of responsibilities can never amount to a transfer of the oversight function of a board of trustees, nor amount to an abdication of the responsibilities entrusted to the

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trustees. This is well documented as a principle which flows from trust law, as reflected in the following statements:

"It is not uncommon for a trustee to delegate the administration of the trust to another. This may be to a co-trustee, to a firm in which the trustee is or is not a partner, to a relative, to a suitably qualified professional person or even to a management committee. Such a course is not improper as long as it amounts only to a delegation (the appointment of another, for which acts one will be responsible, to act on one's behalf) and not to abdication (the appointment of another to act instead of oneself, so as to relieve oneself of responsibility...[t] does not relieve the trustee from the duty of supervising and checking the work of any non-trustee to whom the delegation may have been made. Indeed, the trustee retains office as trustee with primary responsibility to the beneficiaries under the trust and is accordingly at liberty at any time to revoke the delegation of the authority".¹

27. The applicability of these principles to retirement funds was confirmed in the judgement of Boruchowitz J of the Witwatersand Local Division of the High Court in *Johannesburg Municipal Pension Fund & another v NBC Employee Benefits (Pty) Ltd & another*² in which he said:

*"There is no dispute that the committee, or board, has the power to delegate, but not to abdicate its responsibilities to third parties...It is a well established principle that where trustees choose to delegate any part of their functions, they are at liberty at any time to revoke such delegation of authority (see *Soofie v Haje Shah Goolam Mohamed Trust & Another* 1985 (3) SA 322 (N); *Alexander & Others v Opperman* 1952 (1) SA 609 (O); *Bary N.O v Bloemfontein Town Council* 1953 (2) SA 105 (O)...). The underlying reason for this principle is that a delegation does not release a committee, board or trustee from liability for wrongs committed in the administration of the funds, and the committee retains its office as controllers, with primary responsibility to members of the fund. (See also in this regard Honoré's *South African Law of Trusts* 4ed para 201 p269)...Notwithstanding the purported delegation to the first respondent in terms of the administration agreement, the committee, or board, of the funds carries a primary fiduciary*

¹ Cameron et al Honoré's *South African Law of Trusts*

² A 2001 unreported judgment (case number 74/01)

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*responsibility to administer the funds, and is entitled, for whatever reason, to revoke the delegation*³.

28. In the determination of the Pension Funds Adjudicator ("the Adjudicator") in *Twerefoo the Liberty Life Association of SA Limited & Others*⁴ paragraph 14 of PF Circular 130 is referred to, which states that:

"The board may, should the rules of the fund permit, delegate some of its functions to board sub-committees, employees of the fund and service providers; but such delegation does not relieve the board of accountability for the functions so delegated. The board may not abdicate any of its function and responsibilities".

29. Thus in terms of the PF Act, in terms of common law principles and in terms of PF Circular 130, the board of trustees of a fund maintains responsibility for the monitoring and supervision of the conduct by its administrator in the fulfilment of their functions and duties in terms of the delegated authority.
30. It is submitted therefore that the averments against Dynamique and Aon, who were and are agents of the IF Funds, as contained in the respective Particulars of Claim and referred to in paragraphs 19 and 20 above of this complaint, must be imputed to the Respondents in consequence of their failure to perform their oversight function in respect of the administration of the IF Funds and the protection of the interests of the members.
31. It is submitted that the Respondents are accountable for the maladministration of the IF Funds by the agents appointed by them. The First Respondents however, have not been accountable to the members (and the Complainants specifically) in respect of the loss they have suffered in the reduction of their fund credits by 2.5% and the potential prejudice that they may suffer if the costs of the rebuild exercise are not recoverable.
32. Despite the IF Funds instituting legal action against Aon and Tony Kamionsky in his capacity as director of Dynamique, there remains a possibility that the costs of the rebuild exercise are irrecoverable. This is alleged in the Particulars of Claim against Tony Kamionsky, namely that, as a

³ At page 10-12 of the judgment

⁴ [2000] 12 BPLR 1437 (PFA) at 1449

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result of his negligent conduct, the claims by the Plaintiffs (including the IF Funds) against Dynamique arising from such rebuild, are rendered irrecoverable. (See paragraph 36 of these Particulars of Claim, which is Annexure "G" hereto).

33. Although the First Respondents may have had the power (which is not conceded) to authorise that the cost of the rebuild exercise be deducted from member share accounts it is submitted that if the board of the IF Funds have such powers, the decision of the First Respondents, alternatively the First and Second Respondents in this regard, was an improper exercise of such powers because it resulted in the members of the IF Funds suffering the consequence of the failure of the board of trustees to perform a proper oversight function.
34. It is submitted further that members of the IF Funds may withdraw, die or retire before the recovery of the cost of the rebuild exercise (if recovery is possible) with the consequential reduction of 2.5% of their fund credits and the loss of fund return that would have been earned had their fund credits been restored by this amount. It is submitted that it is unfair and inappropriate to expect members at that time to institute legal action against the IF Funds and/or the Respondents for their loss.

RELIEF SOUGHT

35. It is submitted that the First Respondents have failed to provide assurances that the cost of the rebuild exercise will be met from professional indemnity insurance cover held in respect of themselves and the IF Funds.
36. It is submitted that the First Respondents have failed to address their accountability or the accountability of prior board of trustees (Second Respondents) for the failure of their oversight function, which caused the loss to the IF Funds and its members in consequence of the cost of the rebuild exercise being incurred. The Respondents must answer for their accountability in respect of the maladministration of the IF Funds.
37. It is submitted that the First Respondents ought to have secured the recovery of the cost of the rebuild exercise from the professional indemnity insurance cover held in respect of the IF Funds and that in terms of the right of subrogation held by the insurer, the insurer should thereafter seek recovery of the

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