

IN THE NORTH GAUTENG HIGH COURT, 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 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
 - B. Why my input is crucial
 - C. Procedural issues
 - D. Non-payment of insurance premiums
 - E. Further high level issues
 - F. Further input on the founding affidavit
 - G. Further input on the minutes of the trustee meetings
 - H. Further input on the thirty-second and thirty-third respondents' affidavit

- I. Further input on the applicants' replying affidavit to the sixteenth respondent's affidavit
- J. Further input on the thirty-second and thirty-third respondents' supplementary affidavit
- K. What did the rebuild achieve
- L. The relief sought by the applicants.

A. BACKGROUND

- 4. I will abide by this Court's ruling. I seek no relief and no cost orders. I am nevertheless in possession of material information, as set out in this affidavit, that the Court needs to take into account when considering this application.
- 5. I am not introducing new evidence but merely addressing the points raised in the various affidavits submitted in this matter.

B. WHY MY INPUT IS CRUCIAL

- 6. Given there are thirty three other respondents why is my input crucial? A breakdown of the other thirty three respondents will assist the Court in understanding why:
 - 6.1. One of the respondents is the Adjudicator who has a stated policy of not intervening in any appeal and further she has no first-hand knowledge of the events to which the complaint (that is the subject matter of this appeal) relates; and

- 6.2. Two of the respondents are the IF Umbrella Pension and Provident Funds who are represented by trustees who joined after the happening of the events in question and hence also have no first-hand knowledge; and
- 6.3. The remaining thirty respondents are the participating employers and members of the funds concerned who once again have no first-hand knowledge and whose understanding of events was largely based on what the applicants and subsequent trustees communicated to them.
7. I, by virtue of being a director of Dynam-ique SA Consultants and Actuaries (Pty) Ltd ("Dynam-ique") at all material times and a trustee of the IF Umbrella Pension and Provident Funds from 27 September 2006 to 27 February 2008, am therefore the only respondent who has first-hand intimate knowledge of the events to which this complaint relates. What's more my name is mentioned no less than 15 times in the Adjudicator determination now being appealed and my name is mentioned by the applicants no less than 28 times in their founding affidavit.
8. The importance of my contribution is further illustrated by the way the applicants tried so hard to keep me out of this matter eventhough I am a party to the complaint being appealed. First the applicants excluded me as a respondent and I only heard about this application via the grapevine. I then proceeded to bring an intervention application which the applicants opposed

only for the applicants to withdraw their opposition two days before my intervention application was to be heard by this Court. This effort that the applicants went to to keep me out of this matter should be a clear warning bell to the Court to pay particular attention to what I have to say.

9. My input is further necessitated by the countless references to, and allegations against, the entity Dynam-ique in the applicants' founding affidavit. I am the sole director of Dynam-ique and the only person who could and would speak on behalf of Dynam-ique.

C. PROCEDURAL ISSUES

10. This application is an appeal of an Adjudicator determination brought in terms of Section 30P of the Pension Funds Act.
11. Section 30P (1) of the Pension Funds Act states as follows: "*(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.*"
12. This applicants' whole application is therefore fatally flawed as the applicants are in breach of the Pension Funds Act as they have not given notice to all the other parties to the complaint. Specifically they have not given notice to

Jager, Rosen, Mol, Murewa and Stolterfoht who are former trustees and hence part of the second respondents to the complaint (copy of complaint attached as Annexure DELL1 to the sixteenth respondent's affidavit).

13. These individuals could be materially affected should the Court grant the applicants the alternative relief that they seek and these individuals have every right to be informed of this appeal and to be given the opportunity to respond to this appeal.
14. Further there is no provision in Section 30P (1) of the Pension Funds Act to include in the appeal any party who is not a party to the complaint.
15. In this regard the applicants should not have included the thirty-second and thirty-third respondents as they are not parties to the complaint and they have no direct and substantial interest in this appeal as regardless of the outcome of this application it affects the members of the funds but not the funds themselves.
16. The fact that the thirty-second and thirty-third respondents are not parties to the complaint was confirmed in the submission made by the thirty-second and thirty-third respondents to the Adjudicator (copy attached as Annexure GL27 to the founding affidavit) in which they stated in paragraph 3 as follows:
"Neither the Funds nor the current board are cited as Respondents by the complainants, notwithstanding, the Funds wish to provide the Pension Funds Adjudicator ("the PFA") with comment and background for the benefit of the

PFA, the Complainants and the respondents. As the Funds have not been cited as a Respondent, it is submitted that no formal relief can be sought against the Funds."

17. It was within the Adjudicator's power to request comment from the funds and allow them to provide this comment however in this application all parties are bound by the rules of the High Court and if the applicants wish to bring in the thirty-second and thirty-third respondents or if they themselves wish to intervene then the rules relating to joinder of third parties will need to be followed and the necessary intervention applications will need to be brought.
18. Also given the thirty-second and thirty-third respondents are not valid parties to this appeal their affidavit and supplementary affidavit should be set aside and not taken into consideration.

D. NON-PAYMENT OF INSURANCE PREMIUMS

19. The applicants would like the court to believe that the version of events was as follows: there was maladministration which necessitated a complete rebuild of the records of the funds which resulted in the members losing R20m of their retirement fund monies.
20. This is simply not true. What actually happened was there was alleged maladministration which allegedly necessitated a complete rebuild of the records of the funds for which the funds had adequate indemnity cover in

place but on which the insurer repudiated the claim which resulted in the members losing R20m of their retirement fund monies.

21. These 2 additional steps are so fundamental that it could not have been an accidental oversight for the applicants to not have brought this to the Court's attention in their founding affidavit.
22. The implication of this is twofold: have the applicants deliberately tried to mislead the Court and can anything in their founding affidavit be trusted.
23. Now the reason the applicants did not raise this repudiation of the insurance claim in their founding affidavit is that the repudiation resulted from their negligence in that they were the ones who were liable to pay the insurance premiums which they failed to do allowing the insurance company to repudiate the claim due to non-payment of the premiums. A copy of the letter that was sent to the funds following the claim having been lodged with the insurer is attached as annexure FK3 to the thirty-second and thirty-third respondents' supplementary affidavit and in this letter the insurer clearly states: "*We regret to advise you that we have lapsed the abovementioned policies with effect from the following dates: This is consequent on non-payment of the Renewal Premium on the dates indicated.*"
24. This non-payment of insurance premiums leading to no cover being in place is gross negligence and on its own is sufficient reason for the Court to uphold

the Adjudicator's finding that the applicants were negligent and liable for the loss incurred by the members.

25. In the Adjudicator's first determination on the complaint (attached as annexure GL28 to the founding affidavit) she states as follows in paragraph 5.20 "*The board also acted negligently in failing to ensure that the funds and trustees had adequate indemnity cover in the event of gross negligence resulting in financial loss or liability. In terms of Rule 6.17.2 of the funds' rules, the trustees have a duty to safeguard the funds against loss by ensuring the fund against loss due to the gross negligence, dishonesty or fraud of any of the officials of the funds, including a trustee. The facts indicate that the funds and the board of trustees were not covered by the indemnity insurance that the funds have in respect of the financial loss incurred as a result of the costs of the rebuild process.*"
26. The applicants have gone to great lengths to hide the truth about these indemnity policies from the members, from the Adjudicator and from this Court.
27. Back in 2011 when I first started making enquiries about why the trustees did not simply claim the R20m against the funds' indemnity insurance policies the applicants and subsequent trustees attempted to block me finding out the truth by refusing to give me copies of the insurance policies and by instructing the insurer to not give me any information. I had to bring an application in

the South Gauteng High Court (copy attached as annexure TK1) to get copies of the policies and to get responses from the insurer.

28. My High Court application was fortunately successful and it was then that I found out about the non-payment of the premiums on the insurance policies and the resulting lapsing of the policies.
29. Notwithstanding the applicants being negligent for not paying the insurance premiums they have continued to try escape liability by claiming the following:
 - 29.1. It was AON who was responsible to pay the premiums and hence they are to blame for the absence of cover; and/or
 - 29.2. There would have been no claim anyway as there was no negligence by an officer of the Funds; and/or
 - 29.3. The insurer would have repudiated the claim anyway due to other reasons and/or due to such events not being covered by the policies.
30. These claims by the applicants are without any merit whatsoever for the following reasons:

- 30.1. It is the trustees who are responsible and accountable to ensure that there is indemnity cover in place and whilst they can delegate the job of paying the premiums to the administrator the trustees still remain fully liable and accountable for ensuring that the premiums have been paid. Hence the applicants are 100% liable for the fact that the premiums were not paid. Of course the applicants can always bring their own claim against AON if they are of the view AON didn't do what they were supposed to;

- 30.2. The applicants themselves alleged that there was negligence by an officer of the funds, in two following instances:
 - 30.2.1. Negligence by a trustee in the claim the applicants brought against myself in the South Gauteng High Court (copy included as part of annexure DELL1 to the sixteenth respondent's answering affidavit);

 - 30.2.2. Negligence by the administrator in the arbitration the applicants brought against Dynam-ique (copy attached as annexure TK2).

- 30.3. Whilst the insurer did try raise other reasons relating to the validity of the claim and/or the reasons for repudiation it is evident from a series of exchanges that I had with the insurance company's lawyer (attached as annexures TK3, TK4, TK5, TK6 and TK7) when

I challenged them on all these other reasons they were not able to substantiate any of them and the series of exchanges ended with the insurance company's lawyer confirming in annexure TK7 that the only reason for repudiation not in dispute is the non-payment of premiums.

30.4. Lastly any argument by the applicants that the indemnity policy didn't cover such events only serves to aggravate their negligence as they had a duty to put the appropriate insurance cover in place, which duty arises from:

30.4.1. Clause 6.17.2 of the rules of the fund (copy attached as annexure GL4 to the founding affidavit) which clause states as follows: "*6.17.2 The TRUSTEES shall safeguard the FUND against loss by insuring the FUND against loss due to the gross negligence, dishonesty or fraud of any of the officials of the FUND (including a TRUSTEE);*" and

30.4.2. The legal requirement that the trustees put fund fidelity cover in place as evidenced by the attached annexure TK11 which is an extract from the Financial Services Board's trustee toolkit, tutorial unit 7, and which states as follows:

30.4.2.1. *"In terms of pensions law a fund is required to take out fidelity cover. The purpose of this cover is to indemnify the Fund against any loss suffered by the Fund which cannot otherwise be recovered. The terms of this cover and the quantum should be carefully considered by the Board to ensure that it is appropriate for the Fund; where necessary, expert advice should be obtained in this regard."*

E. FURTHER HIGH LEVEL ISSUES

The applicants' response (or lack thereof) to the perceived maladministration

31. One of the applicants' primary argument is that they exercised their oversight functions reasonably and appropriately. It is however evident from their own version of events, as set out in their founding affidavit, that for the most part all they did was attend meetings and interrogate, as they call it, the administrator at these meetings. So the question is whether acting in this way is deemed to be a reasonable and appropriate exercise of a trustee's oversight functions, particularly in a situation where such trustee perceives there to be material administration problems as was the case, on the applicants' own version of events, in this instance.

32. In my view just attending trustee meetings does not constitute a reasonable and appropriate exercise of a trustee's oversight functions. The applicants had fiduciary duties and duties in terms of the Pension Funds Act. More specifically:

32.1. A fiduciary duty is a very high duty of care and in this instance involved an obligation to care for the financial affairs or well-being of others;

32.2. Sections 7C and 7D of the Pension Funds Act stipulate the fiduciary duties and general duties that trustees have in respect of their fund;

32.3. In terms of section 7C 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 and in pursuing its object the board shall 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 and the board shall act with due care, diligence and good faith;

32.4. Clearly therefore the applicants were in breach of their fiduciary duties given the way they for an extended period of time, in a situation where they perceived there to be maladministration, merely attended each trustee meeting, voiced concerns, then left

the situation to ride to the next meeting only to again attend the next meeting, voice concerns, then leave the situation to ride to the following meeting, and so forth.

33. Further a trustee must discharge their duties, adopting the same standard of care an ordinary prudent man of business would take in managing similar affairs of his own. Rest assured that had the applicants been aware of the same perceived maladministration on their own pension fund monies they would not have left the situation to ride from meeting to meeting but would have taken decisive and immediate action.

34. So given the above what action could the applicants reasonably have been expected to take? They could have done a number of things including *inter alia* the following:
 - 34.1. Gone into the offices of the administrator and sat with the administrators for the administrators to show them first-hand how the funds were being administered and what the quality of the records on the administration system was like;

 - 34.2. Requested online access (Dynam-ique provided full online access to members, employers and brokers) and spend time themselves going through the data held by the administrator doing reasonability checks, checking the contributions were up to date, etc.

- 34.3. Approached the Financial Services Board to come audit Dynamique. The Financial Services Board had a monitoring and surveillance department that did exactly this type of thing.
- 34.4. They could have contacted the brokers to get them to check the data on the administration system or to find out from the brokers what issues were being experienced in relation to the administration of the funds;
- 34.5. They could have informed the members, participating employers and brokers about the perceived problems so that these parties were aware of the situation and were in a position to make informed choices about whether they should continue paying contributions into these funds and in so doing they could have limited the loss that the members landed up incurring as a result of the rebuild;
- 34.6. They could have simply called for action at a trustee meeting, be the action a change of administrator or some other appropriate action. The defence put forward by the applicants as to why they didn't do this is that they would not have been successful in getting any action due to their being an equal number of independent and administrator appointed trustees. There is no merit whatsoever in this defence for the following reasons:

34.6.1. You can't just assume that the administrator appointed trustees would have not supported appropriate action being taken to address any administration problems and in fact the applicants put forward no evidence to prove that the administrator appointed trustees would have opposed any appropriate action; and

34.6.2. The rules of the funds were drawn up with arbitration clauses included specifically to prevent the administrator appointed trustees from being able to block any required action being taken;

34.6.3. More specifically the IF umbrella pension fund rules (copy attached as annexure GL4 to the founding affidavit) contains clauses 6.5.4 and 6.5.5 (the IF umbrella provident fund rules contain almost exactly the same wording under different clause numbers) which read as follows:

34.6.3.1. *"6.5.4: At all meetings of the TRUSTEES, the decision of the majority will be binding. If no majority decision can be reached on any matter, the matter must be referred to the next meeting of the TRUSTEES. If no majority decision can be reached at that*

meeting, the matter must be referred, for a recommendation, to a person agreed to by the TRUSTEES and suitably qualified in the matter in dispute."

34.6.3.2. *"6.5.5: If no majority decision can be reached after the recommendation has been received by the expert, the matter in dispute shall be referred to an arbitrator chosen by the AUDITOR who must be a person suitably qualified in the matter in dispute. The arbitrator's decision on the matter will be final and binding on the TRUSTEES."*

The applicants' have previously put evidence before the South Gauteng High Court that there was negligence by the trustees

35. The applicants in their founding affidavit put forward lengthy argument detailing how their actions as trustees were reasonable and cannot be deemed to be negligent in relation to the alleged maladministration of the funds. They go as far as saying in paragraph 129 of their founding affidavit *"there is not a shred of evidence to suggest that the applicants were grossly negligent, dishonest, fraudulent, or committed a breach of trust."*

36. This is in total contradiction to the applicant's own version of events which they put in front of the South Gauteng High Court in February 2011, via their particulars of claim in case number 4075/2011 (copy included as part of annexure DELL1 to the sixteenth respondent's answering affidavit), which were in respect of the claim they brought against myself contending that there in fact was negligence by the trustees in failing to prevent the alleged maladministration.
37. Of particular importance is that whilst the allegations in this other matter were directed at me, in my capacity as a fellow board member of the first and second applicants, it is clear that the acts referred to (as detailed below) were the responsibility of the board of trustees as a whole of whom the first and second applicants were also part of and hence the applicants were jointly and severally liable for these alleged negligent acts.
38. More specifically the applicants set out the following in their particulars of claim in case 4075/2011: (the comments added in square brackets are my own additions and were not included in the particulars of claim):
- 38.1. *"30. As trustee and member of the Plaintiffs' boards the Defendant [and the applicants] had a duty to act with good faith and the standard of care, skill and diligence to be expected of a person in a fiduciary position of trust."*

- 38.2. *"31. As a trustee and member of the Plaintiffs' boards the Defendant [and the applicants] further had the duties and obligations referred to in sections 7C and 7D of the PFA, the provisions of which were enacted for the protection and benefit of registered pension fund organisations such as the Plaintiffs, which in the event of breach would occur a right of action to them;"*
- 38.3. *"32. The Defendant's [and the applicants] duties as set out in sections 7C and 7D of the PFA were inter alia as follows:"*
- 38.3.1. *"32.1 To 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 were protected at all times;"*
- 38.3.2. *"32.2 To act with due care, diligence and good faith;"*
- 38.3.3. *"32.3 To ensure that proper registers, books and records of the operations of the plaintiff funds were kept;"*
- 38.3.4. *"32.4 To ensure that proper control systems were employed by or on behalf of the board;"*

- 38.3.5. *"32.5 To obtain expert advice on matters where the board members may have lacked sufficient expertise; and"*
- 38.3.6. *"32.6 To ensure that the rules, operation and administration of the Plaintiffs' funds complied with the PFA, the Financial Institutions (Protection of Funds) Act, 2001 (Act 28 of 2001), and all other applicable laws."*
- 38.4. *"33. The Defendant [and the applicants], as a member of the Plaintiffs board, wrongfully and negligently breached his fiduciary duties to the plaintiffs, as well as well as his duties to the plaintiffs in terms of sections 7C and 7D of the PFA, by failing to prevent the maladministration referred to in paragraph 20 above, which necessitated rebuilding the Plaintiffs' records at member level, in particular in that he [and the applicants]."*
- 38.4.1.1. *"33.1 failed to ensure that Dynam-ique complied with its obligations in the prior administration agreements in circumstances where he knew or ought to have known of such non-compliance;"*

38.4.1.2. *"33.2 Failed to implement or timeously implement proper registers, books, records of operations and control systems, to prevent the maladministration in circumstances where he knew or ought to have known that such proper registers, books, records of operations and control systems were not being implemented by Dynam-ique;"*

38.4.1.3. *"33.3 Failed to ensure that adequate professional indemnity insurance was on place during the tenure of Dynam-ique, given the state of the administration of the Plaintiffs' pension fund portfolios by Dynam-ique, and/or the amount of Plaintiffs' monies under administration;"*

38.4.1.4. *"33.4 failed to obtain or timeously obtain appropriate expert advice to prevent and/or rectify Dynam-ique's maladministration, when he knew or ought to have known that such advice was necessary to prevent or rectify the maladministration and/or to*

institute proceedings to interrupt prescription of claims;"

38.4.1.5. *"33.5 failed generally to exercise due care, diligence and good faith, and to ensure that the interests of members in terms of the rules of the fund and the provisions of the PFA were protected, by ensuring that the administration, record-keeping and insurance cover of the Plaintiff funds was adequate at all times."*

38.4.2. *"34. The Defendant further, as a member of the Plaintiffs' boards, wrongfully and negligently breached his fiduciary duties to the Plaintiffs in terms of sections 7C and 7D of the PFA, in that on or about 7 February 2008 and at Johannesburg he orally approved the sale of business agreement and cession of the administration agreements to Aon [the applicants have subsequently confirmed in their founding affidavit that they welcomed the sale to AON] in circumstances where he knew or ought to have known."*

38.4.2.1. *"34.1.1 The Defendant, as a shareholder of Dynam-ique was conflicted and stood to*

profit from the transaction to the detriment of the Plaintiffs;" [no detail was given by the applicants as to what they meant by this given they welcomed the sale to AON]

38.4.2.2. *"34.1.2 The warranties provided by the Defendant and Dynam-ique were false and in any event insufficient to safeguard the interests of the Plaintiffs and their members; and"* [no detail given by applicants as to what warranties they were referring to]

38.4.2.3. *"34.1.3 Inadequate insurance cover and/or run-off insurance cover was in place in circumstances where he knew or ought to have known that the sale of business agreement would leave the latter as an under-insured shell and render the plaintiff's claims against Dynam-ique for maladministration irrecoverable."* [as detailed previously the fund had plenty indemnity insurance in place but the applicants allowed it to lapse due to not paying the premiums]

38.4.3. *"35. The actions of the defendant [and the applicants] as set out in paragraphs 33 and 34 above and in particular his [and the applicants] failure to prevent or rectify:"*

38.4.3.1. *"35.1 Dynam-ique's maladministration and poor record keeping; and/or"*

38.4.3.2. *"35.2 The subsequent sale of Dynam-ique's business in the circumstances set out in paragraphs 34 above (as the case may be),"*

38.4.4. *"constituted negligent conduct in breach of his [and the applicants] fiduciary duties and his [and the applicants] duties in terms of s7C and 7D of the PFA, and/or grossly negligent conduct within the meaning of s23 of the Financial Services Board Act 1990, in breach of his [and the applicants] fiduciary duties and their duties in terms of s7C and 7D of the PFA."*

38.4.5. *"36. As a result of the Defendant's [and the applicants] negligent conduct as set out in paragraph 33 and 34 above, the plaintiffs failed to prevent or rectify the maladministration and thereby the necessity of the*

rebuild referred to in paragraphs 21 and 22 above, alternatively the Plaintiff's claims against Dynam-ique arising from such rebuild were thereby rendered irrecoverable."

38.4.6. *"37. In the circumstances the Defendant [and the applicants] is liable to the Plaintiffs in the sum of R18,162,480.00"*

39. In conclusion it is the applicants themselves who have put forward the evidence given in both paragraphs 36 and 39 above despite these paragraphs being in blatant contradiction with each other and this must surely alert the Court as to the fact that the applicants are willing to put forward whatever argument suits their particular purpose regardless of the merits of that argument.

F. FURTHER INPUT ON THE FOUNDING AFFIDAVIT

40. In addition to what is stated above I set out in this section some further comments on the founding affidavit.

41. In paragraph 65 of the founding affidavit the applicants refer to a trustee meeting held in August 2007 of which they don't have a copy but notwithstanding this they proceed to set out their recollection of what was discussed at that meeting. One of the key things they can recall is that

Dynam-ique required substantial guidance with the compliance aspects of the funds. Well attached as annexure TK8 is a copy of the minutes from this meeting and there is no evidence whatsoever in what was said at the meeting that Dynam-ique required substantial guidance with the compliance aspects which once again highlights inconsistencies between the version of events set out by the applicants in their founding affidavit and what actually happened.

42. In paragraph 67.1 of the founding affidavit the applicants allege that there was a shift in fact at that time with Dynam-ique then blaming the previous administrator Integrated Futures. This is a somewhat astounding comment as at every previous meeting we had been discussing the problems with finalising the outstanding financials on the funds which outstanding financials covered the period from 1 January 2004 to 28 February 2006 of which period Integrated Futures was the administrator for most of the period from 1 January 2004 to 30 November 2005 and Dynam-ique was the administrator only for the last three months of the period from 1 December 2005 to 28 February 2006. Therefore the fact that the applicants didn't realise that the problems stemmed from Integrated Futures illustrates how the applicants hadn't applied their minds to what the actual problems were and the applicants were too hasty to jump to conclusions about what they call in their founding affidavit the 'historical mess'.
43. In paragraph 67.3 of the founding affidavit the applicants allege that I never reverted within two weeks with an audit plan as promised which is simply not true as in paragraph 72 the applicants themselves confirm that I did in fact

revert to them via email which email is attached as annexure GL12 to the founding affidavit.

44. In paragraph 67.4 of the founding affidavit the applicants for the first time allege that the administration reports had been useless. This is not consistent with the minutes of the meetings which confirm that whilst various improvements to the reports had been periodically requested, nowhere in the minutes was it raised by the applicants that the admin reports were useless to them and hence this once again suggests an attempt by the applicants to recreate a version of events that is not consistent with what actually transpired.

45. In paragraph 78 of the founding affidavit the applicants state that Cassim Patel was Dynam-ique's legal advisor and that he had no clue how to handle rule amendments, resolutions etc. This comment is highly inappropriate for a number of reasons:
 - 45.1. At that time Cassim was employed by AON and not Dynam-ique;

 - 45.2. At the time that Cassim was employed by Dynam-ique he was not Dynam-ique's legal advisor but rather he just assisted with documentation work;

 - 45.3. At no time during Dynam-ique's tenure did the applicants complain to Dynam-ique about Cassim;

- 45.4. Cassim is not a highly educated person but he is the nicest guy who always went out of his way to help people and deliver good customer service and this personal attack on him is uncalled for;
- 45.5. I can't see the relevance of the applicants raising this issue here and it smacks of a desperate attempt by the applicants to divert attention away from their own actions to the actions of others.
46. In paragraph 86 of the founding affidavit the applicants set out the contents of the minutes of the meeting held on 26 May 2010 at which the decision to proceed with the rebuild was taken. I would like to comment on a number of issues emanating from these minutes as follows:
- 46.1. A key factor on which the applicants based their decision to do the rebuild is what they refer to as the dirty ALM presented by Ms Barton effective 31 December 2009 which allegedly illustrated a large mismatch between the asset and liability values and in this regard:
- 46.1.1. It is evident from the minutes that the trustees made no attempt to find out what caused this mismatch. The most common cause of such a mismatch is simply that the unit pricing on the system goes wrong. For the applicants to have therefore taken a decision to rebuild all the records just because of this asset and liability

match without knowing the cause of the mismatch constitutes negligent action by the applicants.

46.1.2. In fact Ms Barton herself confirmed that the figures presented were unaudited and for information only and that the figures could only be used as a possible indication of the extent of asset mismatch;

46.1.3. Given the effective date of this ALM was 31 December 2009 it means that the results were a function of the administration carried out by three entities, namely:

46.1.3.1. Integrated Futures from 1 January 2004 to 30 November 2005;

46.1.3.2. Dynam-ique from 1 December 2005 to 31 January 2008; and

46.1.3.3. AON from 1 February 2008 to 31 December 2009.

46.1.4. The implication here is that it would not have been possible to determine just from the ALM result which of the above three administrators had caused the mismatch and therefore the way the applicants jumped

to the conclusion that the mismatch was as a result of a historical mess by Dynam-ique and that the records only needed to be rebuilt to 1 February 2008 illustrates how they didn't have any real understanding of what was causing the mismatch and once again this shows negligence on the part of the applicants in assuming that rebuilding all the records was the solution.

46.1.5. Also evident from these minutes is that the other key factor on which the applicants based the rebuild decision was the confirmation that they themselves gave that the 1 February 2008 values received from Dynam-ique were not accurate and could not be accepted. In this regard:

46.1.5.1. The applicants do not possess the appropriate qualifications or expertise to be able to certify whether values are accurate or not and hence they were negligent to have given such certification.

46.1.5.2. At no time did the applicants raise with Dynam-ique any concern whatsoever over the values provided by Dynam-ique. Should they have done this Dynam-ique could have

and would have verified and corrected the values free of charge.

47. In paragraph 86 of the founding affidavit it is also evident from the minutes quoted that AON was not prepared to ensure the accuracy of the opening balances as at 1 February 2008. The applicants should not have accepted AON's refusal. To address this point I need to digress for a moment to look at what happens when a fund moves from one administrator to another.
48. When a fund appoints a new administrator then the new administrator becomes responsible for all the work on the fund from that point onwards and the new administrator is entitled to receive opening values from the previous administrator. Any questions or concerns over the accuracy of the opening values would be dealt with by the previous administrator and in this instance the new administrator can refuse to certify the accuracy of the opening values.
49. However when one administrator buys the business of another administrator and takes over the ongoing administration operations of that other administrator, taking over all the contracts, systems and staff, then the purchasing administrator becomes fully liable and accountable for all administration work on the funds regardless of whether that work relates to the period post the date of acquisition or the period prior to the date of acquisition. Similarly the purchasing administrator would be required to deal

with any queries regarding the member values as at the date of acquisition or at any other date for that matter.

50. Now on the funds under discussion in this application the latter applies, in other words on 1 February 2008 AON bought and took over the ongoing operations of Dynam-ique, including the contracts, systems and staff and hence on 1 February 2008 AON became fully responsible and accountable for all work on the Funds regardless of whether that work related to the period post or prior to 1 February 2008.
51. Therefore AON most definitely were required to certify the values and/or correct any errors in the values as at 1 February 2008 and it was therefore gross negligence by the applicants to have spent R20m of the members' money for this purpose. The applicants should have simply insisted that AON fix the values and then AON in turn could have pursued a claim against Dynam-ique should they have felt they had a valid reason for doing so.
52. Rest assured if it was the applicants' own money that was needing to be spent they would never have just gone ahead and spent R20m of their own money and hence they did not show the same level of care for the members' money that they would have shown for their own money which constitutes a major breach of their fiduciary duties.
53. Notwithstanding the above it should not be forgotten that as stated above when you have an asset liability mismatch the appropriate response is not to

go redo everything but rather you would simply identify the problems causing the mismatch and go fix just those problems. The cost of adopting this alternative approach would be miniscule compared to the cost of redoing everything.

G. FURTHER INPUT ON THE MINUTES OF THE TRUSTEE MEETINGS

54. In the applicants founding affidavit they have selectively quoted from the minutes quoting only those items that go towards supporting the version of events they are trying to create. However if one considers the minutes in their entirety then it is evident that they do not support the applicants' version of events, and the following is evident from a reading of the full set of minutes:

54.1. There are a number of instances where the minutes specifically contradict the applicants' version of events and to get round this the applicants argue that the minutes do not correctly reflect what was discussed in the meeting. However in each and every instance that they claim this they were present at the following meeting at which the minutes of the previous meeting were signed off as being a true reflection of the previous meeting.

54.2. During Dynam-ique's tenure the concerns raised at the trustee meetings related for the most part to the audits being late and not to the way the funds were being administered or to specific administration problems. Only after AON took over the

administration then did all the allegations start flying of an administration mess at Dynam-ique.

- 54.3. The minutes show that the auditor had attended a number of meetings to inform the trustees of the status of the audits and at one point the auditor even confirmed that the audit work on the 2006 financials had been completed and at no time did the auditor mention anything about a historical mess.
- 54.4. Prior to 2010 no problems with the asset liability matching on the funds had been raised.
- 54.5. The fidelity cover and the need to keep it active due to the perceived administration problems is something that is mentioned in a number of the trustee meetings and despite this the applicants still didn't see to it that the premiums were paid on these policies leading to the insurance cover lapsing.
- 54.6. At no time did the applicants make an effort to find out what exactly the administration problems were and at no time did the applicants make any effort to seek out a more cost effective alternative for fixing the alleged problems.

- 54.7. Deloitte and AON were going to reconstruct one scheme to see the cost and other implications but this never happened and the applicants went ahead with a full fund rebuild regardless.
- 54.8. Other than just pitching up at meetings and interrogating, as they call it, the administrator, the applicants did nothing to address the perceived administration problems.
- 54.9. The minutes show that, notwithstanding the fact that the audits were late, Dynam-i-que was making good progress on the audits and committing the necessary resource to get them completed despite the historical problems and backlog inherited from Integrated Futures. However following AON taking over the schemes it is evident from the minutes that the progress on the audits slowed significantly with almost no progress on the audits from meeting to meeting.
- 54.10. The applicants only obtained two quotes for the rebuild. This is clearly inadequate for a R20m project and a proper tender should have been carried out encompassing at least say 5 providers. The applicants provide no evidence to support their excuses that there were no other suitable providers or that they were not permitted to obtain further quotes due to a confidentiality issue. Without doubt if the applicants were spending R20m of their own money they would have been far more cautious and would have made a proper

effort to find a cheaper solution. Finally it is evident from the minutes of the trustees meeting that the applicants themselves had stated that a cost in excess of R11m would be excessive.

H. FURTHER INPUT ON THE THIRTY-SECOND AND THIRTY-THIRD RESPONDENTS' AFFIDAVIT

55. In this section the references to the funds' affidavit refers to the Affidavit of the thirty-second and thirty-third respondents.

56. In addition to all my comments above I wish to give some further input on the funds' affidavit.

57. As I mentioned above in section C of my affidavit I do not believe the funds' affidavit, nor their supplementary affidavit, should be considered in this application as they are not valid respondents. I will nevertheless comment on these affidavits for two reasons:

57.1. In case the Court decides to take their affidavits into consideration;
and

57.2. For the benefit of all the respondents who have already read the funds' affidavits.

58. In paragraph 8.1 of the funds' affidavit they claim the rebuild was justified and appropriate but yet they provide no evidence whatsoever to support this claim.
59. In paragraph 8.2 and 8.3 of the funds' affidavit they argue that the Adjudicator did not investigate the role and responsibilities of the other former trustees who were not still in office at the time the decision to do the rebuild was taken but who still nevertheless may have had some liability in relation to the alleged maladministration. There is no merit in this argument as it is clear from the Adjudicator's determination that she most certainly took in submissions from all the trustees and considered the role of all the former trustees and further funds' argument in this regard is based on a flawed interpretation of the adjudicators ruling.
60. The Adjudicator ruled that the applicants are liable to the members as they caused financial loss to the members which loss resulted from alleged maladministration that they should have prevented. In other words there are two legs which must both be present for the attaching of liability to a trustee, namely the failure by the trustee to prevent the maladministration and the actions by the trustee must have caused a financial loss to the members.
61. The evidence for this can be found in the Adjudicators second determination (copy attached as annexure GL38 to the founding affidavit) in which she states:

61.1. *"5.23 ... As trustees of the funds, the board controls and administers monies paid into the fund and each trustee can be held personally liable for any financial loss caused to the funds due to maladministration ..."; and*

61.2. *"5.24 It follows that the trustees who were in office when the decision was taken to rebuild the funds data in July 2010 must be held personally liable to compensate the IF funds for the financial loss occasioned by the rebuilding of the funds' data by reason of their failure to exercise their duties of proper care and diligence in the management of the funds."*

62. Now any former trustee who was not present at the time the applicants took the decision to rebuild the records of the Funds could at most be found liable on one of the legs only, namely that they were negligent in not preventing the alleged maladministration. However given they were not a party to the decision to rebuild the funds' records it would not be possible to find them guilty of having caused a loss to members given:

62.1. There was no loss sustained by the fund and/or members at the time they were trustees of the funds. This is confirmed by the applicants themselves whom in paragraph 13.1 of their replying affidavit to the sixteenth respondent's affidavit state as follows: *"... it ignores the fact that until the rebuild exercise was done, there was in fact no claim and no loss suffered by the Funds."*

- 62.2. The applicants have to date not been able to prove that there were no more cost effective options to remedy the perceived problems and/or that the rebuild was actually required and/or that it could not have been done at a lower cost.
- 62.3. Further even if it could be proven that the rebuild was required and that it could not have been done at a cheaper cost then the fact remains that there would have still been no loss to members as whilst these other former trustees were in office there was sufficient insurance in place to cover this loss but once again it was the applicants, and only the applicants, who caused a loss to the members by failing to pay the premiums on the insurance policies.
63. In paragraph 15 of the funds' affidavit they state that the funds' insurance cover was qualified during the applicants' tenure and effectively excluded any claims related to the rebuild of members' records. They however fail to bring to the attention of the Court that the reason why the insurance cover was qualified was due to the non-payment of the premiums by the applicants leading to the insurance cover lapsing and the insurer was then only prepared to reinstate the policy with this exclusion added in. I have attached as annexure TK9 the letter from the funds' lawyer in which they accept the exclusions being added into the policy and of relevance here is the date of the letter being 23 June 2011 which is long after the rebuild happened and after the claims were repudiated due to non-payment of premiums confirming what I am saying about the exclusions only having been added into the policies

when the policies were reinstated which was after the rebuild and after they had lapsed.

64. I also attach as annexure TK10 the funds' insurance policies that were in force for the period 1 August 2009 to 31 July 2010 which covers the time when the decision to do the rebuild was taken and it is self-evident that these policies contain no exclusions relating to the rebuild. Once again as detailed in section D of this affidavit the insurer themselves has confirmed that the only reason for repudiation not in dispute is that the premiums on the policy were not paid.

65. In paragraphs 23 and 37 and 38 of the funds' affidavit they claim that there is no basis for holding the third and fourth applicants liable. This is not correct as eventhough the third and fourth applicants were not trustees at the time of the alleged maladministration by Dynam-ique they still attract liability by virtue of them jointly causing the loss to members by:

65.1. Them being a party to authorising the rebuild; and

65.2. Them being jointly liable with the first and second applicants for the non-payment of the insurance premiums which resulted in the policies lapsing and the members then having to fund the cost of the rebuild.

66. In paragraph 30 and 31 of the funds' affidavit they state that the Adjudicator concluded various things in relation to the alleged maladministration. This is factually incorrect. It is evident from the Adjudicator's determination that she did not 'conclude' these things but actually just 'accepted' these things as fact based on what was stated in the complaint. It was therefore highly inappropriate for the funds to use the word conclude.
67. In paragraph 41 of the funds' affidavit the funds claim that in settling the legal claims between myself and the funds they did not settle any potential claims on behalf of the members. This is utter nonsense and all members of the funds would most certainly be bound by the settlement agreement that the trustees, as their lawful representatives, concluded on their behalf.
68. In paragraph 55 of the funds' affidavit they claim that the process followed by the Adjudicator of considering only written submissions was inappropriate however they fully accepted this approach and at no time in their submissions to the Adjudicator did they ever argue that oral evidence needs to be heard. There is therefore no merit in their argument and I deal further with the matter of oral hearings in section L of this affidavit.

I. FURTHER INPUT ON THE APPLICANTS' REPLYING AFFIDAVIT TO THE SIXTEENTH RESPONDENT'S AFFIDAVIT

69. This affidavit is just a rehash by the applicants of the various arguments they have already put forward in their founding affidavit. I therefore see no reason

to comment further on this affidavit, save for the points mentioned below, as I have already extensively dealt with all these arguments elsewhere in my affidavit.

70. In paragraphs 13.2 and 13.3 of the applicant's replying affidavit to the sixteenth respondent's affidavit they say that the first time a potential claim was made against the funds was on 8 December 2010 and hence the applicable policy was the policy covering the period 1 August 2010 to 31 July 2010 which contained a rebuild exclusion. There is no merit in this argument as according to the insurance policy wording (copy attached as annexure RA3 to the applicant's replying affidavit to the sixteenth respondent's affidavit) it states as follows:

70.1. *"CONDITIONS 2. Claims Notification: Notification of any claim or circumstances which may give rise to a claim shall be given in writing as soon as is reasonably possible, with the fullest information thereof."*

71. Now in this regard at the trustee meeting in May 2010 the applicants were clearly aware at that point that there were significant perceived problems resulting from a perceived negligence of an administrator and previous trustees and that it was going to cost a significant amount of money to fix the perceived problems which no doubt constitutes circumstances which may give rise to a claim and hence already in May 2010 the applicants should have notified the insurer of this in which case the applicable policy was the policy

for the period 1 August 2009 to 31 July 2010 (copy attached as annexure TK10), which policy does not have any exclusions.

J. FURTHER INPUT ON THE THIRTY-SECOND AND THIRTY-THIRD RESPONDENTS' SUPPLEMENTARY AFFIDAVIT

72. In this section the reference to funds' supplementary affidavit refers to the thirty-second and thirty-third respondent's supplementary affidavit.
73. The funds' supplementary affidavit seems to focus almost exclusively on the issues surrounding the repudiation of the insurance claim and tries to put forward justifications as to why the insurance company repudiated the claim. This is not appropriate as the funds are not authorised representatives of the insurance company.
74. I have already dealt with the issue of the insurance policies extensively and the fact remains that the insurance company itself has confirmed that the only reason for repudiation not in dispute is the non-payment of the insurance premiums.
75. What is noteworthy is that in paragraph 11 of the funds' supplementary affidavit they admit for the first time that the premiums were not paid on the insurance policies. The funds however had the opportunity to admit this in their first affidavit but chose not to indicating that they are not being totally honest and open with the Court. Similarly the applicants did not admit to the

non-payment of the insurance premium in their founding affidavit, only admitting to it for the first time in their replying affidavit to the sixteenth respondent's affidavit which was after the sixteenth respondent had raised the issue, again indicating that the applicants are also not being open and honest with the Court.

76. In annexure FK4 to the funds' supplementary affidavit they attached a letter to AON dated 7 April 2011 in which it states "*In the circumstances, and given the statutory obligations of the Funds to operate with appropriate insurance cover in the interest of members, unless we receive confirmation within 14 calendar days that AON will stand surety for the obligations of the insurer, we are instructed to institute proceedings for a declaratory order to the effect that AON is liable to indemnify the funds to the extent that the insurers have lawfully "lapsed" the policies.*" The funds are therefore refuting their own evidence that the non-payment of premiums was not the reason for the repudiation of the claims as if that were true why would they have sent this letter to AON reserving their rights in relation to AON's not having paid the premiums.

K. WHAT DID THE REBUILD ACHIEVE

77. On the applicants' own version of events the primary justification for doing the rebuild was to address the mismatch between the assets and the liabilities.

78. The rebuild however did not achieve this primary purpose which is evidenced by the actuarial valuation reports of the funds as at 31 May 2010 (attached as annexures TK12 and TK13) in which:
- 78.1. It is confirmed that the results of the rebuild formed the basis of this valuation; and
- 78.2. It is confirmed that there is still a mismatch between the assets and the liabilities.
79. Given the rebuild did not achieve its purpose the members of the fund are by definition worse off to the tune of R20m as a result of the applicants having carried out the rebuild which once again confirms that the applicants were negligent in carrying out the rebuild.

L. THE RELIEF SOUGHT BY THE APPLICANTS

80. The alternative relief sought by the applicants of sending the complaint back to the adjudicator for the hearing of oral evidence would not be appropriate for the following reasons:
- 80.1. The applicants already had their chance to put their arguments to the Adjudicator and so why should they be given another chance to do this;

- 80.2. All the information in the applicants' possession was already in their possession at the time they made their submissions to the Adjudicator with nothing new having come to light since then;
- 80.3. It has not been established whether the Adjudicator herself is willing to hold oral hearings on this complaint;
- 80.4. Section 30J of the pension Funds Act provides that the Adjudicator can follow any procedure that she feels is appropriate and hence it was well within her right to not call for oral evidence;
- 80.5. At the time submissions were being made to the Adjudicator the applicants fully accepted the process being followed by the Adjudicator and at no time in their submissions or otherwise did they state that oral evidence must be heard. Rest assured if the Adjudicator had ruled in the applicants' favour they wouldn't now be asking for oral evidence to now be heard;
- 80.6. Other than stating that the applicants do not agree with the Adjudicator's determination the applicants do not put forward any evidence to prove that the Adjudicator will reach a different decision if she is to hear oral evidence;
- 80.7. The Adjudicator is not set up to take oral evidence under oath as the pension funds adjudicator is not a court of law, it is an office

and an administrative tribunal. If one considers all the prior determinations by the Adjudicator it is evident that the Adjudicator only takes oral evidence not under oath and then relies primarily on the documentary evidence placed before her. In this particular complaint given the vast sum of money involved it would not be appropriate to decide the matter on oral evidence that was given by people who were not under oath;

80.8. There is nothing that can be said orally that could not have been put in writing by the applicants in their submissions to the Adjudicator. Generally the only time that this can't be done is when a respondent does not have the education or communication ability to be able to set out in writing what they want to say, as could possibly be the case with say a blue collar worker. This would definitely not apply in this case where the first applicant, who has been writing and submitting the affidavits on behalf of the applicants, is a qualified lawyer;

80.9. Given there is nothing that can be said orally that cannot be put in writing, to entertain oral evidence without cross examination would be no different to just deciding the matter based on each person's written submission, which is what has already been done. However allowing of cross examination in front of the Adjudicator would not be viable for the following two reasons:

- 80.9.1. As already stated the pension funds adjudicator is not a court of law, it is an office and an administrative tribunal;
- 80.9.2. Legal representation is not allowed on matters before the Adjudicator and you cannot expect lay men to start cross examining each other.
- 80.10. Nowhere in the applicants founding affidavit do they state that this Court needs to hear oral evidence in order to be able to rule on this matter. They are once again satisfied that this matter can be decided on written submissions alone. This again illustrates that the alternative relief sought of sending the complaint back to the Adjudicator to hear oral evidence is nothing more than the applicants trying to get another bite at the apple, this time hoping that the outcome will be different;
- 80.11. Oral evidence would require the Adjudicator to come face to face with the people giving the oral evidence which is one thing prior to ruling on a matter but it is another thing altogether to have to come face to face with someone you have already found guilty and accused of being negligent and hence requiring the Adjudicator to now hear oral evidence after the event could place the Adjudicator in an awkward and possibly even a hostile position. This would not be fair to the Adjudicator and also with the Adjudicator not being a

court of law the Adjudicator would not have the security personnel that one finds in a court of law.

81. Finally, in terms of the Pension Funds Act there is an automatic right of appeal on any Adjudicator determination. It is not like a court of law where you need to apply for leave to appeal. The implication here is that sending it back to the Adjudicator will not resolve the complaint as whatever the Adjudicator decides there will be someone who is unhappy and appeals it again, causing this matter to run on for a number of years more. This would not be fair to the 11,000 odd fund members who have already now been waiting for 4 years to get back the money they lost as a result of the applicants' negligence, nor would it be fair to all the other parties involved.

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